



Potential human rights impacts of the TPP

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Summary

This document summarises some of the ways in which the Trans-Pacific Partnership Agreement (TPP) can harm human rights. The analysis below only examines the impact on recommendations and comments by United Nations (UN) Special Procedures mandate-holders¹ and other United Nations human rights bodies,^a so there are other human rights which are likely to be adversely affected by the TPP which are not covered here.

In a statement on the TPP and other free trade agreements, 10 UN Special Rapporteurs/Independent Experts expressed concern about the secret way in which they have been negotiated and their potential adverse impacts on human rights (including the rights to life, food, water and sanitation, health, housing, education, science and culture, improved labour standards, an independent judiciary and a clean environment).²

The relevant TPP provisions which go beyond the World Trade Organization (WTO) rules are outlined in Annex 1. Since the TPP governments have refused to release the text,³ this assessment is based on other

^a Therefore the documents referred to in the left column of the tables are largely reports by human rights bodies.

publicly available documents, see below. While other WTO, free trade agreement (FTA) and bilateral investment treaty (BIT) disputes are unlikely to set precedents for TPP interpretation, they are often likely to be followed, so some of these interpretations have been noted.

Acronyms

AoA: Agreement on Agriculture

ART: antiretroviral therapy

ASEAN: Association of Southeast Asian Nations

BIT: bilateral investment treaty

CAFTA: Central America FTA

FCTC: Framework Convention on Tobacco Control

FDI: foreign direct investment

FET: fair and equitable treatment

FTA: free trade agreement

FTAA: Free Trade Area of the Americas

FTT: financial transaction tax

GATS: General Agreement on Trade in Services

GRP: good regulatory practice

HRIA: human rights impact assessment

ICSID: International Centre for Settlement of Investment Disputes

ICT: information and communication technology

IMF: International Monetary Fund

IP: intellectual property

IPR: intellectual property right

ISDS: investor to state dispute settlement

MAI: Multilateral Agreement on Investment

MFN: most favoured nation

NAFTA: North American Free Trade Agreement

NCD: noncommunicable disease

NCM: nonconforming measure

OHCHR: Office of the High Commissioner for Human Rights

PVR: plant variety right

SPS: sanitary and phytosanitary

TBT: Technical barriers to trade

TNC: transnational corporation

TPP: Trans-Pacific Partnership Agreement

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights

TRIPS+: stronger intellectual property protection than that required by TRIPS

TTIP: Transatlantic Trade and Investment Partnership

UN: United Nations

UPOV: International Convention for the Protection of New Varieties of Plants

USTR: Office of the United States Trade Representative

WAI 262: The indigenous flora and fauna and cultural intellectual property (Wai 262) inquiry. Wai 262 is a claim to rights in respect of mātauranga Māori or Māori knowledge, and indigenous flora and fauna.

WHA: World Health Assembly

WHO: World Health Organization

WTO: World Trade Organization

Introduction

TPP background

‘Currently, there are 12 negotiating Parties: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam . . . The first round of TPP negotiations was held in Melbourne in March 2010.’⁴

The intention is to expand it to additional countries throughout the Asia Pacific region⁵ and countries like the Philippines^b are likely to join. The USA has been laying the groundwork for all ASEAN^c countries to join the TPP.⁶ This includes three least developed countries^d which do not have to have intellectual property protection for as long as they are least developed,⁷ but the leaked TPP intellectual property chapter requires much stronger intellectual property protection than the World Trade Organization requires, see Annex 1. It is expected that countries which join the TPP in future will only be allowed to negotiate: how quickly they remove their tariffs, which services and investment sectors they do not open to foreign competition, which government ministries open their procurement and perhaps some exceptions to the rules on state owned enterprises. I.e. they will not be able to negotiate the rules generally, they would just have to accept those which are agreed and they may not benefit from any transition periods. Therefore even if some of these issues are not relevant to the current TPP Parties, they may be relevant to those which join in future.

A list of the 29 TPP chapters is available.⁸ Although it has an exceptions chapter, this will not be sufficient to protect all the TPP Parties’ human rights obligations, see Annex 1.

^b President Obama has asked the Philippines to join the TPP, <http://www.usatoday.com/story/news/politics/2013/10/02/obama-shutdown-apec-asia-trip/2909123/> and the Philippines government has said that it is aiming to join the TPP, <http://www.dti.gov.ph/dti/index.php/2014-04-02-03-40-26/news-room/64-dti-exec-to-american-asia-pacific-ceos-now-is-the-time-to-expand-business-in-phl>

^c These are: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam, <http://www.asean.org/asean/asean-member-states>.

^d Cambodia, Laos, Myanmar, http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf.

TPP's enforceability

Like other U.S. free trade agreements (FTAs), the TPP is expected to be enforceable via trade sanctions under state-to-state dispute settlement (see dispute settlement chapter in Annex 1) as occurs at the World Trade Organization (WTO). This would allow one TPP government to sue another at an international tribunal and the winning Party to raise tariffs on the losing Party's exports until it changes its law to comply. Thus when faced with a choice between complying with a human rights treaty which has no sanctions for breach and the TPP there is a 'risk that, faced with situations of conflict, States will opt for compliance with their obligations under trade agreements: since these agreements are commonly backed by the threat of economic sanctions - as is the case within the WTO, under the Dispute Settlement Understanding - setting aside their human rights obligations will appear to Governments less costly economically and even, often, politically.'⁹

Based on the leaked TPP investment chapter, investors from other TPP countries could also sue TPP governments for unlimited monetary compensation for failure to comply with the investment chapter ('investor-to- state dispute settlement', ISDS), see Annex 1.

Chilling effect

Concerns have been expressed about the chilling effect of state-to-state dispute settlement, especially for developing countries including:

- 'the norms established in these agreements may cause a "chilling effect", 'when the members do not know whether or not any particular measure they take, in order to comply with their human rights obligations, will be considered acceptable by the other members or instead expose them to retaliation.'¹⁰
- 'Although the likelihood of a trade dispute resulting from food insecure WTO members adopting new food security policies may be low, policymakers are risk averse. They are unlikely to pursue agricultural and food security policies they perceive as being in the gray zone of WTO legality. Under WTO law, violations are not self-evident but are determined by the Dispute Settlement Body (DSB) after a Member has initiated dispute proceedings. Therefore, States are less likely to initiate creative policies without strong assurances and confidence that new policies will not negatively affect third parties' commercial interests and leave them exposed to potential litigation. It is in practice very difficult for poorer developing countries to assess and make confident determinations about current implications and future scenarios. This is why when it comes to WTO matters, most developing country States err on the side of caution in order not to violate their WTO commitments that are binding under international law and which, if violated, could lead to punitive counter-measures. Moreover, poorer developing countries are less likely to push the envelope of WTO rules compared to richer and/or better-resourced countries. Poorer countries have less financial and human resources to engage in lengthy litigation and navigate the highly complex terrain of WTO law. In addition, poor countries are much more vulnerable to, and less able to withstand, coercive threats that take place behind closed doors from powerful WTO members (especially when such powerful countries disapprove of policies that may threaten their commercial interests).'¹¹

Concerns have also been expressed about the chilling effect of provisions equivalent to those which have been agreed in the leaked TPP investment chapter (see Annex 1), including ISDS:

- 'Investment agreements may also contain provisions that allow States to be sued for taking measures to protect public health that may adversely impact investments of the contracting party and private corporations. The mere threat of onerous and expensive litigation may create a chilling effect where States would refrain from formulating such policies in the first place.'¹²

- ‘it will be important to avoid a situation where the threat of litigation on the basis of broadly interpreted expropriation provisions has a “chilling effect” on government regulatory capacity’¹³
- ‘We believe the problem has been aggravated by the “chilling effect” that intrusive ISDS awards have had, when States have been penalized for adopting regulations, for example to protect the environment, food security, access to generic and essential medicines, and reduction of smoking’¹⁴

This is a real problem as can be seen by the example of Uruguay which was almost chilled from defending its tobacco control measures when sued under ISDS by the tobacco company Philip Morris (PMI): ‘Daunted by paying “contract lawyers at \$1,500 an hour for several years,” Uruguay’s President Jose Mujica almost settled PMI’s claim. He decided to defend Uruguay’s laws only after former President Vazquez voiced a protest, and the Bloomberg Philanthropies helped finance Uruguay’s defense team.’¹⁵

Some TPP issues common to multiple human rights

A number of common issues have arisen in multiple reports by human rights bodies regarding various human rights that can be affected by the TPP. These are outlined below.

Given the extensive existing statements and analysis on the interdependence, indivisibility and interrelationship of human rights, those aspects are not included here and the human right (eg water) is listed under the human rights body which raised it.

Concerns about human rights implications of other USFTAs generally

UN Committees have also raised concerns about the impact on human rights of USFTAs being negotiated by Costa Rica,¹⁶ Ecuador,¹⁷ El Salvador (demanding that El Salvador conduct an impact assessment of intellectual property (IP) agreements on the accessibility of affordable generic medicine),¹⁸ Morocco,¹⁹ Nicaragua²⁰ and Thailand (‘strongly recommended that Thailand “ensure that regional and other free trade agreements do not have a negative impact on the enjoyment of the right to health by children. More specifically, ensure that such agreements will not negatively impact the availability of drugs and medicines for children’)²¹ and urging them to take their human rights obligations into account in their trade negotiations.

When Malaysia was questioned by the UN Committee on the Rights of the Child during its then USFTA negotiations, as to how they can ensure that trade agreements do not affect provision of generic medicines, its Attorney-General replied ‘that generic drugs should not be restricted in any manner,’ as generics are cheaper than patented medicines and that Malaysia is not going to negotiate on this issue.²² Although it decided not to sign a USFTA then, Malaysia is again facing stronger intellectual property protection (TRIPS+) proposals from the USA, this time in the IP chapter of the TPP, that can delay access to affordable generic medicines and he is still the Malaysian Attorney General today²³.

Human rights body concerns about the trade agreement negotiation process

Concerns have been expressed about the secrecy of the TPP negotiations specifically by:

- human rights bodies. For example, ‘Considerable concern is expressed today about an apparent democratic deficit in international policymaking on copyright. Of particular concern is the tendency for trade negotiations to be conducted amid great secrecy, with substantial corporate participation but without an equivalent participation of elected officials and other public interest voices. For example, the recent negotiations around the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership have involved a few countries negotiating substantial commitments on copyright policy, without the benefit of public participation and debate. In contrast, treaty negotiations in WIPO forums are characterized by greater openness, participation, and consensus-building.’²⁴
- Parliamentarians, academics and civil society.²⁵

In addition, concerns have also been expressed by human rights bodies about the trade agreement negotiation process generally, for example:

Human rights body comment or recommendation	What has occurred in the TPP
‘The legal basis for adopting human rights approaches to trade liberalization is clear.’ ²⁶	All TPP Parties have undertaken obligations under human rights law, see Attachment 1
<p>‘All stages of the negotiations [of bilateral trade agreements] must be open, transparent and subject to public scrutiny.’²⁷</p> <p>‘The rights to information and to participate in the decision-making process are essential for the enjoyment of the right to health. Those elements of the right to health framework are undermined when international investment agreements are negotiated and concluded in secrecy. Affected communities should be able to participate in negotiations.’²⁸</p> <p>‘The Special Rapporteur recommends that States . . . enter into international investment agreements in an open and transparent manner, with the participation of affected communities and other stakeholders.’²⁹</p> <p>‘it is essential that national parliaments and civil society are provided opportunities to monitor the positions adopted by Governments in trade negotiations. They should not be presented, at the very final stage of the negotiation process - once agreement has been reached - with a set of commitments made by the Executive from which, at that stage, from which it would be politically very difficult or impossible to retreat.’³⁰</p>	<p>Only government negotiators are allowed in the TPP negotiations. Whereas at the World Health Organization and World Intellectual Property Organization where they are negotiating many of the same issues, civil society can attend the negotiations, receive the negotiating texts and make statements during the negotiations.</p> <p>The leaked TPP investment chapter (see Annex 1) has many equivalent provisions to those in international investment agreements as it closely follows the US Model BIT 2012³¹.</p> <p>Since the TPP will be a legally enforceable treaty where every comma and footnote matters, it is not possible for parliaments and civil society to effectively monitor government positions without seeing the negotiating text. The TPP negotiating text has still not been released, although it is about to be concluded, despite repeated calls to do so by civil society etc. There are concerns that the TPP text will only be released to the public after it has been signed or after decisions have already been made to sign it. It is possible to release the negotiating texts of ongoing trade negotiations and this has been done in other fora, see below.</p> <p>Although earlier TPP negotiating rounds included briefings for stakeholders and opportunities for stakeholders to give presentations to negotiators (but still not attend the negotiations), a 2014 news article noted that ‘The last formal round of TPP talks – the 19th – took place roughly a year ago in Brunei. That was the last round to involve a formal role for stakeholders.’³² Since then there have been at least 11 informal TPP negotiating rounds.³³ Parliamentarians from TPP countries have repeatedly expressed dissatisfaction with the information they have been given on the TPP and have called for access to the TPP negotiating texts.³⁴</p>
‘Human rights obligations of WTO members must therefore be taken into consideration at the negotiation stage of trade agreements: later may be	<p>The TPP is negotiating rules that are stronger than those at the WTO, see Annex 1.</p> <p>Since no TPP country appears to have conducted a</p>

Human rights body comment or recommendation	What has occurred in the TPP
<p>too late.³⁵</p> <p>‘WTO members should therefore bear in mind their concurrent obligations to promote and protect human rights when negotiating and implementing international rules on trade liberalization’³⁶</p> <p>‘Developing countries should therefore be careful to ensure the form and pace of liberalization appropriate for national circumstances and not bargain away the possibility of using development tools that wealthy countries have previously used. At the same time, developed countries have responsibilities to take into account the particular obligations of developing countries to meet their responsibilities to protect human rights and ensure operational special and differential treatment for developing countries accordingly.’³⁷</p>	<p>human rights impact assessment, see below, their human rights obligations are unlikely to have been taken into consideration.</p> <p>Furthermore, even if they are raised, the USA has historically been unwilling to take them into account in its free trade agreement negotiations, for example ‘when Costa Rican negotiators raised their human rights obligations, including the right to health, with the US during the process of negotiating the CAFTA, the US responded that the negotiations were a commercial matter and unrelated to human rights.’³⁸</p> <p>In past USFTAs,³⁹ the USA does not appear to have given special and differential treatment for developing countries beyond short transition periods that do not last long enough for them to reach the USA’s level of development. In the leaked TPP intellectual property chapter, there are proposals that all countries have to eventually comply with the final level of intellectual property protection, again with an insufficient transition period for developing countries.⁴⁰</p>
<p>‘States should ensure that they will not accept undertakings under the WTO framework without ensuring that these commitments are fully compatible with their obligation to respect the right to food. This requires that they assess the impact on the right to food of these commitments.</p> <p>It also requires that any commitments they make be limited in time, and re-evaluated subsequently, since the impacts of trade liberalization on the ability of States to respect the right to food may be difficult to predict in advance, and may become visible only after a number of years of implementation. For instance, whatever the results of the current round of negotiations launched in Doha in November 2001, these results should be explicitly treated as provisional, and a sunset clause should be appended to the outcome in order to allow for a renegotiation, following a period of a few years of implementation, on the basis of an independent review of the impact on the enjoyment of the right to adequate food.’⁴¹</p>	<p>Although these comments were made in the context of the WTO negotiations, they are relevant to the TPP because the TPP typically goes beyond the WTO rules in terms of greater tariff liberalisation, stronger intellectual property protection etc so is even more likely to harm human rights, although amongst fewer countries.</p> <p>Human rights impact assessments of the TPP do not appear to have been done, see below.</p> <p>The TPP chapters which have leaked do not have time limited commitments, they last until they can be amended (which in past USFTAs requires the consent of the other Parties) or a country withdraws from the treaty (which in past USFTAs can be done with six months’ notice in writing, but in practice no country has ever done so). Past USFTAs also do not have time limited commitments, so they are unlikely to be agreed to in the TPP.</p>
<p>Commenting on the similarly secret negotiation process of the Multilateral Agreement on Investment (MAI), the experts tasked with</p>	<p>The MAI has many of the same provisions as the leaked TPP investment chapter and the TPP has</p>

Human rights body comment or recommendation	What has occurred in the TPP
analysing the MAI by the Sub-Commission on Prevention of Discrimination and Protection of Minorities noted that ‘The process that accompanied the negotiations raised numerous human rights issues. One could even say that the whole thrust of the process was grounded in an ideological conception that was antithetical to all the well-known tenets of human rights law. Among them we could speak broadly about issues of transparency, accountability, participation and good governance.’ ⁴²	been negotiated in secret, see above
Re investment treaties: ‘these treaties are negotiated in secret without any discussion at the domestic level, which is not compatible with the right to health framework.’ ⁴³	The TPP includes an investment chapter (see comments on leaked text in Annex 1) which has equivalent provisions to those in investment treaties and the TPP is being negotiated in secret, see above.

Transparency during other trade negotiations

- Although the TPP negotiating texts have not yet been released, negotiations on the same trade issues are more transparent in other fora, with the negotiating text being released during negotiations including:
 - The text of the Free Trade Area of the Americas (FTAA) (also a USFTA, so almost the same issues as the USA has a strong consistent template as can be seen in the small variation between USFTAs)⁴⁴ was released three times.⁴⁵ The previous U.S. Trade Representative during the earlier stages of the TPP negotiations noted that ‘a decade ago negotiators released the draft text of the proposed Free Trade Area of the Americas and were subsequently unable to reach a final agreement.’⁴⁶
 - the text of the Anti-Counterfeiting Trade Agreement (on the enforcement issues that are also being negotiated in the TPP IP chapter) was released twice before it was concluded.⁴⁷
 - All TPP Parties are WTO members⁴⁸ and the WTO regularly releases negotiating texts during the negotiation on issues also being negotiated in the TPP including: goods liberalisation, disciplines on export taxes, IP, services and trade facilitation.⁴⁹
- In relation to the European Union’s free trade agreement negotiations with the U.S, (the Transatlantic Trade and Investment Partnership (TTIP)), where they are negotiating many of the same issues as in the TPP,⁵⁰ the EU Ombudsman recommended many transparency measures including that negotiating texts were made available to the public **before the agreement was finalised**.⁵¹ The EU has so far released some of its negotiating text proposals and other documents and agreed to ‘make the whole text of the agreement public once negotiations have been concluded – well in advance of its signature and ratification’.⁵² After expressing deep concern over the access that corporate representatives have to TPP negotiating texts, while elected officials do not, six U.S. Senators contrast this to this European Union (EU) decision to release textual proposals in the TTIP negotiations. They note that ‘USTR contends that it cannot negotiate a trade agreement effectively in public. The European transparency initiative suggests otherwise. If the European Commission can do it, so can USTR. Congress negotiates complex legislation using open processes; there is no reason

why the USTR could not do so as well.⁵³ They go on to request that USTR releases specific proposals for legal text and pending draft agreements in the TPP.

Obligation to protect

‘In order to clarify the meaning of States’ obligations, they are sometimes put under three headings: to respect, to protect and to fulfil economic, social and cultural rights.’⁵⁴ ‘The obligation to protect requires States to prevent violations of such rights by third parties’.⁵⁵ ‘Failures to protect rights in the context of service provision usually stem from a lack of regulation or lack of enforcement of such regulation’.⁵⁶ Unfortunately, the agreed provisions in the leaked TPP investment chapter are equivalent to those which have been successfully used to challenge governments who enforce regulations to the detriment of foreign investors. For example:

- When a government fined a private water provider due to upsettingly dark, blackish water because of manganese deposits (and took other measures, see below), it was successfully sued by the foreign investor under its investment treaty for violating the fair and equitable treatment and expropriation provisions (both of which have been agreed to in the leaked TPP investment chapter, see Annex 1) and the government had to pay the investor US\$105 million.⁵⁷
- When a government punished an oil company for breaking the law, as the ISDS tribunal agreed it was allowed to do under its domestic law, the foreign oil company successfully sued under an investment treaty and was awarded US\$2.4 billion for the government’s violations of fair and equitable treatment and expropriation provisions (both of which have been agreed to in the leaked TPP investment chapter, see Annex 1) due to enforcing its domestic law.⁵⁸

Furthermore, even court decisions to enforce domestic law on foreign investors have been challenged under equivalent provisions to those which have been agreed in the leaked TPP investment chapter, see Annex 1. For example:

- 30,000 Amazonian indigenous people successfully sued Chevron in Ecuador’s courts for its pollution of the Amazon and won an US\$18 billion award which Chevron is trying to avoid paying by suing Ecuador’s government under an investment treaty.⁵⁹
- See also corruption cases below.

Obligation to fulfil

Will economic growth due to the TPP improve human rights?

It is not clear that exports or economic growth will significantly increase under the TPP. This is for a number of reasons including that:

- All TPP countries are already members of the WTO,⁶⁰ so their exporters already benefit from the maximum tariffs set at the WTO.
- Many TPP countries already have low applied tariffs,⁶¹ so reducing them to zero does not have a significant effect.
- There are already many free trade agreements amongst TPP countries which further reduce or remove tariffs beyond the WTO levels,⁶² for example Chile has them with every TPP country.

This is borne out in analysis:

- By an economist from the United Nations Conference on Trade And Development which finds that for Malaysia, the TPP will actually worsen its balance of trade because its imports will increase by more than its exports.⁶³
- In a U.S. government study which found that even under the unlikely scenario of total tariff elimination (which even past USFTAs have not done as each country protects a sensitive agricultural

product, see goods chapter in Annex 1) and which TPP countries will not agree to,⁶⁴ the TPP would result in a gross domestic product (GDP) gain of 0.00% for Australia, Canada, Chile, Peru, Singapore, and the United States. For Japan, New Zealand, Malaysia, and Mexico, the projected gain is 0.01% or 0.02%. Vietnam is projected to get the biggest GDP boost at 0.1%.⁶⁵

Furthermore, concerns have been expressed that increased trade and increased economic growth do not necessarily improve human rights, for example:

- ‘The idea that the positive impacts from trade liberalization would compensate for its negative impacts on these categories, by leading to net welfare gains which should benefit all categories following redistributive policies, does not correspond to a human rights perspective, which focuses on the most vulnerable; it has not always proven to be correct empirically; and it often overestimates the capacity of States, in the developing world, to operate such redistribution of gains.’⁶⁶
- ‘Many commentators agree that the main beneficiaries of trade liberalization have been larger farmers and larger corporations, which have the capacities to take advantage of the economic restructuring. The poorest and most marginal, especially rural peasant farmers, are increasingly being left behind.’⁶⁷

Revenue loss implications

‘The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.’⁶⁸ However:

- TPP countries may experience irreplaceable revenue loss due to the TPP. This is likely to be more significant for developing countries as they tend to rely more heavily on the sources of revenue expected to be restricted by the TPP and find it harder to replace them due to their weaker ability to collect taxes generally not affected by the TPP such as income tax and corporate tax. TPP countries can lose revenue due to the TPP via its likely requirements:
 - To remove and reduce import tariffs: past U.S. free trade agreements (FTAs) have only allowed one product to be excluded from tariff liberalisation and five products to have partial liberalisation.⁶⁹ The TPP is expected to be similar. This tariff revenue loss can be significant for some developing countries such as the Philippines (if it joins the TPP as expected). A study on the potential loss in income suffered by African countries that sign an FTA with the EU found that Senegal would lose about 45% of its revenue.⁷⁰ The Philippines depends on tariffs for revenue even more than Senegal,⁷¹ so may face an even greater revenue loss if it joins the TPP. Since tariffs are easier to collect for developing countries than other taxes such as corporate or income tax, International Monetary Fund staff have noted that for middle-income countries such as the Philippines, even if a value added tax is introduced, only 45–60 cents is recovered for each dollar of lost trade tax revenue.⁷² Therefore for some developing countries, the TPP is likely to involve a permanent loss of revenue.
 - based on past USFTAs⁷³ to eliminate export taxes except for on perhaps three products. A number of developing countries rely on export taxes for revenue⁷⁴ and a number of TPP countries still use them⁷⁵.
 - To restrict or perhaps ban any financial transaction tax due to the free movement of capital requirement in the leaked TPP investment chapter, see below
 - To restrict the ability to set maximum royalties in voluntary licence contracts to prevent transfer pricing and tax avoidance, as has been agreed by all TPP Parties in the performance requirements provision of the leaked TPP investment chapter, see Annex 1, since the exceptions chapter in past USFTAs such as the Peru-USFTA⁷⁶ explicitly says that the performance requirements provision applies to taxation measures.

- To restrict services licensing fees at all levels of TPP governments in the sectors covered to the cost of the government issuing a licence and enforcing it, see services chapter in Annex 1. A number of TPP countries use services licensing fees at different levels of government to raise revenue, including for health care.

If spending on areas related to human rights such as education, water and health is not ring fenced, this would also decline if revenue losses as above occur due to the TPP.

- Based on past USFTAs⁷⁷ and the U.S. government stated proposals in the most likely chapter⁷⁸, there will be no additional aid provided to developing countries in the TPP to make up for any revenue shortfall due to the TPP.
- As the developing countries in the TPP are now middle-income, they are already losing aid that they have been relying on to fulfil their human rights obligations such as the right to health, see below.

Retrogression

Human rights body comment or recommendation	TPP provision
<p>‘the adoption of any deliberately retrogressive measure in the liberalization process that reduces the extent to which any human right is protected constitutes a violation of human rights’⁷⁹</p> <p>‘This also implies the “principle of non-regression”, which means that Governments must not adopt regressive policies that lead to deterioration in access to food.’⁸⁰</p> <p>‘As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources’⁸¹</p> <p>‘Even where retrogression is non-deliberate, the human rights framework obliges States to act with care and deliberation, to assess the impacts of their actions and omissions, and to adjust their policies and measures as soon as they become aware that current policies might lead to unsustainable results. States’ failure to meet this obligation may result in human rights violations.’⁸²</p> <p>‘States should not be allowed to use external circumstances as an excuse for retrogressive measures such as cutting certain health-related policies as part of a redistribution of funds from the health sector.’⁸³</p>	<p>The final TPP text is likely to have a number of retrogressive measures including stronger intellectual property protection, see comments in the rights to health and food sections.</p> <p>Since the TPP countries do not appear to have done human rights impact assessments, see below, it is not clear how they could satisfy the burden of proof before taking these retrogressive measures</p> <p>Therefore the TPP itself cannot be an excuse for retrogressive measures.</p>

Extraterritoriality

Human rights body comment or recommendation	TPP provision
A number of human rights bodies have emphasized the extraterritorial aspect of human rights obligations	The leaked TPP intellectual property (IP) chapter text, see Annex 1, shows that despite concerted

Human rights body comment or recommendation	TPP provision
<p>including:</p> <p>‘A group of United Nations human rights experts today urged governments worldwide to take into account a set of guidelines on extraterritorial obligations adopted by leading specialists in international law and human rights on 28 September 2011 in Maastricht, the Netherlands: the Maastricht Principles*. . . “The Maastricht Principles clarify the human rights obligations of States beyond their own borders, especially their obligation to avoid causing harm and to protect human rights extraterritorially,” the UN experts on extreme poverty, food, water and sanitation, and international solidarity explained.</p> <p>When making policy and deciding on new laws, they said, States must consider their impact on the enjoyment of human rights of people outside their own country. “The protection and promotion of human rights beyond borders must be elevated to the heart of States’ national and international decision-making,” the experts stressed.’⁸⁴</p> <p>‘Governments should ensure coherence at the national and international levels, by putting human rights at the centre of all government policy’⁸⁵</p> <p>See also specific human rights sections below.</p>	<p>opposition from other TPP countries, the U.S. is still pushing for stronger intellectual property protection which can harm human rights in a number of TPP Parties, see below. This pressure is not unusual, for example:</p> <p>‘The use of trade pressure to impose “TRIPS plus”-style IP legislation has been noted before CESC. This could lead member States to implement IP standards that do not take into account the safeguards included under the TRIPS Agreement which could lead to IP systems that are inconsistent with States’ responsibilities under human rights law.’⁸⁶</p> <p>‘Indeed, the hope that TRIPS would end (or outlaw) unilateral pressures on countries to establish high levels of IPR protection has largely proven ill-founded. . . The situation is compounded outside the arena of TRIPS because pressure is being exerted on countries to confer IPR protections that are more extensive than those stipulated in the Agreement. . . The additional problem with these types of pressures is that they are mostly exerted in bilateral contexts where the room for flexibility is even more limited. . . The second challenge relates to the political pressures being brought to bear on such countries to adopt regimes of protection that do not substantially differ from that of patents.’⁸⁷</p> <p>The U.S. does not appear to be complying with its extraterritorial obligations in its free trade agreement negotiations by putting human rights at the centre of all government policy, for example ‘when Costa Rican negotiators raised their human rights obligations, including the right to health, with the US during the process of negotiating the CAFTA, the US responded that the negotiations were a commercial matter and unrelated to human rights.’⁸⁸ Since the leaked TPP texts show that they are very similar or more extreme than CAFTA, the USA once again appears to believe the TPP is a commercial matter unrelated to human rights.</p>
<p>‘States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means’⁸⁹ Similar statements were</p>	<p>Given the problems the agreed provisions in the leaked TPP investment chapter, see Annex 1, have caused for human rights in disputes under other investment treaties, possible mechanisms for home governments to prevent their companies</p>

Human rights body comment or recommendation	TPP provision
made regarding the right to water. ⁹⁰	<p>from suing to challenge host government measures that protect human rights in the host country are to:</p> <p>a) prohibit ISDS disputes that involve human rights.</p> <p>b) have a screening mechanism that allows the home and/or host governments to prevent an ISDS claim from going ahead where it would adversely affect human rights. This would be similar to the partial screening for ISDS claims involving taxation measures in the exceptions chapter of USFTAs.⁹¹</p> <p>Unfortunately, neither of these is present in the leaked TPP investment chapter or in past USFTAs, so are unlikely to be in the final TPP text.⁹²</p>

Human rights impact assessments of trade agreements

Calls for human rights impact assessments

A number of human rights bodies have called for human rights impact assessments (HRIAs)⁹³ including specifically in the context of trade and investment negotiations and liberalisation, for example:

- In a statement on the TPP and other FTAs, 10 UN experts recommended that ‘Ex ante and ex post human rights impact assessments should be conducted with regard to existing and proposed BITs and FTAs.’⁹⁴
- ‘States should undertake human rights impact assessments of trade rules both during the process of the negotiations as well as post-negotiation. Such assessments should be public and participatory, focus in particular on disadvantaged and vulnerable groups as well as gender effects of trade rules, and States should raise the findings in trade negotiations.’⁹⁵
- ‘States should not enter into commitments in investment agreements that might threaten the enjoyment of human rights. Consequently, it will be important to undertake human rights impact assessments prior to undertaking commitments to liberalization investment.’⁹⁶ The leaked TPP investment chapter has almost all of the provisions commonly found in investment agreements, see Annex 1.
- ‘The Special Rapporteur emphasizes the importance of a WTO member undertaking a right to health impact assessment before making a commitment to open up the health service sector to international competition. . . If a State chooses to engage in trade liberalization in those areas that impact upon the right to health, then it should select the form, pacing and sequencing of liberalization that is most conducive to the progressive realization of the right to health for all, including those living in poverty and other disadvantaged groups. The form, pacing and sequencing of liberalization should be selected on the basis of right to health impact assessments.’⁹⁷ Although these comments were made in the context of the WTO negotiations, they are relevant to the TPP because the TPP’s services and investment chapters are expected to be negative list liberalisation which is likely to require

liberalisation beyond the WTO level (where it is positive list), see Annex 1, so is even more likely to harm human rights, although amongst fewer countries.

- The UN Special Rapporteur on the right to food:
 - Recommended that ‘States: Ensure, notably through transparent, independent and participatory human rights impact assessments, that their undertakings under the WTO framework are fully compatible with their obligation to respect, protect and fulfil the right to food’⁹⁸ Although these comments were made in the context of the WTO negotiations, they are relevant to the TPP because the TPP typically goes beyond the WTO rules in terms of greater tariff liberalisation, stronger intellectual property protection etc so is even more likely to harm human rights, although amongst fewer countries.
 - noted that ‘Human rights treaty bodies and special procedures of the Human Rights Council have regularly called upon States to prepare human rights impact assessments of the trade and investment agreements that they conclude.’⁹⁹ He produced guiding principles for these HRIA.¹⁰⁰
 - noted that ‘For over ten years, the human rights treaty bodies and independent experts have called on governments to assess the impact of trade and investment agreements on the enjoyment of human rights, but without success. And yet, there is growing evidence that trade and investment policies can have important impacts on human rights, particularly economic and social rights. It is time to act. The methodology for conducting HRIAs exists. The decision to implement HRIAs is a matter of political will.’¹⁰¹

Canada’s Parliamentary Standing Committee on International Trade also called for an independent ex ante HRIA of its FTA with Colombia, which did not occur.¹⁰²

Past human rights impact assessments of other trade agreements

There have been three main HRIAs of trade agreements:¹⁰³

- 1. Thai National Human Rights Commission’s ex ante assessment of the Thai-US bilateral free trade agreement (FTA): The Thai National Human Rights Commission established under the Thai Constitution ‘studied possible human rights violations in the following areas: agriculture, environment, intellectual property, services and investment and their impact on the right to development, socioeconomic and cultural rights, community rights, the right to access resource bases, the right to access drugs and public health services. . . The Commission found that “an FTA is like a tsunami that crashes to the shore without warning when one is not prepared to deal with it.” It goes on to note that both the Thai Government and its entrepreneurs are not sufficiently prepared.’¹⁰⁴
- 2. An ex post assessment of the impact of trade liberalization on the right to food in developing countries, carried out by FoodFirst Information and Action Network (FIAN) in collaboration with a number of other CSOs; and
- 3. An assessment of the impact of the Central American Free Trade Agreement (CAFTA) on the right to health of people in Costa Rica.

In addition, a human rights impact assessment of one of the obligations that has been proposed in the TPP (joining UPOV 1991) was carried out in 2014.¹⁰⁵

No HRIA of the TPP appears to have been done

To our knowledge, no TPP government has carried out a human rights impact assessment of the TPP. (When all TPP Parties at the time^e were asked by the Special Rapporteur on the right of everyone to the

^e Canada and Mexico only joined the negotiations in 2012, <https://ustr.gov/sites/default/files/2014%20NTE%20Report%20on%20FTB%20Canada.pdf> ; Japan in 2013,

enjoyment of the highest attainable standard of physical and mental health in a communication about the TPP to ‘provide details of any actions taken to ensure the enjoyment of the right to the highest attainable standard of health’, of those that replied, none stated that they had taken this basic first step of doing a human rights impact assessment).¹⁰⁶

There has already been at least one request for a scoping study for a TPP HRIA,¹⁰⁷ however the New Zealand Human Rights Commission did not have the resources to carry it out.¹⁰⁸

Privatisation

The issue of reversing privatisations or refusing to continue privatisations if they are having an adverse impact on human rights arises in a number of reports by Special Procedures mandate holders. The leaked TPP investment chapter (see Annex 1) shows that it will be difficult to reverse privatisations or refuse to continue privatising, as can be seen in ISDS disputes under equivalent provisions to those in the leaked TPP investment chapter in other treaties.

Refusal to continue privatising:

‘Dutch insurer Eureko launched an international arbitration under the Holland-Poland bilateral investment treaty (BIT) . . . The claim arises out of a 1999 privatization agreement, in which Eureko and its Polish partner Bank Millennium acquired a 30% stake in the Polish group. Eureko contends that the agreement also entitles it to purchase a further 21% stake in the Polish insurance company PZU. However following elections in Poland, a new government expressed its opposition to any move to relinquish the state's majority control of PZU to the Dutch consortium.’¹⁰⁹

‘Eureko was seeking some 1 Billion Euros (\$1.2 Billion US) in compensation from the Polish government’¹¹⁰ despite during this period, public opinion in Poland having swung decisively against the sale of the country's insurance giant to a foreign investor.¹¹¹ Eureko won on fair and equitable treatment (FET) and expropriation,¹¹² both of which have been agreed by all TPP Parties in the leaked TPP investment chapter (see Annex 1) and the wording of the TPP's attempt to narrow FET has not been successful in the past.¹¹³ After winning, Eureko in the damages phase is reported to be claiming 10billion euros for the breaches of the investment treaty and settlement negotiations are taking place.¹¹⁴

Poland is also being sued under a BIT for reversing its commitment to sell two state-owned sugar producers.¹¹⁵

Reversing privatisations:

If the government reverses a privatisation such that only the government can provide the service, for example water or healthcare and all TPP Parties have not agreed to allow it to list the relevant exception as a nonconforming measure under the TPP services and investment chapters, this would violate the market access provision that is likely to be in the services chapter (see Annex 1).

Even if the government has the relevant nonconforming measure, it could be sued for a privatisation reversal under the fair and equitable treatment or the expropriation provisions of the leaked TPP investment chapter (see Annex 1). This is also the case even if the government still allows some private operators. For more detailed analysis, see for example

http://www.citizen.org/documents/ssprivatizationreport_0607.pdf.

An example of a kind of privatisation reversal (the cancellation of a concession agreement) ISDS case which was found to violate the version of fair and equitable treatment and expropriation provision in its investment treaty is: Vivendi v Argentina:

‘In 1995, the French company Compagnie Générale des Eaux (which subsequently became Vivendi Universal) and its Argentine affiliate Compañía de Aguas del Aconquija S.A. signed a concession contract with the Argentine province of Tucumán to develop and operate the region’s water service.

As part of Vivendi’s “cost recovery strategy,” the company raised water bills in the impoverished province some 70 percent. Not only were these increased costs far beyond the means of most Tucumán’s residents, but they did not yield any significant improvements to the water service.

In fact, a year after the concession agreement was signed, heavy manganese deposits turned much of the province’s tap water a brownish color – an indication of a potential public health hazard.

This sparked massive public protests, a consumer boycott, and widespread civil disobedience as citizens refused to pay their water bills. It also fueled increased government dissatisfaction with the arrangement. The provincial government filed a domestic lawsuit against the company when the water was found to be contaminated, and the concession agreement was finally cancelled by the government in late 1996. By February of 1997, Vivendi had registered an ICSID claim of \$300 million in damages against Argentina for alleged violations of the 1991 France-Argentina BIT.

Vivendi claims that Tucumán’s rate regulation, including its efforts to prevent water-cutoffs due to non-payment, its fines due to poor water quality, public statements by legislators impugning the company and various other actions were tantamount to expropriation and violated its rights as an investor.’¹¹⁶

The tribunal commenting on the dark, blackish water due to manganese deposits noted that ‘given the unattractive appearance of the water, it had the potential to be, and no doubt was very upsetting to consumers.’¹¹⁷

The tribunal found Argentina had violated the fair and equitable treatment and expropriation provisions and awarded Vivendi US\$105 million plus interest at 6% compounded annually from 1997 and costs of USD701,000.¹¹⁸ Argentina unsuccessfully tried to get an annulment of this case.¹¹⁹

Corruption

A number of reports by Special Procedure mandate holders have noted the adverse impact of corruption on human rights.¹²⁰

However, the already agreed text in the leaked TPP investment chapter has provisions which allow investors from other TPP countries to sue governments who take anti-corruption measures which harm the investor. This can be seen in India’s experience where it has been sued under equivalent provisions in its bilateral investment treaties for taking anti-corruption measures:¹²¹

- 2G spectrum phone licenses were corruptly issued in India resulting in an estimated loss of nearly US\$20 billion in revenue to the Indian government.
- The highest court in India cancelled them because they were corruptly issued.
- The Indian government is now being sued under its investment treaties by the recipients of the corruptly issued phone licences, with one investor alone claiming US\$14 billion.

Impact on certain thematic mandates

Special Rapporteur on the right to food

Human rights body comment or recommendation	How TPP provision affects human rights
States responsibilities include ‘To ensure that in international agreements the right to food is given	Since no TPP country appears to have even conducted a HRIA, it is not clear if or how they

Human rights body comment or recommendation	How TPP provision affects human rights
adequate consideration.’ ¹²²	have done this sufficiently.
Subsidies and tariffs	
<p>‘Despite preaching the benefits of free trade in agriculture, the European Union, the United States of America, Japan and other industrialized countries still heavily protect their agriculture in order to ensure the production of basic staple foods.’¹²³ US subsidies are responsible for causing poor countries about US\$8billion/year in lost agricultural and agro-industrial income.¹²⁴ ‘While some developed countries (with the notable exception of Australia) continue to protect agriculture as a question of national security, food security or multifunctionality, many of the poorest developing countries are left at a severe disadvantage, as they cannot afford to subsidize their agriculture, but must reduce tariffs and open up to unfair competition from subsidized products of the developed countries.’¹²⁵</p> <p>‘All this has left many countries and many people understandably distrustful of the promises of free trade for ensuring food security, particularly in the face of the “do as I say, not as I do” positions of the northern, developed countries.’¹²⁶</p> <p>‘when domestic support is concentrated in wealthy countries and is so large that it becomes trade distorting and anti-competitive for poorer producers and traders, this raises questions concerning the compatibility of domestic support with a just international and social order conducive to the promotion and protection of human rights... over 60 per cent of domestic agricultural support in OECD countries is excluded from reduction commitments under the AoA, in spite of the fact that many exempt support measures - while admittedly less trade distorting than traditional forms of domestic support - still have production and trade effects’¹²⁷</p> <p>‘Policies such as export subsidies for agriculture may also have negative effects when production is exported to agrarian-based developing countries. It is clear that such policies will have a negative impact on the right to food of people living in those countries since their livelihoods will be destroyed and they will not be able to purchase food, even if the food is cheaper. In Mexico, for example, it is estimated that up to 15 million Mexican farmers and their families, many from indigenous communities,</p>	<p>It is expected that the U.S. will be able to keep their agricultural domestic subsidies and perhaps even their export subsidies in the TPP while requiring the removal of tariffs on all US agricultural products imported into other TPP Parties (even those which are subsidised), except perhaps one product, see goods chapter discussion in Annex 1.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>may lose their livelihoods as a result of the North American Free Trade Agreement and competition with subsidized United States maize.’¹²⁸</p> <p>‘it is widely recognized that subsidies to farmers in developed countries can have negative impacts on farmers and the right to food in developing countries if food products are “dumped” on developing countries . . . In a globalized and interdependent world, decisions taken in one country can have very far-reaching effects on other countries.’¹²⁹</p> <p>‘This means for example that Governments should not subsidize agricultural production that will be exported to primarily agrarian developing countries, as it can be seen in advance that the right to food of people living in those countries will be seriously negatively affected as their livelihoods will be destroyed and they will not be able to purchase food, even if the food is cheaper.’¹³⁰</p>	
<p>‘import surges may threaten the ability of local producers in net food-importing countries to live from their crops and therefore the ability to feed themselves and their families, when such import surges lead to such low prices on the domestic markets that they are driven out of business. Agricultural producers from developing countries have been facing unfair competition from highly subsidized products exported by farmers from OECD countries.’¹³¹</p> <p>‘States should define their positions in trade negotiations in accordance with national strategies for the realization of the right to food. . . These strategies also should support the position of Governments in their discussions with international financial institutions, with donors, or in bilateral trade negotiations. It is a particular source of concern that, in a large number of cases, States have been unable to use flexibilities allowed under the WTO agreements - or to apply certain tariffs remaining under their bound tariffs - because of prescriptions from such institutions or because of bilateral free trade agreements.’¹³²</p> <p>FAO studies have noted the adverse impacts of tariff reduction on farmers facing increased imports.¹³³</p> <p>‘trade rules that do not take into account the need to alleviate rural poverty can increase the vulnerability of rural populations to external price fluctuations,</p>	<p>Despite this need for tariffs, it is expected that in the TPP, countries will not be able to retain tariffs on all their sensitive agricultural products which will continue to face subsidized competition from imports, see goods chapter discussion in Annex 1.</p> <p>The USA has a strong template which in past FTAs has only allowed one product to be excluded from tariff liberalisation and five products to have partial liberalisation, see goods chapter in Annex 1. This template is expected to be followed in the TPP and would leave little room for Parties to define their positions in the TPP negotiations in accordance with national strategies for the realization of the right to food. Ie based on past USFTAs, the TPP will be an FTA that prevents Parties from using the flexibilities under the WTO to raise their tariffs on almost all products, see above.</p> <p>The USA’s strong FTA template does not allow the need to alleviate rural poverty to be taken into</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>expose poorer farmers to competition for which they are ill-prepared and reduce crop diversity and subsistence farming by focusing disproportionately on export crops (E/CN.4/2002/54, paras. 35-38). It should also be noted that market distortions due to market access barriers to the agricultural exports of developing countries and subsidized competition from developed countries can affect rural development in poorer countries by constraining agricultural growth and even reducing agricultural growth as small farm incomes are reduced by decreasing agricultural commodity prices.</p> <p>Another FAO report has recently concluded that the incidence of external shocks in the form of depressed prices and import surges is expected to rise as agricultural trade is increasingly open, which can further undermine domestic production¹³⁴</p> <p>‘the Special Rapporteur on the right to food encouraged States to avoid excessive reliance on international trade in the pursuit of food security... Indeed, increasing food production in developing countries will . . . also likely require States to apply tariffs on certain food imports as complementary measures to protect smallholders from import surges . . . States should also carefully examine the impacts of additional cuts to tariffs on national food security. States should refuse such cuts if they are unable to counterbalance negative impacts on food-insecure vulnerable groups with national policies, including social safety-nets and the creation of non-agricultural employment opportunities.’¹³⁵</p> <p>‘States, particularly developing States, in accordance with the principle of special and differential treatment, must therefore retain the freedom to take measures which insulate domestic markets from the volatility of prices on international markets.’¹³⁶</p>	<p>account, but based on past USFTAs, the USA will keep their agriculture subsidies, (see above).</p> <p>Special and differential treatment for developing countries is not evident in past USFTAs as can be seen by the equally few number of products they were able to retain tariffs on, see goods chapter discussion in Annex 1. So it is not expected in the TPP either. Although developing countries do obtain transition periods of a few years for some obligations in USFTAs and so are likely to get them in the TPP as well, this has been criticised by the High Commissioner as being insufficient, see special and differential treatment below.</p>
<p>‘If trade is to work for development and to contribute to the realization of the right to adequate food, it needs to recognize the specificity of agricultural products, rather than to treat them as any other commodities and to allow more flexibilities to developing countries, particularly in order to shield their agricultural producers from the competition from industrialized countries’ farmers. The reason for this is obvious, and it is at the heart of what justifies special and differential treatment for developing</p>	<p>Agricultural products are required to remove tariffs in the same way as for non-agricultural products in USFTAs, see goods chapter discussion in Annex 1 and see special and differential treatment below.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>countries: even after the removal of existing trade-distorting measures, which currently are disproportionately benefiting developed countries, the productivity per active labourer in agriculture will remain much lower in developing countries, on average, than in developed countries. . . The deepening of the reform programme under the AoA will not result in agricultural producers in developing countries being able to compete on equal terms with producers in industrialized countries, unless wages in developing countries are repressed at very low levels to compensate for a much lower productivity per active laborer.’¹³⁷</p>	
<p>‘All developing countries should be able to use a positive list approach to declare which agricultural products or sectors they would like disciplined under the provisions of the Agreement on Agriculture. That is, only the products that are declared by a country are subject to the commitments of the Agreement;’¹³⁸</p>	<p>Instead of using a positive list approach for the equivalent liberalisation commitments, past USFTAs (and since this is such a strong template for the USA, the TPP is expected to be the same) have required the removal of all tariffs on all products except for a few, see goods chapter discussion in Annex 1.</p>
<p>‘International trade does not automatically help countries to meet food shortages if they do not have foreign exchange to buy food imports. Nor does it help when their farmers have to compete with cheap subsidized imports.’¹³⁹</p>	<p>Some countries which are aiming to join the TPP such as the Philippines have experienced foreign exchange shortages in the past.¹⁴⁰</p>
<p>‘Imbalances and inequities in the global trading system that can have profound negative effects on the right to food should be urgently addressed. . . WTO members resolve the current inequities and imbalances in the WTO Agreement on Agriculture to reflect the needs and rights of both developing, as well as developed countries, in order to ensure that the right to food is not threatened by global trading rules’¹⁴¹</p> <p>‘The right to adequate food can only be fully realized by States within a multilateral trading system which enables them to pursue policies aimed at realizing the right to food. Such a system should not only refrain from imposing obligations which directly infringe upon the right to food. It should also ensure that all States have the policy space they require to take measures which contribute to the progressive realization of the right to food under their jurisdiction, a goal towards which States should move “as expeditiously as possible” (E/C.12/1999/5, para. 9). This obligation must be facilitated, not impeded, by the organization of the multilateral trade</p>	<p>The imbalances in the WTO system are expected to be even greater in the TPP since based on past USFTAs, it will require tariffs to be removed on more products while countries such as the USA can keep their agriculture subsidies, see goods chapter discussion in Annex 1.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>regime, as also implied by article 11, paragraph 2, of the Covenant which recognizes the need to ensure that the regulation of trade contributes to the enjoyment of the right to food.’¹⁴²</p> <p>‘International trade obligations must also be reviewed to ensure that they do not conflict with the right to food. The unfairness of the current regime must be revised and developing countries allowed special protection, as it is in those countries that food security remains a daily struggle. The new WTO negotiations must take into account the suggestions of the developing countries and must consider the need to protect the right to food.’¹⁴³</p>	<p>No significant special and differential treatment for developing countries is expected in the TPP, see below.</p>
<p>Supply-management</p>	
<p>‘supply management regimes in Canada for dairy, poultry and eggs have been successful in ensuring fair prices for small- and medium-scale producers and consumers alike while also providing for adequate and safe supply of food on the domestic market.’¹⁴⁴</p>	<p>However in the TPP:</p> <ul style="list-style-type: none"> • Canada’s supply management regime ‘severely limits the ability of U.S. producers to increase exports to Canada above TRQ levels’¹⁴⁵ and ‘the U.S. has made clear to Canada that Ottawa needs to provide additional market access for dairy and poultry. Those are sensitive areas for Canada because they are subject to a supply management system that limits imports and domestic production.’¹⁴⁶ • And it has been targeted in the TPP by some US Congressional Representatives.¹⁴⁷
<p>‘Measures such as supply-management schemes, which guarantee a certain price to producers, should also be possible, although this requires that States remain free to maintain import tariffs at levels which allow them to protect their agricultural sector from the impact of the arrival on domestic markets of low-priced products. It is particularly perplexing that certain supply-management schemes, which seek to adapt production to demand and shield both producers and consumers from sudden shifts in prices, while at the same time ensuring processors a reasonable profit margin, would be threatened by proposals to reduce over-quota tariffs, even for products designated as sensitive because they are the subject of such a management scheme. Such schemes are an insurance policy for both producers and consumers against the fluctuations of prices on international markets. Their removal would be a regressive step in the realization of the right to</p>	<p>Import tariffs are unlikely to be able to be kept at sufficient levels on many products in the TPP, see goods chapter discussion in Annex 1. Therefore the introduction or maintenance of supply-management is unlikely to be possible for many products under the TPP.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>food.¹⁴⁸</p> <p>‘Maintain the necessary flexibilities and instruments, such as supply management schemes, to insulate domestic markets from the volatility of prices on international markets.’¹⁴⁹</p>	
<p>Land</p>	
<p>‘The rural poor often lack access to sufficient productive resources, such as land, water, fertilizers and seeds, as well as to markets, information and technology. . . .The denial of access to land can occur, for example, in the context of unfair competition over land with large agribusiness, extractive industries’¹⁵⁰</p>	<p>The pre-establishment rights which have been agreed in the leaked TPP investment chapter and based on past USFTAs are likely to be in the TPP services chapter make it easier for foreign investors from other TPP countries to buy agricultural land, unless the relevant exception (nonconforming measure) has been agreed to by all TPP countries, see Annex 1.¹⁵¹ Seeds and agricultural chemicals are also likely to be expensive for longer due to the TPP, see IP chapter in Annex 1.</p>
<p>States should implement land redistribution programmes where a high degree of landownership concentration is combined with a significant level of rural poverty attributable to landlessness¹⁵²</p>	<p>Under the leaked TPP investment chapter (see Annex 1):</p> <p>If the land redistribution involves land owned by investors from other TPP countries, since land is a protected investment, whether it was bought before or after the TPP entered into force:</p> <p>a) if the government is expropriating the land, it will need to pay fair market value compensation plus interest at a commercially reasonable rate. This may make effective land redistribution unaffordable for a number of TPP developing countries</p> <p>b) a change in policy to start doing/expand etc land redistribution may violate fair and inequitable treatment</p>
<p>Intellectual property (IP)</p>	
<p>‘Improving the access of small-scale farmers to productive inputs (including mineral and organic pesticides . . .) . . holds significant potential to lead to sustainable improvements in production and food security.’¹⁵³</p>	<p>More pesticides and other agricultural inputs such as seeds and herbicides are likely to be protected by intellectual property and for longer if proposals in the TPP are accepted, thus keeping more prices at the high monopoly level for longer, see IP chapter discussion in Annex 1.</p>
<p>‘The strengthening of breeders’ rights in the 1991 UPOV Convention is also a concern in this regard. . . No State should be forced to establish a regime for the protection of intellectual property rights</p>	<p>The leaked TPP IP chapter proposes that countries join UPOV 1991. This and a number of other proposals for stronger intellectual property protection on agricultural imports go beyond the</p>

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<p>which goes beyond the minimum requirements of the TRIPS Agreement¹⁵⁴</p>	<p>requirements of TRIPS, see IP chapter discussion in Annex 1.</p> <p>UPOV 1991 prohibits the exchange of seed and patents on plants prohibit farmers from replanting seed they have saved themselves unless they pay a royalty to the patent holder. Both of these have been proposed in the TPP, see IP chapter discussion in Annex 1. ‘Worldwide, about 1.4 billion farmers continue to cultivate their land with seed they or a fellow farmer have saved from previous harvests. . . Ultimately, millions of farmers could lose their livelihood because they will no longer be able to afford seeds. . . Seed exchange practices have long constituted a fundamental aspect of farmers’ cultural life. By limiting such exchange, thus also hindering rituals around planting and harvests, IP protection directly interferes with the enjoyment of the right to take part in cultural life, as well as with minority and indigenous rights. . . Permitting IPRs on genetic resources encourages biopiracy.’¹⁵⁵ Table 1 of Seeds of Hunger lists the human rights affected by intellectual property on seeds.</p> <p>A human rights impact assessment of UPOV 1991 included the Philippines, which is likely to join the TPP, see Introduction. It found that:¹⁵⁶</p> <ul style="list-style-type: none"> - if the Philippines joined UPOV 1991 and therefore had to prohibit seed exchange and seed banks for the protected varieties, farmers would have to pay more than four times more for seeds. -one of the reasons to use farm saved seed or seed exchanged with neighbours is because it does not require cash in hand at the time of sowing, which is often not available. - some of the Philippines farmers noted that if UPOV 1991 was implemented, there would be no money left for school fees and they would have no more food.
<p>Local level food security including local seed banks are needed.¹⁵⁷</p>	<p>If the TPP proposal to join UPOV 1991 is accepted, seed banks could not include seeds from protected varieties as this would violate UPOV 1991’s ban on exchanging saved seed.</p>
<p>‘In particular, States should not allow patents on plants’¹⁵⁸</p>	<p>There is a proposal in the TPP to allow patents on plants, see IP chapter discussion in Annex 1. Patents on plants prevent farmers from saving the</p>

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	<p>seed from one harvest and replanting it, unless they pay a royalty to the patent holder.</p> <p>A human rights impact assessment of UPOV 1991 included the Philippines, which is likely to join the TPP, see Introduction. It found that buying seed is more than 10 times more expensive than using farm saved seed.¹⁵⁹</p>
<p>‘Indigenous peoples are concerned that recent developments in international intellectual property rights regimes represent a threat to indigenous access to and control over plant and animal genetic resources, as well as to community knowledge gained over generations. . . They are particularly concerned about developments in biotechnology and intellectual property protection that could deprive indigenous farming communities of their access to and control of seeds and livestock breeds, allowing intellectual property protection to “inventions” that will later require pay for its use.’¹⁶⁰</p> <p>‘Indigenous peoples’ access to and control over plant and animal genetic resources, such as seeds traditionally cultivated by indigenous communities, as well as to community knowledge gained over generations are also threatened. There is concern that recent developments in international intellectual property rights regimes, such as the World Trade Organization’s Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), may protect “inventions” of business enterprises and research institutions based on indigenous communities’ traditional resource and knowledge and deprive them of free access and use of such resource and knowledge.’¹⁶¹</p>	<p>The leaked TPP IP chapter has proposals to join UPOV 1991 and allow patents on plants and the proposals on traditional knowledge and genetic resources are too weak to be effective, see IP chapter discussion in Annex 1.</p> <p>Past USFTAs since 1995 have required the Parties to comply with UPOV 1991, so it is expected that this will be a red line for the USA in the TPP.</p> <p>A human rights impact assessment of UPOV 1991 included the Philippines, which is likely to join the TPP, see Introduction. It found that: ‘UPOV 91-type restrictions could contribute to the erosion of traditional practices and seed management systems (which could incorporate protected varieties) and consequently adversely impact on cultural rights, minority rights, indigenous peoples’ rights, women’s rights, as well as on biodiversity and the right to food.’¹⁶²</p> <p>In New Zealand:¹⁶³</p> <ul style="list-style-type: none"> - ‘Many Māori are concerned about the granting of intellectual property rights to life forms, including indigenous flora. There is concern that the grant of an exclusive right over a variety derived from an indigenous variety, or over an indigenous variety that has been “discovered”, may infringe what Māori consider to be their rights under the Treaty of Waitangi to maintain control over their own resources, and may also limit the rights of Māori themselves to develop new uses of those resources. There is also concern about the cultural and spiritual implications of the alteration of life forms, and the encouragement given through the intellectual property rights system to continued innovation in this field.’ - ‘Some Māori would argue that granting of PVRs on indigenous varieties that had been discovered, or which had been developed from an indigenous

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	<p>variety, where the breeder had not obtained prior informed consent from the relevant iwi or hapu, is in direct conflict with what they see as the rights guaranteed to Māori under the Treaty of Waitangi.’</p> <p>-Under UPOV 91, ‘if, for example, a person were to go into a national park or conservation land, take an indigenous plant, and use it develop a new variety , then, under UPOV 91, that person would be considered to be the “breeder” of the new variety. It would not be possible, under the provisions of UPOV 91, to refuse to grant a PVR (or revoke a granted PVR) on the grounds that the breeder had not obtained (for example) prior informed consent to use the variety in that way. Ratification of UPOV 91 is likely to be strongly opposed by many Māori, in particular the WAI 262 claimants. They may consider that ratification of UPOV 91 would be in breach of the Crown’s obligations under the Treaty of Waitangi’</p> <p>A New Zealand government review of patents on plants noted that:¹⁶⁴</p> <p>‘Māori are in general opposed to any reform of the Patents Act that might either “extend” patentability in the area of biotechnology, or that might not prevent the granting of patent rights to inventions based upon living organisms.</p> <p>Many Māori are concerned about the application of patent rights to life forms, including indigenous flora and fauna. These concerns are wide ranging. First, there is concern that a patent for an invention derived from indigenous flora and fauna may, through the grant of exclusive rights in relation to the invention, infringe what Māori consider to be their rights under the Treaty of Waitangi to maintain control over their resources, and may also limit the rights of Māori themselves to develop new uses of those resources. Second, there is concern about the cultural and spiritual implications of the alteration of life forms, and the encouragement given through the patents system to continue innovation in this field.</p> <p>Māori have also raised concerns about the application of the patents system to inventions based on traditional knowledge. There is a</p>

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	concern that traditional remedies, or their active ingredients, may be patented by individuals from outside the iwi from which the knowledge is obtained, and that Iwi would then be denied access to their traditional remedies during the patent term without either informed consent or arrangements for benefit sharing.’
Minimum wage	
‘It is the duty of the State to ensure that a minimum wage is set in legislation, and that compliance with this requirement is adequately monitored. That minimum wage should be, at least, a “living wage”, that “provides an income allowing workers to support themselves and their families”, as required under articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights. . . States should . . . [ensure] that their legislation sets a minimum wage corresponding at least to a “living wage”’ ¹⁶⁵	<p>As the Veolia v Egypt investment dispute shows, an increase in the minimum wage can give rise to an investment dispute under provisions similar to those which have been agreed in the leaked TPP investment chapter (see investment chapter in Annex 1).</p> <p>The labor chapter of past USFTAs does not override these problematic investor protection provisions, nor have there been effective exceptions in the investment or exceptions chapters of past USFTAs for labor rights. Therefore, neither of these are expected in the TPP.</p>
Small farmers	
<p>‘for the realization of the right to food, there is no alternative but to strengthen the agricultural sector, with an emphasis on small-scale farmers.’¹⁶⁶</p> <p>‘local production by small-scale farmers is the best way of ensuring food security at the household level in developing countries’¹⁶⁷</p> <p>‘the study commissioned by FAO concluded that the root cause of the massive crisis of small farming communities, of rural poverty and hunger in poor agricultural countries lies in the exposure of poorly equipped and unproductive small farming communities to competition from far more productive agricultural systems.’¹⁶⁸ ‘Trade liberalization and policies of structural adjustment in the agricultural sector have brought small-scale agriculture (in developing countries, though not in developed countries that maintain subsidies) into direct competition with imports from markets where world prices are artificially low as a result of subsidies.’¹⁶⁹</p>	<p>Unfortunately, the likely TPP provisions will mean that small farmers:</p> <ul style="list-style-type: none"> -will continue to face competition from subsidized U.S. imports while having to remove tariffs that protect them, see subsidies and tariffs above -will face increased input costs, see comments on intellectual property chapter above
‘Limit excessive reliance on international trade in the pursuit of food security and build capacity to produce	See subsidies and tariffs section above

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the food needed to meet consumption needs, with an emphasis on small-scale farmers.’ ¹⁷⁰	
‘Many commentators agree that the main beneficiaries of trade liberalization have been larger farmers and larger corporations, which have the capacities to take advantage of the economic restructuring. The poorest and most marginal, especially rural peasant farmers, are increasingly being left behind.’ ¹⁷¹ ‘Trade liberalization of agriculture across the world is resulting in an increasing concentration of agricultural production, however, benefiting large-scale farming and transnational corporations. This is especially true for developing countries’ ¹⁷²	See land and subsidies and tariffs section above
‘One issue which deserves urgent attention, is the need to ensure access to seeds and fertilisers . . . Due to the combined effects of the sharp increase in the prices of oil, of the protection of the intellectual property rights of the producers of intrants (seeds, fertilizers, pesticides), and of a high concentration rate in this sector, the prices of intrants have skyrocketed . . . Seed prices are also rising, fuelled by an increase in the costs of royalties for genetics and technology (traits) . . . while the profits of companies producing such intrants have risen significantly, the smallhold farmers are struggling to prepare the next crops. They need help. This is urgent.’ ¹⁷³	See IP section above
Fishing	
‘From the perspective of the right to food, it is essential to protect access to sustainable fishery resources for poor and marginalized communities, especially where this provides their primary means of livelihood and where few alternative opportunities exist. . . The right to food of these communities is therefore closely linked to their access to and control over fishing resources. It is extremely important to ensure that fishing communities have secure rights of access to sustainably managed fishing resources. . . In relation to fisheries, the obligation to respect means that the State should not take actions that arbitrarily deprive people of their existing access to adequate food. . . The obligation to respect the people’s existing access to food is frequently being violated, not only through direct actions, but also through policies that have failed to protect artisanal and subsistence fisheries. . . .	Restrictions on foreign fishing vessels may not be allowed under the market access provision of the TPP services chapter unless the relevant exception (nonconforming measure) is agreed to by all TPP Parties, see Annex 1.

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<p>To deprive people of livelihoods and their access to food, without compensation or in an arbitrary or discriminatory way, is a clear violation of the obligation to respect people's existing access to food. This is particularly the case when there is no alternative employment, especially if or when the new fisheries industry structure fails to provide employment equal to that lost through the restructuring. Rights of access should be secured and compensation offered in cases where reallocation leaves traditional fishing communities with no access to their traditional resources. . .</p> <p>In the case of communities dependent on fish and fishing resources, Governments must comply with obligations to respect, protect and fulfil the right to adequate food. This means that it must ensure that artisanal and subsistence fishers are not arbitrarily excluded from their access to fishing resources. Governments must also provide protection to small-scale fisheries against negative impacts of actions undertaken by corporations or other private actors. Priority must be given in the first instance to protecting livelihoods.. .</p> <p>'Impact analysis of policy shifts must analyse potential impacts on all groups and ensure that all needs are met in a way that avoids potential for regression in the realization of the right to adequate food; . . Therefore, all Governments have a responsibility to ensure that their activities do not have negative impacts on the right to food of people in other countries, and should seek to ensure an equitable distribution of resources.'¹⁷⁴</p>	
<p>'Local food supplies can be reduced where host Governments have issued licences or signed access agreements allowing foreign vessels to target fish and fishing grounds used by small-scale fishers, given that foreign boats are geared towards export and may undermine local small-scale fisheries.. . . States should refrain from adopting any policy that affects the territories and activities of small-scale, artisanal and indigenous fishers unless their free, prior and informed consent is obtained.'¹⁷⁵</p>	<p>Restrictions on foreign fishing vessels may not be allowed under the market access provision of the TPP services chapter unless the relevant exception (nonconforming measure) is agreed to by all TPP Parties, see Annex 1.</p>
<p>The cancellation of all commercial fishing licences and the establishment of community-based user rights for small-scale and subsistence fisheries may sometimes promote human rights¹⁷⁶</p>	<p>A ban on commercial fishing may not be allowed under the market access provision of the TPP services chapter unless the relevant exception (nonconforming measure) is agreed to by all TPP</p>

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	<p>Parties, see Annex 1.</p> <p>If a TPP country had allowed commercial fishing licences and then decided to cancel them, since a fishing licence owned by an investor from another TPP country would be a protected investment under the leaked TPP investment chapter, even if it had the relevant nonconforming measure, the TPP country cancelling the licence could still be found to have violated fair and equitable treatment and perhaps the expropriation provision in the leaked TPP investment chapter, see Annex 1.</p>
States should: ¹⁷⁷ ‘Conduct human rights impact assessments involving the participation of the fishing communities who could potentially be affected before fishing access agreements are concluded’	No human rights impact assessments of the TPP appear to have been conducted by the TPP Parties, see above.
SPS	See SPS chapter in Annex 1
<p>‘The Committee considers that the core content of the right to adequate food implies: The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture. . . Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins’¹⁷⁸</p>	<p>The U.S. government has been pushing other TPP countries to weaken their safeguards against various diseases including:¹⁷⁹</p> <ul style="list-style-type: none"> • bovine spongiform encephalopathy which is believed to cause¹⁸⁰ the fatal brain disease,¹⁸¹ variant Creutzfeldt-Jakob disease (pressuring Australia, Chile, Japan, Peru, Singapore, Vietnam) • Trichinosis which can be a fatal disease in humans¹⁸² (pressuring Chile,^f Peru, Singapore) and in 2000 the infection rate in U.S. swine was still 0.007%¹⁸³ <p>This has been discussed in the TPP for at least Chile and Viet Nam.¹⁸⁴</p>
Breast-milk substitutes	
<p>‘improper marketing and promotion of breast-milk substitutes often negatively affects the choice and ability of a mother to breastfeed her infant optimally and thus undermines infants’ access to adequate food. In this regard, the Committee on the Rights of the Child consistently recommends that States should promote breastfeeding in an effort to protect children’s rights to basic health and welfare</p>	<p>Some of the provisions of the Code¹⁸⁹ which may violate the TPP include:</p> <p>-the ban on advertising or other promotion to the general public of products covered by the Code.¹⁹⁰ This is likely to violate the market access provision of the services chapter of the TPP, unless a relevant non-conforming measure</p>

^f ‘The United States has raised this issue on the margins of the Trans-Pacific Partnership (TPP) SPS negotiations on numerous occasions’, <http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled.pdf>

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<p>and comply with the World Health Organization's International Code of Marketing of Breast-milk Substitutes.¹⁸⁵</p> <p>States should: 'Transpose into domestic legislation the International Code of Marketing of Breast-milk Substitutes and the WHO recommendations on the marketing of breast-milk substitutes'¹⁸⁶</p> <p>'the 1981 World Health Organization (WHO) International Code of Marketing of Breast-milk Substitutes must be enforced.'¹⁸⁷</p> <p>Legislation is needed because voluntary corporate social responsibility has meant over 30 years of repeated non-compliance with the voluntary International Code of Marketing of Breastmilk Substitutes.¹⁸⁸</p>	<p>has been agreed, see Annex 1.</p> <p>-the ban on manufacturers and distributors providing products covered by the Code to pregnant women, mothers or their families.¹⁹¹ This may also constitute a market access violation of the TPP services chapter, see above.</p> <p>-the ban on point-of-sale advertising, giving of samples, or any other promotion device to induce sales directly to the consumer at the retail level, such as special displays, discount coupons, premiums, special sales, loss-leaders and tie-in sales, for products within the scope of the Code.¹⁹² This may also constitute a market access violation of the TPP services chapter, see above, as well as potentially violate any domestic regulations disciplines in the TPP services chapter, see Annex 1.</p> <p>Others have been concerned about the way the equivalent market access rules (Article XVI) at the WTO (GATS) could restrict the ability to implement the Code: 'public health regulations governing the marketing of breast-milk substitutes could be seen as market access limitations under GATS. Many countries have incorporated WHO's International Code of Marketing of Breast-milk Substitutes into their national legislation as a central plank in child health promotion strategies; Article 5 of that Code is specifically designed to restrict advertising and marketing of breast-milk substitutes. With national legislation which incorporated such restrictions, any country which committed its advertising sector to liberalisation under GATS (as countries such as Burundi, Jamaica and The Gambia have done) and did not enter specific limitations exempting the marketing of breast-milk substitutes (as none of those countries have done) could be challenged on grounds of contravening Article XVI.'¹⁹³</p>
<p>Unhealthy food</p>	
<p>'following the entry into force of the North American Free Trade Agreement, United States companies massively increased investments in the Mexican food processing industry (from \$210 million in 1987 to \$5.3 billion in 1999) and sales of processed foods in Mexico soared at an annual rate of</p>	<p>In the TPP, foreign investment is likely to be allowed from other TPP countries on a negative list basis, i.e. they can invest in any sector unless a non-conforming measure has been agreed to by all TPP Parties, see services and investment chapter discussion in Annex 1</p>

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<p>5 to 10 per cent in the period from 1995 to 2003. The resulting rise in soft drink and snack consumption by Mexican children is at the source of the very high rates of child obesity in the country.’¹⁹⁴</p>	
<p>‘Significant concerns are expressed today about the marketing practices of the agrifood industry, particularly as regards marketing to children. The range of practices is wide: they include television advertising, product placement, promotional partnerships, sales promotions, and direct marketing in schools, among others. Most advertisements promote unhealthy foods, high in total energy, sugars and fats, and low in nutrients. A recent study covering television advertising in Australia, Asia, Western Europe, and North and South America, found that in all sampled countries, children were exposed to high volumes of television advertising for unhealthy foods, featuring child-oriented persuasive techniques, leading the authors to call for regulation of food advertising during children’s peak viewing times. The ability of these marketing practices to change consumer behaviour is remarkable in developing countries, in part because brands of North-based global companies carry positive connotations.’¹⁹⁵</p> <p>‘Furthermore, States should take the legislative and other measures needed to protect people, especially children, from advertising and promotions of unhealthy food so as to support the efforts of parents and health professionals to encourage healthier patterns of eating and physical exercise.’¹⁹⁶</p>	<p>A restriction or ban on advertising or marketing could be a violation of the market access provisions of the services chapter, unless the relevant non-conforming measure has been agreed by all TPP Parties, see Annex 1 below.</p> <p>Like the tobacco industry, the agrifood industry continues to find new and creative ways to promote and market their products. Therefore the problem with negative list services market access provisions is that:</p> <p>a) countries may not have taken non-conforming measures in the relevant sectors that industry uses to promote its products in future,</p> <p>b) they are unlikely to have scheduled exceptions at the time of signing the TPP to sectors that are only developed in the future</p> <p>unless it gets all other TPP Parties to agree to a horizontal exception across all service sectors.</p> <p>Such restrictions or bans may also violate any domestic regulations disciplines in the TPP services chapter, see Annex 1.</p>
<p>States should:¹⁹⁷</p> <p>- ‘Transpose into domestic legislation . . . the WHO recommendations on the marketing of . . . foods and non-alcoholic beverages to children, and ensure their effective enforcement;</p> <p>- Adopt statutory regulation on the marketing of food products, as the most effective way to reduce marketing of foods high in saturated fats, trans-fatty acids, sodium and sugar (HFSS foods) to children, as recommended by WHO, and restrict marketing of these foods to other groups;</p>	<p>This may also constitute a market access violation of the TPP services chapter, see above, as well as potentially violate any domestic regulations disciplines in the TPP services chapter, see Annex 1.</p>
<p>The General Assembly recommended further implementation of the WHO set of recommendations on the marketing of foods and non-alcoholic</p>	<p>This may also constitute a market access violation of the TPP services chapter, see above, as well as potentially violate any domestic</p>

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<p>beverages to children¹⁹⁸ which include:¹⁹⁹</p> <p>-‘The systematic reviews show that, although television remains an important medium, it is gradually being complemented by an increasingly multifaceted mix of marketing communications that focuses on branding and building relationships with consumers. This wide array of marketing techniques includes advertising, sponsorship, product placement, sales promotion, cross-promotions using celebrities, brand mascots or characters popular with children, web sites, packaging, labelling and point-of-purchase displays, e-mails and text messages, philanthropic activities tied to branding opportunities, and communication through “viral marketing” and by word-of-mouth. Food marketing to children is now a global phenomenon and tends to be pluralistic and integrated, using multiple messages in multiple channels... . In many countries the effects of marketing coming in from other countries (in-flowing) may be as important as the marketing originating nationally.’</p> <p>-‘ Given that the effectiveness of marketing is a function of exposure and power, the overall policy objective should be to reduce both the exposure of children to, and the power of, marketing of foods high in saturated fats, trans-fatty acids, free sugars, or salt.. . A comprehensive approach has the highest potential to achieve the desired impact.. . Important definitions include the age group for which restrictions shall apply, the communication channels, settings and marketing techniques to be covered, what constitutes marketing to children according to factors such as product, timing, viewing audience, placement and content of the marketing message, as well as what foods are to be covered by marketing restrictions.’</p>	<p>regulations disciplines in the TPP services chapter, see Annex 1.</p>
<p>‘Member States should cooperate to put in place the means necessary to reduce the impact of cross-border marketing (in-flowing and out-flowing) of foods high in saturated fats, trans-fatty acids, free sugars, or salt to children in order to achieve the highest possible impact of any national policy’²⁰⁰</p> <p>WHA Resolution urges Member States to ‘to take active steps to establish intergovernmental collaboration in order to reduce the impact of cross-border marketing’²⁰¹</p>	<p>Cross-border advertising (services mode one) for example via broadcast television cannot be restricted under the negative list market access liberalisation likely to be in the TPP services chapter, unless TPP Parties agree to allow a non-conforming measure for it, see Annex 1.</p> <p>These trade rules have already given rise to concern for example: ‘This applies mainly to broadcast media, particularly television, but also cinema, video games, and digital media such as</p>

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	<p>the Internet which originate in one country but are seen or heard in another. The ability to regulate this cross-border marketing will be affected by prevailing trade law and other legal restrictions on communications across borders. International co-operation may be needed to address this.²⁰² It remains to be seen when the TPP text is released whether TPP countries have cooperated and allowed exceptions for this in their schedules.</p>
Obligation to protect	
<p>‘States have the duty to protect the people living under their jurisdiction against non-State actors’ human rights abuses, including abuses by businesses.’²⁰³</p> <p>‘States should prevent third parties from destroying sources of food by, for instance, polluting land, water and air with hazardous industrial or agricultural products or destroying the ancestral lands of indigenous peoples to clear the way for mines, dams, highways or industrial agriculture. . .’²⁰⁴</p> <p>‘The Government would also fail to protect the right to food if it took no action if a company polluted a community’s water supply.’²⁰⁵</p> <p>‘States also have an obligation to protect their citizens against negative impacts of transnational corporations on the right to food, including water. States must monitor and regulate the activities of their transnational corporations to ensure that they do not violate the right to food;’²⁰⁶</p>	<p>A number of countries which have tried to protect people against human rights abuses by suing the investors who pollute etc have been sued (and some investors have already won) under investment protection provisions equivalent to those which have already been agreed in the leaked TPP investment chapter. See ‘obligation to protect’ in the Introduction above and the Renco case in investment chapter section of Annex 1. They end up paying the polluter/law breaker.</p>
<p>‘The obligation to protect requires States to ensure that their own citizens and companies, as well as other third parties subject to their jurisdiction, including transnational corporations, do not violate the right to food in other countries.’²⁰⁷</p>	<p>Given the problems the agreed provisions in the leaked TPP investment chapter have caused for human rights in disputes under other investment treaties, possible mechanisms for home governments to prevent their companies from suing to challenge host government measures that protect human rights in the host country are to:</p> <ul style="list-style-type: none"> a) prohibit ISDS disputes that involve human rights. b) have a screening mechanism that allows the home and/or host governments to prevent an ISDS claim from going ahead where it would adversely affect human rights. This would be similar to the partial screening for ISDS claims

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	<p>involving taxation measures in the exceptions chapter of USFTAs.²⁰⁸</p> <p>Unfortunately, neither of these is present in the leaked TPP investment chapter or in past USFTAs, so are unlikely to be in the final TPP text.²⁰⁹</p>
<p>‘Any person or group that is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies.’²¹⁰</p>	<p>See comments about the obligation to protect in the Introduction section above</p>
<p>Local procurement</p>	
<p>States should ‘use public procurement schemes for school-feeding programmes and for other public institutions to support the provision of locally sourced, nutritious foods’²¹¹</p>	<p>If the purchasing for schools is done by a government ministry which opens its procurement under the government procurement chapter (and the contract is above the minimum threshold value), it cannot choose to purchase food from domestic farmers, if the food is cheaper from another TPP country, see government procurement chapter in Annex 1.</p> <p>Since subsidies can continue, but countries may have to remove their tariffs on subsidized imported food products, see goods chapter in Annex 1, the foreign food may be cheaper and therefore have to be bought by the relevant government ministries.</p>
<p>Privatisation</p>	
<p>The Committee on Economic, Social and Cultural Rights recommended ‘that the Government of Nepal ensure that projects involving privatization of water supply provide for continued, assured and affordable access to water by local communities, indigenous people, and the most disadvantaged and marginalized groups of society’²¹²</p>	<p>Domestic regulations disciplines in the TPP services chapter may restrict the ability for governments to set affordable prices for water, see Annex 1.</p>
<p>‘In the now infamous case of Cochabamba, Bolivia, the Government sold off the public water to Aguas del Tunari, a subsidiary of the transnational corporation Bechtel, in 1999. The company immediately announced an increase in water prices by up to 35 per cent, which for many Bolivians meant that water was no longer affordable (see E/CN.4/Sub.2/2003/9). A public outcry led to broader civil unrest and the Government declared martial law to control the protests, but finally revoked the water privatization legislation.’²¹³</p>	<p>Privatisation reversal is likely to be able to be challenged under the TPP investment chapter, see privatisation section in the Introduction above.</p> <p>While in the Cochabamba case the investor eventually settled for 30¢ due to public pressure,²¹⁴ other governments have not been so fortunate when they have reversed privatisations under provisions equivalent to those which have been agreed in the leaked TPP investment chapter. See for example the privatisation section in the Introduction above.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>‘With the increasing monopoly control by transnational corporations over all components of the food distribution chain, from production, trade and processing to marketing and retailing of food, and control over the majority of water concessions worldwide (see E/CN.4/2004/10, paras. 35-52), it is becoming more difficult for less powerful national Governments to regulate transnational corporations working within their territory to respect human rights, making it essential that the often more powerful “home” States engage in adequate regulation. In water privatization, for example, steps should be taken by “home” States to ensure that the policies and activities of transnational corporations respect the right to water of all people in the countries where they are working.’²¹⁵</p>	<p>Based on past USFTAs,²¹⁶ it is extremely unlikely that there will be obligations in the TPP on home States to ensure that the policies and activities of their transnational corporations respect the right to water of all people in the other TPP Parties.</p> <p>Furthermore, as noted above and in the investment chapter part of Annex 1, transnational corporations have violated human rights and successfully challenged host government attempts to regulate them under provisions equivalent to those which have been agreed in the TPP. Given this, possible mechanisms for home governments to at least prevent their companies from suing to challenge host government measures that protect human rights in the host country are to:</p> <p>a) prohibit ISDS disputes that involve human rights.</p> <p>b) have a screening mechanism that allows the home and/or host governments to prevent an ISDS claim from going ahead where it would adversely affect human rights. This would be similar to the partial screening for ISDS claims involving taxation measures in the exceptions chapter of USFTAs.²¹⁷</p> <p>Unfortunately, neither of these is present in the leaked TPP investment chapter or in past USFTAs, so are unlikely to be in the final TPP text.²¹⁸</p>
<p>Financial transaction tax</p>	
<p>‘a financial transaction tax (FTT) is a pragmatic tool for providing the means for governments to protect and fulfill the human rights of their people . . . EU countries must take bold leadership now to pave the way towards what should eventually be a global FTT. . The FTT will likely reduce hot capital flows that fuel speculation, drive price instability and wreak havoc on the right to food worldwide.’²¹⁹</p>	<p>US Senator Elizabeth Warren, the law professor who set up the Consumer Financial Protection Bureau, is one of a number of US Senators and other experts who are concerned that financial transaction taxes may be limited under the TPP because of its ban on capital controls in the investment chapter, see Annex 1.²²⁰</p>
<p>Special and differential treatment</p>	
<p>‘Importantly, paragraph 13 of the Doha Declaration calls for special and differential treatment for developing countries to be an integral part of all elements of the current trade negotiations and for</p>	<p>Although these comments were made in the context of the WTO, they are also relevant to the TPP as the TPP goes beyond WTO rules, for example in additional liberalisation and stronger</p>

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<p>special and differential treatment to be embodied so as to be operationally effective to enable developing countries to effectively take account of their development needs, including food security and rural development. Given that the application of the same trade rules to agricultural products irrespective of the level of development of the producing country could result in indirect discrimination that could exacerbate existing inequalities within and between rural populations, implementation of paragraph 13 will be instrumental in combating discrimination within and against rural populations and in alleviating current global inequalities.’²²¹</p> <p>‘While special and differential treatment under trade law is a positive step, the High Commissioner encourages the introduction of measures that go beyond longer transition times and “best endeavour” commitments and calls for targeted and enforceable treatment. In this context, the High Commissioner welcomes the commitment in the Doha Ministerial Declaration to make special and differential treatment an integral part of the rules and disciplines of the AoA so as to be operationally effective and to enable developing countries the flexibility to take into account food security and rural development objectives. . . Leaving greater flexibility for developing countries to raise tariffs and grant domestic support can have positive effects for the enjoyment of human rights by resource-poor farmers and rural populations’²²²</p>	<p>intellectual property protection, although amongst fewer countries.</p> <p>The only type of special and differential treatment for developing countries that we have seen in past USFTAs is short time limited transition periods. Therefore this is likely to be all that is allowed in the TPP as well. There is no indication in the development chapter that special and differential treatment will be allowed, see Annex 1.</p>
<p>Extraterritorial violations</p>	
<p>‘The Special Rapporteur believes that, States must respect, protect and support the fulfilment of the right to food of people living in other territories, to fully comply with their obligations under the right to food. The obligation to respect is a minimum obligation which requires States to ensure that their policies and practices do not lead to violations of the right to food in other countries.’²²³ ‘It is simply the obligation to “do no harm”’²²⁴</p>	<p>As outlined above, a number of TPP provisions appear to lead to potential violations of the right to food in other TPP Parties, ie doing harm.</p>
<p>‘The obligation to protect requires States to ensure that their own citizens and companies, as well as other third parties subject to their jurisdiction, including transnational corporations, do not violate the right to food in other countries.’²²⁵</p>	<p>Based on past USFTAs,²²⁶ it is extremely unlikely that there will be obligations in the TPP on home States to ensure that the policies and activities of their transnational corporations respect the right to water of all people in the other TPP Parties.</p>

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	<p>Furthermore, as noted above and in the investment chapter part of Annex 1, transnational corporations have violated human rights and successfully challenged host government attempts to regulate them under provisions equivalent to those which have been agreed in the TPP. Given this, possible mechanisms for home governments to at least prevent their companies from suing to challenge host government measures that protect human rights in the host country are to:</p> <p>a) prohibit ISDS disputes that involve human rights.</p> <p>b) have a screening mechanism that allows the home and/or host governments to prevent an ISDS claim from going ahead where it would adversely affect human rights. This would be similar to the partial screening for ISDS claims involving taxation measures in the exceptions chapter of USFTAs.²²⁷</p> <p>Unfortunately, neither of these is present in the leaked TPP investment chapter or in past USFTAs, so are unlikely to be in the final TPP text.²²⁸</p>
<p>‘Governments should respect, protect and support the fulfilment of the right to food in other countries, including through their decisions taken under their roles within WTO, IMF and the World Bank.’²²⁹</p>	<p>This is relevant as the TPP has more extreme liberalisation of food tariffs and stronger IP protection etc than the WTO and so can be expected to have a more significant effect on the right to food (although amongst fewer countries)</p>
<p>Negotiation process</p>	
<p>‘A State must also take into account its international legal obligations regarding the right to food when entering into agreements with other States’²³⁰ The failure to do so is a violation of the right to food.²³¹</p> <p>‘States should ensure that the protection and promotion of the right to food is given due attention when concluding international agreements or adopting domestic measures which have an extraterritorial impact.’²³²</p> <p>‘The decisive negotiations on agriculture and other issues currently under way in the Millennium round of the World Trade Organization must take the right to food into particular account and ensure that trade rules do not conflict with international human rights</p>	<p>Since no HRIAs seem to have been done for the TPP, see Introduction, it is unclear how human rights have been taken into account.</p>

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law, especially the right to food. ²³³	

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

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IP chapter	
Re Vietnam's participation in the TPP	
<p>‘The Special Rapporteur is concerned about the country’s negotiations towards the adoption of the Trans-Pacific Partnership Agreement (TPPA) . . . Viet Nam must ensure that any agreement it enters into does not interfere with the availability and accessibility of safe, efficacious and affordable medicines, as required under the right to health. . .</p> <p>As stated in earlier reports of the Special Rapporteur, intellectual property protections increase drug prices by restricting or preventing generic pharmaceutical competition from entering the market (see, for example, A/HRC/11/12). If recent draft versions are any indication, the final version of the TPPA is likely to contain provisions that significantly alter the scope of Vietnamese intellectual property law. . . If Viet Nam adopts recent drafts of the TPPA, it will delay or prohibit low-cost generic drugs from entering the market, further restricting access to medicines. . . Intellectual property provisions in recent drafts of the TPPA, however, would make it very difficult, if not impossible, for generic drug manufacturers to enter and remain viable in the market.</p> <p>The negotiating power of Viet Nam is weaker than that of the more developed countries in the TPPA negotiations, due to the country’s greater need for increased access to developed country markets. In addition, Viet Nam is more likely to have fewer resources devoted to the negotiations and less technical capacity to interpret the intellectual property provisions of the agreement in order to determine their impact on the right to health. . .</p> <p>If adopted on the basis of recent drafts, the TPPA</p>	<p><i>Intellectual property:</i></p> <p>These TRIPS-plus provisions, see Annex 1, are still being insisted on in the latest leaked text and are expected to be decided at the May 2015 ministerial level negotiations.²³⁵</p> <p>While 82% of Vietnam’s HIV population eligible for treatment would receive antiretroviral (ARVs) medicines under a scenario of TRIPS-level of IP protection, only 30% of Vietnam's eligible HIV patients would have access to ARVs under the US 2014 TPP intellectual property proposals – more than halving the proportion treated compared to the current 68% receiving treatment.²³⁶ However, this is likely to have underestimated the impact because it does not take into account the extent to which provision of antiretrovirals in Vietnam is funded by foreign donors who are withdrawing:</p> <p>-14% of the money spent on care and treatment for HIV/AIDS in Vietnam came from the Vietnamese government, the rest was aid from PEPFAR and the Global Fund etc.²³⁷</p> <p>-But ‘with Vietnam’s status as a lower-middle income country, many donors in the health sector are reducing or withdrawing aid. Following an unexpected one-year extension, World Bank/DfID support for Vietnam’s harm reduction efforts will conclude in December 2013. The Clinton Health Access Initiative (CHAI) has already ended its support for Early Infant Diagnosis and pediatric ARVs. After PEPFAR, the second-largest source of funding for HIV/AIDS in Vietnam is the Global Fund.²³⁸</p> <p>-And ‘A number of major HIV donors are reducing their funding and/or withdrawing from the country: . . . PEPFAR has announced a</p>

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<p>may limit the use of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) flexibilities and introduce TRIPS-plus provisions. . . . Numerous recent studies have demonstrated the pricing impact of free trade agreements that introduce TRIPS-plus provisions, such as expanded data exclusivity protections, or that restrict the use of TRIPS flexibilities. With a view to ensuring the accessibility of medicines in Viet Nam, the Special Rapporteur calls on the Government to ensure that, if Viet Nam accedes to the TPPA, it retains the ability to use all TRIPS flexibilities and that it does not accept TRIPS-plus measures²³⁴</p>	<p>significant reduction in funds for 2012 and warned that funds will continue to decrease in coming years, and the Global Fund has recently cancelled funding for Round 11.²³⁹</p> <p>-‘PEPFAR is the only program procuring second-line drugs in Vietnam and these are being supplied to all sites prescribing ART. . . A key driver is the cost of Abbott Lopinavir/Ritonavir products. Expectations that the cost of Lopinavir/Ritonavir would fall by 50% in 2009 due to the introduction of generic versions were dashed when it was discovered that Abbott has patents pending in Vietnam and that Abbott intended to use the patents to prevent the procurement of generic alternatives. . . . Approximately 98% of ARVs imported for PEPFAR by volume between May 2008 and April 2009 were generics from India. Because of the high price of Abbott Aluvia drugs in particular, and innovator brand drugs in general, these drugs make up 14% of the PEPFAR ARV budget.’²⁴⁰</p> <p>In addition, the estimates of the impact of the stronger intellectual property provisions in the TPP on medicine availability in Vietnam for other diseases which use biologic medicines (such as cancer and vaccines) are underestimates if countries in the TPP agree to the U.S. proposal of data exclusivity for biologic medicines of more than five years, perhaps even 12 years.</p> <p>Therefore unless Vietnam can find more funding for health without jeopardising other human rights such as education, the combination of falling aid and high prices for longer due to stronger intellectual property protection in the TPP are likely to adversely impact the right to health in Vietnam.</p>
In the context of Peru-USFTA negotiations	
<p>‘The Special Rapporteur is concerned that the bilateral trade agreement may result in “WTO-plus” restrictions, including new patent and registration regulations that impede access to essential medicines for those living in poverty. . . .</p> <p>The Special Rapporteur is concerned that the agreement might allow for the grant of a five-year patent-like monopoly for drugs that are not patented by the original manufacturer.</p>	<p>The proposed TPP IP chapter text is for five years of strict data exclusivity for small molecule medicines and 12 years for biologic medicines, (see Annex 1), which go beyond the Peru-USFTA.</p>
He is also concerned that the agreement might	The last leaked TPP IP chapter text of May 2014 (see

Human rights body comment or recommendation	How TPP provision affects human rights
<p>allow companies to apply for a new 20-year patent for each “new use” of a product, and that it might propose the establishment of a national drug regulatory body to monitor the enforcement of drug patents, including by delaying or blocking generic medicines.</p>	<p>Annex 1) still proposed:</p> <ul style="list-style-type: none"> - these patents on new uses of an old medicine. This was not in the Peru-USFTA. -this linkage of medicine regulatory approval to patent status. This was not in the Peru-USFTA.
<p>If these provisions were introduced and implemented, they would significantly impede access to affordable essential medicines for some individuals and groups, including antiretrovirals for people living with HIV/AIDS. . .</p> <p>Thus, the conclusion of bilateral trade agreements must not result in a restriction on Peru’s ability to use the public health safeguards enshrined in TRIPS and the Doha Declaration . . . The Special Rapporteur urges Peru to take its human rights obligations into account when negotiating bilateral trade agreements. He suggests that before any trade agreement is finalized assessments identify the likely impact of the agreement on the enjoyment of the right to health, including access to essential medicines and health care, especially of those living in poverty.</p> <p>In accordance with its human rights responsibility of international cooperation, the United States should not apply pressure on Peru to enter into commitments that either are inconsistent with Peru’s constitutional and international human rights obligations, or by their nature are “WTO-plus”.²⁴¹</p>	<p>The leaked text shows that these WTO-plus proposals which are still being made in the TPP are from the USA.²⁴²</p>
<p>IP chapter generally</p>	
<p>The right to health includes access to essential medicines.²⁴³ ‘States are bound to promote the right to health through the ensuring access to affordable treatments. . .’²⁴⁴</p> <p>‘the World Bank has noted that IPRs can sometimes prevent the distribution of potential international public goods helpful to poor countries, which can seldom afford the prices charged by patent owners’²⁴⁵</p> <p>‘there is evidence to suggest that the effect of patents on affordability is significant with drug prices falling sharply when generic substitutes enter a market to compete with drugs upon patent</p>	<p>The study above noting the impact on Vietnam of agreeing to TRIPS+ in the TPP states that ‘Similar price impacts can be expected for other countries participating in the TPPA, though these are less economically vulnerable than Vietnam.’²⁴⁹ Even in countries which are richer than Vietnam, medicines can be difficult to afford for governments who subsidise them or patients who pay out of pocket. For example biologics are increasingly important medicines. At the monopoly prices for biologics (which more of them would have for longer if the provisions proposed in the TPP are accepted, see Annex 1): in 2007, Americans spent \$286.5 billion for prescription drugs, \$40.3 billion of which was for biologic drugs²⁵⁰, biologics ‘are eventually going to</p>

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<p>expiry²⁴⁶</p> <p>‘According to UNAIDS, the high prices of HIV treatments are due, in part, to patent protection which allows control over their manufacture and sale²⁴⁷</p> <p>‘Developing countries and LDCs should not introduce TRIPS-plus standards in their national laws. Developed countries should not encourage developing countries and LDCs to enter into TRIPS-plus FTAs²⁴⁸</p>	<p>represent more than 50 percent of spending in the next few years²⁵¹ and ‘The average daily cost of a brand name biologic product is approximately 22 times greater than a traditional drug²⁵². ‘12 out of the 13 new cancer drugs approved last year were priced over 100,000 dollars annually. And some drugs are coming to market with prices closer to 400,000 dollars.²⁵³ One biologic medicine costs about \$569,000/ patient/year, often for a lifetime.²⁵⁴</p> <p>The leaked TPP IP chapter text, see Annex 1, shows that developed countries are still seeking TRIPS-plus provisions in this FTA.</p>
<p>‘the State has to do all it reasonably can to make an essential medicine available in its jurisdiction e.g. by using, where appropriate, the TRIPS flexibilities, such as compulsory licences and parallel imports. . . Clearly, the affordability of essential medicines raises crucial issues, such as drug pricing, compulsory licences, parallel importing, and the reduction of import duties. . . The exclusion of competitors as a result of the grant of a patent can also be used by patent holders as a tool to increase the price of pharmaceuticals. High prices can exclude some sections of the population, particularly poor people, from accessing medicines. Given that the right to health includes an obligation on States to provide affordable essential medicines according to the WHO essential drugs list, intellectual property protection can lead to negative effects on the enjoyment of the right to health. In other words, in some cases intellectual property protection can reduce the economic accessibility of essential medicines.’²⁵⁵</p>	<p>The implementation of patent term extensions alone (something the USA is proposing in the leaked TPP IP chapter, see Annex 1) has already cost Australian taxpayers more than \$200million/year.²⁵⁶</p> <p>In addition to the impact of the intellectual property chapter, see above, there are concerns that the leaked TPP transparency chapter annex (see Annex 1 below) could restrict the ability of government medicine reimbursement schemes such as Australia’s Pharmaceutical Benefits Scheme²⁵⁷ and New Zealand’s PHARMAC²⁵⁸ to keep medicine prices affordable. In 2012, 16% of Australians already experienced a cost-related access problem (did not fill or skipped a prescription, did not visit a doctor, or did not receive recommended care) and the health impact assessment noted that higher copayments discourages medicine use and higher downstream costs and prolonged illness.²⁵⁹</p>
<p>‘traditional medicines have been appropriated, adapted and patented with little or no compensation to the original knowledge holders and without their prior consent.</p> <p>This raises significant issues, not only in the field of the right to health, but also for the cultural rights of these communities and their members²⁶⁰</p>	<p>If accepted, the proposal in the leaked TPP intellectual property chapter to allow patents on plants and animals would make it easier to appropriate and patent traditional medicines in TPP countries. The proposed traditional knowledge and genetic resource provisions would not be sufficient to counteract this, see Annex 1 intellectual property chapter section and there is unlikely to be a sufficient culture exception in the TPP, see investment and</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	exceptions chapters in Annex 1.
Investment chapter generally	
<p>‘international investment agreements and investor-State dispute settlement systems benefit transnational corporations at the cost of States’ sovereign functions of legislation and adjudication. Existing international investment agreements have no checks on the activities of transnational corporations and many do not recognize States’ prerogative to legislate and enforce health-related laws. This power asymmetry is perpetuated by the fact that States often have no ability under international investment agreements to initiate disputes against transnational corporations for violating the right to health. . . They prevent affected third parties from gaining access to the system to demonstrate the violation of the third party’s right to health and receive a remedy.’²⁶¹</p> <p>States should have the right to initiate disputes against investors that do not comply with or violate the right to health of individuals.²⁶²</p>	<p>These concerns (including that States cannot initiate disputes) are borne out in the agreed text in the leaked TPP investment chapter which has the same provisions as are in international investment agreements, including an investor-State dispute settlement system which has been agreed to by all TPP countries except Australia, see Annex 1</p>
<p>‘International investment agreements impose obligations on States vis-à-vis investors that may affect States’ power to introduce health laws in the public interest. States may have to modify their laws to accommodate investors’ rights, even though such modifications may increase the risk of violating individuals’ right to health. . .Pharmaceutical companies may be able to challenge the patent laws of host States if such laws do not comply with investors’ rights under the free trade agreement, even though such patent laws may be compliant with the Agreement on Trade-Related Aspects of Intellectual Property Rights. States may thus be unable to check the increasing cost of medicines, which undermines their core obligation to ensure access to health facilities, goods and services, including essential medicines, especially for vulnerable groups.’²⁶³</p>	<p>The agreed text in the leaked TPP investment chapter has the same provisions as are in international investment agreements, which have given rise to cases successfully challenging health laws and are currently being used by a pharmaceutical company to challenge Canada’s patent laws, see Annex 1</p>
<p>‘International investment agreements may provide for exceptions that can be used by States to defend laws in the public interest, such</p>	<p>The US has not allowed even a difficult to use health exception in the exceptions chapter (see Annex 1) to apply to the investment chapter in its past USFTAS,</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>as public health laws. Even where international investment agreements contain such exceptions, however, investor rights may trump them. After Uruguay had entered into a bilateral investment treaty with Switzerland, it adopted public health measures on the packaging and advertisement of cigarettes, in accordance with local laws, which were enacted pursuant to the World Health Organization Framework Convention on Tobacco Control. Although those measures accorded with the public health exception in the bilateral investment treaty, Phillip Morris International initiated a dispute against Uruguay, claiming that its law was unreasonable and breached the guarantee of fair and equitable treatment. . .</p> <p>The high cost of arbitration and the threat of an adverse judgement can create a chilling effect on States, dissuading them from fulfilling their right to health obligations. These disputes may also deplete States' resources, which can affect their ability to progressively realize the resource-dependent aspects of the right to health.²⁶⁴</p>	<p>so it is extremely unlikely to do so in the TPP.²⁶⁵</p> <p>Since the awards and legal fees can be high, see Annex 1, some governments can be chilled from regulating, see Introduction. Uruguay was going to give up its regulation when sued under equivalent provisions to those which have been agreed in the leaked TPP investment chapter until a donor funded its legal defence and it has a gross national income/capita 8.7 times greater than Vietnam's, a TPP Party.²⁶⁶</p>
<p>'International investment agreements are treated as a stand-alone legal code and often do not contain references to the right to health.. . Under the current regime, States may be vulnerable to dispute settlement procedures when a State breaches an obligation under the agreement in order to comply with its human rights obligations. This was the case when the Ethyl Corporation submitted a claim against a public health decision by the Government of Canada to impose a trade ban on a controversial gasoline additive produced by Ethyl Corporation. In another case, the tribunal noted that, though the claimant's property was expropriated in furtherance of environmental public interests and legitimate, expropriation by the State "did not alter the legal character of the taking for which adequate compensation must be paid".²⁶⁷</p>	<p>Provisions equivalent to those in NAFTA used by Ethyl Corporation²⁶⁸ have been agreed in the leaked TPP investment chapter, see Annex 1.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
Tobacco	
<p>The right to health also includes discouraging the abuse of alcohol, and the use of tobacco²⁶⁹</p> <p>‘Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as . . . the failure to discourage production, marketing and consumption of tobacco’²⁷⁰</p> <p>‘WHO has identified adverse health effects of investment and trade in relation to tobacco and infant formula. In the context of tobacco control, WHO has indicated that the transnational tobacco industry has taken advantage of foreign direct investment to develop strategic partnerships with local companies which is spreading and reinforcing worldwide the “tobacco epidemic” - one of the most significant causes globally of preventable death’²⁷¹</p>	<p>The TPP provisions could restrict governments' ability to introduce life saving measures such as those outlined in the WHO Framework Convention on Tobacco Control (FCTC), a treaty designed to curb the tobacco epidemic through comprehensive regulatory measures including packaging, advertising, price, and integrity measures.²⁷² All TPP countries are party to the FCTC except the USA.²⁷³</p> <p>The TPP provides the tobacco industry a new forum in which to bring its claim either directly, as investors in an investor dispute case (except perhaps Australia, see investment chapter in Annex 1), or indirectly, through States utilizing the dispute settlement mechanisms (state to state dispute settlement, see dispute settlement in Annex 1).²⁷⁴ The tobacco industry’s strategic litigation has already led to delays in the introduction of life-saving measures.²⁷⁵ The tobacco industry is using ISDS to sue Australia for US\$billions for its plain packaging.²⁷⁶ It is also suing Uruguay for its tobacco control measures.²⁷⁷</p> <p>With the TPP, states are prohibited from adopting measures that would cap the market’s growth for advertising and distribution,²⁷⁸ unless an exception is agreed by all TPP Parties, thereby expanding the coverage of cross-border services that advertise and distribute tobacco products and harming the ability of states to impose regulations on tobacco control.²⁷⁹</p> <p>The TPP is likely to liberalize FDI on a negative list basis, see services and investment chapters in Annex 1. This would mean no restrictions are possible on the number of these strategic partnerships between transnational tobacco companies from other TPP countries and local companies, unless all TPP Parties agree to an exception (nonconforming measure).</p> <p>Furthermore, proposed regulatory coherence and transparency requirements go against the principle enshrined in the FCTC that the tobacco industry is not a stakeholder in tobacco control development.²⁸⁰</p> <p>See also the report for the New Zealand Ministry of Health by a law professor about how various TPP provisions can affect various tobacco control measures.²⁸¹</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	An Australian health impact assessment of the TPP expressed concern about various TPP provisions which could make tobacco control more difficult. ²⁸²
Alcohol control	
The right to health also includes discouraging the abuse of alcohol, and the use of tobacco ²⁸³	<p>Effective alcohol control measures include:²⁸⁴</p> <p>a) prominent health warning labels. However the technical barriers to trade chapter's wine and spirits annex may effectively prevent this, see Annex 1.²⁸⁵</p> <p>b) restrictions on alcohol advertising. A ban on alcohol advertising would not be allowed under the market access provisions of the services chapter, unless the relevant nonconforming measures (NCMs) were proposed and agreed to, see Annex 1.</p> <p>c) restrictions on when alcohol can be bought. Restrictions on trading hours could either be a market access violation unless the relevant NCM is allowed (see services and investment chapters in Annex 1) or a violation of the domestic regulation disciplines if they apply to the relevant sectors (see services chapter in Annex 1).</p> <p>In addition, a comment that is relevant to all TPP countries is that: 'If Australia agrees to an investor-state dispute settlement (ISDS) mechanism applying to Australia, the alcohol industry will have access to a new legal channel to sue the Australian Government over alcohol policy decisions that adversely impact their investments'²⁸⁶ as they are doing for tobacco control, see above.</p>
Unhealthy food	
Tariffs	
'Bilateral investment treaties may subvert existing internationally agreed upon guidelines and lower tariff and non-tariff barriers to trade, allowing freer import and export of unhealthy food products. For instance, free trade agreements have been directly linked to an increased consumption of soft drinks.' ²⁸⁷	TPP countries are unlikely to be allowed to keep tariffs on unhealthy food products, see goods chapter part of Annex 1
'In order to reduce the global and domestic burden of NCDs and ensure that health concerns override trade relations, States need to collaborate by supporting localized and suitable food systems and ensuring that domestic	Localized food production may require the ability for countries to raise tariffs on imported food, especially since agriculture subsidies are likely to be able to continue under the TPP, see comments under right to food above.

Human rights body comment or recommendation	How TPP provision affects human rights
policy space on nutritional systems is protected.’ ²⁸⁸	Another way to encourage sufficient local food production is to ensure that when the government buys food, it buys it from domestic farmers. However, this is not likely to be possible under the government procurement chapter of the TPP, see Annex 1, unless all TPP Parties agree that all the relevant government ministries can keep their procurement in this area closed to imported food.
Labeling	
In the context of the WTO, the Special Rapporteur ‘hopes that the omitted Agreements and issues - particularly the Agreement on Technical Barriers to Trade, the Agreement on Sanitary and Phytosanitary Measures and WTO dispute settlement - will be subject, in due course, to a detailed analysis through the prism of the right to health’ ²⁸⁹	According to reports, see Annex 1, the technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures chapters of the TPP will go beyond the WTO rules, further restricting policy space for health regulations. This can be seen in Chile’s experience and the leaked and reported TBT annexes, see above and below.
‘For instance, some States have issued guidance for supermarkets and food and beverage companies to use images such as front-of-pack, “traffic light” food labelling. This creates awareness about healthier food options, impacting positively consumer choice. Traffic light food labelling makes use of red, amber and green colours to indicate high, medium and low content, respectively, of a particular nutrient. . . With a view to respecting, protecting and fulfilling the right to health, the Special Rapporteur recommends that States take the following steps: Adopt, implement and enforce easy-to-understand labelling and nutritional profiling requirements, such as “traffic light” labelling;’ ²⁹⁰	<p>Chile did try to introduce traffic light labelling, however after discussions with the USA in the TPP, the size of the warning was reduced to almost 1/3 of the original proposal and the color of the warning could now be green instead of red/black: ‘The implementing regulations set limits for maximum levels of certain nutrients including saturated fat, calories, sugar, and sodium according to portion size of specific foods. Chile set nutrient limits for 24 categories of foods, including those preferred by children. If the limits in the food categories are exceeded, an icon must be placed on the front label panel, indicating the product is "High In" that nutrient. The icon must account for approximately 7.5 percent of the total surface of the packaging. . . The United States discussed this issue with Chile . . . on the margins of the TPP Agreement negotiations . . .</p> <p>Chile has decreased the total size of the icon from 20 percent of the total surface of the package to 7.5 percent. There is a choice of background colors of the square (red, blue, or green) where previously red or black was dictated. The font for the “High In” declaration is normal where previously it was bold and exaggerated. . . Chile also reduced the number of food categories subject to the requirements substantially from its original proposal. . . The United States is pleased with modifications Chile made to the initial labeling proposal but . .</p>

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	<p>Consumers may also interpret the six-sided icon on the package as a stop sign that will discourage consumption even when the product is consumed in the context of an overall healthy diet and active lifestyle. The United States will continue to monitor the situation, especially the trade impact on imported prepackaged foods, and seek opportunities to work with Chile both bilaterally and in the WTO TBT Committee to address remaining concerns.’²⁹¹</p> <p>An Australian health impact assessment of the TPP expressed concern about various TPP provisions which could make food labelling to encourage healthier eating more difficult.²⁹²</p>
<p>‘Commercial investment treaties cast obligations that are automatically binding on States. To abide by these obligations, States may be compelled to modify national policies such as agricultural or labelling policies. As a result, the function of States to formulate domestic policy gets distorted in favour of the private rights of food and beverage industries, rather than the public rights of the affected population.’²⁹³</p>	<p>There is a proposed TBT annex in the TPP that would restrict the ability of governments to require information about the ingredients in packaged food and the ability to require this information to be displayed on the label.²⁹⁴ This may prevent for example requirements to list the amount of each ingredient, even on sensitive products such as infant formula. It would also make it harder for consumers to make healthy choices for example by choosing the tinned soup that had a higher percentage of vegetables in it. ‘the Grocery Manufacturers of America (GMA) said Russia, China, Thailand, South Korea, Ecuador, Brazil, Indonesia and Japan are among the countries that require companies disclose a product’s “precise recipe or formula” as part of their product registration process’ and they opposed this requirement.²⁹⁵ Japan has already joined the TPP negotiations, Thailand²⁹⁶ has expressed interest in joining after U.S. pressure, Korea is trying to join²⁹⁷ and the GMA position appears to be reflected in this proposal in the TPP.</p>
<p>‘For instance, under international trade agreements, States have sometimes expressed concerns about requirements in other States’ domestic nutrition labelling policies, which have been instituted to attain public health goals. Such practices may restrict the policy space of developing countries in favour of attracting FDI and avoiding economic sanctions.’²⁹⁸</p>	<p>The U.S. government has already noted that ‘Peru enacted the Act to Promote Healthy Eating Among Children and Adolescents. This law will require a mandatory warning statement for prepackaged foods considered to have high contents of sugars, sodium, saturated fat, and trans fats. This warning statement must be displayed on the front display panel of the foods and warn potential consumers to “avoid excessive consumption” or, in the case of trans fats, to “avoid consumption” entirely. The Act also lays out restrictions with respect to the advertising and promotion of certain affected foods to children and</p>

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	<p>adolescents. . . some Members highlighted concerns that less trade restrictive approaches exist, that the present maximum daily nutrient thresholds lack a scientific basis, and that mandatory symbols and warning statements that are inconsistent with international standards might create unnecessary fear in consumers.²⁹⁹</p> <p>Since the negotiations have been held in secret, the text has not been released and the technical barriers to trade (TBT) chapter has not leaked, it is unclear whether the U.S. has successfully tried to water down this law in the TPP negotiations as it did for Chile, see above.</p> <p>Like most other TPP chapters, the TBT chapter is expected to be enforceable with economic sanctions, see dispute settlement chapter in Annex 1.</p>
Foreign direct investment (FDI)	
<p>‘The processes of globalization, in particular trade and FDI in food processing, retailing, and food advertising and promotion, have been increasingly associated with driving shifts in dietary patterns towards those closely linked with NCDs.</p> <p>This is also demonstrated in the increasing presence of transnational food and beverage companies in a number of countries, particularly developing countries, and their pervasive marketing of unhealthy foods. . . Studies show that countries adopting market deregulation policies experience a faster increase in unhealthy food consumption and mean body mass index, an indicator of obesity.’³⁰⁰</p> <p>‘Rise in levels of FDI in the processed foods sector is one such factor that allows for greater exposure to unhealthy foods in low- and middle-income countries.</p> <p>FDI is one of the mechanisms by which TNCs enter developing countries. FDI enables companies to purchase or invest in food-processing companies in other countries, which then produce processed foods for the domestic market. This circumvents import tariffs on processed foods and reduces the cost of transportation. FDI has been more crucial than trade in increasing sales of</p>	<p>The TPP is likely to liberalize FDI on a negative list basis, see services and investment chapters in Annex 1. This would mean unlimited amounts of FDI from other TPP countries is allowed in these problematic sectors, unless all TPP Parties agree to an exception (nonconforming measure).</p>

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<p>processed foods in developing countries.</p> <p>For example, in some emerging markets, the processed food industry is amongst the top sectors attracting FDI.³⁰¹</p> <p>‘TNCs that manufacture and sell processed foods are making their presence felt globally by reaching consumer groups, which transcend national boundaries through FDI and international trade agreements, thus impacting on the health of transboundary populations. Recognizing this, States need to bring these companies within their regulatory framework.’³⁰²</p>	<p>It may be difficult to regulate these companies, eg see labelling and investment comments above.</p>
Marketing and advertising	
<p>‘Global food promotion, marketing and advertising are closely linked with globalization, leading to dietary transitions towards unhealthy foods. . . At a population level, the aggressive and systematic marketing strategies used by TNCs fuel this demand.’³⁰³</p> <p>‘To prevent harm to people’s health and fulfil their obligation under the right to health, States should put in place national policies to regulate advertising of unhealthy foods. States should formulate laws and a regulatory framework with the objective of reducing children’s exposure to powerful food and drink marketing. . . Owing to the inherent problems associated with self-regulation and public–private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. . . Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health. To reduce opportunities for targeted advertisements, some States have instituted laws to ban companies from advertising their products to children below a certain age and to limit the availability of unhealthy foods in schools.’³⁰⁴</p>	<p>The TPP is likely to liberalize FDI on a negative list basis, see services and investment chapters in Annex 1. This would mean unlimited amounts of marketing and advertising from companies from other TPP countries is allowed, unless all TPP Parties agree to an exception (nonconforming measure).</p> <p>An Australian health impact assessment of the TPP expressed concern about the way the TPP could make restrictions on cross-border advertising of unhealthy foods to children more difficult.³⁰⁵</p>
Restrictions on availability	
<p>Control the availability of fast foods and drinks high in sugar and caffeine and other harmful</p>	<p>Domestic regulations disciplines in the TPP services chapter may restrict the ability to have these</p>

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substances in schools and other places frequented by children ³⁰⁶	requirements as licensing requirements or technical standards, see Annex 1
Pollution	
<p>‘States should adopt legislation or other measures to ensure that private actors conform with human rights standards when providing health care or other services (such as regulating the composition of food products); .. protect individuals from acts by third parties that may be harmful to their right to health. . . The Committee on Economic, Social and Cultural Rights has underlined that States must protect against pollution or contamination by private companies and assess their impact on the environment.’³⁰⁷</p> <p>The right to health includes ‘preventive measures in respect of occupational accidents and diseases. . . the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.</p> <p>. . . the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment. . . States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services’ this includes control of dangerous substances³⁰⁸</p> <p>‘Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the</p>	<p>The provisions which have already been agreed in the leaked TPP investment chapter could restrict the ability to introduce new laws to prevent pollution if the fair and equitable treatment provision is interpreted as a standstill, see Annex 1.</p> <p>Countries which have tried to prevent exposure to harmful substances have found they have been sued by the foreign investors being regulated under equivalent provisions to those which have been agreed in the leaked TPP investment chapter, see Annex 1, for example the <i>Ethyl Corp v. Canada</i> (government settled and removed the ban on the chemical), <i>Metalclad v Mexico</i> (investor won), <i>Renco v Peru</i> (significant pollution including occupational health hazards) and <i>Vattenfall v Germany</i> (nuclear power phase out after Fukushima disaster) cases under the investment chapter section of Annex 1.</p> <p>Countries which have tried to enforce laws against pollution have been sued by the polluting foreign investors, see cases above.</p>

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<p>activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health³⁰⁹</p> <p>Violations of the right to health include failure to enforce relevant laws³¹⁰</p>	<p>As noted in the Introduction, where the TPP obligations (which in the investment chapter can be enforced by the investors suing directly for unlimited monetary compensation) conflict with human rights or obligations, it is likely that countries will choose to comply with their trade obligations, even if it means they violate the right health for failure to enforce pollution laws.</p>
<p>Confidentiality of personal health data</p>	
<p>‘accessibility of information should not impair the right to have personal health data treated with confidentiality.’³¹¹</p>	<p>There is a proposal in the E-commerce chapter to have free flow of data, presumably including patient health records, even to countries with insufficient confidentiality and privacy laws and the privacy exceptions are unlikely to be sufficient, see Annex 1.</p>
<p>Domestic regulations disciplines</p>	
<p>‘With a view to respecting, protecting and fulfilling the right to health, the Special Rapporteur recommends that States take the following steps: . . .Regulate the marketing, advertisement and promotion of unhealthy foods, particularly to women and children, to reduce their visibility and to increase the visibility of healthier options by, for instance, requiring supermarkets to place fruits and vegetables in more accessible and visible places.’³¹²</p>	<p>Restrictions on marketing and advertising are likely to violate market access commitments in the TPP services and/or investment chapter, see above under unhealthy food.</p> <p>Requiring supermarkets to place fruits and vegetables in more accessible and visible places may be difficult under the domestic regulations disciplines in the TPP services chapter as licensing requirements or technical standards, see Annex 1.</p>
<p>‘health facilities, goods and services must be affordable for all.’³¹³</p>	<p>Setting a maximum price for health services to ensure they are affordable may not be permitted as a licensing requirement/technical standard under the domestic regulations disciplines in the TPP services chapter, see Annex 1</p>
<p>‘All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements’ and indigenous peoples³¹⁴</p>	<p>Considerations such as culture, indigenous peoples and gender may not be permitted for health services as a licensing requirement/technical standard under the domestic regulations disciplines in the TPP services chapter, see Annex 1. They are also not permitted exceptions under the exceptions chapter in past USFTAs, so are unlikely to have exceptions in the TPP, see exceptions chapter in Annex 1.</p>
<p>‘States should adopt legislation or other measures to ensure that private actors conform with human</p>	<p>Acceptability to older persons, affordability and other human rights considerations for services may</p>

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<p>rights standards when providing health care or other services³¹⁵</p> <p>‘Health facilities, goods and services should be made available, accessible, affordable and acceptable to older persons, and be of good quality’³¹⁶</p>	<p>not be permitted as a licensing requirement/technical standard under the domestic regulations disciplines in the TPP services chapter, see Annex 1.</p>
Privatisation	
<p>‘Obligations to protect include, inter alia, the duties of States to adopt legislation or to take other measures . . . to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services’ and accessibility includes affordability³¹⁷</p> <p>‘a State must ensure that privatization in the health sector advances, and does not hinder, the realization of the right to health.’³¹⁸</p>	<p>Regulation of privatized services to ensure acceptability and affordability etc may not be permitted as a licensing requirement/technical standard under the domestic regulations disciplines in the TPP services chapter, see Annex 1.</p> <p>If the privatized service turns out to be hindering the realization of the right to health and a TPP country wants to stop any future privatisation plans, or renationalise the privatised service, this may be problematic under the TPP, see privatisation section of the Introduction.</p>
Extraterritorial obligations	
<p>‘In its general comment N° 14, the Committee on Economic, Social and Cultural Rights also stressed that States parties should prevent third parties from violating the right to health in other countries.’³¹⁹</p>	<p>Given the problems the agreed provisions in the leaked TPP investment chapter have caused for human rights in disputes under other investment treaties, possible mechanisms for home governments to prevent their companies from suing to challenge host government measures that protect human rights in the host country include to:</p> <ul style="list-style-type: none"> a) prohibit ISDS disputes that involve human rights. b) have a screening mechanism that allows the home and/or host governments to prevent an ISDS claim from going ahead where it would adversely affect human rights. This would be similar to the partial screening for ISDS claims involving taxation measures in the exceptions chapter of USFTAs.³²⁰ <p>Unfortunately, neither of these is present in the leaked TPP investment chapter or in past USFTAs, so are unlikely to be in the final TPP text.³²¹</p>
<p>‘States should respect the enjoyment of the right to health in other jurisdictions, and ensure that no international trade agreement or policy adversely impacts upon the right to health in those other countries.’³²²</p>	<p>If the provisions outlined above are in the final TPP, it appears it will adversely affect the right to health in other TPP countries.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
Generally	
<p>‘Globalization and trade liberalization have allowed transnational corporations to gain greater and easier access to otherwise closed markets. Their increasing presence in the world economy has enabled them to influence international and domestic law-making and infringe upon States’ policy space. They have influenced food consumption patterns and promoted the use of tobacco, especially in developing countries.</p> <p>They have also affected the rights of large communities with impunity, causing . . . contamination of groundwater . . . They have directly perpetrated serious human rights violations, in particular in developing and least developed countries. They have thus seriously affected the laws, policies and social and economic environments of States and have violated the economic, social and cultural rights of individuals and communities, including the right to health. . . The first pillar, protect, reflects the existence in international human rights law of a binding obligation on States to protect individuals from actions of</p>	<p>The removal of tariffs in the TPP (see goods chapter in Annex 1) and the opening to investors from other TPP countries on a negative list basis (see investment chapter in Annex 1) will further facilitate the access of transnational corporations to TPP countries.</p> <p>The TPP is likely to make it easier for transnational corporations including tobacco companies to participate in and influence the domestic law-making in TPP countries, see for example the transparency chapter in Annex 1 and the leaked regulatory coherence chapter³²⁴.</p> <p>Transnational corporations have a formal pathway to influence international law-making through the TPP negotiations in the USA as corporates are 85%³²⁵ of the cleared advisers³²⁶ who are allowed to read and comment on the USA’s confidential negotiating proposals in the TPP³²⁷. ‘There are no public interest groups, academics, or other non-industry experts on ITAC 15, which focuses on "intellectual property" issues’³²⁸ which can keep medicines at high prices for longer.</p> <p>There is also an informal pathway for transnational corporations to influence the TPP rules: ‘Two major factors contribute to the USTR’s strong pro-rightsholder slant. An obvious one is the revolving door between USTR and private industry. Since the turn of the century, at least a dozen USTR officials have taken jobs with pharmaceutical companies, filmmakers, record labels, and technology companies that favor stronger patent and copyright protection.’³²⁹</p> <p>Equivalent provisions to those which have been agreed in the leaked TPP investment chapter have made it difficult for governments to hold transnational corporations accountable including when they pollute, see Chevron case in the introduction and counterclaims in the investment chapter section of Annex 1.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>third parties. The pillar requires States to take measures such as instituting laws to hold transnational corporations accountable for their transgressions (principle 1). It could be argued, however, that the State obligation to protect, which is already an important obligation of States under international human rights law, has been ineffective against transnational corporations.³²³</p>	
<p>‘When entering into investment agreements, host States should take assertive steps and mention clear and explicit exceptions to investments that may harm public health.’³³⁰</p>	<p>In past USFTAs, the difficult to use health exception has not applied to the investment chapter. Even if it does apply to the investment chapter, it is likely to only apply to the parts which have not been so problematic for the right to health and it is so difficult to use, it may not be effective, see exceptions chapter in Annex 1. The leaked TPP investment chapter itself does not have any effective health exceptions and only Australia is attempting to exempt even some of its health programmes (not tobacco or alcohol control etc) from ISDS, but even this has not yet been agreed to, see Annex 1.</p>
<p>‘While entering into international agreements, States should ensure that such agreements do not negatively impact on the enjoyment of the right to health. Giving primacy to international trade over the right to health has widespread repercussions on public health.’³³¹</p> <p>‘When formulating their trade policies, all States must take into account their national and international human rights obligations, including those relating to the right to health.’³³²</p> <p>the Special Rapporteur recommends that States ‘Accord primacy to the right to health in international investment and trade agreements, and ensure that the right to health is not impaired by the provisions of these agreements or their implementation;’³³³</p>	<p>If the provisions outlined above are in the final TPP, it appears it will negatively affect the right to health with the TPP’s trade and investment rules overriding the right to health and not sufficiently taking into account human rights obligations relating to the right to health.</p> <p>Since TPP Parties do not seem to have done human rights impact assessments, it is unclear how they have taken into account their human rights obligations</p>
<p>‘if reliable evidence confirms that a particular trade policy has a negative impact on the enjoyment of the right to health of those living in poverty or other disadvantaged groups, then the State has an obligation under international human rights law to revise the relevant policy.’³³⁴</p>	<p>While the TPP is likely to:</p> <ul style="list-style-type: none"> - allow amendments, this will require the agreement of all the other Parties, -allow countries to withdraw, in practice none have withdrawn once they have signed U.S. free trade agreements <p>see final provisions chapter in Annex 1.</p>

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<p>The right to health framework, on the other hand, requires transparency in activities that directly or indirectly affect governance. It acts as a check against arbitrary decisions that may be taken by States and pre-empts violations of the right to health. One of the ways in which States could ensure transparency is by opening negotiations to include affected people such as farmers and consumers. At minimum, States should make the content of negotiations and agreements available for public scrutiny and invite comments by stakeholders before entering into these agreements.³³⁵</p>	<p>The TPP negotiations are not open to affected people, see Introduction. It is not clear that the TPP text will be released for public scrutiny and comments by stakeholders before countries agree to sign it.</p>
<p>‘progressive realization of the right to health. . . can be fulfilled, inter alia, by formulating policies related to health, as well as to sectors such as trade and agriculture. . . For instance, States may need to modify their food and agricultural, trade and fiscal policies. . . . States should necessarily develop multisectoral approaches that include all relevant ministries such as ministries of health, agriculture, finance, industry and trade.’³³⁶</p>	<p>It remains to be seen how much the final TPP text reflects the concerns of other ministries such as health, as based on the leaked TPP texts, past USFTAs and news reports, the TPP seems likely to adversely affect health.</p>

Special Rapporteur on the human right to safe drinking water and sanitation

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<p>‘the Special Rapporteur stresses that:</p> <p>(a) Violations may result from action or failure to act;</p> <p>(b) Violations may be deliberate and intentional or they may be unintended consequences of policies, programmes and other measures; . . .</p> <p>(d) Violations may result from retrogressive measures or from failures to make reasonable progress;. . .</p> <p>(g) Violations may result from direct action by the State or from the failure to regulate non-State actors; . . .</p> <p>(k) Violations may occur as a result of State conduct that has effects within a State’s territory, or</p>	<p>As can be seen below, the TPP may restrict the ability of Parties to ensure that water prices are affordable, to regulate the private sector to prevent pollution and have extraterritorial impacts</p>

Human rights body comment or recommendation	How TPP provision affects human rights
extraterritorially, ³³⁷	
<p>‘Agreements concerning trade liberalization should not curtail or inhibit a country’s capacity to ensure the full realization of the right to water.’³³⁸</p> <p>Violations include ‘failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States’³³⁹</p>	<p>As can be seen below, the TPP may inhibit a country’s capacity to ensure the full realization of the right to water in various ways. It is not clear that Parties have taken into account their international legal obligations regarding the right to water when negotiating the TPP</p>
<p>‘States must not limit their regulatory and policy space and must safeguard the ability to protect human rights’³⁴⁰</p>	<p>Given the ways in which the TPP can restrict the regulatory and policy space regarding the right to water, the leaked texts (for example in the investment chapter, given the typically limited exceptions chapter provisions, see Annex 1) do not show that the right to water has been safeguarded</p>
Domestic regulations disciplines on services	
<p>‘Water must also be of an acceptable colour, odour and taste’³⁴¹</p>	<p>The domestic regulations disciplines in the services chapter may restrict the ability to regulate in these areas, see Annex 1. Furthermore, attempts to enforce these regulations may give rise to an ISDS dispute, see below.</p>
<p>‘No individual or group should be denied access to safe drinking water because they cannot afford to pay.’³⁴² ‘Water, and water facilities and services, must be affordable for all. . . Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.’³⁴³</p> <p>‘Regulation also has to set standards regarding pricing. . . . To meet human rights standards, the essential criterion is that tariffs and connection costs are designed in a way, including through social policies, that makes them affordable to all people, including those living in extreme poverty.’³⁴⁴</p>	<p>The domestic regulations disciplines in the services chapter may restrict the ability to set affordable prices for water, see Annex 1. Furthermore, attempts to enforce these regulations may give rise to an ISDS dispute, see below.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
ISDS	
<p>‘States should adopt legislation or other measures to ensure that private actors . . . do not compromise the equal, affordable and physical access to sufficient Safe [and acceptable]³⁴⁵ drinking water.’³⁴⁶ ‘When the State does not directly provide services, its role nevertheless remains obligatory and critical. . . regulation is essential. . . When non-State actors are involved in service provision, the obligation remains with the State to ensure that the involvement does not result in violations of the rights to sanitation and water; adequate regulation is thus required. . . . In order to be effective, regulation requires, inter alia, “independent monitoring, genuine public participation and imposition of penalties for non-compliance.” . . . Even the best contracts and regulatory frameworks will not serve any purpose if they are not monitored and enforced.. . The regulator must be endowed with the power to enforce existing regulations and the contractual agreements. Mechanisms for contract enforcement must include adequate incentives, serious penalties for non-compliance, such as fines, and the possibility of revocation of the contract.’³⁴⁷</p> <p>The Cochabamba case (see Annex 1) ‘does raise serious questions for the enjoyment of the right to water. According to the Committee on Economic, Social and Cultural Rights, the obligation to respect the right to water includes refraining from arbitrary or unjustified disconnection or exclusion from water services and from increasing the price in water to the extent that it is unaffordable (E/C.12/2002/11, para. 44). Similarly, the obligation to protect the right to water requires States to take necessary measures within their jurisdiction to prevent infringements of the right to water by third parties and to regulate effectively and control water service providers . . . In this context, it is relevant to note that this dispute is only one of three disputes between investors and States concerning investment in the water sector, another one of which is ongoing.’³⁴⁸</p>	<p>When countries take steps to ensure the affordability and quality of water, they have been successfully sued via investor to state dispute settlement (ISDS) for violating equivalent^g provisions to those which have already been agreed in the TPP’s investment chapter (along with ISDS), see Annex 1. See for example the Vivendi and Azurix cases below:</p> <p>Vivendi :</p> <p>‘In 1995, the French company Compagnie Générale des Eaux (which subsequently became Vivendi Universal) and its Argentine affiliate Compañía de Aguas del Aconquija S.A. signed a concession contract with the Argentine province of Tucumán to develop and operate the region’s water service. <u>As part of Vivendi’s “cost recovery strategy,” the company raised water bills in the impoverished province some 70 percent. Not only were these increased costs far beyond the means of most Tucumán’s residents, but they did not yield any significant improvements to the water service.</u></p> <p><u>In fact, a year after the concession agreement was signed, heavy manganese deposits turned much of the province’s tap water a brownish color – an indication of a potential public health hazard.</u></p> <p>This sparked massive public protests, a consumer boycott, and widespread civil disobedience as citizens refused to pay their water bills. It also fueled increased government dissatisfaction with the arrangement. The provincial government filed a domestic lawsuit against the company when the water was found to be contaminated, and <u>the concession agreement was finally cancelled by the government</u> in late 1996. By February of 1997, Vivendi had registered an ICSID claim of \$300 million in damages against Argentina for alleged violations of the 1991 France-Argentina BIT.</p> <p><u>Vivendi claims that Tucumán’s rate regulation, including its efforts to prevent water-cutoffs due to</u></p>

^g Although every case depends on the exact facts and wording of the provisions of the treaty, this gives an idea of how TPP Parties could be successfully challenged under the TPP investment chapter for equivalent water regulation, even if it is to comply with human rights obligations regarding the right to water.

Human rights body comment or recommendation	How TPP provision affects human rights
	<p><u>non-payment, its fines due to poor water quality, public statements by legislators impugning the company and various other actions were tantamount to expropriation and violated its rights as an investor.</u>³⁴⁹</p> <p><u>The tribunal commenting on the dark, blackish water due to manganese deposits noted that ‘given the unattractive appearance of the water, it had the potential to be, and no doubt was very upsetting to consumers.</u>³⁵⁰</p> <p><u>The tribunal nevertheless found Argentina had violated the fair and equitable treatment and expropriation provisions and awarded Vivendi US\$105 million plus interest at 6% compounded annually from 1997 and costs of USD701,000.</u>³⁵¹</p> <p><u>Argentina unsuccessfully tried to get an annulment of this case.</u>³⁵²</p> <p>Enron/Azurix:</p> <p>‘in 2006, the controversial Enron Company’s Azurix division sued Argentina for damages for expropriation and other measures resulting from a botched water privatization attempt in 1999-2000. In that case, Azurix won a concession from the provincial government of Buenos Aires in 1999, <u>and immediately tried to start hiking rates – a move that was blocked by government regulators. Later, government officials advised consumers to boil their water following an algae outbreak,</u> which led some consumers to refuse to pay their bills. According to Food & Water Watch, “In October 2001, shortly after parent company Enron announced it would break-up Azurix and sell its assets, the company withdrew its contract in Argentina, accusing the provincial government of ‘serious breaches’ and filing a compensation claim with ICSID.”</p> <p><u>In June 2006, ICSID ruled that Argentina must pay \$165.2 million of Enron’s Azurix division’s \$525 million claim’³⁵³ and compound interest from 2002 for violating provisions including fair and equitable treatment³⁵⁴. Argentina unsuccessfully petitioned for an annulment of this case.</u>³⁵⁵</p> <p>While in the Cochabamba case the investor eventually settled for 30¢ due to public</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	<p>pressure,³⁵⁶ other governments have not been so fortunate, see above.</p> <p>Where governments have imposed the penalty available under the law for non-compliance by foreign investors, they have been successfully sued via ISDS, see Occidental case discussed in the investment chapter section in Annex 1.</p>
<p>‘an individual shall under no circumstances be deprived of the minimum essential level of water.’³⁵⁷</p> <p>‘Linked to the question of affordability of services is the issue of disconnections. When water disconnections take place despite people’s inability to pay, individuals must still have at least access to minimum essential levels of water.’³⁵⁸</p>	<p>Prohibition of deprivation of the minimum essential level of water may violate the domestic regulations disciplines in the services chapter, see Annex 1.</p> <p>Furthermore, the government’s attempts to prevent disconnection due to non-payment were one of the bases for a successful ISDS case, see Vivendi case above.</p>
<p>‘The Committee on the Rights of the Child . . . stressed the need for States parties to address the pollution and contamination of water’³⁵⁹</p> <p>‘The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health.’³⁶⁰</p> <p>Violations include failure to enforce relevant laws including to prevent the contamination and inequitable extraction of water;³⁶¹</p> <p>Common violations of the human rights to water: ‘Failure to protect resources or infrastructure from pollution or interference. . . relate to issues such as . . .</p> <p>(b) failure to regulate excessive exploitation of water resources by third parties that leads to deprivation of water necessary for personal and domestic uses; and</p> <p>(c) failure to develop and enforce regulation to protect water resources from contamination.’³⁶²</p>	<p>Concerns about water pollution have been involved in a number of ISDS cases.³⁶³ For example, when a Mexican local government refused to give a permit for a toxic waste dump partly because of local opposition³⁶⁴ which was due to concerns about pollution of the water supply from the toxic waste amongst other reasons,³⁶⁵ the Mexican national government was successfully sued via ISDS (under provisions equivalent to those which have been agreed in the TPP investment chapter, see Annex 1) and had to pay US\$16million to the foreign investor.³⁶⁶</p> <p>The water use/extraction rights have also been the basis for a number of ISDS disputes.³⁶⁷ For example, ‘Sun Belt, a U.S. bulk water importer/exporter, challenged a British Columbia bulk water export moratorium’ claiming US\$10.5 billion in damages (under provisions equivalent to those which have been agreed in the TPP investment chapter, see Annex 1).³⁶⁸ This case is still pending,³⁶⁹ perhaps because the relevant actions took place before the treaty came into force³⁷⁰.</p>
Fracking	
<p>‘The independent expert received concerning reports on hydraulic fracturing and its impact on water. . . In 2005 the Congress exempted this practice from regulation under the Safe Drinking Water Act, 25 making this the only industry allowed to inject</p>	<p>A moratorium on fracking has already been challenged in an on-going ISDS case: ‘Lone Pine Resources, a U.S.-based corporation, challenged Quebec’s moratorium on the controversial practice of hydraulic fracturing, or fracking, for natural</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>known pollutants into the ground near water sources without federal oversight. . . Residents in regions where hydraulic fracturing occurs have reported drinking water contamination. In some cases, reports have been received of flammable tap water in a severe incident causing a home to explode. Federal and state agencies have determined the drinking water in several rural towns, such as Dimock, Pennsylvania, and Pavilion, Wyoming, non-potable due to chemical contaminants used in nearby hydraulic fracturing operations. . . the New York City Department of Environmental Protection has asserted that “hydraulic fracturing poses an unacceptable threat to the unfiltered water supply of nine million New Yorkers and cannot safely be permitted within the New York City watershed. . . recommendations: . . .</p> <p>(e) Exemptions under the Safe Drinking Water Act, including for the oil and gas industry, must be re-assessed and repealed if resulting in a negative impact on the enjoyment of the right to water;</p> <p>(f) Strengthen the regulatory system on water and sanitation to prevent upstream pollution (agricultural, industrial, chemical, including pharmaceutical, stormwater run-offs, etc.) as well as ensure adequate regulation of the bottled water industry.”³⁷¹</p>	<p>gas. . . According to Lone Pine, such policymaking contravened NAFTA’s protections against expropriation and for “fair and equitable treatment” (equivalent provisions have already been agreed in the TPP investment chapter, see Annex 1) and it is claiming US \$241 million.³⁷²</p> <p>Changes to regulations such as those recommended by the independent expert when commenting on fracking in the USA, could be challenged under fair and equitable treatment, see comments on the TPP investment chapter in Annex 1. Enforcing regulations against pollution have also given rise to ISDS disputes, see above and Renco case in Annex 1 and Chevron case in the Introduction.</p>
Privatisation	
<p>‘The Greek Council of State recently blocked the planned privatization of the Athens Water Supply and Sewerage Company, arguing that it could put public health at risk due to the anticipated deterioration of water and sanitation quality.’³⁷³</p>	<p>Water privatisations have been problematic in a number of countries. For example, ‘After Guinea privatised its water sector in 1989, water prices nearly doubled.’³⁷⁴ When the privatisation is reversed, it has given rise to successful ISDS challenges, see for example Vivendi case above. Privatisation reversals can also be challenged under a number of other TPP provisions, see Introduction above. Failure to continue privatising has also given rise to ISDS disputes, at least one successful, see Introduction.</p>
Revenue loss	
<p>Common violations of the human rights to water: Failure to properly raise, allocate and utilize available resources or to budget appropriately</p>	<p>The TPP could cause its governments revenue loss, especially in developing country Parties, see obligation to fulfil in Introduction above. If the</p>

Human rights body comment or recommendation	How TPP provision affects human rights
includes: ‘failure to raise the maximum available resources through taxation and other sources of revenue; . . . failure to direct sufficient funds to sub-national governments and other delegated authorities to allow them to fulfil their roles.’ ³⁷⁵	relevant budgets are not ring fenced, this could make it more difficult to fulfil the right to water obligations of TPP Parties
Extraterritorial violations	
‘To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction’ ³⁷⁶	Based on the above, the impact on the right to water, including in other TPP Parties, does not appear to have adequately been taken into account in the TPP negotiations.
<p>‘the State must. . . Prevent companies based in their territory from violating the right to water in other countries (host countries to investment) (E/C.12/2002/11, para. 33);’³⁷⁷</p> <p>Common violations of the human rights to water:³⁷⁸</p> <p>‘Extraterritorial violations may occur, for example, when (a) States fail to regulate activities of companies under their jurisdiction that cause violations abroad; . . .</p> <p>States fail to respect human rights or restrict the ability of others to comply with their human rights obligations in the process of elaborating, applying and interpreting international trade and investment agreements;’</p>	<p>Given the problems the agreed provisions in the leaked TPP investment chapter have caused for human rights in disputes under other treaties with equivalent provisions, possible mechanisms for home governments to prevent their companies from suing to challenge host government measures that protect human rights in the host country include to:</p> <p>a) prohibit ISDS disputes that involve human rights.</p> <p>b) have a screening mechanism that allows the home and/or host governments to prevent an ISDS claim from going ahead where it would adversely affect human rights. This would be similar to the partial screening for ISDS claims involving taxation measures in the exceptions chapter of USFTAs.³⁷⁹</p> <p>Unfortunately, neither of these is present in the leaked TPP investment chapter or in past USFTAs, so are unlikely to be in the final TPP text.³⁸⁰</p> <p>Furthermore, in the elaboration of the leaked TPP investment chapter, it so far fails to have sufficient safeguards for human rights. Furthermore, based on past USFTAs, the TPP’s exceptions chapter is also unlikely to have sufficient human rights safeguards, see Annex 1</p>

Special Rapporteur on the right to education

Human rights body comment or recommendation	How TPP provision affects human rights
Revenue loss	
<p>‘States cannot fulfil their international obligations concerning the realization of the right to education unless they provide the necessary resources for education and make them available on a consistent and predictable basis’³⁸¹</p>	<p>The TPP could cause its governments revenue loss, especially in developing country Parties, see obligation to fulfil in Introduction above. If the relevant budgets are not ring fenced, this could make it more difficult for TPP Parties to find the necessary resources for education</p>
Privatisation	
<p>‘privatization adversely affects the right to education, both as an entitlement and as empowerment . . . Privatization in education cripples the universality of the right to education as well as the fundamental principles of human rights law by aggravating marginalization and exclusion in education and creating inequities in society. . . Privatization in education favours access to education by the privileged. . . privatization by definition is detrimental to education as a public good and vitiates the humanistic mission of education.. . The Special Rapporteur would like to emphasize that the delegation by States of their obligation to provide education to for-profit providers may be contrary to their international obligations. The effects of privatization in education must receive foremost consideration in public policies, bearing in mind the principles and norms underpinning the right to education. . . . It throws overboard the fundamental principle of equality of opportunity in education, which is common to almost all international human rights treaties . . . Privatization in education also exacerbates discrimination against girls in gaining access to education.’³⁸²</p> <p>States should not ‘allow for-profit institutions in education’³⁸³</p> <p>‘The Supreme Court of Nepal issued a verdict demanding that educational authorities devise reform programmes to control private schools . . .</p>	<p>A ban on private educational institutions or a restriction of their numbers is not possible under the likely market access rules of the TPP services and investment chapters unless a TPP country has obtained the agreement of all other TPP Parties to an exception (‘nonconforming measure’) for this, see Annex 1.</p> <p>If a TPP country had allowed for-profit educational institutions and then closed them down, even if it had the relevant nonconforming measure, it could still violate fair and equitable treatment and perhaps the expropriation provision in the leaked TPP investment chapter, see Annex 1.</p> <p>See discussion of privatisation in the Introduction above including the ISDS cases which have successfully challenged reversals of privatisation or decisions to not continue privatising.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>limiting the number of private schools obtaining accreditation.³⁸⁴</p> <p>‘In particular, the commercialization of education services does not sit easily with States’ commitments to make education progressively free at all levels. Further, the increasing power of the private sector in relation to Governments raises challenges to the capacity of the State as primary duty bearer for human rights.’³⁸⁵</p>	
Domestic regulations disciplines	
<p>‘access to private schools, based upon the capacity to pay fees, which in many cases can be exorbitant, flies into the face of prohibited grounds of discrimination based, notably, on “social origin”, “economic condition”, “birth” or “property” in international human rights conventions.’³⁸⁶</p> <p>States should ensure private providers ‘are not allowed to charge exorbitant fees.’³⁸⁷</p>	<p>The domestic regulations disciplines in the services chapter may restrict the ability to set affordable fees, see Annex 1. Furthermore, attempts to enforce these regulations may give rise to an ISDS dispute, see below.</p>
<p>‘the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate’³⁸⁸</p>	<p>Considerations such as culture may not be permitted for educational services as a licensing requirement/technical standard under the domestic regulations disciplines in the TPP services chapter, see Annex 1. It is also not a sufficient permitted exception under the exceptions chapter in past USFTAs, so is unlikely to have a sufficient exception in the TPP, see exceptions chapter in Annex 1.</p>
ISDS	
<p>‘States must regulate all private providers of education’³⁸⁹</p>	<p>The agreed leaked TPP investment chapter provisions can make it difficult to regulate and enforce regulations against investors from other TPP Parties. For example, a government enforcing its laws against a foreign investor was successfully sued under ISDS, see Occidental case in investment chapter discussion in Annex 1</p>
<p>Stating that ‘Governments can be inspired by numerous court decisions and emerging jurisprudence’, he noted that: ‘As regulators, States must sanction abusive practices by private education establishments. For instance, in 2008, the National Universities Commission in Nigeria ordered the closure of all local and</p>	<p>Cancellation of permits for failure to comply with laws has given rise to a number of ISDS disputes, see for example the Occidental case in the investment chapter discussion in Annex 1</p>

Human rights body comment or recommendation	How TPP provision affects human rights
foreign satellite campuses, which had mushroomed, making arrests or detaining the owners of unauthorized operations ³⁹⁰	
Subsidies	
‘Under no circumstances should a State provide financial support to a private provider of education.’ ³⁹¹	If financial support is currently provided to private education providers, the cancellation of the subsidies could give rise to an ISDS dispute. For example when Spain cancelled its solar energy subsidies because of lack of revenue in the current financial crisis, it is being sued via ISDS for more than €600 million under a treaty with equivalent provisions ³⁹² to those which have been agreed in the leaked TPP investment chapter. ³⁹³ Although there is an exception to expropriation for subsidy cancellation in the leaked TPP investment chapter, ³⁹⁴ there is no equivalent exception for FET, which is also being used to sue Spain for its cancelled subsidies and is the most successful ground for suing under ISDS, see investment chapter in Annex 1.
Copyright	
The cost of textbooks and other educational supplies ‘can be prohibitively high, as has been noted quite a few times in the context of the reporting procedures of the human rights treaty bodies’ ³⁹⁵	In the leaked TPP intellectual property chapter, there is a proposal to extend the copyright period, including on educational materials, for another 20 to 50 years, see Annex 1. Since all USFTAs since the WTO began have required an extra 20 years of copyright protection, ³⁹⁶ this is likely to be what is required in the TPP. Agreeing to this would keep educational materials at the high monopoly price for another 20 years thus delaying the entry of these educational materials into the public domain which allows their use without having to pay royalties (including for copying or translation). Even if existing exceptions to this longer copyright period are preserved under the current (Berne Convention and WTO) multilateral copyright rules, according to a distinguished copyright expert, these do not provide sufficient exceptions for the education needs of developing countries. ³⁹⁷ The impact of any longer copyright protection would be felt most keenly in developing countries, which have with the most limited resources to provide education and promote innovation, and therefore where copyright royalties are one of the most significant obstacles to the distribution of learning materials to needy students. ³⁹⁸ For example, according to a 2006 report

Human rights body comment or recommendation	How TPP provision affects human rights
	<p>for these TPP countries:³⁹⁹</p> <p>In Mexico, ‘The cost of learning materials alone could reach 40% of the family budget of the poor. The government’s policy has then been to deliver free school books to the poorest areas in the country.’</p> <p>In Peru, ‘Education International has highlighted the costs of uniforms and books for which parents have to pay the full price.’</p> <p>In Vietnam, ‘Even though primary education is free in public schools, other fees such as the fee for school construction and fees for textbooks and uniforms are relatively high. For a family with two children, the annual education fee could be about 15-30% of the total family expenditure.’⁴⁰⁰</p>
Trade agreement negotiations	
‘In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education.’ ⁴⁰¹	Given the above and the lack of an education exception in past USFTAs, see exceptions chapter in Annex 1 and the therefore low probability that there will be one in the TPP, it is not clear that TPP Parties have taken steps to ensure that the TPP will not adversely impact the right to education.

Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

‘The right to adequate housing is relevant to all States, as they have all ratified at least one international treaty referring to adequate housing and committed themselves to protecting the right to adequate housing through international declarations, plans of action or conference outcome documents.’⁴⁰²

Human rights body comment or recommendation	How TPP provision affects human rights
‘They should not reduce State expenditure on housing. On the contrary, public funding for housing and construction of public housing will need to increase in order to address the impact of the crisis on the most vulnerable.’ ⁴⁰³	If funding for State programmes and development aid for housing is not ring fenced, a loss of tariff and other revenue could adversely affect the right to adequate housing. Please see obligation to fulfil and the Introduction and explanation of goods chapter in Annex 1
The right to adequate housing includes affordability ⁴⁰⁴	The leaked TPP investment chapter and the likely TPP services chapter would allow investors from other TPP countries to buy as much land and housing for investment purposes as they want, unless an exception (a ‘nonconforming measure’) has been

Human rights body comment or recommendation	How TPP provision affects human rights
	<p>accepted by all other TPP countries. The leaked TPP investment chapter also prevents capital controls including on inflows that may cause housing bubbles and thus reducing affordability of housing, see Annex 1.</p> <p>In Singapore, ‘Private-home prices have surged 59% since the market's most recent trough in 2009. . . The government worries that foreign buying is introducing the risk of a market bubble and making homes less affordable for Singaporeans’.⁴⁰⁵</p> <p>Singapore's government therefore imposed a stamp duty tax in 2011 on foreign buyers of residential property to fight what it contends is excessive speculation in the property market and raised it to 15% in 2013.⁴⁰⁶ However the stamp duty could not be imposed on Americans due to the national treatment provision in the Singapore-USFTA, which will also be in the TPP, see Annex 1 and would apply to real estate unless an exception is agreed by all TPP Parties. The free movement of capital requirement agreed in the leaked TPP's investment chapter would also prevent capital flow regulations to stem asset bubbles, despite attempted safeguards, see Annex 1.</p>
<p>‘In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases.’⁴⁰⁷</p> <p>‘Rental tenure could be made more secure with appropriate legislation to protect tenants against abusive evictions, as well as to expand access to affordable, controlled and subsidized rent mechanisms’⁴⁰⁸</p>	<p>Disciplines on domestic regulations in the TPP services chapter may restrict the ability to control rent and set it at affordable rates, see Annex 1</p>
<p>‘States should adopt internal and international measures to control speculation in housing and mortgages.</p>	<p>In Singapore ‘Private-home prices have surged 59% since the market's most recent trough in 2009. . . The government worries that foreign buying is introducing the risk of a market bubble and making homes less affordable for Singaporeans’.⁴¹⁰</p> <p>Singapore's government therefore imposed a stamp duty tax in 2011 on foreign buyers of residential property to fight what it contends is excessive speculation in the property market and raised it to 15% in 2013.⁴¹¹ However the stamp duty could not be imposed on Americans due to the national treatment provision in the Singapore-USFTA, which will also be in the TPP, see Annex 1 and would apply to real estate unless an exception is agreed by all TPP</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>They should, in particular, protect the housing rights of the population by putting in place monitoring mechanisms aimed at regulating the activities of private companies - prohibiting predatory lending, mobbing, discriminatory credit practices, etc. - that result in the denial of the right to adequate housing.⁴⁰⁹</p>	<p>Parties. The free movement of capital requirement agreed in the leaked TPP's investment chapter would also prevent capital flow regulations to stem asset bubbles, despite attempted safeguards, see Annex 1.</p> <p>Disciplines on domestic regulations and market access provisions in the TPP services and financial services chapters may restrict the ability to ban predatory lending, discriminatory credit practices etc , see Annex 1</p>
<p>'States must ensure that financial institutions and regulation take account of the vulnerabilities and limited repayment capacities of low-income households'⁴¹²</p>	<p>Disciplines on domestic regulations in the TPP services chapter may restrict the ability of governments to ensure that financial institutions take account of the limited repayment capacities of low-income households, see Annex 1</p> <p>Furthermore, based on past experience, foreign banks may be less likely to lend to low income households: 'Around the world, countries that have opened up their banking sectors to large international banks have found that those banks prefer to deal with other multinationals like Coca-Cola, IBM and Microsoft. While in the competition between large international banks and local banks the local banks appeared to be the losers, the real losers were the local small businesses that depended on them.'⁴¹³ The TPP financial services chapter is likely to increase the presence of financial institutions from other TPP countries, see Annex 1.</p>
<p>'States should ensure appropriate regulation of international financial activities in order to avoid future financial crises and their subsequent effect on human rights and adequate housing.'⁴¹⁴</p>	<p>The Commission of Experts on Reforms of the International Monetary and Financial System convened by the United Nations General Assembly president in 2008, in the early days of the financial crisis and chaired by Nobel Prize winner Joseph Stiglitz noted that 'Many developing countries have entered into (North-South) free trade agreements (FTAs), bilateral investment treaties (BITs), and World Trade Organization (WTO) commitments that prevent them from regulating the operations of financial institutions and instruments or capital flows. . . Capital and financial market liberalization, pushed not only by the IMF but also within certain trade agreements, exposed developing countries to more risk and has contributed to the rapid spread of the crisis around the world.'⁴¹⁵</p> <p>The leaked TPP investment chapter does require free movement of capital with no capital controls (with</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	<p>attempted partial safeguards which have not yet been agreed), see Annex 1 and past USFTAs have required financial services liberalisation, so the TPP is also likely to.</p> <p>The IMF noted that developing countries could be exposed to the crisis because distressed foreign parent banks may withdraw capital from their subsidiaries in developing countries, call in loans to their developing country subsidiaries, stop investing local profits in local subsidiaries or a combination of these.⁴¹⁶ A 2010 IMF staff paper finds that allowing foreign direct investment in the financial sector can be particularly destabilising.⁴¹⁷ The TPP financial services chapter is likely to increase the presence of financial institutions from other TPP countries, see Annex 1.</p>
‘Effective regulation and close monitoring by the State of private sector activities, including financial and building companies, is required.’ ⁴¹⁸	When governments do attempt to enforce regulations on foreign investors, some have successfully been sued under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see obligation to protect in the Introduction.

Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Human rights body comment or recommendation	How TPP provision affects human rights
‘Trade liberalization and deregulation of international financial markets have also helped to create the conditions in which trade in toxic and dangerous products and wastes could develop. .	<p>Reduction/removal of tariffs on hazardous waste was a concern for the Philippines Department of Environment and Natural Resources in the Japan-Philippines Economic Partnership Agreement⁴²⁰ and concerns about the potential substantial environmental effects of further decreases of tariffs have been raised as an issue in the TTIP⁴²¹. Based on past USFTAs, the TPP is likely to require removal of tariffs on almost all products, including hazardous waste, see goods chapter in Annex 1.</p> <p>The possible technical barriers to trade (TBT)⁴²² and sanitary and phytosanitary (SPS)⁴²³ provisions of the TTIP have also given rise to concern about the adverse impacts on the ability to regulate chemicals including pesticides. The TPP will have rules in the TBT and SPS chapters which are stronger than the WTO’s and which will further restrict the ability of</p>

<p>Furthermore, trade liberalization and the deregulation of international financial markets have facilitated access to easy credit and removed licensing requirements and other restrictions on waste traders. . .</p> <p>As a preliminary recommendation, the Special Rapporteur reiterates the call, contained in the Vienna Declaration and Programme of Action, on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and wastes and to cooperate in the prevention of illicit dumping.⁴¹⁹</p>	<p>governments to regulate these chemicals etc, see Annex 1.</p> <p>Licensing requirements on waste traders and those who dispose of waste are also likely to be restricted in the TPP, see domestic regulations disciplines in the services chapter of Annex 1.</p> <p>All TPP Parties except the USA are party to the Basel Convention.⁴²⁴ Canada banned the commercial export of polychlorinated biphenyl (PCB) waste for disposal and was successfully sued for this ban under investment chapter provisions in the North American Free Trade Agreement (NAFTA) that are equivalent to those which have been agreed in the leaked TPP investment chapter, see Annex 1. During this SD Myers case,⁴²⁵ Canada's environment minister stated that 'We are meeting our obligations under the Basel Convention to dispose of our own PCBs.'⁴²⁶ Canada's position was that the Basel Convention prevails over the NAFTA investment chapter obligations in the circumstances to the extent of the inconsistency.⁴²⁷ However, even though NAFTA stated that 'In the event of any inconsistency between this Agreement and the specific trade obligations set out in: . . . c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, . . . such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement'⁴²⁸, Canada still lost. The USA is still not a Party to the Basel Convention and recent USFTAs have not even had this provision allowing certain environmental treaties to override the free trade agreement,⁴²⁹ so it is unlikely to be in the TPP and the leaked TPP environment chapter did not allow environment treaties or concerns to override the investment chapter, see Annex 1. Furthermore, the ISDS tribunal found 'that there was no legitimate environmental reason for introducing the ban.'⁴³⁰ Although a TPP ISDS tribunal is not bound by the SD Myers decision, the decision shows that it may be difficult for TPP Parties to implement the Basel Convention and the Ban Amendment if it comes into force etc.⁴³¹</p>
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	<p>Concern has been expressed about the impact on environmental regulation of equivalent ISDS provisions in TTIP.⁴³²</p> <p>Since the likely health and environment exceptions in the TPP's exceptions chapter have proved difficult to use and will almost certainly not apply to the TPP's investment chapter, see Annex 1, it is difficult to be confident that TPP Parties will be able to implement the Special Rapporteur's recommendation to 'vigorously implement existing conventions' including the Basel Convention.</p>
<p>The Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste recommended that States should 'Ensure that the "polluter pays principle," . . . is implemented in practice'⁴³³</p>	<p>Unfortunately, under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see Annex 1, governments which have attempted to enforce their domestic laws on foreign investors have successfully been sued, see Occidental case in Introduction under obligation to protect. Even when governments are attempting to enforce their laws on polluters, they are being sued under these investment provisions, see Chevron case in Introduction under obligation to protect. Therefore based on the agreed provisions in the leaked TPP investment chapter, including its failure to ensure that counterclaims are available, it looks like it will be difficult for TPP Parties to ensure that the polluter pays when the polluter is an investor from another TPP country. There are significant stocks of foreign direct investment (FDI) from other TPP Parties in TPP countries.⁴³⁴ For example, 21% of FDI in Chile is from the USA and Canada, although the definition of FDI may differ from the definition of investment in the leaked TPP investment chapter, see Annex 1.⁴³⁵</p>
<p>Eg if a TPP country wants to ban the pesticide Endosulfan which 'has been aerially sprayed in some developing countries over the past decades, although it is known to cause endocrine disruptions, reproduction system disorders, central nervous system disorders, liver and kidney dysfunctions in animals and human beings. The chemical which has toxicological properties comparable with DDT has been banned or severely restricted in 32 countries'⁴³⁶</p>	<p>This may be challenged under the agreed provisions the leaked TPP investment chapter as Canada found when it tried to ban a chemical and was sued under equivalent provisions and settled by reversing the ban etc, see Ethyl Corporation v Canada in Annex 1</p>

Special Rapporteur on extreme poverty and human rights

Human rights body comment or recommendation	How TPP provision affects human rights
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Human rights body comment or recommendation	How TPP provision affects human rights
Revenue loss	
<p>‘Services essential for persons living in poverty to enjoy their rights should be ring-fenced in national and local budgets.’⁴³⁷</p> <p>‘With regard to international cooperation and extraterritorial impact, each State should refrain from any conduct that impairs the ability of another State to raise revenue as required by their human rights commitments, and cooperate in creating an international environment that enables all States to fulfil their human rights obligations.’⁴³⁸</p>	<p>A number of TPP chapters may cause revenue loss for TPP governments, see obligation to fulfil in the Introduction. If this is the case, then this budget ring fencing is even more important.</p> <p>This presumably implies that TPP countries should not ask for or insist on provisions which can impair the ability of other TPP Parties to raise revenue, especially since developing countries rely more on tariffs for revenue, see obligation to fulfil in the Introduction. However the TPP seems likely to require the removal of almost all tariffs, see Introduction. Where TPP provisions allow TPP governments discretion for example:</p> <ul style="list-style-type: none"> -whether to sue another TPP country for failing to comply with a provision which would result in revenue loss, see dispute settlement chapter in Annex 1, they should decide not to sue. -whether to find a taxation measure is not expropriation, see exceptions chapter in Annex 1, they should find that taxation is not expropriation. -whether to sue under state to state dispute settlement to enforce an ISDS award in favour of their investor, they should decide not to sue.
<p>‘Ensure that extractive industries are subject to appropriate tax rates and export duties, and that the human rights of affected communities and future generations are protected in the exploitation of natural resources’⁴³⁹</p>	<p>Export taxes are an important source of revenue for some developing countries, for example they supplied half of the Chilean government revenue for some time.⁴⁴⁰ However, based on past USFTAs, TPP Parties will only be able to retain them on exports to other TPP countries for up to three products, see goods chapter in Annex 1. Currently, Malaysia has export taxes on about five per cent of its products.⁴⁴¹</p>
Domestic regulations disciplines	
<p>‘States are responsible for ensuring quality, affordability and coverage and have the duty to protect individuals against abuses committed by private service providers.’⁴⁴²</p> <p>‘States should ensure the affordability of facilities, goods and services relevant to those living in poverty. No one should be denied access to essential services because of an inability to pay.’⁴⁴³</p> <p>‘States should: a. Ensure that persons living in poverty have access to at least the minimum</p>	<p>The disciplines on domestic regulations in the TPP services chapter may restrict the ability of TPP governments to set affordable prices for water and other essential services, see Annex 1. See also section on implications for the Special Rapporteur on the human right to safe drinking water and sanitation</p>

Human rights body comment or recommendation	How TPP provision affects human rights
essential amount of water that is sufficient and safe for personal and domestic uses . . . and sanitation that is . . . affordable ⁴⁴⁴	
Land	
<p>‘Implement effective land distribution and agrarian reform programmes, especially in areas in which land concentration threatens access to livelihoods for rural communities, and adopt preventive measures to avoid land and water grabbing.’⁴⁴⁵</p> <p>‘Access to land and agrarian reform must form a key part of the right to food. . . .Access to land must be recognized as a fundamental element of the right to food. Agrarian reform should be taken seriously as a policy instrument to reduce hunger and poverty.. . . “Market-based” land reforms that undermine local legislation and constitutional commitments or undermine the possibility of a truly transformative and redistributive agrarian reform must be avoided.’⁴⁴⁶</p>	<p>Market based reforms are explained as ‘This model shifts the logic of agrarian reform away from a concept of a right to land and redistribution, towards the view that access to land is possible only through the purchase of the land at market prices, despite a context of historically produced inequities.’⁴⁴⁷</p> <p>Foreign investors have already been seeking to buy land from countries targeted to join the TPP including Cambodia, Indonesia and the Philippines.⁴⁴⁸</p> <p>The TPP services and investment chapters are likely to allow foreigners to buy as much agricultural land as they want, unless an exception is agreed by all TPP Parties. For land held by investors from TPP countries, if TPP governments wish to do land reform programmes involving this land, they will have to pay market value compensation and interest at a commercially reasonable rate. Therefore any land reform programmes in TPP countries of land owned by TPP investors will need to be the market based land reforms that must be avoided. This may also be extended to land in TPP countries that is owned by other foreign investors who are covered by treaties which have a most favoured nation provision which can import this expropriation provision with its level of compensation.</p>
Trade agreement negotiations	
‘Strive to ensure that all trade and investment policies, including those specific to food and agriculture, are conducive to fostering food and nutrition security for all’ ⁴⁴⁹	A number of TPP provisions are likely to harm food security, see section on Special Rapporteur on the right to food
‘States should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and investment policies. The international community’s commitments to poverty re-duction cannot be seen in isolation from international and national policies and	A number of the agreed provisions in the leaked TPP chapters appear to have potential to violate human rights obligations, see for example the investment chapter in Annex 1. Furthermore, TPP Parties do not appear to have assessed whether the TPP is compatible with their international human rights obligations by a human

Human rights body comment or recommendation	How TPP provision affects human rights
<p>decisions, some of which may result in conditions that create, sustain or increase poverty, domestically or extraterritorially. Before adopting any international agreement, or implementing any policy measure, States should assess whether it is compatible with their international human rights obligations.’⁴⁵⁰</p> <p>‘As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices.’⁴⁵¹</p> <p>‘States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection’⁴⁵²</p>	<p>rights impact assessment, see Introduction. It remains to be seen whether the final TPP text has sufficient human rights exceptions, however past USFTAs have not, see exceptions chapter in Annex 1, so the TPP is unlikely to.</p>
Health	
<p>‘States should . . . Ensure that persons living in poverty have access to safe and affordable medicines and that inability to pay does not prevent access to essential health care and medicine’⁴⁵³</p>	<p>The proposals in the leaked TPP intellectual property chapter and transparency annex if accepted, are likely to keep medicine prices high for longer, see comments in the section on the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</p> <p>In addition, the domestic regulations disciplines in the services chapter may prevent affordable prices being set for health care, see Annex 1</p>
Minimum wage	
<p>‘States should . . . Ensure that all workers are paid a wage sufficient to enable them and their family to have access to an adequate standard of living’⁴⁵⁴</p>	<p>As the <i>Veolia v Egypt</i> investment dispute (see investment chapter in Annex 1) shows, increases in the minimum wage can give rise to an investment dispute.</p> <p>The labor chapter of past USFTAs does not override these problematic investor protection provisions, nor has there been an exception in the exceptions chapter of past USFTAs for labor rights. Therefore, neither of these are expected in the TPP.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
Investment chapter	
<p>‘The obligation of States to protect against human rights infringements by third parties requires taking steps to prevent, investigate, punish and redress any abuse through effective policies, legislation, regulations and adjudication. States must ensure that those affected by business-related abuses have access to a prompt, accessible and effective remedy, including where necessary recourse to judicial redress’⁴⁵⁵</p>	<p>Unfortunately, under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see Annex 1, governments which have attempted to enforce their domestic laws on foreign investors have successfully been sued, see Occidental case in Introduction under obligation to protect. Even when those affected by business-related abuses have access to effective judicial redress and win, for example, the 30,000 indigenous people who successfully sued Chevron in Ecuador’s courts for its pollution of the Amazon, the case is effectively being appealed under investment treaty provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see Chevron case in Introduction under obligation to protect. Therefore based on the agreed provisions in the leaked TPP investment chapter, including its failure to ensure that counterclaims are available, it looks like it will be difficult for TPP Parties to ensure that they can punish abuse of human rights by investors from other TPP countries. There are significant stocks of foreign direct investment (FDI) from other TPP Parties in TPP countries.⁴⁵⁶ For example, 21% of FDI in Chile is from the USA and Canada, although the definition of FDI may differ from the definition of investment in the leaked TPP investment chapter, see Annex 1.⁴⁵⁷</p>
<p>‘Where transnational corporations are involved, all relevant States should cooperate to ensure that businesses respect human rights abroad, including the human rights of persons and communities living in pov-erty.’⁴⁵⁸</p>	<p>If the agreed provisions in the leaked TPP investment chapter are in the signed text, at a minimum, to ensure that businesses from TPP countries respect human rights when investing in other TPP countries, there should be an added provision that when a TPP investor which is suing under investor to state dispute settlement (ISDS) is alleged to have violated human rights, the home and host governments can meet and decide that if there was a human rights violation, the ISDS claim cannot go ahead. This is not currently in the leaked TPP investment chapter and has never been in a past USFTA, so is unlikely to be agreed in the TPP. It would be the equivalent of the procedure for deciding whether taxation is expropriation, see exceptions chapter in Annex 1.</p>
States should ‘Ensure that . . . future generations are	Attempts to enforce environmental regulations on

Human rights body comment or recommendation	How TPP provision affects human rights
protected in the exploitation of natural resources ⁴⁵⁹	<p>foreign investors have given rise to investor to state dispute settlement claims under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see investment chapter in Annex 1. Attempts to enforce domestic laws on foreign investors have given rise to successful investor to state dispute settlement claims, see for example the Occidental case under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see investment chapter in Annex 1.</p> <p>Export taxes on natural resources to raise revenue for future generations or provide value added employment are likely to be extremely limited under the TPP, see above</p>
‘phase out the use of lead in lead-based paints’ ⁴⁶⁰	This may be challenged under the agreed provisions in the leaked TPP investment chapter as Canada found when it tried to ban a chemical and was sued under equivalent provisions and settled by reversing the ban etc, see Ethyl Corporation v Canada in Annex 1
‘Ensure that social security systems are designed, implemented and evaluated taking into account the particular needs of persons living in poverty, especially women.’ ⁴⁶¹	‘Chile’s social security system was privatized – a move that has proved disastrous, raising costs while failing to improve coverage or social equity.’ ⁴⁶² But reversing its privatisation (and that of any other TPP country’s) is problematic under the TPP investment chapter provisions, see Introduction ⁴⁶³
<p>‘a financial transaction tax (FTT) is a pragmatic tool for providing the means for governments to protect and fulfill the human rights of their people . . . EU countries must take bold leadership now to pave the way towards what should eventually be a global FTT. . . the opportunity should not be wasted; it would fill government deficit holes, but should be channeled to fighting poverty, reversing growing inequality, and compensating those whose lives have been devastated by the enduring global economic crisis. . . A global consensus on a financial transaction tax would represent an historic decision to prioritize the most disadvantaged and marginalized and be a valuable means of assisting developing countries to meet obligations to ensure the full realization of all economic, social and cultural rights’⁴⁶⁴</p> <p>‘States should . . . implement a financial transaction</p>	US Senator Elizabeth Warren, the law professor who set up the Consumer Financial Protection Bureau, is one of a number of US Senators and other experts who are concerned that financial transaction taxes may be limited under the TPP because of its ban on capital controls ⁴⁶⁶ in the leaked TPP investment chapter, see Annex 1

Human rights body comment or recommendation	How TPP provision affects human rights
tax ⁴⁶⁵	
<p>‘The weaknesses of a deregulated free market have been brought into sharp relief in recent years, and States should utilize this moment to meet the challenge of restructuring the global financial system so that it is more equitable and protects against economic shocks with the potential to devastate the lives of the most vulnerable. . .</p> <p>States should take immediate steps to regulate the actions of banking and financial sector entities under their control, in order to prevent them from violating or infringing upon human rights.’⁴⁶⁷</p>	<p>The Commission of Experts on Reforms of the International Monetary and Financial System convened by the United Nations General Assembly president in 2008, in the early days of the financial crisis and chaired by Nobel Prize winner Joseph Stiglitz noted that ‘Many developing countries have entered into (North-South) free trade agreements (FTAs), bilateral investment treaties (BITs), and World Trade Organization (WTO) commitments that prevent them from regulating the operations of financial institutions and instruments or capital flows. . . Capital and financial market liberalization, pushed not only by the IMF but also within certain trade agreements, exposed developing countries to more risk and has contributed to the rapid spread of the crisis around the world.’⁴⁶⁸</p> <p>The leaked TPP investment chapter does require free movement of capital with no capital controls (with an attempted partial safeguard which is not yet been agreed), see Annex 1 and past USFTAs have required financial services liberalisation, so the TPP is also likely to, see Annex 1.</p> <p>Enforcing regulations on financial sector entities to prevent them from infringing human rights could give rise to an investor to state dispute settlement claim, see obligation to protect in the Introduction.</p>
<p>‘Research shows that street vendors turn to vending because they have no other form of income, have low levels of education and lack employment opportunities. Street vending is a means for the poorest and most vulnerable to earn money to support their families and their livelihoods. When States impose bans, onerous licences or strict restrictions on street vendors, they severely undermine the rights of persons living in poverty to gain a living.’⁴⁶⁹</p>	<p>The TPP services and investment chapters will allow unlimited amounts of supermarkets, hypermarkets, convenience stores, shopping malls, fast food chains and restaurants by investors from other TPP countries, unless an exception is agreed by all TPP Parties. In other countries, the introduction of supermarkets, hypermarkets and shopping malls has resulted in reduced business for small retailers. For example in India:⁴⁷⁰</p> <ul style="list-style-type: none"> - 71% of the small shops (all of which were within one kilometer of a mall) had seen a decline in sales, in most cases of around 20%. - Another study found that 88% of the existing retailers had experienced a fall in their sales, since Reliance stores had appeared in their area. - ‘59% of the respondents said that the impact on

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	<p>sales was of a magnitude that they believed they would soon have to abandon their businesses.’</p> <p>If the TPP allows more supermarkets, hypermarkets, shopping malls, convenience stores, fast food chains and restaurants, street vendors may lose business.</p>

Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

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Sovereign debt restructuring	
<p>‘The Independent Expert fully supports the establishment of a permanent, independent international sovereign debt workout mechanism . . . States should intensify cooperative efforts to establish an independent international sovereign debt workout mechanism that can resolve debt repayment difficulties effectively and fairly.’⁴⁷¹</p> <p>‘The future multilateral framework on debt restructuring should address adequately negative human rights impacts caused by hold outs’⁴⁷²</p> <p>‘The Independent Expert . . . reiterates his call on all countries to enact legislation, as a matter of priority, to limit the ability of unscrupulous investors to pursue immoral profits at the expense of the poor and most vulnerable through protracted litigation. . . there is an urgent need for an independent international mechanism based on a clear set of binding rules and procedures for resolving sovereign debt problems and addressing capital flight.’⁴⁷³</p> <p>‘Debt restructuring should ensure that minimum essential levels of the enjoyment of economic, social and cultural rights can be satisfied even in</p>	<p>According to the United Nations Conference on Trade And Development,⁴⁷⁵ a number of provisions^h which have already been agreed in the leaked TPP investment chapter can give rise to an investor to state claim for sovereign debt restructuring, see investment chapter in Annex 1. Argentina⁴⁷⁶ and Greece⁴⁷⁷ are currently being sued for their sovereign debt restructuring under equivalent⁴⁷⁸ provisions to those which have been agreed in the leaked TPP investment chapter in their investment treaties. Some sovereign debt restructuring is excluded from some investor to state claims, however it is only a partial exception, see investment chapter in Annex 1. For example, if the take up rate is less than 75 per cent, holdouts could still sue under the leaked TPP investment chapter provisions for expropriation etc.</p> <p>The leaked TPP investment chapter requires TPP countries to allow capital flight through free movement of capital, even in a financial crisis. There are proposals for a partial safeguard, however they are likely to be insufficient, see investment chapter in Annex 1.</p> <p>There is no agreed exception in the leaked TPP investment chapter for human rights measures in a financial crisis and there have not been sufficient such exceptions in past USFTAs, see exceptions chapter in Annex 1, so it is unlikely to be agreed in the TPP.</p>

^h National treatment, fair and equitable treatment, expropriation and transfer of funds

Human rights body comment or recommendation	How TPP provision affects human rights
contexts of financial crisis and retrogressive measures affecting the enjoyment of these rights should be avoided. ⁴⁷⁴	
Privatisation	
Re privatisation of public utilities: ‘The adverse impact of these policies on the ability of governments to provide basic social services is well-documented’. ⁴⁷⁹ The overwhelming view of these conditionalities ‘is that they are ineffective and harmful: they have destroyed livelihoods, increased poverty and inequality and left many poor countries trapped in externally prescribed or approved policy frameworks that not only make it difficult for them to comply with their human rights obligations but also undermine their development In the United Republic of Tanzania, the privatization of water supplies in Dar es Salaam resulted in severely reduced access to water for the poorest, both through cuts in services and through increased user fees.’ ⁴⁸⁰	The TPP is likely to make it difficult to reverse a problematic privatisation or refuse to continue with the privatisation process, see Introduction. It is also likely to make it difficult to regulate private essential services companies to ensure that they set affordable prices, see domestic regulations disciplines in the services chapter in Annex 1, obligation to protect in the Introduction and Special Rapporteur on the human right to safe drinking water and sanitation section.
Revenue	
‘Efforts should be made to reduce developing countries’ dependence on international capital by enhancing their capacity to mobilize domestic resources through increased public revenue collection, ensuring a fair and mutually beneficial return on natural resource exploitation by foreign investors’ ⁴⁸¹	The obligation to fulfil section in the Introduction notes the ways in which the TPP may reduce government revenue collection, especially in developing countries in the TPP
‘a financial transaction tax (FTT) is a pragmatic tool for providing the means for governments to protect and fulfill the human rights of their people . . . EU countries must take bold leadership now to pave the way towards what should eventually be a global FTT. . . it would help relieve sovereign debt load stemming from the financial crisis, shift the burden from ordinary citizens to the private sector which caused the crisis, and significantly enlarge government fiscal space for spending on desperately needed economic and social rights programmes.’ ⁴⁸²	US Senator Elizabeth Warren, the law professor who set up the Consumer Financial Protection Bureau, is one of a number of US Senators and other experts who are concerned that financial transaction taxes may be limited under the TPP because of its ban on capital controls ⁴⁸³ in the leaked TPP investment chapter, see Annex 1
Trade policy coherence	
‘The reduction of poverty in developing countries requires not only debt relief and development assistance, but also changes to global	‘WTO data show that the total domestic support of the United States grew from US\$61 billion in 1995 (of which \$46 billion was in the Green Box) to

Human rights body comment or recommendation	How TPP provision affects human rights
<p>trade rules so as to afford developing countries improved trade opportunities to fuel development and growth. In particular, impediments to enhanced access, in the form of trade distortions such as trade restrictions and agricultural subsidies, should be removed . . . National development strategies need to be supported by stable aid flows; by a fair multilateral trading regime that allows countries space for building domestic production capacity and pursuing sustainable development goals; and by stable and predictable financial markets. This will require profound reforms of the existing international aid, trade and financial architectures and efforts to ensure policy coherence across those areas.’⁴⁸⁴</p>	<p>US\$130 billion in 2010 (\$120 billion in the Green Box).’⁴⁸⁵ However, agricultural domestic subsidies will almost certainly not be reduced in the TPP, while the tariffs that developing countries use to protect themselves from subsidised agricultural imports such as rice will have to be removed on all but perhaps one product, see goods chapter in Annex 1.</p>
<p>‘International investment agreements, while ensuring the promotion and protection of investments, should comply with all human rights in the territories of the contracting States. To the extent that international investment agreements contemplate sovereign debt as a type of investment such agreements should be consistent with and interpreted in a manner that is consistent with these principles.’⁴⁸⁶</p>	<p>The agreed provisions in the leaked TPP investment chapter are equivalent to those in international investment agreements as can be seen in the similarity to the U.S. Model Bilateral Investment Treaty (BIT) of 2012.⁴⁸⁷ There is no effective exception in that chapter for human rights and is extremely unlikely that there will be one in the TPP’s exceptions chapter, see Annex 1. Sovereign debt appears to be a protected investment under the leaked TPP investment chapter with a limited exception and the investment chapter does not incorporate the Guiding Principles On Foreign Debt And Human Rights, see Annex 1. For example, the Guiding Principles include that ‘The duty of international assistance and cooperation enjoins States to ensure that their activities, and those of their residents and corporations, do not violate the human rights of people abroad and that States, individually or through membership of international institutions, do not adopt or engage in policies that undermine the enjoyment of human rights or further engender disparities between and within States.’ However, the leaked TPP investment chapter allows a foreign investor from another TPP country to sue the host government for its actions to protect human rights, see Annex 1.</p>
<p>‘Trade, debt and finance policies are important components of the development strategy of any country. Coherence between them, therefore, is essential in domestic and international economic</p>	

Human rights body comment or recommendation	How TPP provision affects human rights
<p>policies in order to adequately support national development policies. The pursuit of these areas in isolation raises the risk that policy actions in one area will undermine rather than support the goals of policy actions in another. . . “there is a need to strengthen the global coordination of economic decision-making so as to minimize the number of cases where rules dealing with trade, aid, debt, finance, migration, environmental sustainability and other development issues come into conflict”. . . It is also important to ensure that global economic policymaking is consistent with the realization of human rights, particularly economic, social and cultural rights and the right to development.’⁴⁸⁸</p> <p>‘States must undertake efforts to enhance the coherence and consistency of, inter alia, trade, aid, debt, financial and monetary policies . . . States should urgently take measures to ensure coherence among finance, monetary, trade and development policies.’⁴⁸⁹</p>	<p>‘Ensuring policy coherence between a State’s international human rights obligations and all its multilateral and bilateral trade and development engagements was, therefore, a central prerequisite of the right to development.’⁴⁹⁰</p> <p>However, given the above and the issues raised in other sections, the TPP does not appear to be coherent and consistent with human rights obligations of the TPP Parties and their development policies.</p>

Special Rapporteur on the rights of indigenous peoples

Indigenous peoples can be even more adversely affected by some of the TPP provisions. For example, indigenous people in Australia⁴⁹¹ and New Zealand⁴⁹² have higher smoking rates so they are even more adversely affected by TPP provisions which restrict a government’s ability to do effective tobacco control measures. Indigenous Australians were identified to be vulnerable to adverse health impacts from the TPP on medicine, alcohol and food policies as well by a recent health impact assessment of the TPP.⁴⁹³ Therefore some of the comments in the sections above such as health, may also be relevant for indigenous peoples.

Human rights body comment or recommendation	How TPP provision affects human rights
Intellectual property chapter	
<p>‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora’⁴⁹⁴</p> <p>‘other forms of intellectual property protection such as patents are more problematic and have been used to misappropriate the cultural heritage and traditional knowledge of indigenous peoples.</p>	<p>The leaked TPP IP chapter has proposals to join UPOV 1991 and allow patents on plants and the proposals on traditional knowledge and genetic resources are too weak to be effective, see IP chapter discussion in Annex 1.</p> <p>Past USFTAs since 1995 have required the Parties to comply with UPOV 1991, so it is expected that this will be a red line for the USA in the TPP.</p> <p>In New Zealand:⁴⁹⁶</p> <p>- ‘Many Māori are concerned about the granting of intellectual property rights to life forms, including</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>Specifically, non-indigenous researchers have adapted indigenous peoples' knowledge in genetic resources into new innovations, or simply reproduced them in a more easily marketable or synthetic form and protected them with patents without the prior informed consent of the community or the equitable sharing of the arising benefits. For example, patents have been granted over products derived from indigenous and local community knowledge such as: basmati rice (a product associated with South Asia); a process of extracting oil from the neem tree (used over generations in India); a process of healing a wound by administering turmeric (a culinary ingredient and traditional medicine used in India); and the highly nutritious drought-resistant food crop, Quinoa (bred by indigenous communities in Bolivia and Peru).⁴⁹⁵</p>	<p>indigenous flora. There is concern that the grant of an exclusive right over a variety derived from an indigenous variety, or over an indigenous variety that has been “discovered”, may infringe what Māori consider to be their rights under the Treaty of Waitangi to maintain control over their own resources, and may also limit the rights of Māori themselves to develop new uses of those resources. There is also concern about the cultural and spiritual implications of the alteration of life forms, and the encouragement given through the intellectual property rights system to continued innovation in this field.’</p> <p>- ‘Some Māori would argue that granting of PVRs on indigenous varieties that had been discovered, or which had been developed from an indigenous variety, where the breeder had not obtained prior informed consent from the relevant iwi or hapu, is in direct conflict with what they see as the rights guaranteed to Māori under the Treaty of Waitangi.’</p> <p>-Under UPOV 91, ‘if, for example, a person were to go into a national park or conservation land, take an indigenous plant, and use it develop a new variety , then, under UPOV 91, that person would be considered to be the “breeder” of the new variety. It would not be possible, under the provisions of UPOV 91, to refuse to grant a PVR (or revoke a granted PVR) on the grounds that the breeder had not obtained (for example) prior informed consent to use the variety in that way. Ratification of UPOV 91 is likely to be strongly opposed by many Māori, in particular the WAI 262 claimants. They may consider that ratification of UPOV 91 would be in breach of the Crown’s obligations under the Treaty of Waitangi’</p> <p>A New Zealand government review of patents on plants noted that:⁴⁹⁷</p> <p>‘Māori are in general opposed to any reform of the Patents Act that might either “extend” patentability in the area of biotechnology, or that might not prevent the granting of patent rights to inventions based upon living organisms.</p> <p>Many Māori are concerned about the application of patent rights to life forms, including indigenous flora and fauna. These concerns are wide ranging. First, there is concern that a patent for an invention</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	<p>derived from indigenous flora and fauna may, through the grant of exclusive rights in relation to the invention, infringe what Māori consider to be their rights under the Treaty of Waitangi to maintain control over their resources, and may also limit the rights of Māori themselves to develop new uses of those resources. Second, there is concern about the cultural and spiritual implications of the alteration of life forms, and the encouragement given through the patents system to continue innovation in this field.</p> <p>Māori have also raised concerns about the application of the patents system to inventions based on traditional knowledge. There is a concern that traditional remedies, or their active ingredients, may be patented by individuals from outside the iwi from which the knowledge is obtained, and that Iwi would then be denied access to their traditional remedies during the patent term without either informed consent or arrangements for benefit sharing.’</p>
Indigenous media content	
<p>‘The Special Rapporteur also recommends that the mass media regularly include content related to indigenous peoples and cultures in their programming, in a context of respect for the principles of tolerance, fairness and non-discrimination established in international human rights instruments, and that indigenous peoples and communities be given the right to have access to the mass media, including radio, television and the Internet for their own use.’⁴⁹⁸</p> <p>‘States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity’⁴⁹⁹</p>	<p>According to a New Zealand government legal opinion⁵⁰⁰ about equivalent provisions to the leaked TPP investment chapter and likely services chapter: If the TPP’s Parties implement these recommendations on indigenous media content via a requirement to have indigenous-made programming for a certain number of hours per day, this would violate the market access and national treatment provisions, unless an exception is agreed by all TPP Parties, see Annex 1</p>
Domestic regulations disciplines in services chapter	
<p>In a mission to Canada the Special Rapporteur noted: ‘That concerted action be undertaken by all levels of government to guarantee the right to culturally sensitive and quality education of Aboriginal people. . . That culturally relevant education in Aboriginal languages be promoted at</p>	<p>The domestic regulations disciplines in the TPP services chapter may not permit cultural requirements in education, see Annex 1. Furthermore, there is unlikely to be an effective culture or indigenous exception in the TPP for all Parties, see exceptions chapter in Annex 1</p>

Human rights body comment or recommendation	How TPP provision affects human rights
all school levels. ⁵⁰¹ Investment chapter	
<p>‘the State’s protective role in the context of extractive industries entails ensuring a regulatory framework that fully recognizes indigenous peoples’ rights over lands and natural resources and other rights that may be affected by extractive operations; that mandates respect for those rights both in all relevant State administrative decision-making and in corporate behaviour; and that provides effective sanctions and remedies when those rights are infringed either by Governments or by corporate actors.’⁵⁰²</p> <p>In Mexico: ‘In 1992 the Constitution was reformed, opening the way to the privatization of indigenous communal lands as part of a globalization-encapsulating economic development process, including the North American Free Trade Agreement, which has brought great changes to the rural world in which most indigenous people live.’⁵⁰³</p>	<p>A government which had tried to sanction a foreign investor for breaking the law has successfully been sued under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see Occidental case in the investment chapter in Annex 1. When indigenous people successfully sued Chevron in Ecuador’s courts for polluting the Amazon rainforest, Chevron is now challenging this decision under investment treaty provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see obligation to protect in the Introduction. When the U.S. government refused to approve the plan of operation for an open pit gold mine because of the impact that it would have upon the Quechuan Indian Nation, it was sued for US \$50 million under provisions equivalent to those which have been agreed in the leaked TPP investment chapter.⁵⁰⁴ Although the U.S. government won in that case,⁵⁰⁵ since they have won all of their ISDS cases, other TPP governments may not be so lucky.</p> <p>‘Much of Mexican agriculture — and the backbone of Mexico’s rural economy — consisted of campesinos who farmed small plots of land (called ejidos) that were permanently deeded to Mexico’s peasant farmers by the land reforms at the core of Mexico’s post-revolution 1917 Constitution. In preparation for NAFTA, Mexico was required to amend its Constitution to allow foreign ownership of land. This undermined the ejido system, allowing plots to be sold or, in most cases, seized by creditors.’⁵⁰⁶ The leaked TPP investment chapter and likely provisions of the services chapter will allow investors from other TPP countries to own as much land as they want, unless an exception is agreed by all TPP Parties, see Annex 1</p>
Exceptions chapter	
‘Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect	Although New Zealand typically has an exception for its indigenous people in its free trade agreements, even if accepted in the TPP, it is likely to be insufficient, see exceptions chapter in Annex 1. Furthermore, since it only applies to New

Human rights body comment or recommendation	How TPP provision affects human rights
such treaties, agreements and other constructive arrangements. ⁵⁰⁷	Zealand, it does not ensure that indigenous peoples from other TPP countries have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements, where they conflict with TPP provisions.

Special Rapporteur on the rights of persons with disabilities

Human rights body comment or recommendation	How TPP provision affects human rights
<p>‘In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces.’⁵⁰⁸</p> <p>‘The lack of resources for education as a result of financial dependence and the privatization and commercialization of education are obstacles to the expansion of’ the right to education of persons with disabilities⁵⁰⁹</p>	<p>The domestic regulations disciplines in the TPP services chapter may restrict the ability of TPP governments to ensure that services are appropriate for persons with disabilities and affordable, see Annex 1.</p> <p>A reversal of privatisation or decision not to continue with privatisation may be difficult under some of the TPP provisions, see Introduction</p>
<p>“... current economic and social deterioration, marked by low growth rates, high unemployment, reduced public expenditure, current structural adjustment programmes and privatization, have negatively affected programmes and services ... If the present negative trends continue, there is the risk that [persons with disabilities] may increasingly be relegated to the margins of society, dependent on ad hoc support.”⁵¹⁰</p>	<p>The TPP may cause revenue loss in some countries, especially developing countries, see obligation to fulfil in the Introduction. If this occurs and spending on programs and services for persons with disabilities is not ring fenced, they will face further difficulties.</p>
<p>‘The right to physical and mental health also implies the right to have access to, and to benefit from, those medical and social services including orthopaedic devices’⁵¹¹</p>	<p>Since orthopaedic devices can be protected by intellectual property,⁵¹² if the proposals in the leaked TPP intellectual property chapter are accepted, more orthopaedic devices will be at high monopoly prices for longer, see Annex 1 and section on the right to health.</p> <p>Furthermore, the leaked TPP transparency chapter annex also applies to medical devices which are likely to include orthopaedic devices⁵¹³. If accepted, it could result in higher prices for</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	orthopaedic devices, see Annex 1.

Independent Expert on the enjoyment of all human rights by older persons

See rights to food, water, housing, health care and education⁵¹⁴.

Human rights body comment or recommendation	How TPP provision affects human rights
<p>‘The immediate consequences of longer life expectancy include increases in the prevalence of chronic and non-communicable diseases and disabilities, which, if unaddressed, could place significant burdens on health systems, strain pension and social security systems, increase demand for primary health care and put pressure on the availability and affordability of long-term care. Developing countries will be predominantly affected by the resulting epidemiological transition, when non-communicable diseases amongst older persons increase.’⁵¹⁵ older persons ‘are particularly vulnerable to infringements of their right to health. . . Under the right-to-health framework, health facilities, goods and services should be made available, accessible, affordable, acceptable and be of good quality for older persons.</p> <p>Availability refers to the fact that functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity. In many cases, older persons are affected by selective unavailability because of rationing of medical care, i.e. allocation and prioritization of health resources, which often results in de-prioritizing older persons for health treatment.’⁵¹⁶</p>	<p>A number of TPP provisions could reduce revenue in TPP countries, especially in developing countries, see obligation to fulfil in the Introduction. If spending on older persons is not ring fenced, the problems indicated will be exacerbated.</p>
<p>‘Chronic illnesses and disability increase in prevalence with advancing age. Around half of deaths due to non-communicable diseases occur in persons aged over 70. . . . In light of the increasing proportion of the population who are elderly, it becomes vital that these conditions are managed in an equitable and resource-effective manner.’⁵¹⁷</p> <p>The rights of older persons include access to adequate health-care⁵¹⁸</p>	<p>If the proposals in the leaked TPP intellectual property chapter are agreed to, patented medicines and medical devices will be at the high monopoly price for longer, see Annex 1 and the right to health section.</p> <p>Furthermore, the leaked TPP transparency chapter annex applies to medicines and medical devices. If accepted, it could result in higher prices for medicines and medical devices, see Annex 1.</p>
<p>Older persons have ‘socio-economic vulnerability, especially as access to health care is often subject to receiving a pension or to paying out-of-pocket fees. Living in poverty can also be a root cause of deterioration of older</p>	<p>The domestic regulations disciplines in the TPP services chapter may restrict the ability of governments to set affordable health-care and water prices, see Annex 1</p>

persons' health: with limited access to safe drinking water or adequate nutrition, older persons face a high risk of contracting diseases.' ⁵¹⁹	and sections on poverty and right to water.
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Special Rapporteur in the field of cultural rights

Human rights body comment or recommendation	How TPP provision affects human rights
Intellectual property chapter	
‘States implement the recommendations of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the right to food on the issue of intellectual property rights.’ ⁵²⁰	<p>A/HRC/11/12 includes that developing countries should exclude patents on new uses and ‘Developing countries and LDCs should not introduce TRIPS-plus standards in their national laws. Developed countries should not encourage developing countries and LDCs to enter into TRIPS-plus FTAs’. However, the leaked TPP intellectual property chapter includes proposals for patents on new uses and other TRIPS-plus standards, see Annex 1.</p> <p>A/64/170 includes ‘No State should be forced to establish a regime for the protection of intellectual property rights which goes beyond the minimum requirements of the TRIPS Agreement’. However, the leaked TPP intellectual property chapter includes proposals that go beyond the minimum requirements of the TRIPS agreement including to allow patents on plants and for TPP countries to join UPOV 1991, see Annex 1.</p>
‘The Special Rapporteur points out that legal scholars have increasingly questioned the economic effectiveness of intellectual property regimes in promoting scientific and cultural innovation. Scholars have found no evidence to support the assumption that scientific creativity is only galvanized by legal protection or that the short-term costs of limiting dissemination are lower than the long-term gain of additional incentives. Consequently, the Special Rapporteur proposes the adoption of a public good approach to knowledge innovation and diffusion, and suggests reconsidering the current maximalist intellectual property approach to explore the virtues of a minimalist approach to IP protection.’ ⁵²¹	The intellectual property (IP) maximalist approach pushed by the USA ⁵²² can be seen in some of the proposals in the leaked TPP intellectual property chapter, see Annex 1. It remains to be seen if TPP Parties will agree to the proposed longer copyright and patent etc protection in the TPP.
Re copyright: ⁵²³	High statutory damages have been agreed in the leaked TPP intellectual property chapter. ⁵²⁴

ⁱ See A/HRC/11/12, AHRC/17/43 and A/64/170.

Human rights body comment or recommendation	How TPP provision affects human rights
<p>‘Additional concern is expressed over . . . high statutory damages or fines and criminal sanctions for non-commercial infringement.’</p> <p>‘revisions to the Berne Convention required that all countries accord copyright holders an exclusive right of translation. That global change overlooked the interests of linguistic groups for whom the ability to translate works into their vernacular languages was essential to promote education and cultural development’</p> <p>‘Libraries negotiating subscription fees with publishers face an unequal bargaining situation; they are obliged to pay high prices, or forego providing researchers and students with the resources needed for their work. The burden of journal subscription fees is becoming unsustainable even at some of the world’s best-resourced universities. In some developing countries, the subscription fee to a single database may exceed the total annual budget of a university library.’</p> <p>‘States should ensure that exceptions and limitations cannot be waived by contract, or unduly impaired by technical measures of protection’</p> <p>‘International copyright instruments should be subject to human rights impact assessments and contain safeguards for freedom of expression, the right to science and culture, and other human rights’</p> <p>‘concern is often expressed that powerful parties may use international rule-making to restrict domestic policy options, advancing private interests at the expense of public welfare or human rights.’</p>	<p>Criminal sanctions for non-commercial infringement have been proposed in the leaked intellectual property chapter.⁵²⁵</p> <p>If the copyright term extensions proposed in the leaked TPP intellectual property chapter are agreed to, TPP countries will have to pay royalties for translations for even longer, see Annex 1.</p> <p>Libraries even in developed countries have already been concerned about the longer copyright protection proposed in the TPP.⁵²⁶</p> <p>The leaked TPP intellectual property chapter proposes TRIPS-plus technological protection measures with an exception for limitations and exceptions provided they meet certain conditions.⁵²⁷</p> <p>Despite proposing stronger copyright protection for the TPP Parties and some already having been agreed to, see above, they do not appear to have undertaken a human rights impact assessment, see Introduction.</p> <p>It remains to be seen whether the final TPP intellectual property chapter provisions will further restrict domestic policy options to advance the interests of intellectual property rights holders at the expense of public welfare and human rights.</p>
<p>‘States should seek the free, prior and informed consent of source communities before adopting measures concerning their specific cultural heritage, in particular in the case of indigenous peoples, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples’⁵²⁸</p>	<p>See section on indigenous rights</p>
<p>Services and investment chapters</p>	
<p>‘The Committee wishes to recall in this regard that educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as</p>	<p>The domestic regulations disciplines in the TPP services chapter may not permit cultural and linguistic requirements in education, see Annex 1. Furthermore, there is unlikely to be an effective</p>

Human rights body comment or recommendation	How TPP provision affects human rights
indigenous peoples, and incorporate in those programmes their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations. Such programmes should be included in school curricula for all, not only for minorities and indigenous peoples. States parties should adopt measures and spare no effort to ensure that educational programmes for minorities and indigenous groups are conducted on or in their own language, taking into consideration the wishes expressed by communities and in the international human rights standards in this area. ⁵²⁹	culture or indigenous exception for all Parties in the TPP, see exceptions chapter in Annex 1
Remedies: ‘In Switzerland, associations working in the field of cultural heritage may challenge construction permits affecting cultural heritage before the courts.’ ⁵³⁰	<p>The domestic regulations disciplines in the TPP services chapter may not permit cultural heritage requirements in construction, see Annex 1. Furthermore, there is unlikely to be an effective culture exception for all Parties in the TPP, see exceptions chapter in Annex 1.</p> <p>In addition ,if the challenge to the construction permit is successful, TPP governments could be sued under the leaked TPP investment chapter provisions which are equivalent to those used by a foreign investor to successfully challenge a refusal to give a permit in the Metalclad v Mexico case, see investment chapter in Annex 1</p>
The Special Rapporteur recommends that: ‘States promote the transfer of technologies, practices and procedures to ensure the well-being of people.’ ⁵³¹	The leaked TPP investment chapter prohibits TPP governments from requiring technology transfer from investors from any country, subject to limited exceptions or unless an NCM is agreed to by all TPP Parties, see investment chapter in Annex 1.

Special Rapporteur on human rights and the environment

Human rights body comment or recommendation	How TPP provision affects human rights
<p>Examples of environmental threats to the right to health include the improper disposal of toxic wastes and exposure to radiation and harmful chemicals . . . The Special Rapporteur on hazardous substances and wastes has indicated that waste from extractive industries can infringe the right to water⁵³²</p> <p>‘the special rapporteurs appointed to carry out this mandate have identified many human rights that may be infringed by such toxic dumping, including not only the rights to life and health, but also “such fundamental rights as the right of peoples to self-determination and permanent</p>	Countries which have tried to enforce domestic laws on foreign investors, including for environmental pollution have been successfully challenged under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see obligation to protect in the Introduction and the investment chapter in Annex 1

Human rights body comment or recommendation	How TPP provision affects human rights
<p>sovereignty over natural resources, the right to development, the rights to ... adequate food'⁵³³</p> <p>'The Committee has interpreted the phrase "the improvement of all aspects of environmental and industrial hygiene" in article 12.2(b) to include "the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health" (para. 15). To that end, States are required to adopt measures against environmental health hazards, including by formulating and implementing policies "aimed at reducing and eliminating pollution of air, water and soil"'⁵³⁴</p> <p>'The Convention on the Rights of the Child states that environmental pollution poses "dangers and risks" to nutritious foods and clean drinking-water'⁵³⁵</p> <p>'The human rights obligations relating to the environment also include substantive obligations to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors'⁵³⁶</p>	
<p>'The Special Rapporteur on the rights of indigenous peoples has emphasized that "extractive industry activities generate effects that often infringe upon indigenous peoples' rights"'⁵³⁷</p> <p>"the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights"'⁵³⁸</p>	<p>Countries which have tried to enforce domestic laws on foreign investors, including to protect indigenous peoples' rights have been challenged under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see obligation to protect in the Introduction, indigenous peoples section and the investment chapter in Annex 1.</p>
<p>'In the context of the right to water, the Committee has made it clear that the duty to protect extends to adopting and enforcing effective measures to restrain third parties from infringing the right through pollution of water sources'⁵³⁹</p> <p>'the right to health as encompassing "taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions ... States parties should ensure that natural water resources are protected from contamination by</p>	<p>When a government fined Vivendi for poor water quality it was successfully sued under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see Vivendi case in the right to water section. Other countries which have tried to enforce domestic laws on foreign investors, including for environmental pollution have been successfully challenged under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see obligation to protect in the Introduction and the</p>

Human rights body comment or recommendation	How TPP provision affects human rights
harmful substances and pathogenic microbes”” 540	investment chapter in Annex 1
‘special rapporteurs have explained how climate change threatens a wide range of rights, including the rights to health, water and food’ 541	<p>A number of TPP provisions can make it more difficult to mitigate and adapt to climate change, including:</p> <ul style="list-style-type: none"> - broader and longer intellectual property protection on climate change technologies, see intellectual property chapter in Annex 1 -the provisions agreed to in the leaked TPP investment chapter as there have been investment disputes under equivalent provisions in other treaties which have challenged climate change measures, see Annex 1. 542

Independent Expert on human rights and international solidarity

Human rights body comment or recommendation	How TPP provision affects human rights
Investment chapter	
‘a financial transaction tax (FTT) is a pragmatic tool for providing the means for governments to protect and fulfill the human rights of their people . . . EU countries must take bold leadership now to pave the way towards what should eventually be a global FTT. . . The FTT is an opportunity for Governments to move beyond rhetoric in their commitments to sustainable development, and to give flesh to their noble pronouncements of solidarity. . . Governments can, and must rise to the occasion and work together to make a global FTT possible as a significant step towards reducing the asymmetries that hinder the realization of the right to development’ 543	US Senator Elizabeth Warren, the law professor who set up the Consumer Financial Protection Bureau, is one of a number of US Senators and other experts who are concerned that financial transaction taxes may be limited under the TPP because of its ban on capital controls 544 in the leaked TPP investment chapter, see Annex 1
‘Positive obligations would include taking concrete steps to regulate financial markets,’ 545	<p>The Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System noted that ‘Many developing countries have entered into (North-South) free trade agreements (FTAs), bilateral investment treaties (BITs), and World Trade Organization (WTO) commitments that prevent them from regulating the operations of financial institutions and instruments or capital flows. For example, if a developing country decides to nationalize some services such as banking, this can require compensation. . . . Agreements that restrict a country’s ability to revise its regulatory regime—including not only domestic prudential but, crucially, capital account</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	<p>regulations—obviously have to be altered, in light of what has been learned about deficiencies in this crisis⁵⁴⁶</p> <p>One example of this is the use of capital controls, as Iceland has done in this financial crisis and Malaysia successfully used in the 1997 Asian financial crisis⁵⁴⁷. Economists such as Nobel Prize Laureate Joseph Stiglitz⁵⁴⁸ and the International Monetary Fund (IMF)⁵⁴⁹ support the use of capital controls. However the leaked TPP investment chapter prohibits them, even in a crisis. Some countries are attempting to have a limited balance of payments safeguard in the leaked TPP investment chapter, but this is unnecessarily restrictive and is unlikely to be effective as the US has not allowed effective capital controls in past USFTAs as the IMF Senior Counsel noted⁵⁵⁰.</p>
Trade agreements	
<p>‘Negative obligations would include: not adopting free trade agreements that have the effect of undermining peoples’ livelihoods or other rights;’⁵⁵¹</p> <p>The Proposed Draft Declaration On The Right Of Peoples And Individuals To International Solidarity states that:⁵⁵²</p> <p>-‘In the elaboration and implementation of international agreements and related standards, States shall ensure that the procedures and outcomes are fully consistent with their human rights obligations in matters pertaining to, inter alia, international trade, investment, finance, taxation, climate change, environmental protection’</p> <p>-‘States shall give effect to the establishment of a fair, inclusive and human rights-based international trade and investment regime where all States shall act in conformity with their obligation to ensure that no international trade agreement or policy to which they are a party adversely impacts upon the protection, promotion and fulfilment of human rights inside or outside of their borders’</p> <p>-‘The right to international solidarity shall impose on States particular negative obligations, required by applicable international human rights instruments, including: (a) Not adopting free trade agreements or investment treaties that would undermine peoples’ livelihoods or other rights;’</p>	<p>As noted in this paper, a number of the leaked TPP provisions and proposals appear to adversely affect human rights and people’s livelihoods. As noted in the Introduction, TPP Parties do not appear to have carried out human rights impact assessments to ensure that the TPP does not adversely impact on their human rights obligations.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
‘the need for solidarity was amplified in the context of increasing interdependence in a globalizing world, where liberalization of international trade and foreign direct investment have created a single global economy, mandating that humanity was also conceived as a single, global community. . . international solidarity . . . was a broader concept and principle that included sustainability in international relations, especially international economic relations . . . and refraining from doing harm or posing obstacles to the greater well-being of others, including within the international economic system . . . As a minimum core obligation, States must desist from actions that violate human rights in other countries;’ ⁵⁵³	
The Proposed Draft Declaration On The Right Of Peoples And Individuals To International Solidarity states that: ‘The right to international solidarity shall impose on States particular negative obligations, required by applicable international human rights instruments, including: . . . (c) Not denying anyone access to life-saving pharmaceuticals and to the benefits of medical and scientific progress;’ ⁵⁵⁴	As noted in the section on the right to health, if the leaked TPP intellectual property chapter provisions are agreed to, this will keep life-saving medicines at high prices for longer, see Annex 1. If the transparency chapter annex is agreed to, this is also likely to increase medicine prices, see Annex 1.

Independent expert on the promotion of a democratic and equitable international order

Human rights body comment or recommendation	How TPP provision affects human rights
‘He is concerned about the secrecy surrounding current negotiations for trade treaties like the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) and the Trade in Services Agreement (TISA), currently under discussion, which have excluded key stakeholder groups from the process, including labour unions, environmental protection groups, food-safety movements and health professionals. The expert maintains that proactive disclosure by governments, genuine consultation and public participation in decision-making are indispensable to render such agreements democratically legitimate.’ ⁵⁵⁵	The TPP is being negotiated in secret, see Introduction.
‘Parliaments should call for a moratorium on all pending free trade and investment agreements until independent human rights impact assessments are conducted and the public is properly consulted.’ ⁵⁵⁶	Human rights impact assessments do not appear to have been done yet for the TPP, see Introduction.

Human rights body comment or recommendation	How TPP provision affects human rights
<p>‘Scarce reports indicate that these agreements are not about trade facilitation but essentially about deregulation, which is a “lose-lose” proposition for everybody except transnational corporations.’⁵⁵⁷</p>	<p>The services (including domestic regulations disciplines) and investment chapters make it difficult to regulate, but the goods, SPS, TBT, intellectual property, government procurement, e-commerce, transparency etc chapters also reduce policy space to regulate, see Annex 1.</p>
<p>‘The expert is especially worried about the impact that investor-state-arbitrations (ISDS) may have on human rights, in particular the provision which allows investors to challenge domestic legislation and administrative decisions if these can potentially reduce their profits. Such investor-state tribunals are made up of arbitrators, mostly corporate lawyers, whose independence has been put into question on grounds of conflict of interest, and whose decisions are not subject to appeal or to other forms of accountability. The apparent lack of independence, transparency and accountability of ISDS tribunals also entails a prima-facie violation of article 14 of the International Covenant on Civil and Political Rights (ICCPR), which requires that suits at law be adjudicated by independent tribunals.’⁵⁵⁸</p>	<p>These problems can still occur via the agreed provisions in the leaked TPP investment chapter, see Annex 1.</p>
<p>‘It has been argued that ISDS tilts the playing field away from democratic accountability, favouring “big business” over the rights and interests of labourers and consumers.</p> <p>Prior experience has shown that transnational corporations have sued States on account of their social legislation, labour laws, minimum wage provisions, environmental and health protection measures. Such lawsuits entail a frontal attack on democratic governance, in particular on the exercise of the State responsibility to legislate in the public interest, thus undermining both the commitment to the rule of law and to domestic and international democracy.’⁵⁵⁹</p> <p>‘Under no condition can ISDS tribunals hinder States in the fulfilment of their fundamental duties to regulate domestic policies in economic, social and labour matters. Arbitration awards and punitive damages assessed against States because of changes in their labour laws (including raising the minimum wage), measures to protect the environment, regulation of toxic waste disposal, public health standards, medical hygiene etc. shock the conscience of mankind, violate the good faith requirement of treaty implementation (art. 26 VCLT), constitute a</p>	<p>These cases can still occur as there are insufficient safeguards for labourers, consumers, environmental and health measures, see investment and exceptions chapters in Annex 1.</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>gross abuse of rights and unjust enrichment. Ontologically capitalism and investment entail risk-taking. The progressive improvement of health and social legislation is an important goal of a democratic and equitable international order – and as such a thoroughly foreseeable risk that investors must accept.⁵⁶⁰</p>	
<p>‘universal and regional human rights treaties, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples Rights, as well as ILO Conventions on labour standards and WHO Conventions, including the Framework Convention on Tobacco Control (in force 27 February 2005, 168 signatories), the Framework Convention on Climate Change and the Biodiversity Convention must take precedence over trade and investment agreements.’⁵⁶¹</p>	<p>Given past disputes under equivalent provisions in other trade and investment agreements, there is a real risk that these human rights Treaties and ILO, WHO and environmental Conventions could be successfully challenged under TPP provisions, see Annex 1, including the likely lack of sufficient safeguards in the exceptions chapter.</p>
<p>‘A moratorium on on-going negotiations is necessary to prevent the establishment of economic and financial structures that foreseeably will lead to gross violations of human rights worldwide and ultimately may lead to situations where international peace and security are threatened. Special procedures mandate holders have a preventive vocation which is more important than their task to propose curative measures after the fact.’⁵⁶²</p>	<p>There is no moratorium on TPP negotiations, in fact they are aiming to conclude the negotiations at the next ministerial meeting from 26-28 May 2015 if fast track authority has been passed in the USA.⁵⁶³</p>
<p>‘A democratic and equitable international order cannot be achieved as long as civil society lacks mechanisms to ensure change, e.g. by democratically enforcing a shift in priorities away from . . . surveillance of citizens’⁵⁶⁴</p>	<p>The electronic commerce chapter of the TPP is likely to require free flow of data from TPP countries across national borders (e.g. to the USA), without adequate privacy exceptions, see Annex 1. This would facilitate the kind of surveillance exposed by Snowden which included that the U.S. government’s National Security Agency (NSA) has among other activities sent an agent to a technology company’s headquarters where they installed U.S. government software on to the company server and downloaded data from there for several weeks.⁵⁶⁵</p>
<p>‘Privatization of public functions constitutes an attack on democracy, because the public interest can only be protected by a public entity, whether a municipal administration or parliament, and not by a board of directors of a corporation oriented toward profit and expanding markets.’⁵⁶⁶</p>	<p>Privatisation reversals or decisions not to continue privatisation are likely to be more difficult under the TPP, see Introduction</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>‘With regard to an international order that shall be more equitable, the Independent Expert commends those countries that have met their commitments under the Millennium Declaration, in particular the Millennium Development Goals, as well as progress achieved in technology transfer and access to medical services and drugs’⁵⁶⁷</p>	<p>The leaked TPP intellectual property chapter has proposals that would delay access to affordable medicines, see section on the right to health and Annex 1. In addition, if the leaked transparency chapter annex is accepted, medicines and medical devices are likely to be more expensive, see Annex 1. Furthermore, setting a maximum price for medical services to ensure that is affordable may be difficult under the domestic regulations disciplines in the services chapter, see Annex 1.</p> <p>The leaked TPP investment chapter prohibits TPP governments from requiring technology transfer from investors from any country, subject to limited exceptions or unless an NCM is agreed to by all TPP Parties, see investment chapter in Annex 1.</p>
<p>‘States should impose controls on financial and commodity markets, prohibit “shadow banking” and regulate speculation.’⁵⁶⁸</p> <p>‘an equitable international order . . . rejects the excesses of the uncontrolled financial markets that have more than once adversely impacted on the world economy, causing hardship such as the unemployment and loss of savings and pensions of millions of people . . . currency speculation, constitute unethical practices. Efforts in many countries to regulate the financial markets are commendable but risk remaining insufficient.’⁵⁶⁹</p>	<p>The Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System noted that ‘Many developing countries have entered into (North-South) free trade agreements (FTAs), bilateral investment treaties (BITs), and World Trade Organization (WTO) commitments that prevent them from regulating the operations of financial institutions and instruments or capital flows. For example, if a developing country decides to nationalize some services such as banking, this can require compensation. . . . Agreements that restrict a country’s ability to revise its regulatory regime—including not only domestic prudential but, crucially, capital account regulations—obviously have to be altered, in light of what has been learned about deficiencies in this crisis’⁵⁷⁰</p> <p>One example of this is the use of capital controls, as Iceland has done in this financial crisis and Malaysia successfully used in the 1997 Asian financial crisis⁵⁷¹. Economists such as Nobel Prize Laureate Joseph Stiglitz⁵⁷² and the International Monetary Fund (IMF)⁵⁷³ support the use of capital controls. However the leaked TPP investment chapter prohibits them, even in a crisis. Some countries are attempting to have a limited balance of payments safeguard in the leaked TPP investment chapter, but this is unnecessarily restrictive and is unlikely to be effective as the US has not allowed effective capital controls in</p>

Human rights body comment or recommendation	How TPP provision affects human rights
	<p>past USFTAs as the IMF Senior Counsel noted⁵⁷⁴. The financial services and investment chapters of the TPP may also prevent prohibitions of shadow banking and currency speculation etc, see Annex 1.</p>
<p>‘five Human Rights Council special procedures mandate holders on the issues of extreme poverty, food, business, foreign debt and international solidarity, proposed the imposition of a global financial transaction tax aimed at offsetting the costs of the enduring economic, financial, fuel, climate and food crises, and to protect basic human rights’⁵⁷⁵</p>	<p>US Senator Elizabeth Warren, the law professor who set up the Consumer Financial Protection Bureau, is one of a number of US Senators and other experts who are concerned that financial transaction taxes may be limited under the TPP because of its ban on capital controls⁵⁷⁶ in the leaked TPP investment chapter, see Annex 1</p>
<p>‘States should . . . implement the principle of separation of powers.’⁵⁷⁷</p>	<p>Chevron severely polluted the rainforest in Ecuador. 30,000 indigenous people sued Chevron in Ecuador’s courts and won US\$18billion from Chevron to clean up their pollution in Ecuador’s rainforest.⁵⁷⁸ To avoid paying the fine, Chevron is suing Ecuador under an investment treaty which has very similar provisions to those which have been agreed to in the leaked TPP investment chapter. Before deciding the case, an UNCITRAL investment tribunal (that all TPP countries (except Australia which is asking for an exclusion from being able to be sued by investors so far) have agreed the investor can choose to go to in the leaked TPP investment chapter) has repeatedly ordered⁵⁷⁹ Ecuador to violate the separation of powers required by Article 168 of its Constitution^j in order to block the finalizing of the Ecuadorian court decision awarding the indigenous people the US\$18billion. This shows that the provisions agreed to by all TPP countries (except Australia which is so far not agreeing to ISDS) in the leaked TPP investment chapter (see Annex 1) could violate the constitutional separation of powers in TPP countries such as Australia and Malaysia as there is no exception in the leaked TPP investment chapter for constitutional separation of powers and it has not been an exception in past USFTAs, see exceptions chapter in Annex 1, so is unlikely to be an allowed exception in the TPP.</p>

^j See page 4-6 of <http://italaw.com/sites/default/files/case-documents/ita0172.pdf> (Ecuador government’s submission to the investment tribunal explaining how it would be unconstitutional) which shows that the Ecuador government official who interferes with Ecuador’s courts the way the tribunal has required would be criminally liable).

Special Rapporteur on the independence of judges and lawyers

Human rights body comment or recommendation	How TPP provision affects human rights
<p>Separation of powers:</p> <ul style="list-style-type: none"> • ‘The rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency. These guarantees are embodied to varying degrees in the legal systems of the world’s countries in the form of constitutional and legal texts and case law. They are also universal in scope’⁵⁸⁰ • ‘is the bedrock upon which the requirements of judicial independence and impartiality are founded. . . the Special Rapporteur will emphasize the special and urgent necessity for respecting the principle of separation of powers and the requirements of judicial independence and impartiality’⁵⁸¹ • ‘It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency. • In this connection, it should be noted that the Human Rights Committee, in its general comment No. 32, emphasized that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal. Therefore, the Committee pointed to this concern in several of its concluding recommendations and called for a clear demarcation between the respective competences of the different branches of power.’⁵⁸² • ‘the Special Rapporteur recommends that: <ul style="list-style-type: none"> ○ Competencies of the different branches of power be clearly distinguished and enshrined in the Constitution or equivalent. 	<p>Chevron severely polluted the rainforest in Ecuador. 30,000 indigenous people sued Chevron in Ecuador’s courts and won US\$18billion from Chevron to clean up their pollution in Ecuador’s rainforest.⁵⁸⁴ To avoid paying the fine, Chevron is suing Ecuador under an investment treaty which has very similar provisions to those which have been agreed to in the leaked TPP investment chapter. Before deciding the case, an UNCITRAL investment tribunal (that all TPP countries (except Australia which is so far asking for an exclusion from being able to be sued by investors) have agreed the investor can choose to go to in the leaked TPP investment chapter) has repeatedly ordered⁵⁸⁵ Ecuador to violate the separation of powers required by Article 168 of its Constitution^k in order to block the finalizing of the Ecuadorian court decision awarding the indigenous people the US\$18billion. This shows that the provisions agreed to by all TPP countries (except Australia who is so far not agreeing to ISDS) in the leaked TPP investment chapter (see Annex 1) could violate the constitutional separation of powers in TPP countries such as Australia and Malaysia as there is no exception in the leaked TPP investment chapter for constitutional separation of powers and it has not been an exception in past USFTAs, see exceptions chapter in Annex 1, so is unlikely to be an allowed exception in the TPP.</p> <p>See also concerns by current and former judges, parliamentarians,</p>

^k See page 4-6 of <http://italaw.com/sites/default/files/case-documents/ita0172.pdf> (Ecuador government’s submission to the investment tribunal explaining how it would be unconstitutional) which shows that the Ecuador government official who interferes with Ecuador’s courts the way the tribunal has required would be criminally liable).

Human rights body comment or recommendation	How TPP provision affects human rights
<ul style="list-style-type: none"> ○ The independence of the judiciary be enshrined in the Constitution or be considered as a fundamental principle of law. Both principles must adequately be translated into domestic law.⁵⁸³ 	academics etc about the investor to state dispute settlement system under the investment chapter below in Annex 1.

Working Group on the issue of human rights and transnational corporations and other business enterprises

Human rights body comment or recommendation	How TPP provision affects human rights
<p>Foundational principle: ‘As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.’⁵⁸⁶ Remedies may include fines.⁵⁸⁷</p> <p>‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’⁵⁸⁸</p> <p>‘Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights’⁵⁸⁹</p>	<p>When a government fined Vivendi for poor water quality it was successfully sued under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see Vivendi case in the right to water section. Other countries which have tried to enforce domestic laws on foreign investors, including for environmental pollution have been successfully challenged under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see obligation to protect in the Introduction and the investment chapter in Annex 1</p>
<p>‘a financial transaction tax (FTT) is a pragmatic tool for providing the means for governments to protect and fulfill the human rights of their people . . . EU countries must take bold leadership now to pave the way towards what should eventually be a global FTT. . . At a global level, the FTT can discourage excessive risk-taking and speculation, a significant factor in the financial crisis which itself created vast harm to the enjoyment of human rights worldwide.’⁵⁹⁰</p>	<p>US Senator Elizabeth Warren, the law professor who set up the Consumer Financial Protection Bureau, is one of a number of US Senators and other experts who are concerned that financial transaction taxes may be limited under the TPP because of its ban on capital controls⁵⁹¹ in the leaked TPP investment chapter, see Annex 1</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>‘States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties. Commentary: Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects . . . can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.’⁵⁹²</p> <p>Ensuring policy coherence so that those responsible for trade are ‘informed of and act in a manner compatible with the Governments’ human rights obligations’⁵⁹³</p> <p>‘There is a saying that the first thing to do when you are stuck in a deep hole is to stop digging. Yet, countries unwittingly get stuck in metaphorical holes that may constrain their ability to adopt legitimate policy reforms, including for human rights. The prime examples the Special Representative has studied in depth, because their effects can be so far-reaching, are bilateral investment treaties (BITs) . . .</p> <p>A current BIT case illustrates the problem. European investors have sued South Africa under binding international arbitration, contending that certain provisions of the Black Economic Empowerment Act amount to expropriation, for which the investors claim compensation. A policy review examined why the Government had agreed to such BIT provisions in the first place. It explains that, among other reasons, “the Executive had not been fully apprised of all the possible consequences of BITs”. . . In conclusion, one important step for States in fulfilling their duty to protect against corporate-related human rights abuses is to avoid unduly and unwittingly constraining their human rights policy freedom when they pursue other policy objectives.’⁵⁹⁴</p>	<p>The leaked TPP investment chapter provisions are very similar to those in bilateral investment treaties such as the U.S. Model Bilateral Investment Treaty (BIT) of 2012⁵⁹⁵. As can be seen in some of the cases outlined in the investment chapter in Annex 1, these provisions are likely to constrain TPP governments’ ability to implement their human rights obligations. TPP provisions in other chapters are also likely to violate human rights obligations, see other sections such as the right to health. There are insufficient human rights exceptions in the leaked TPP investment chapter and are unlikely to be sufficient human rights exceptions in the exceptions chapter of the TPP, see Annex 1.</p> <p>Affirmative action by TPP governments like that done by South Africa, could also violate the expropriation or other provisions which have been agreed in the leaked TPP investment chapter. (The provisions that South Africa was sued under in its investment treaty (it settled the case by removing the affirmative action requirement⁵⁹⁶) have been agreed in the leaked TPP investment chapter and so could be used to challenge similar affirmative action programs that exist in TPP countries).</p>
<p>‘Free trade agreements and bilateral investment agreements entered into by States with the aim of promoting</p>	<p>See rights of indigenous peoples section</p>

Human rights body comment or recommendation	How TPP provision affects human rights
<p>trade and investment have a significant impact on indigenous peoples. Such agreements are reported to have been entered into on many occasions without proper consultation. They often concern investments in extraction of natural resources on indigenous lands and territories, with the risk of adverse impacts on the rights of indigenous communities, affecting livelihoods, culture and the ability of indigenous peoples to decide their own paths to development. In addition, laws enacted and policies implemented further to these agreements can weaken the protection of indigenous lands and resources. In some cases, States have criminalized indigenous protests against such agreements by prosecuting indigenous leaders or by repressing communities that have demonstrated against them (see A/HRC/16/51/Add.3, para. 34).⁵⁹⁷</p>	

Annex 1: outline of relevant TPP provisions

Since the text of the TPP has not been made public and may not be made public until after it is signed, the analysis below is based on:

- Statements by TPP governments⁵⁹⁸
- Leaked TPP texts
- past U.S. free trade agreements (USFTAs) as they have very similar provisions which indicates that the U.S. has a strong template which they are likely to insist on in the TPP.⁵⁹⁹
- News reports

Goods chapter

- U.S. free trade agreements do not reduce or remove agricultural domestic subsidies, as this should apparently be addressed at the WTO. However they are not being effectively reduced at the WTO either. So the USA's agricultural domestic subsidies are not expected to be reduced or removed in the TPP. They are not even able to agree to effectively remove agricultural export subsidies in the TPP.⁶⁰⁰
- Past U.S. free trade agreements (FTAs) have only allowed one product to be excluded from tariff liberalisation and five products to have partial liberalisation.⁶⁰¹ The TPP is expected to be similar. Countries usually choose to shelter their most sensitive agricultural products, however given how few products can typically retain tariffs in a USFTA, not all products which face subsidized import competition may be able to retain their tariffs under the TPP.
- Based on past USFTAs,⁶⁰² there will be a requirement to eliminate export taxes to the other Parties to the free trade agreement except for on perhaps three products.

SPS chapter

The TPP will contain 'New and enforceable rules to ensure that science-based SPS measures are developed and implemented in a transparent, predictable, and non-discriminatory manner, while at the

same time preserving the ability of U.S. and other TPP regulatory agencies to do what they deem necessary to protect food safety, and plant and animal health⁶⁰³

Since the sanitary and phytosanitary measures (SPS) chapter will go beyond WTO rules for the first time in a USFTA and it has not leaked, it is difficult to predict how it will restrict government's regulatory space. Some indications can be seen in the U.S. government reports of the types of barriers to their exports that other TPP countries believe are disease risks that they have been trying to remove in the TPP, see the discussion in the right to food section above.

TBT chapter

'to encourage governments to eliminate and prevent unwarranted standards-related barriers to trade . . . USTR will continue working to conclude on the negotiation of a modernized Technical Barriers to Trade (TBT) chapter in the Trans-Pacific Partnership (TPP) that builds on and strengthens TBT disciplines contained in the WTO Agreement on Technical Barriers to Trade (TBT Agreement).'⁶⁰⁴ Stronger TBT disciplines further restrict the regulatory space of TPP governments.

In the TPP, 'The twelve countries have made considerable progress toward concluding the negotiations, including on standards-related issues, on which the United States is seeking to establish rules and disciplines for standards-related measures that reduce or eliminate unwarranted barriers to trade.

In 2013, the TPP Technical Barriers to Trade negotiating group made substantial progress toward conclusion of the TBT chapter and several sector specific annexes. The TPP TBT Chapter will build on the WTO TBT Agreement and include obligations on regulatory transparency, the use of GRPs, the acceptance of the results of conformity assessment procedures carried out in TPP countries, and international standards. It will also set out a framework for addressing trade concerns and for advancing cooperative activities on standards-related measures.

The TPP also will have sector specific annexes including obligations regarding the development and implementation of standards-related measures to address unnecessary barriers to trade in cosmetics, pharmaceuticals, medical devices, information and ICT, wine and spirits, organics, footwear and food formulas.'⁶⁰⁵

Services

Since this TPP chapter has not leaked, the summary below of some of the main relevant provisions likely to be in the TPP's services chapter is based on past USFTAs.

Scope

The TPP is expected to cover at least the same **range of services** as the World Trade Organization's services rules (GATS). 'GATS therefore covers service sectors relevant to the enjoyment of economic, social and cultural rights such as the health sector (the right to health), the education sector (the right to education) and the environmental services sector (eg sanitation services are relevant to the right to water) . . . other sectors, such as electricity, transport and telecommunications can also provide the means to promote human rights and should also be subject to assessment.'⁶⁰⁶ 'Most directly, any commitments in the health, education or environmental sectors can affect the enjoyment of the right to health, the right to education and the right to development. Further, commitments to liberalization in other sectors, such as tourism, telecommunications, advertising, or even prison services, can impact on the enjoyment of human rights. Indeed, the privatization of prison services and its relationship with the administration of justice has already been the subject of study in the Sub-Commission'⁶⁰⁷

The TPP's services chapter is likely to cover **modes**:

- 1: ‘services supplied from one country to another . . . , officially known as “cross-border supply”’.⁶⁰⁸ This could include television broadcasts from another country that contain tobacco, alcohol or junk food advertising
- 2: ‘consumers or firms making use of a service in another country (e.g. tourism), officially “consumption abroad”’.⁶⁰⁹
- 3: ‘a foreign company setting up subsidiaries or branches to provide services in another country (e.g. foreign banks setting up operations in a country), officially “commercial presence”’.⁶¹⁰ However, this would only apply to services being supplied by investments of investors from other TPP countries and only for the purposes of market access, domestic regulations disciplines and transparency. Investment is also covered in the leaked TPP investment chapter which has additional obligations such as national treatment, most favoured nation, performance requirements and investment protection provisions, see below.
- 4: ‘individuals travelling from their own country to supply services in another’.⁶¹¹ In the TPP this is only likely to allow business people to temporarily stay in other TPP countries.⁶¹² Past USFTAs have not allowed unskilled workers such as construction or agricultural workers to work in the U.S.

At the WTO, national governments only have to take such reasonable measures as may be available to it to ensure their observance by regional and local governments.⁶¹³ However, the TPP’s services chapter is likely to be strictly binding on **all levels of government**, including sub national governments. Therefore a measure by a municipal government in a TPP country, for example in setting a maximum price for essential services such as water and electricity could violate the services chapter and the national government could be sued by another TPP government under the dispute settlement chapter.

Market access

In the WTO, countries decide which service sectors to provide market access to on a positive list basis: they list the service sectors they are willing to open to foreign service providers in Modes 1 to 4.⁶¹⁴

In the TPP, this is likely to be negative list liberalisation. I.e. all service sectors are open to companies from other TPP countries, unless they are listed as non-conforming measures, which all the other TPP Parties must agree to. This also makes it likely that all future sectors will be liberalized.

If a country has agreed to give market access in a sector, they cannot prohibit companies from operating in that sector,⁶¹⁵ even in one region of the TPP country. Therefore there is concern that it would not be possible to ban tobacco or alcohol advertising etc unless the relevant non-conforming measures have been agreed.

The High Commissioner for Human Rights noted that ‘Given that FDI is primarily driven by commercial objectives, the promotion of FDI in areas such as the health, water and education sectors will not necessarily be the most effective means of ensuring universal access to entitlements that at times can be unprofitable. . . For example, the World Bank has noted that liberalization could increase prices of some services and threaten the provision of transport and telecommunications services to the poor’⁶¹⁶

When deciding whether to liberalise, ‘other sectors, particularly health and education and sectors that affect water supply, should be treated very carefully’⁶¹⁷ and on the basis of sound empirical evidence gathered through assessments ‘based on thorough consultation with the people affected by liberalizing trade in services - the poor, rural populations, vulnerable groups, industry and Government, including the education, health, environment, transport ministries, not only trade and finance departments. . . Where assessments are not available, the High Commissioner encourages States to adopt a cautious approach to making new commitments until the relevant facts are available.’⁶¹⁸

It is likely that to withdraw any commitment to liberalise services in the TPP, Parties will have to get the consent of all other TPP countries to amend it, see final chapter below. This is similar in difficulty to the

process under GATS where the Office of the High Commissioner for Human Rights stated that ‘Given the difficulties in withdrawing commitments under GATS – including the possibility of having to compensate other WTO Members as a result – it will be important to avoid undertaking commitments to open services sectors which are unsustainable from the perspective of the promotion and protection of human rights.’⁶¹⁹

National treatment

This would be a requirement to treat service suppliers of another Party no less favourably than that it treats its own service suppliers.

In the WTO, countries decide which service sectors to provide national treatment to on a positive list basis: they list the service sectors they are willing to provide national treatment in in Modes 1 to 4.⁶²⁰

In the TPP, this is likely to be negative list liberalisation. I.e. national treatment must be provided in all service sectors, unless they are listed as non-conforming measures, which all the other TPP Parties must agree to. This also makes it likely that all future sectors will have to provide national treatment.

Furthermore, to protect one sector (eg water), many other related sectors must also be excluded under the negative list system, eg ‘GATS commitments on construction, distribution, consultancy, management consulting, technical testing, pipeline transport, logistics, energy, integrated engineering, financing and billing systems could still give its transnational companies effective control of a country’s water infrastructure’⁶²¹

Disciplines on domestic regulations

These are additional restrictions, beyond market access and national treatment, on the ability to have even non-discriminatory domestic regulations on services. Past USFTAs have had some domestic regulations disciplines. They are currently also being negotiated at the WTO, but negotiations have not yet concluded.⁶²² In those negotiations, Australia and New Zealand are amongst the most aggressive in trying to restrict the ability of governments to regulate services.⁶²³ Since they are in the TPP, it is expected that they will be proposing greater restrictions on the ability to regulate services than have been in the services chapter of past USFTAs.

These disciplines are likely to apply to qualification requirements and procedures, technical standards, and licensing requirements.⁶²⁴ A licensing requirement is likely to be requirements that have to be met to get authorisation to supply a service such as operate a hospital or provide water. Technical standards set out the characteristics of a service or the manner in which it is supplied, for example the maximum price that can be charged to consumers for water, or the maximum amount of bacterial contamination of water that is allowed.

Based on the proposals in the equivalent negotiations at the WTO,⁶²⁵ the TPP is likely to contain attempts to limit domestic regulations on services to those that satisfy the four criteria below. Based on the meaning of these terms of the WTO, they could be interpreted to mean:⁶²⁶

- Objective:
 - Not arbitrary: arbitrary has been interpreted at the WTO to mean a single, rigid, and unbending requirement, for example a maximum price that can be charged for water.
 - Not subjective: This can make it difficult to set things like set “just and reasonable” water rates as Kenya does or balance the needs of consumers and the environment etc.
 - Not biased: ‘This definition could conflict with any number of measures that are designed to express a preference in qualification requirements or preferences. Examples include small or medium-sized enterprises (SMEs), indigenous peoples, women-owned businesses, etc.’

- Relevant to ability to perform the service: if this is limited to competence and ability to supply the service, it would exclude other considerations such as cultural or indigenous rights, the environment etc.
- Based on international standards: this can make it harder to have criteria that are higher than international standards, for example tobacco control measures that go beyond the World Health Organization's Framework Convention On Tobacco Control
- Transparent: this can mean that the requirements are fixed, not discretionary. However, if regulations cannot be fixed because that is arbitrary and therefore not objective and yet they must be fixed to satisfy a possible definition of transparent, then it is not clear how regulations can be worded.
- Relevant: if this is limited to quality and consumer protection, again it would exclude the consideration of other factors such as cultural or indigenous rights, the environment etc.
- Necessary: necessity tests 'are employed to determine whether a measure that is trade restrictive is absolutely essential or if there are other less trade restrictive ways to achieve a certain end . . . These tests can severely restrain the right to regulate and be applied in unpredictable ways in dispute settlement . . . The majority of developing countries have expressed opposition to inclusion of necessity tests'.
 - Australia and New Zealand have so far unsuccessfully proposed necessity tests during the domestic regulations disciplines negotiations at the WTO,⁶²⁷ therefore they are likely to have proposed them in the TPP services chapter.
 - The U.S. and Canada are likely to oppose any necessity test for services regulations in the TPP, because they are opposing it at the WTO⁶²⁸. They note that:
 - a necessity test 'aims at assessing the need or merit of a certain measure to achieve a domestic public policy objective, irrespective of whether it has any effect on these commitments or even any effect on trade in services. This means that the regulator could be told to choose a less burdensome measure if any other Member believes that the approach taken was not "necessary" to fulfil this objective. This threatens the crucial discretion that regulators must maintain to enable them to adequately take into account legitimate policy objectives in their own jurisdiction.
 - A measure can be adopted for a number of legitimate reasons, many of which pertain to non-trade concerns, generally linked to societal norms and rules. The necessity test would allow another WTO Member to challenge the way the regulator chose to address the non-trade concern even with no demonstrated effect on trade by claiming that another measure, allegedly less burdensome, could have been taken to achieve the same policy objective. In such disagreements, the argument would come down to the legitimacy of the non-trade concern and how the regulator chose to address it rather than whether or not that measure undermines market access or national treatment commitments (which can already be addressed under GATS).
 - This situation is particularly untenable because it applies not to discriminatory measures (which would be captured by Article XVII) but to *non-discriminatory* measures, which are applied equally to foreign and domestic services or foreign and domestic suppliers. . .
 - Regulators of services need broader discretion to make judgments about the applicants appearing before them, balancing factors such as ensuring both the quality and availability of the service in light of societal norms and values. . . .

- the necessity test would be both a vague and unpredictable standard, ultimately defined by a panel rather than WTO Members, which would open the door to second-guessing experienced regulators about some of the most sensitive policy choices made by Members.’
- Others have also criticised the necessity test:
 - because ‘a measure calculated to promote the enjoyment of human rights - for example health or water safety standards - might have to consider its trade-restrictiveness as one of its decisive elements. The question arises whether this has the effect of subordinating human rights obligations to trade rules. The High Commissioner emphasizes that a human rights approach to trade sets the enjoyment of all human rights among the objectives of trade liberalization, not as an issue secondary to trade objectives.’⁶²⁹
 - Meaning ‘namely that any government regulation of a service should be "not more burdensome than necessary to ensure the quality of the service". In keeping with the necessity tests included within other WTO Agreements (notably the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures), the test would demand that the government in question prove its regulation to be the least trade-restrictive measure possible to achieve the desired result.

As it stands, this requirement issues an open challenge to all regulation by shifting the burden of proof onto the regulating government, not the service provider. Moreover, the requirement that any regulation be shown to be the least trade-restrictive possible threatens to conflict with the primary aims of public health policy, and in particular with children’s rights. Under Article 24.1 of the Convention on the Rights of the Child, children are entitled to "the highest attainable standard of health". Yet GATS VI:4 requires that government regulation should minimise restrictions on trade, not maximise health opportunities, even when -- as the WTO itself acknowledges (WTO 1999b) -- those two objectives can conflict with one another. The EU has also acknowledged the conflict between degree of trade restriction and a country’s regulatory ability, arguing against the use of ‘least trade-restrictive’ as a standard within the necessity test on the grounds that it would "unduly restrict the choice of the regulatory tools available" (European Communities 2001).⁶³⁰

It is unclear whether all the disciplines on domestic regulation would apply to all service sectors, or only those liberalized in the TPP. However, since the TPP is almost certain to liberalize services on a negative list basis, that means that even if it only applied to those which are liberalized, all future service sectors are likely to be covered.

Based on the proposals in the equivalent negotiations at the WTO,⁶³¹ the TPP may also restrict licensing fees for services to be commensurate with the cost of issuing the license and regulating and supervising the service. A number of governments at varying levels in TPP countries use licensing fees to raise revenue, including to provide health care and other services. This would no longer be possible if licensing fees in the relevant sectors are restricted to covering the costs of issuing the license and regulating the service. These governments, including sub-national governments, would need to find alternative sources of revenue or cut their funding for the service etc.

Financial services chapter

Based on past USFTAs, the TPP will liberalize financial services in a number of ways including by allowing financial institutions from the other TPP countries to enter on a negative list basis, see explanation in services chapter above.

There is likely to be a limited prudential defence which allows government measures for prudential reasons but states that ‘Where such measures do not conform with the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party’s commitments or obligations under such provisions.’⁶³² This provision is essentially the same as the WTO’s Financial Services Annex prudential defence⁶³³ which has been criticised by some experts as self-cancelling and therefore ineffective as an exception.⁶³⁴

Investment chapter

The leaked TPP investment chapter provisions are similar to those in the investment chapters of past USFTAs, other bilateral investment treaties and the proposed Multilateral Agreement on Investment. Although the leaked TPP investment chapter tries to narrow some of these obligations, some of the wording used has proved to be unsuccessful when used in other treaties which have been tested by disputes. Therefore after a brief summary of the relevant provisions which provide rights to investors from other TPP countries, some relevant disputes under other treaties which could also occur under the TPP investment chapter’s wording are provided below.

Main relevant provisions

A summary of the main relevant provisions of the leaked TPP investment chapter is below.⁶³⁵

- Definitions:⁶³⁶
 - the definition of investment which gets the protection of this chapter is broad and not exhaustive. It includes:
 - enterprises, shares, futures, production contracts, intellectual property rights, licences and any other tangible and intangible movable or immovable property.
 - bonds, debentures, other debt instruments, and loans (but does not include loans from one Party to another).
 - Investments from other TPP countries which are already in the host country at the time that TPP enters into force, or enter afterwards.
 - The definition of negotiated restructuring only includes processes where 75 per cent or more of the holders of the debt have consented to the process.
- Scope: this chapter applies to:⁶³⁷
 - government laws, regulations and policies etc¹ whether they are by the national or sub-national levels of government. This is against the recommendation of all US state-level parliaments.⁶³⁸
 - Investments from any country, even those who are not party to the TPP in restricting performance requirements
- National treatment is provided before and after the investor comes into the country on a negative list basis.⁶³⁹ See explanation for services chapter above.

¹ Based on the definition of ‘measure’ in the general definitions chapter of past USFTAs such as Peru: <https://ustr.gov/trade-agreements/free-trade-agreements>.

- Most-favoured nation (MFN) treatment is provided before and after the investor comes into the country on a negative list basis.⁶⁴⁰ This means that investments and investors from other TPP countries must be treated no less favourably than those from non-TPP countries, unless they are listed as non-conforming measures, which all the other TPP Parties must agree to.
- Restrictions on performance requirements on investors from any country: these prevent TPP countries from setting a maximum royalty for voluntary licences for IP-protected products, including medicines or other healthcare technology, environmental technology etc, or requiring investors from any country to transfer technology etc. on a negative list basis.⁶⁴¹ There are some limited exceptions in addition to the negotiated schedules, however two⁶⁴² of these exceptions copy much of the wording from the limited WTO health and environment exceptions which have been extremely difficult to use, see exceptions chapter analysis below.
- Based on the Peru-USFTA, it is possible to have an exception to some of the investment chapter obligations for measures according rights or preferences to indigenous communities.⁶⁴³ However, these exceptions via non-conforming measures are only allowed to apply to national treatment, most-favored-nation treatment, performance requirements, senior management and board of directors, market access and local presence obligations,⁶⁴⁴ not the other provisions of the services and investment chapters which can be problematic for human rights, see above and below.
- Minimum standard of treatment: this requires TPP governments to treat investments from other TPP countries fairly and equitably.⁶⁴⁵
 - This has been interpreted by some^m investment tribunals as a standstill on laws and regulations, i.e. no new laws or regulations and no changing them if this is adverse to the foreign investor.⁶⁴⁶ This interpretation has been described by the United Nations Conference on Trade and Development as ‘nearly impossible to achieve’.⁶⁴⁷ If this interpretation is used, it would severely restrict TPP governments’ ability to regulate, for example to ban a substance that is newly found to be dangerous to health or the environment.
 - There is a wide range of other interpretations which governments have also found it difficult to comply with. This can be seen in the statistics for disputes under U.S. trade or investment treaties where:⁶⁴⁸
 - 74 per cent of the time when investors win, there has been a violation of fair and equitable treatment (FET)
 - FET has been found to have been violated in 81% of the cases won by investors when they allege a violation of FET.
 - FET has been used more frequently recently.⁶⁴⁹
 - Annex II-A attempts to narrow the meaning of fair and equitable treatment. However, this is the same wording as was used in the annex of the investment chapter of the Central America-USFTA (CAFTA). This was tested in two cases brought by investors and both times the investment tribunal failed to consider this annex and instead interpreted fair and equitable treatment broadly and the governments lost.⁶⁵⁰
- Expropriation: the expropriation provision requires the payment of fair market value compensation and interest at a commercially reasonable rate even where the expropriation is for a public purpose and non-discriminatory.⁶⁵¹ The expropriation can be direct i.e. nationalisation where the government takes ownership of the investment; or indirect, where a government action or series of actions equivalently reduces the value of the investment without taking ownership of it.⁶⁵²

^m These do not have precedent value, but may be followed,
<http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>

- There is an attempt to narrow this in Annex II-B. Assuming that the ISDS tribunal actually takes these annexes into account (as they did not for FET, see above), they still do not seem to be sufficient to safeguard all regulatory actions that TPP governments may need to take, including for human rights reasons. This is because the wording in the last paragraphⁿ may not be sufficient as:
 - Each tribunal is ad hoc and so each may feel that it is the ‘rare circumstances’ where the action does constitute expropriation. Of the 13 ISDS cases brought under US treaties since this ‘rare circumstance’ provision has been added to them,⁶⁵³ 11 out of 13 still alleged expropriation and one more of the 13 seems likely to (based on the news report where the investor calls it expropriation). Of the 5 out of these 13 cases which have been resolved so far: 1 was settled, 2 were dismissed for jurisdictional reasons without getting to the stage to consider the expropriation claim, 1 investor won (and had dropped the expropriation claim part way through the proceedings) and the other investor won but expropriation was rejected for a different reason (not because of the rare circumstances wording). Therefore the addition of ‘rare circumstances’ does not seem to have noticeably discouraged investors from claiming expropriation when they sue (with the chilling effect that can entail, see Introduction) and it has not yet caused an expropriation claim to be rejected.
 - ‘non-discriminatory’ could prohibit greater regulation of more dangerous industries such as nuclear power generation compared to wind power generation
 - ‘legitimate’ has been interpreted in a WTO dispute to mean widely recognized state practice.⁶⁵⁴ If this interpretation is followed in a TPP investment dispute, this would mean that best practice regulations that have not yet been widely adopted such as plain packaging for tobacco may still be expropriation.
 - ‘public welfare’ is a term which has not been used in the WTO rules,⁶⁵⁵ however one dictionary defines it as state aid to the poor.⁶⁵⁶ If this is the interpretation followed in a TPP investment dispute, it would only cover monetary handouts to poor people, not laws and regulations to protect the rights of indigenous peoples etc.
- There is an exception for compulsory licences and other limitations and revocation of intellectual property rights.⁶⁵⁷ However, this unnecessarily makes it only available where it is consistent with the World Trade Organization’s intellectual property rules (TRIPS) and the intellectual property chapter of the TPP. This is problematic as TRIPS is vague as to the amount of royalties that has to be paid when a compulsory licence is issued, stating only that the remuneration has to be adequate in the case of patents.⁶⁵⁸ This has been interpreted as a 0.5 per cent royalty by Indonesia⁶⁵⁹ which has not been challenged at the WTO. By requiring it to be consistent with TRIPS in the investment chapter, it now opens it to challenge by patent owners under ISDS (whereas only governments can sue to interpret TRIPS⁶⁶⁰), for monetary compensation (whereas at the WTO, if a government loses a dispute for example by having a law which sets compulsory licence royalties too low, it just changes its law into compliance and is not required to pay any monetary penalty⁶⁶¹), at tribunals which have been found to be favourable to investors, see ISDS below. A patent owner is already suing under the North American Free Trade Agreement (NAFTA) claiming a violation of TRIPS, see Eli Lilly case below.

ⁿ ‘Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances’

- The transfers provision requires free movement of capital related to these investments in and out of TPP countries, even in a financial crisis.⁶⁶²
 - Article CCC.3 attempts to add an exception to this but both versions have been criticised as having ‘limitations and neither would sufficiently safeguard a range of appropriate measures enacted to prevent or mitigate financial instability’⁶⁶³ as it is only for:
 - serious balance of payments or external financial difficulties or threat thereof; or
 - where, in exceptional circumstances, payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management.
 - So it could not be used to stem asset bubbles or the build-up of debt in a TPP economy.
 - Furthermore:
 - it has a number of unnecessary procedural requirements that make it more difficult to use including a necessity test which has been difficult to satisfy in WTO jurisprudence⁶⁶⁴.
 - The second (alternative) proposed safeguard version has three additional conditions that ‘would render the safeguard to be of little use in preventing or mitigating financial crises’⁶⁶⁵:
 - capital controls cannot apply to transfers associated with equity which would have prevented some measures used by Iceland in its current financial crisis
 - capital controls can only be for one year, even though the IMF has required Iceland to use them for 6 years in the current financial crisis and many developing countries have used them for 3 years in the current financial crisis
 - capital controls cannot restrict flows of capital (eg by banning the movement) as only price-based regulations are allowed. This price-based requirement has been proposed despite the IMF’s recognition that price-based regulations are not always enough and sometimes quantitative limits are needed and the IMF’s Iceland program has had quantity-based capital outflow regulation.
- Chile is also attempting to obtain some exceptions to this free movement of capital requirement for itself, but these have still not been agreed to by all other TPP Parties.⁶⁶⁶
- Investor-to-state dispute settlement (ISDS):⁶⁶⁷ This allows investors from other TPP countries to sue the host government for violating the substantive obligations above. (States cannot initiate disputes against investors via this chapter⁶⁶⁸). It has been agreed to by all TPP Parties except Australia which noted it could agree to it under certain conditions.^o Under this system:
 - Unlimited amounts of monetary damages can be awarded.⁶⁶⁹ Last year an investor won US\$50 billion in an ISDS award when a government violated an expropriation provision and the government was given 180 days to pay this.⁶⁷⁰

^o Footnote 29 shows Australia is still seeking to be excluded from ISDS, but since the 2012 leak, the political party in government in Australia has changed and it is now willing to drop its proposed exception from ISDS if certain conditions are met. It is not clear why other TPP Parties are not also trying to be excluded from ISDS.

- Any applicable interest can also be awarded.⁶⁷¹ This has been interpreted as compound interest, compounded monthly, at commercial interest rates from the date of the government measure in a number of ISDS awards. The interest alone can be US \$500 million.⁶⁷²
- Legal fees can be high with law firms charging \$1000 an hour, for example the Philippines has spent US\$58 million defending itself against one investor.⁶⁷³ One study found that even when governments win, they still have to pay their own costs in 70% of the cases.⁶⁷⁴ However when investors win they only have to cover their own costs in 40% of the cases.⁶⁷⁵ Some governments find the legal fees so unaffordable, they are willing to settle the dispute by dropping their proposed law, as Uruguay was going to do for its tobacco control measures until Bloomberg funded their defence, see Chilling Effect in Introduction above.
- There are insufficient conflict of interest rules given the well documented problems with the system⁶⁷⁶.
 - For example: The investor can choose to have the case heard at the International Centre for Settlement of Investment Disputes (ICSID) and the government cannot object.⁶⁷⁷ An arbitrator in an ICSID case was on the board of directors of the biggest shareholder of the investor bringing the case. She did not disclose this or recuse herself and the investor won. When the government found out and tried to get annulment of the award, the tribunal refused holding that (1) the arbitrator's exercise of independent judgment was not actually impaired, (2) it would be unjust to deny the claimants the benefit of the award due to the arbitrator's failures, and (3) the lengthy proceedings should "come to an end".⁶⁷⁸
 - There are no additional conflict of interest rules to prevent this from occurring again in the leaked TPP investment chapter.
- A study of all publicly available investment treaty awards to May 2010 found that tribunals gave US investors a broad interpretation of their jurisdictional rights 98% of the time.⁶⁷⁹ The USA is a TPP Party, so their investors could sue under the TPP investment chapter.
- There is an exception for sovereign debt restructuring.⁶⁸⁰ However:
 - this only applies if 75 per cent or more of the debt holders have agreed to the restructuring.⁶⁸¹ It is not always possible to get such a high participation rate. For example Argentina's 2010 sovereign debt restructuring only had a 66% participation rate⁶⁸² and so would not have qualified under this Annex. And
 - Investors can still sue under ISDS claiming that the sovereign debt restructuring violated national treatment or MFN. However, providing national treatment in sovereign debt restructuring 'can be a concern because there may be considerable economic justification for a differential treatment. Some economists have concluded that "the ability to treat domestic and foreign creditors differently is a necessary policy option for governments in a financial crisis" . . .
- Giving priority to servicing domestic debt may be necessary so as to revive a domestic financial system, provide liquidity and manage risk during a recovery. Without such measures a banking crisis can ensue where massive outflows of foreign exchange and/or bank runs can occur. In both the Russian and Argentina cases, this argument underlay the more favourable treatment granted to domestic bondholders . . . There is also a clear rationale to give priority to local bondholders to retain the ability of economic actors to pay wages, salaries and pensions in order to maintain livelihoods, enable domestic demand and avoid mass protest⁶⁸³

- Only Australia, Canada, Mexico and New Zealand have exempted their governments' decisions about whether to allow an investment from ISDS and state-to-state dispute settlement (SSDS).⁶⁸⁴ It is unclear why other TPP Parties were not also given this safeguard.
- Only Canada is attempting to obtain a cultural exception to ISDS⁶⁸⁵ and this is:
 - Only partial (for cultural industries which are basically exhaustively defined as the book/magazine/newspaper publishing sector, production or sale of videos/films or music and TV and radio).
 - Not yet agreed by all TPP Parties.

It is unclear why other TPP Parties are not also still seeking safeguards for culture.

- Only Australia is attempting to exempt certain listed health measures from ISDS (presumably if it drops its attempt to be entirely excluded from ISDS), however not all TPP Parties have agreed to it yet.⁶⁸⁶ It is unclear why other TPP Parties are not also still trying to obtain safeguards to ISDS for health.
- Investment and environment, health and other regulatory objectives:⁶⁸⁷ this purported safeguard is actually useless because it only allows measures that are otherwise consistent with this investment chapter. Since the other provisions of the investment chapter have been used to successfully challenge various environment and health etc measures under other investment treaties, see disputes below, this is unlikely to be effective.
- Counterclaims by the government that the investor has broken the host country's law and therefore cannot sue under ISDS, or should have its damages reduced by the amount of harm the investor has caused, are unlikely to be allowed under the TPP, especially if the investor has made the investment legally and only subsequently broke the law, for example by polluting the environment. Counter-claims are needed because a number of governments who have punished foreign investors who have broken the law, have then been successfully sued by the law-breaking investor under these investment provisions, see for example the Occidental case⁶⁸⁸ where even though the ISDS tribunal agreed that: Occidental had broken the law in Ecuador and Ecuador's law allowed the punishment taken by the Ecuadorian government, it nevertheless awarded Occidental US\$2.4 billion under provisions equivalent to those which have been agreed in the leaked TPP investment chapter. I.e. pay the law breaker/polluter. However, a number of provisions are needed to increase the chances of government counter-claims being allowed⁶⁸⁹ and these are not all present in the leaked TPP investment chapter. Furthermore, no counter-claim has ever been successful under ISDS.

Some relevant investment disputes

'The international investment regime has generally not been receptive to the application of human rights standards to international investment disputes, declining in almost all cases to examine specific provisions of international human rights instruments invoked by the parties, even in cases of violations of the human rights of the claimant investor.'⁶⁹⁰

A free database covering all known investment treaty cases, up to May 2010 which can be searched by policy area for example human rights or environment is available at: <http://www.iiapp.org/>. A summary of some of the relevant cases is below:

Decided cases:

- *Cochabamba (Bechtel v Bolivia): privatisation reversal*: 'In 1999, the Bolivian Government conducted an auction of the Cochabamba water system. . . Shortly afterwards, water tariffs increased with a view to expanding and upgrading the water network. However, the company shortly introduced increases of up to 35 per cent and cut people off from water connections if they did not pay their bills. This in turn led to violent demonstrations and, ultimately, the departure of the water

company and a reversal of the Government's decision to liberalize the water supply. The Government assumed responsibility for the provision of water services, but services still require enhancement. The foreign investor since commenced proceedings against the Bolivian Government before the International Centre for the Settlement of Investment Disputes under the bilateral investment agreement between the Netherlands and Bolivia.⁶⁹¹ 'The reversal of the decision to liberalize water services is consistent, under the circumstances, with the Government's obligation to ensure access to an adequate supply of safe drinking water as a component of the right to health.'⁶⁹² 'Battered by several years of bad publicity, Bechtel settled the \$50 million lawsuit for a symbolic amount of about 30 cents on January 19, 2006.'⁶⁹³ While Bolivia was fortunate in the outcome of this case, other countries who have reversed privatisations have not been so successful. See for example *Eureko v Poland* in the privatisation section of the Introduction.

- *Ethyl Corp v. Canada: ban of dangerous chemical*: 'in 1997, the Government of Canada had introduced a ban on the import of the additive methylcyclopentadienyl manganese tricarbonyl (MMT). The Government justified the ban primarily on the ground that it had not adequately assessed toxic qualities of MMT. Ethyl Corp., the only manufacturer of the substance in the world, commenced proceedings against the Government of Canada including a claim that the introduction of the ban was an expropriation of its investment or, alternatively, that it was "tantamount" to expropriation of its investment. The parties subsequently settled the proceedings and the Canadian Government withdrew the legislation, paid \$13 million for costs and lost profits while the legislation was in place and gave Ethyl Corp. a letter authorizing the use of MMT, stating that there was no scientific evidence of any health risk or any impact on car exhaust systems.'⁶⁹⁴
- *SD Myers v Canada: Toxic Chemical Bans in Canada*: In 1995, Canada banned the export of polychlorinated biphenyl, or PCB, wastes to the United States in order to assess its compliance with the Basel Convention. PCBs are a group of man-made chemicals that were found to pose serious risks to human health and the environment. In response to the ban, S.D. Myers, Inc., an Ohio-based corporation that processes and disposes of PCB waste, filed an investor-state claim against Canada under NAFTA. While Canada defended its measures as justified by environmental considerations, and despite the fact that Canada – as a signatory of Basel Convention, the multilateral environmental treaty on toxic-waste trade – was committed to banning the trade of toxics, the tribunal ruled in favor of SD Myers finding a violation of minimum standard of treatment, among other provisions and ordered Canada to pay US\$5.6 million for the lost profits the investor would have made during the 16 months of the ban.⁶⁹⁵
- *Metalclad v Mexico: Toxic Waste Facility*: When a municipal government in Mexico refused to grant a construction permit for a toxic waste facility unless U.S. firm Metalclad cleaned up existing toxic waste problems, Metalclad launched an investor-state dispute under NAFTA in 1997. The tribunal ruled that the denial of the construction permit and the creation of an ecological reserve were tantamount to an "indirect" expropriation and that Mexico violated NAFTA's obligation to provide foreign investors with a "minimum standard of treatment," because the firm was not granted a "clear and predictable" regulatory environment. The Mexican government was ordered to pay Metalclad US\$16.2 million.⁶⁹⁶
- *Occidental v Ecuador: Oil Exploration*: In 1999, Occidental Petroleum Corporation signed a twenty-year contract with Ecuador for oil exploration and production rights in the Amazon forest. In accordance with Ecuador's laws on oil production, the agreement explicitly prohibited Occidental from selling its oil production rights without government approval, thereby providing the government officials the opportunity to evaluate any companies seeking to produce oil within Ecuador's national boundaries. The country had good reason to be cautious of foreign oil companies. For three decades, Texaco, which Chevron later acquired in 2001, drilled for oil in Ecuador's Amazon rainforest, during which time it dumped over 18 billion gallons of toxic waste into the ecosystem.⁶⁹⁷

Just one year later, however, Occidental violated its contractual agreement (and Ecuadorian law) when it sold 40 percent of its production rights to Alberta Energy Company (AEC) without formally informing, or seeking authorization from, the Ecuadorian government. In response, Ecuador terminated its contract with Occidental, which prompted Occidental to initiate investor-state proceedings under the U.S.-Ecuador Bilateral Investment Treaty.⁶⁹⁸ Although the investor-state tribunal agreed that Ecuador was within its legal rights to annul the contract, the international tribunal ultimately sided with Occidental and fined Ecuador nearly U.S. \$1.8 billion (U.S. \$2.4 billion including compound interest). The panel justified their decision by using an extremely broad interpretation of “fair and equitable treatment,” and “indirect expropriation.”⁶⁹⁹

Ongoing Cases

- *Eli Lilly v Canada: patent cancellation:* after Canadian courts invalidated some of its patents for failure to comply with Canadian law, Eli Lilly is suing for US\$481 million under NAFTA claiming violations of fair and equitable treatment and expropriation.⁷⁰⁰
- *Lone Pine v Canada: Fracking in Quebec:* In September 2013, Lone Pine Resources, a U.S. oil and gas firm, filed its notice of arbitration against Canada for U.S. \$250 million under the North American Free Trade Agreement (NAFTA).⁷⁰¹ The case involved a bill passed by Quebec’s National Assembly that instituted a moratorium on shale gas exploration and development, including fracking, under the St. Lawrence River.⁷⁰² According to Lone Pine representatives, the Quebec government acted “with no cognizable public purpose,” and violated the Enterprise’s “valuable right to mine for oil and gas under the St. Lawrence River,” despite the fact that the fracking process is known to contaminate drinking water, pollute the air, and cause earthquakes.⁷⁰³ Lone Pine, however, argues that its loss of a “stable business and legal environment” violated its minimum standard of treatment and should be counted as expropriation.⁷⁰⁴
- *Renco v Peru: metal smelter pollution:* In 1997, Doe Run Peru—a Peruvian subsidiary of the U.S.-based company, Renco Group Inc.—took control of a metallic smelter and refinery complex in La Oroya, Peru. The pollution in La Oroya is so bad that: 99.1 percent of La Oroyan children had lead poisoning, ‘Cadmium levels that exceeded WHO recommendations by as much as 40 times. “Cadmium damages the lungs, kidneys, and digestive tract and is considered a possible carcinogen”, sulfur dioxide levels are up to 10 times WHO’s recommended limits^p and ‘Peru’s Constitutional Court ordered the health ministry to declare a state of emergency in La Oroya’.⁷⁰⁵ As part of its contractual and legal obligations, Doe Run was required to implement a series of environmental clean-up projects in La Oroya, including the installation of new sulfuric acid plants to help combat the pollution produced by its complex. The company, however, had twice failed to meet its contractual deadlines and had twice been granted extensions by Peruvian authorities to complete its environmental remediation obligations. When the Peruvian government failed to give Doe Run a third extension, Renco Group Inc. retaliated on behalf of its subsidiary by initiating an investor-state case against Peru under the U.S.-Peru FTA. The corporation claimed that the government’s failure to grant Doe Run yet another time-consuming extension violated provisions in the U.S.-Peru FTA, including minimum standard of treatment and indirect expropriation protections. Instead of fulfilling its legal obligations to clean up the pollution caused by its metallic smelter and refinery complex, Renco Group Inc. is demanding U.S. \$800 million from Peruvian taxpayers.⁷⁰⁶
- *Vattenfall v Germany: nuclear energy and coal fired power plant:* Following Japan’s Fukushima Daiichi nuclear disaster of 2011, and in the midst of significant public pressure, the German Parliament made a decision to phase-out its nuclear power program and shift toward cleaner renewable energy sources. In response, Vattenfall, a Swedish energy firm with investments in German nuclear energy, filed a request for arbitration against Germany at the World Bank’s

^p ‘Sulfur dioxide “damages the respiratory system, aggravates existing respiratory illnesses (especially bronchitis), and diminishes the capacity of the lungs to expel foreign particles such as heavy metals. It leads to a higher mortality rate, particularly when combined with the presence of elevated levels of particulate material.”’

International Centre for Settlement of Investment Disputes (ICSID).⁷⁰⁷ Citing the fair and equitable treatment provisions of the Energy Charter Treaty, a trade and investment agreement for the energy sector, Vattenfall is now seeking US \$4.6 billion in damages from the German government for future losses that it may sustain during the nuclear phase-out.⁷⁰⁸

It is important to note that this is Vattenfall's second investor state case against Germany. In 2009, Vattenfall challenged environmental restrictions (including for climate change reasons) on coal fired power plants.⁷⁰⁹ The dispute was settled in 2011 when the environmental requirements were weakened and Vattenfall was granted a modified water-use permit.⁷¹⁰

- *Veolia v Egypt: increase in minimum wage:* 'Veolia concluded a contract in 2001 for waste management in the Egyptian city of Alexandria. . . . the 15 year contract was terminated early in 2011, and Veolia now contends that this move – and Egypt's broader treatment of the concessionaire – has served to breach protections contained in the France-Egypt bilateral investment treaty. . . the company is understood to complain that changes to local labour laws – including recent increases in minimum wages – have impacted negatively on the company despite contract provisions designed to buffer the concessionaire from the financial implications of any such legal changes.'⁷¹¹
- See also the Chevron case in the Introduction.

Comments by human rights bodies

Comments by human rights bodies	TPP provision
High Commissioner for Human Rights: ⁷¹²	
'a human rights approach emphasizes that liberalization should not go so far as to compromise State action and policy to promote and protect human rights.'	As noted above, human rights impact assessments do not appear to have been done for the TPP, so it is not clear how sufficient exceptions to liberalisation have been proposed and agreed given the negative list liberalisation in this chapter, see above
'Investment agreements should retain greater flexibility for States to regulate and control some forms of investment - particularly short-term and volatile investment - that can have negative effects on economic performance and reduce the available resources needed to promote human rights'	The leaked TPP investment chapter described above has the equivalent provisions to investment agreements, however it does not have the flexibility for regulation recommended and such flexibility cannot be expected to be agreed in the exceptions chapter either, see below
'The flexibility to introduce new regulations to promote and protect human rights. There is mounting concern that tribunals adjudicating investor-to-State disputes are increasingly interpreting expropriation provisions broadly in ways that could threaten States' ability and willingness to introduce new regulations to protect the environment and human rights. It will be important to safeguard the ability to introduce new measures to promote and protect human rights within interpretations of expropriation provisions. . . . Introducing new regulations to promote human rights is an important aspect of States' duty to fulfil human rights. As economic, social and political conditions change, it is appropriate that in response States might introduce appropriate regulations strengthening protection for human	As noted in the cases above under equivalent provisions to those which have been agreed in the leaked TPP investment chapter, there is insufficient flexibility in the leaked TPP investment chapter to allow the introduction of new regulations to protect human rights. In particular, the recent increase in the successful use of the FET provision in the investment chapter which has been interpreted as a standstill on laws and regulations in some cases could prevent the introduction of new measures to protect human rights, see analysis above.

Comments by human rights bodies	TPP provision
rights. However, there is increasing concern about investors' use of "expropriation provisions" to protect investments against new measures to protect the environment and to promote human rights. . . That being so, it will be important to safeguard measures directed towards improving respect for human rights within such interpretations.'	
'Broad interpretations of expropriation provisions could affect States' capacity and willingness to regulate for health, safety or environmental reasons. Therefore interpretations, or even explicit declarations by parties to agreements, that recognize and protect States' responsibility to fulfil human rights are encouraged;'	The annex to narrow the interpretation of expropriation in the leaked TPP investment chapter is unlikely to be sufficient, see above. There have been no safeguards in past USFTAs that sufficiently recognize and protect States' responsibility to fulfil human rights, see exceptions chapter analysis below
'There is a need to balance the strengthening of investors' rights in investment liberalization agreements with the clarification and enforcement of investors' obligations towards individuals and communities;'	While the leaked TPP investment chapter does strengthen investors' rights, it has no obligations on investors.
While Ethyl and Metalclad 'focused on environmental protection, government action in relation to chemicals and toxic wastes has flow-on effects in relation to the enjoyment of human rights such as the right to health or the right to water. . . . To the extent that broad interpretations of expropriation provisions could affect States' willingness or capacity to introduce new measures to promote and protect human rights, then the use and interpretation of expropriation provisions is a cause of concern. Specifically, it will be important to avoid a situation where the threat of litigation on the basis of broadly interpreted expropriation provisions has a "chilling effect" on government regulatory capacity, conditioning State action to promote human rights and a healthy environment by the commercial concerns of foreign investors.'	An expropriation provision has been agreed in the leaked TPP investment chapter and the annex to narrow its interpretation is unlikely to be sufficient, see above. The threat of being sued by investors under equivalent provisions has successfully chilled a number of governments from regulating, see Introduction.
'Ensuring States' right and duty to regulate. States should ensure that in investment agreements they maintain the flexibility to use certain policy options to promote and protect human rights. Similarly, States should maintain the flexibility to promote cultural diversity and to implement special measures to protect vulnerable, marginalized, disadvantaged or poor people. Moreover, it is important to highlight the need for	There is insufficient flexibility in the leaked TPP investment chapter including to be able to introduce new regulations to promote and protect human rights with confidence that they will not be challenged by foreign investors, see above.

Comments by human rights bodies	TPP provision
States to introduce new regulations to promote and protect human rights in response to changing conditions and knowledge of health, water, education, environmental and other issues that affect the enjoyment of human rights.’	
‘wealthy countries should meet their commitment to provide 0.7 per cent of GNP as official development assistance and to ensure that such assistance is directed towards development and poverty alleviation in poor countries. In the context of negotiations over new investment agreements, it is strongly encouraged that such targets be included among the obligations in investment agreements.’	There is no such target in the leaked TPP investment chapter
Office of the High Commissioner for Human Rights (OHCHR):	
<p>‘Broad interpretations of expropriation provisions could have direct consequences for regulations intended to promote and protect human rights. Governmental regulations in relation to chemicals and toxic wastes have flow-on effects in relation to the enjoyment of human rights such as the right to health or the right to water and provide an important instance of fulfillment of States obligation to fulfil human rights. . . If investors use expropriation provisions to wind back environmental or human rights regulations, this could violate the human rights principle of non-retrogression.</p> <p>To the extent that broad interpretations of expropriation provisions could affect States’ willingness or capacity to introduce new measures to promote and protect human rights, then the use and interpretation of expropriation provisions is a cause of concern. Specifically, it will be important to avoid a situation where the threat of litigation on the basis of broadly interpreted expropriation provisions has a “chilling effect” on government regulatory capacity, conditioning State action to promote human rights and a healthy environment by the commercial concerns of foreign investors.’⁷¹³</p>	An expropriation provision has been agreed in the leaked TPP investment chapter and the annex to narrow its interpretation is unlikely to be sufficient, see above. The threat of being sued by investors under equivalent provisions has successfully chilled a number of governments from regulating, see Introduction.
‘A human rights approach to investment: While human rights should not provide a shield to protect unwarranted protectionism, administrative failures or unfair treatment, neither should they be made subject solely to an economic calculus.	The outcome of negotiations of equivalent provisions in the TPP investment chapter can be seen in the leaked TPP investment chapter above and it is clear that human rights and environmental considerations have not been placed centrally in the

Comments by human rights bodies	TPP provision
Consequently, it will be important to ensure that all discussions concerning a WTO investment agreement place human rights and environmental considerations centrally within their objectives and outcomes. ⁷¹⁴	outcomes as there are no effective exceptions for human right or environmental considerations and there are unlikely to be any in the TPP exceptions chapter, see below
‘Considering that when not carefully regulated, foreign direct investment – as a key element of the globalization process, one of the main modes of delivering trade in services and a central activity of transnational corporations – can have a detrimental effect with regard to the enjoyment of human rights.’ ⁷¹⁵	Attempts to regulate foreign direct investment have been successfully challenged under equivalent provisions to those which have been agreed in the leaked TPP investment chapter, see above.
Comments by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	
<p>international investment agreements ‘allow transnational corporations to reduce States’ policy space and have been instrumental in increasing the influence of transnational corporations on States’ ability to institute public health policies.’⁷¹⁶</p> <p>‘International investment agreements benefit transnational corporations as investors because such corporations are granted rights protective of their investments in the host State, such as the right to fair and equitable treatment. Transnational corporations also have the right to initiate disputes before international commercial arbitration tribunals for alleged violations by the host State and for State infringement on the corporation’s profit-making activities or potential profits.’⁷¹⁷</p>	<p>These concerns are borne out in the agreed text in the leaked TPP investment chapter which has the same provisions as are in international investment agreements, which is likely to restrict policy space, see above.</p> <p>All TPP Parties have agreed to fair and equitable treatment (FET) in the leaked TPP investment chapter and it gives transnational corporations the right to initiate disputes before international commercial arbitration tribunals for alleged violations by the host State and for State infringement on the corporation’s profit-making activities or potential profits, see above</p>
<p>‘States should also ensure that their ability to implement human-rights-friendly laws is not in any way hindered by the agreement.’⁷¹⁸</p> <p>BITs should ensure that States have the right to change laws and policies or adopt new laws in furtherance of human rights, regardless of the impact of such change on investor rights.’⁷¹⁹</p> <p>In financial and political crises ‘States may need to realign their economic and social policies within the changed climate. Although such changed policies may be in the public interest, the altered policies might threaten investments and prevent States from fulfilling their</p>	<p>These safeguards are not present in the leaked TPP investment chapter. Eg FET has been agreed to in the leaked TPP investment chap and it has been interpreted as preventing new laws/amendments of laws or policies if they harm the foreign investor, see above. The annex in the leaked TPP investment chapter has proven to be unsuccessful in narrowing the interpretation of FET, see above.</p> <p>Since past USFTAs also do not have them, eg in the exceptions chapter, see below, it is extremely unlikely they will be in the TPP.</p>

Comments by human rights bodies	TPP provision
<p>obligations under the international investment agreement.’⁷²⁰</p> <p>BITs should ‘Allow host States to modify existing laws, or adopt new laws... in times of crisis affecting the entire State’⁷²¹</p>	
<p>‘Until international law can hold transnational corporations directly accountable for their violations of human rights, States should incorporate provisions in international investment agreements that enable States to hold transnational corporations liable for such violations under the domestic law of either the home or the host State.’⁷²²</p>	<p>These provisions are not in the leaked TPP investment chapter, see above and when countries have tried to hold transnational corporations accountable for their violations of human rights, they have been sued under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see Chevron case in ‘obligation to protect’ in the Introduction</p>
<p>‘International investment agreements should include provisions that: (a) Confer human rights obligations on host and home States and investors;’⁷²³</p>	<p>The leaked TPP investment chap does not confer human rights obligations on host and home States and investors and since past USFTAs also do not have them, eg in the exceptions chapter, see below, it is extremely unlikely they will be in the TPP.</p>
<p>‘The current system of investor-State dispute settlement also suffers from bias and conflicts of interest. The dispute settlement is controlled by a small clique of arbitrators and lawyers, and the same person may be counsel, arbitrator and adviser to an investor or State at different times. Many arbitrators share close links with business communities and may be inclined towards protecting investors’ profits. This can affect the independence and neutrality of arbitrators, is contrary to the principle of fairness and further compromises the integrity of arbitration under international investment agreements. Annulment applications by States on the ground of bias have in many instances been rejected . . . An issue of bias also arises where an arbitrator has an interest in the investor’s business. In one such case, the State’s application to annul the award was rejected because there was “no material effect on the final decision of the Tribunal, which was in any event unanimous”’⁷²⁴</p> <p>‘Arbitrators should not be allowed to practise as counsel or advisers to investors or States in cases of arbitration.’⁷²⁵</p> <p>‘The Special Rapporteur recommends that investor-State dispute settlement systems should be made transparent and be modified to: (a)</p>	<p>The leaked TPP investment chapter continues to allow the conflicts of interest seen in past ICSID etc cases with no provisions to ensure arbitrators are unbiased, see above.</p>

Comments by human rights bodies	TPP provision
Ensure that arbitrators are unbiased; ⁷²⁶	
‘The amount of compensation awarded runs into millions of dollars and is an additional blow to developing States, especially those undergoing or recovering from crisis. For example, in <i>Al-Kharafi v. Libya</i> , the claimant was awarded more than \$935 million. The enormous size of such awards can have a negative effect on the State’s ability to implement health policies. For example, in <i>CME v. Czech Republic</i> , the compensation awarded to the investor was equal to the entire health budget of the State. States may also have to bear not only legal costs incurred by them during arbitration but also those incurred by the successful claimant. Even where States are successful, they may have to pay a heavy fee for the arbitrators.’ ⁷²⁷	The leaked TPP investment chapter sets no cap on the maximum amount of monetary damages that can be awarded, despite Russia having to pay US\$50billion in an ISDS award under provisions equivalent to those which have been agreed in the leaked TPP investment chapter, see above. Statistically States usually still have pay their own costs when they win and there is nothing in the leaked TPP investment chapter to ensure that States have their arbitration and legal costs paid when they win, see above.
‘Arbitration should also be conducted in host States, to facilitate access by affected communities.’ ⁷²⁸	There is nothing to require the arbitration to be held in the host state in the leaked TPP investment chapter. ⁷²⁹
10 UN experts	
‘There is a legitimate concern that both bilateral and multilateral investment treaties might aggravate the problem of extreme poverty, jeopardize fair and efficient foreign debt renegotiation, and affect the rights of indigenous peoples, minorities, persons with disabilities, older persons’ ⁷³⁰	The TPP investment chapter provisions outlined above do appear to have the potential to have these effects and there are insufficient safeguards in the leaked TPP investment chapter or in the exceptions chapter of past USFTAs, see below.
‘Investor-state-dispute settlement (ISDS) chapters in BITs and FTAs are also increasingly problematic given the experience of decades related arbitrations conducted before ISDS tribunals. The experience demonstrates that the regulatory function of many States and their ability to legislate in the public interest have been put at risk.’ ⁷³¹	This can be seen in the ISDS cases above and there are insufficient safeguards in the leaked TPP investment chapter or in the exceptions chapter of past USFTAs, see below.
‘ISDS chapters are anomalous in that they provide protection for investors but not for States or for the population. They allow investors to sue States but not vice-versa.’ ⁷³²	The leaked TPP investment chapter only allows the investor to sue under ISDS, States cannot sue the investor under the investment chapter. ⁷³³ If States try to enforce their domestic laws on investors, they can be successfully sued under ISDS by investors, eg see <i>Occidental</i> case above.

Comments on the MAI

Specific comments on the MAI	Equivalent provision in TPP leaked investment chapter?
<p>The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission On Human Rights requested two experts to analyse ‘the Multilateral Agreement on Investment (MAI) from a human rights perspective, and to consider ways to ensure that future negotiations on the Agreement or analogous agreements or measures take place within a human rights framework.’⁷³⁴ They noted that:⁷³⁵</p>	<p>Although the MAI was being negotiated amongst OECD countries,⁷³⁶ it is relevant because ‘aspects of the draft provisions that were at the core of the MAI were borrowed from earlier contexts, such as the North American Free Trade Agreement (NAFTA) and bilateral treaties (BITs), in which human rights questions remain important.’⁷³⁷ The equivalent provisions (eg FET, expropriation, ISDS) are also in the TPP leaked investment chapter.⁷³⁸</p>
<p>‘Concerning substantive matters, the MAI can be criticized both on the basis of the general and the specific. Regarding the former . . . the treaty proposed to place fairly extensive restrictions on domestic activity with regard to investment, which would amount to the imposition of serious limitations on the sovereign ability of States to respond to domestic concerns, including those in the areas of labour, the environment and human rights. In this way, States faced the danger of being transformed into the handmaidens of investment as opposed to protectors of the people - their primary human rights obligation - and in the process forced to contravene or to relegate to a secondary position the obligations contained in a host of international human rights agreements. Lastly, the dispute resolution and expropriation provisions respectively raised concerns about the lack of transparency and the imposition of unjustifiable restrictions on host countries’ freedom of action in the interests of development.’</p>	<p>The leaked TPP investment chapter has equivalent expropriation, dispute settlement and other provisions from the MAI, see above</p>
<p>‘To conclude, the MAI as it stood at the termination of negotiations in December 1998 ignored several dimensions of a State’s affirmative obligations to respect, promote and protect human rights. Investment cannot be promoted at the expense of the healthy growth of the human being, or of sustainable human development. Economic growth and liberalization should not occur at the expense of governmental power to protect all persons within its territory. . . . Additionally, it could be said to amount to a violation by the respective member States of the OECD of the obligations to respect, protect and fulfil international human rights standards. The processual aspects through which the draft treaty was conceived, elaborated and</p>	<p>The leaked TPP investment chapter has equivalent provisions to those in the MAI at the time negotiations were terminated,⁷³⁹ see above. It is unlikely that there will be sufficient exceptions for human rights in the TPP, see exceptions chapter analysis below.</p>

Specific comments on the MAI	Equivalent provision in TPP leaked investment chapter?
eventually debated confirm the worst for those fearing a globalized world in which the benefits of development are localized in the hands of a powerful coterie of economic actors, excluding the vast majority of humankind. In form and in substance, the MAI represented the ultimate negation of all the basic principles of fundamental international human rights.’	
‘the MAI sought to boost significantly the rights of investors without introducing any countervailing obligations. In short, its vision conceptually privileged the “rights of investors” while negating investors’ responsibilities to the individual or the State.’	There are no countervailing obligations on investors in the leaked TPP investment chapter, see above.
‘investors are permitted to bring a cause of action against Governments and to seek monetary compensation in the event that a governmental policy is deemed to violate investors’ rights as established in the Agreement. However, there is no reciprocal affirmative right for States to take investors before an international tribunal.’	Investors from other TPP countries are permitted to bring a cause of action against Governments and to seek monetary compensation in the event that a governmental policy is deemed to violate investors’ rights as established in the TPP, see above. There is no reciprocal affirmative right for States to take investors before an international tribunal in the leaked TPP investment chapter, nor is it likely to occur in other TPP chapters based on past USFTAs.
‘Moreover, the MAI did not provide a mechanism for “screening” claims which could have a dampening effect on a Government’s desire to implement or maintain domestic regulatory laws concerning, inter alia, human rights, protecting indigenous peoples, enforcing the right to a healthy environment and protecting labour rights.’	There is no such screening mechanism in the leaked TPP investment chapter, see above.
‘Finally, the Expropriation provision in the MAI was overly broad, failing to provide adequate definitional boundaries to protect reasonable State action in the public interest, and virtually prohibiting a contacting State from introducing measures to improve its regulatory framework which may affect investors’ operations.’	Attempts to narrow the expropriation provision which has been agreed in the leaked TPP investment chapter are uncertain to be successful, see above

Some concerns re investment treaties

Countries such as Venezuela, Ecuador, Bolivia, South Africa and Indonesia have been terminating their BITs because of their implications for their ability to regulate.⁷⁴⁰

Some concerns raised re ISDS

In addition to concerns over the implications of ISDS by non-governmental organisations, others have also been concerned including:

- All US state-level parliaments calling for no ISDS⁷⁴¹
- The French and Dutch Parliaments, European parliamentarians, German Economic Minister and a number of developing countries which are withdrawing from these treaties etc⁷⁴²
- Australia which under the last government refused to agree to ISDS in any treaties, including the TPP.⁷⁴³
- Germany was blocking the Canada-EU Trade Agreement (CETA) because it wanted ISDS removed.⁷⁴⁴
- the increasing number of domestic court decisions giving rise to NAFTA claims have led the US Conference of Chief Justices (representing Chief Justices from state supreme courts) and a US Supreme Court Justice to question the constitutionality of NAFTA tribunals.⁷⁴⁵ ‘The Conference of Chief Justices (representing Chief Justices from state supreme courts) promptly passed a resolution calling upon the Bush administration to keep court rulings out of trade tribunals.’⁷⁴⁶
- After finding its decision on Australia’s tobacco plain packaging effectively being challenged as breaching a bilateral investment treaty, the Australian Chief Justice suggested examination of the possibilities that ‘preclusion of any challenge to the decision of a domestic court as constituting a breach of the relevant BIT or FTA provisions; and preclusion of any arbitral decision based upon a rejection of a decision on a question of law of a domestic appellate court binding on lower courts.’⁷⁴⁷
- The New Zealand Chief Justice noted that human rights based determinations of domestic courts may give rise to ISDS claims.⁷⁴⁸
- Singapore’s Attorney General gave a long speech criticising ISDS.⁷⁴⁹
- Eminent jurists including former: New Zealand Human Rights Commissioners, privacy commissioner, judges and current and former parliamentarians signed a letter urging TPP negotiators to reject ISDS.⁷⁵⁰
- The authors of the study commissioned by the UK government recommend that the UK government should consider either excluding the investment protection chapter from the EU-US free trade agreement altogether; or retaining investment protection provisions but excluding an investor state dispute settlement mechanism. The second option would not affect the “already negligible” benefits of an investment protection treaty while largely removing the costs of the treaty to the UK. According to the authors, those costs include the prospect of successful investment treaty claims, international investors gaining more rights under investment treaties than under UK domestic law, and the political cost associated with high-profile claims from US investors and, to a lesser extent, reduced scope to decide policy.⁷⁵¹
- Some US Congressional representatives⁷⁵²
- Academics have expressed concern about investment treaties and recommended that ‘States should review their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above; should take steps to replace or curtail the use of investment treaty arbitration’⁷⁵³

Intellectual property (IP) chapter

Some of the main provisions relevant to human rights proposed^q in the latest leaked TPP IP chapter text⁷⁵⁴ and which provide stronger intellectual property protection than the WTO requires ('TRIPS-plus') are:

- A requirement to join the International Convention for the Protection of New Varieties of Plants (1991) (UPOV).⁷⁵⁵ This requires all plant genera and species which meet the criteria to be protected for 25 years for grapevines and trees and 20 years for all other plants and prohibits farmers from exchanging seed that they have saved if it is from a protected variety.⁷⁵⁶
- A requirement for longer copyright periods, for example from life of the author plus 50 years under WTO rules to life of the author plus 70 years.⁷⁵⁷ This would require students and consumers etc to wait an additional 20 years before they can legally photocopy a textbook or academic journal article or make a translation etc without paying a royalty to the copyright holder.
- Obligations that are likely to mean more will be patented:
 - Joining the Patent Cooperation Treaty:⁷⁵⁸ this makes it procedurally easier to get a patent in a TPP country and has been shown to increase the number of patent applications. If patents are granted a constant rate, for example 50 per cent of applications, then more technology will be patented. This would apply to technology in all fields including agriculture, health and the environment.
 - Joining the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended in 1980:⁷⁵⁹ this makes it procedurally easier to get a patent on a microorganism in a TPP country, so can be expected to increase the number of microorganisms that are patented and therefore at the monopoly price. This would apply to technology in all fields including agriculture, health and the environment.
 - Requiring patents to be allowed on plants.⁷⁶⁰ This would prevent a farmer from saving the seed from her harvest and replanting it if it is a patented plant, unless she pays a royalty to the patent owner.
 - Requiring patents to be allowed on animals.⁷⁶¹ This would prevent a farmer from keeping, breeding or selling any offspring from the patented animal, unless she pays a royalty to the patent owner
 - Patents on new uses of an old product.⁷⁶² This has implications for many areas including:
 - Health: where the overwhelming majority of patents relating to medicines today are for new forms, new uses or new formulations/dosages/combinations of existing medicines.⁷⁶³
 - Agriculture: where there are often new uses of old agricultural chemicals (such as herbicides and pesticides), for example on other plants or against other pests.⁷⁶⁴
 - The environment where products may be reused for another purpose.Patents on new uses have been found to extend the patent protection duration.⁷⁶⁵
- Obligations that are likely to mean that patents will last for longer (i.e. longer at the monopoly price which human rights bodies have noted can be unaffordable, see above):
 - Patent term extensions for delays by the patent office in granting the patent.⁷⁶⁶ This would apply to technology in all fields including agriculture, health and the environment.

^q As these are so controversial, they have not yet been agreed to, as can be seen by the [] still in the text. However, some of these are in all recent USFTAs and so are likely to be required by the USA in the TPP.

- Patent term extensions for medicines for delays by the marketing approval authority in finding the medicine to be effective, safe and of good quality.⁷⁶⁷
- Obligations that provide a monopoly even when there is no patent:
 - Data/marketing exclusivity:^r
 - for medicines that are:
 - Small molecules for five years⁷⁶⁸ and for an additional three years each time there is new clinical information (such as that the medicine is safe for women)⁷⁶⁹.
 - Biologics (such as vaccines) for up to 12 years, even for synthesised versions of naturally occurring molecules such as insulin.⁷⁷⁰
 - For agricultural chemicals for 10 years.⁷⁷¹ I.e., even if there is no patent on that particular herbicide or pesticide in that TPP country, generic versions which can be 2 to 3 times cheaper⁷⁷² still cannot be imported or sold until the 10 year monopoly period is over. Since agricultural chemicals are 10 to 14 per cent of the input costs for Australian farmers, even though they have low production costs and so are competitive, they asked for this provision to be removed in earlier USFTA negotiations.⁷⁷³
- An obligation for the government to become the enforcer of private patent rights by linking marketing approval of the medicine to patent status.⁷⁷⁴
- A more detailed explanation of the TRIPS-plus provisions which can affect medicines and their implications can be found at http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf
- The US at one stage proposed TEAM, a slight incentive for originator companies to apply to register their medicines earlier in TPP countries. This was heavily criticised by NGOs including Nobel Prize winning Doctors Without Borders⁷⁷⁵ and Oxfam⁷⁷⁶ as worsening access to generic medicines. The US has since dropped even this proposal in the latest leaked version of the TPP IP chapter.
- Although there are proposals in the TPP on traditional knowledge and genetic resources,⁷⁷⁷ even if they were accepted, they are too weak to:
 - Allow countries to override problematic provisions elsewhere in the TPP, for example in the intellectual property chapter because of indigenous rights obligations
 - Prevent biopiracy in other countries which do not have their own prior informed consent and benefit sharing requirements and which would be facilitated by having to allow patents on plants etc.

Comments by Special Rapporteurs appointed by the Commission on Human Rights:

‘In respect of international human rights, since a patent holder can utilize the period of monopoly restriction to prevent competition, create dependencies, or to simply make windfall profits at the appropriate moment, such protection can have serious consequences for basic human existence. The danger is that such monopoly control can be given higher priority than ensuring the progressive realization of the rights to health, food, access to information, and even the right to education. . . . Indeed, the hope that TRIPS would end (or outlaw) unilateral pressures on countries to establish high levels of IPR protection has largely proven ill-founded. . . . The situation is compounded outside the arena of TRIPS

^r For simplicity the term ‘data exclusivity’ will be used to refer to both data and marketing exclusivity in this report.

because pressure is being exerted on countries to confer IPR protections that are more extensive than those stipulated in the Agreement. . . The additional problem with these types of pressures is that they are mostly exerted in bilateral contexts where the room for flexibility is even more limited.. . it is the considered opinion of the Special Rapporteurs that the argument for stringent patent protection as essential to the promotion of innovation and invention is one that over-privileges the owners of capital. As we have already pointed out, these invariably happen to be multinationals. . .

It is for these reasons, among others, that a great deal of attention has come to focus on article 27.3 (b) of the TRIPS Agreement, which is basically concerned with the exclusion from patentability of plants and animals and the protection of plant varieties, either by patents, or through a sui generis system. A host of questions relating to biodiversity, the rights of farmers and farming communities, public health and the recognition of the processes of knowledge generation among traditional communities are implicated in the debate on these issues. . . The second challenge relates to the political pressures being brought to bear on such countries to adopt regimes of protection that do not substantially differ from that of patents.

Thus, many such countries are being urged to adopt the regime created under the International Convention for the Protection of New Varieties of Plants (UPOV) which favours plant breeders' rights. Such pressures could lead to the creation of monopoly rights in an area that will be of substantive importance to human well-being. . . The issue of protecting plant varieties and the numerous ethical, political and human rights questions related to it has attracted nearly as much attention and controversy as the contention over pharmaceuticals. There is no doubt that from a rights perspective, it is of equal importance and vitality to the overall discussion of the link between IPRs and human rights.⁷⁷⁸

Government procurement chapter

Since this TPP chapter has not leaked, based on past USFTAs, this chapter is likely to open government purchasing of goods and services to products, services and companies from other TPP countries on a positive list basis. I.e. for the government ministries listed (and presumably this is a negotiated list where a country may only wish to open the procurement of a few ministries, but in the process of negotiation is forced to open more), procurement over a certain threshold value (likely to be US\$193,000 for non-construction contracts and US\$7.4 million for construction contracts)^s is opened to products, services and companies from other TPP countries. This means that for the procurement which is opened, if the foreign product (e.g rice) is cheaper, the government has to buy the foreign rice, rather than from local rice farmers. I.e.: the following practices are not allowed for government procurement which is opened:

- Set asides: where the government only purchases services/products such as food from domestic suppliers.
- Price preferences: where the government buys products from local suppliers even if they are up to x% more expensive than foreign products
- Offsets: i.e. the government cannot ask for, take account of, impose, or enforce offsets. There are two types of offsets:
 - Direct offsets: this is like a local content requirement. I.e. there may be no local suppliers who can build the helicopter the government wants to buy, but the government specifies that 45 per cent of the parts of the helicopter must come from local suppliers such as the rubber for the tyres and the metal for the body. This direct offset helps create local jobs and improve the balance of payments.
 - Indirect offsets: this is used for example if there are no local suppliers who can even supply the parts for the helicopter the government wants to buy. So the government specifies that

^s The chapter is likely to prevent contracts from being cut up to fit under the threshold value to avoid opening them to foreign products, services or suppliers.

the helicopter supplier must buy some other product from its producers, such as rice. This indirect offset also helps create local jobs, even in an unrelated sector and improve the balance of payments.

E-commerce chapter

- The U.S. government is seeking free flow of data across borders in the TPP.⁷⁷⁹ While they do state that this is ‘consistent with governments’ legitimate interest in regulating for purposes of privacy protection’:⁷⁸⁰
 - If the term ‘legitimate’ is used in the text and an international tribunal interpreting ‘legitimate’ chooses to follow an interpretation found in World Trade Organization jurisprudence, it would mean a widely recognized state practice.⁷⁸¹ Since there are varying degrees of privacy laws amongst the TPP countries, with Australia having strong protection such as a requirement for doctors’ records to be kept in Australia, compared to the weaker privacy protections in the USA, countries with stronger privacy protections may not be covered by such an exception.
 - If this refers to the standard privacy exception incorporated into U.S. free trade agreements or via the WTO’s GATS rules,⁷⁸² this is not likely to be effective because the GATS privacy exception:⁷⁸³
 - only protects privacy measures that are ‘necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement’ and the E-commerce chapter will have a requirement to allow free flow of data, so restrictions on the free flow of data for privacy reasons would be inconsistent.
 - Is restricted by the chapeau which has proved very difficult to satisfy, see exceptions chapter below.

Privacy concerns

Concerns have been expressed about the implications of modern communications technology for privacy including by:

- The Office of the United Nations High Commissioner for Human Rights noted that ‘there is a clear and pressing need for vigilance in ensuring the compliance of any surveillance policy or practice with international human rights law, including the right to privacy, through the development of effective safeguards against abuses. As an immediate measure, States should review their own national laws, policies and practices to ensure full conformity with international human rights law. Where there are shortcomings, States should take steps to address them, including through the adoption of a clear, precise, accessible, comprehensive and non-discriminatory legislative framework. Steps should be taken to ensure that effective and independent oversight regimes and practices are in place, with attention to the right of victims to an effective remedy. . . Effectively addressing the challenges related to the right to privacy in the context of modern communications technology will require an ongoing, concerted multi-stakeholder engagement. This process should include a dialogue involving all interested stakeholders, including Member States, civil society, scientific and technical communities, the business sector, academics and human rights experts.’⁷⁸⁴
- the UN Special Rapporteur on the protection and promotion of human rights while countering terrorism noted that ‘bulk access technology is indiscriminately corrosive of online privacy and impinges on the very essence of the right to privacy . . . Individuals must have the right to seek an effective remedy for any alleged violation of their online privacy rights.’⁷⁸⁵

Transparency chapter

Based on past USFTAs,⁷⁸⁶ this chapter is likely to push TPP Parties to allow anyone including transnational corporations to make comments on proposed laws: ‘To the extent possible, each Party shall: . . .(b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.’ This would even apply to tobacco companies, despite the WHO’s Framework Convention on Tobacco Control^t stating that ‘In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.’⁷⁸⁷ which has been interpreted in adopted Guidelines to include a recommendation that ‘Parties should interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products.’⁷⁸⁸

The U.S. has proposed an Annex in this TPP chapter on transparency and procedural fairness for health care technologies which has leaked.⁷⁸⁹ It would affect countries whose national levels of government decide which medicines or medical devices to reimburse and how much to reimburse them. In setting reimbursement amounts, it ruled out comparisons to prices in other countries, unless it appropriately recognises the high monopoly price under a patent. It also allowed for more involvement by the companies seeking reimbursement in the decision-making process and for them to appeal decisions.

It is aimed at countries which have effective government systems which keep prices for medicines and medical devices affordable such as those in Australia and New Zealand. It has caused considerable concern.⁷⁹⁰

Environment chapter

- The leaked TPP environment chapter⁷⁹¹ does not allow environmental concerns to override any of the problematic provisions for the environment listed above in other chapters.
- Although the exceptions chapter is likely to include an exception which can be used for the environment, it is extremely difficult to use, see below.

Exceptions chapter

Like past U.S. free trade agreements, the TPP will have an exceptions chapter.⁷⁹² However, based on past USFTAs, it is expected to be insufficient to protect human rights because:

- The only exceptions included in these FTAs which are relevant for human rights are for: human, animal or plant life or health, privacy^u and a partial tax exception.⁷⁹³ I.e. there is no exception for other human rights such as education, culture, housing etc. Although some TPP countries may propose exceptions for indigenous and cultural rights, these are unlikely to be sufficient, see below.
- This usually only applies to the listed chapters of the TPP, such as those to do with goods and services. I.e. it does not apply to other chapters which have been shown to cause problems for human rights such as the intellectual property chapter. The U.S. may be willing to allow it to apply to the market-access parts of the investment chapter (as this is basically the same situation as the services rules at the World Trade Organization), but the TPP government document which leaked pointed out that this would be insufficient⁷⁹⁴ (for example because it would not apply to fair and equitable treatment (FET), which is found to have been violated in 81% of the cases won by investors when they allege a violation of FET under a U.S. treaty).⁷⁹⁵

^t Which all TPP Parties except the USA are party to,
https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en

^u See comments under E-commerce chapter as to why this exception is likely to be insufficient

- U.S. free trade agreements typically incorporate the exceptions from the World Trade Organization's goods and services rules.⁷⁹⁶ However one study has found that only one of 40 attempts to use these GATT Article XX/GATS Article XIV "General Exceptions" at the WTO has ever succeeded.⁷⁹⁷ Since USFTAs explicitly incorporate these WTO exceptions, a TPP tribunal is likely to follow this WTO jurisprudence, in which case it will be equally difficult to satisfy each of the many tests required to use any of these limited exceptions in the TPP. For example it includes a necessity test which a tobacco control measure failed:
 - 'WHO contributed evidence from other countries in Asia and in Latin America to show that the liberalisation of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking among the population. According to WHO, public health programmes are unable to compete with the marketing budgets of the world's most powerful tobacco companies, and as a result cigarette consumption increases. In the Thai case, WHO noted that the presence of foreign brands and advertising would have a particularly harmful impact on young people and women, who smoked Thai cigarettes far less than adult men.

The GATT disputes panel agreed that smoking was a legitimate public health issue and thus fell within the scope of GATT XX(b). The issue turned on whether the import ban could be said to be 'necessary' -- defined as meaning that there was no alternative measure which would be 'less inconsistent' with the trade liberalisation regime of GATT. In the end, the panel upheld the US argument that the Thai government's ban could not be considered 'necessary', given that there were other policies which might also work towards curbing the number of smokers (GATT 1990).'⁷⁹⁸
- The taxation exception in past USFTAs⁷⁹⁹ allows an investor from another TPP country to claim that taxation is expropriation if the home and host governments fail to agree that it is not expropriation within six months. Therefore progressive or unusual taxation measures such as a windfall tax on mining companies may be found to be expropriation.^v
- Although New Zealand is likely to insist on its standard exception in FTAs from the whole TPP for its indigenous people,^w a New Zealand law professor has cast doubt on whether this is sufficient to protect its indigenous people.⁸⁰⁰ This was not disputed⁸⁰¹ by the witness for the New Zealand government⁸⁰². Furthermore, even if accepted, it does not apply to indigenous people from any other

^v Algeria settled an investment dispute challenging its windfall tax on oil companies by paying US\$3.5 billion, 'Settlement round-Up: Republic of Georgia resolves dispute, Algeria settles windfall levy claims on eve of arbitral award, and Venezuela pays for a nationalization', Investment Arbitration Reporter, Apr 19, 2012. US\$900million of this was claimed under an investment treaty with provisions similar to those which have been agreed in the leaked TPP investment chapter, see Annex 1, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/43>

^w Eg 'Article 15.8 Treaty of Waitangi

1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 17 shall otherwise apply to this Article. An arbitral tribunal appointed under Article 17.4 may be requested by Thailand to determine only whether any measure (referred to in Paragraph 1) is inconsistent with its rights under this Agreement.' <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/0-cep-chapter15.php>

TPP country who therefore would still have no exception for indigenous rights from the whole agreement^x if the TPP is a standard USFTA.

- Although the North American Free Trade Agreement has an exception for culture,⁸⁰³ it is limited to cultural industries which are defined as: the publication, distribution, or sale of books, magazines, periodicals or newspapers; the production, distribution, sale or exhibition of film or videos or music and radio and television.⁸⁰⁴ Furthermore, although it exempts cultural industries from almost the whole free trade agreement, if the Canadian government does act with respect to its cultural industries in a way that violates the free trade agreement provisions, the U.S. can still retaliate with measures of equivalent commercial effect.⁸⁰⁵ Therefore even to use the exception that is available on paper and which is limited to cultural industries, becomes very expensive.

Malaysia has proposed a carve out from the whole TPP for tobacco control (so that laws regulating tobacco cannot be challenged under ISDS or via other TPP chapters), however this has not been agreed to by other TPP countries.⁸⁰⁶

In addition, the High Commissioner has noted that ‘The fundamental nature of these entitlements as rights requires an approach that sets the promotion and protection of human rights as objectives of trade liberalization, not as exceptions.’⁸⁰⁷

Development chapter

- There is not much information about the likely content of this chapter. However, the U.S. government’s goals do not include allowing exceptions from obligations that can be problematic for development and human rights, for development (such as special and differential treatment for developing countries) or human rights reasons.⁸⁰⁸ We know of no U.S. free trade agreement which has allowed general exceptions to the entire agreement for development or human rights beyond the limited, partial and difficult to use exceptions listed above.
- Past USFTAs have not provided legally enforceable additional aid sufficient to cover costs of the FTA to developing countries such as lost tariff revenue, so it is very unlikely that the TPP will do so.

Dispute settlement chapter

The TPP is expected to be the same as the dispute settlement chapter of past U.S. free trade agreements which typically allow:

- Parties to sue each other at an international tribunal for failure to comply with provisions in any chapter of the free trade agreement except some parts of some chapters such as: the competition chapter and sometimes the labour and environment chapters.⁸⁰⁹
- The winning Party to raise its tariffs on the exports of the losing Party until the losing Party changes its law, regulation, policy or constitution etc to comply with the FTA.

Final provisions chapter

The TPP is expected to be the same as past USFTAs, where this chapter this typically allows:

- Parties to amend the treaty with the agreement of the other Parties.

^x Some countries (such as Peru, Chile, Australia see Annex II, <https://ustr.gov/trade-agreements/free-trade-agreements> and Canada (aboriginal affairs) and Mexico and USA (minority affairs), Annex II, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>) put nonconforming measures to services and investment chapter provisions in their past USFTAs for their indigenous peoples, however even if agreed to in the TPP, these nonconforming measures cannot apply to all the problematic provisions for indigenous peoples, see above

- Withdrawal from the FTA with six months' notice in writing. However in practice this has never been done in a USFTA.

¹ As listed here: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>

² <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E@>

³ <https://ustr.gov/sites/default/files/TPP-letter-on-confidentiality.pdf> and responses to Special Rapporteur on the Right to Health, <http://www.ohchr.org/Documents/HRBodies/SP/A.HRC.19.44.EFSonly.pdf>, https://spdb.ohchr.org/hrdb/21st/USA_02.07.12_%2813.2011%29.pdf

⁴ <http://www.dfat.gov.au/trade/agreements/tpp/Documents/tpp-overview.docx>

⁵ <https://ustr.gov/tpp/overview-of-the-TPP>

⁶ See for example <http://www.whitehouse.gov/the-press-office/2012/11/19/fact-sheet-us-asean-expanded-economic-engagement-e3-initiative>

⁷ Article 66.1, https://www.wto.org/english/docs_e/legal_e/27-trips_08_e.htm. A number of extensions have already been provided, see for example WTO documents: IP/C/40, WT/MIN(01)/DEC/2, IP/C/64 available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

⁸ http://www.miti.gov.my/storage/documents/065/com.tms.cms.document.Document_9bb0617c-c0a8156f-34330fb9-37a3988d/1/TPPA%20Workshop%20-%20For%20MITI%20Portal.pdf

⁹ A/HRC/10/5/Add.2

¹⁰ A/HRC/10/5/Add.2

¹¹ http://www.ohchr.org/Documents/Issues/Food/BN4_SRRTF_WTO_EN.pdf

¹² A/HRC/26/31

¹³ E/CN.4/Sub.2/2003/9

¹⁴ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E@>

¹⁵ 'Safeguards for Tobacco Control: Options for the TPPA', Robert Stumberg, American Journal of Law & Medicine, 39 (2013): 382-441

¹⁶ <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.

¹⁷ <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.

¹⁸ http://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/3d_elsalvadoraccessmedspr_june2004.pdf

¹⁹ http://www.ftamalaysia.org/file_dir/90755183744cdaf0c18772.pdf

²⁰ http://www.bilaterals.org/spip.php?page=print&id_article=7070

²¹ <http://ourworldisnotforsale.org/en/node/1227>

²² http://www.bilaterals.org/spip.php?page=print&id_article=7070

²³ http://www.agc.gov.my/index.php?option=com_content&view=article&id=1405&Itemid=106&lang=en

²⁴ A/HRC/28/57

²⁵ See for example <http://infojustice.org/tpp>

²⁶ E/CN.4/Sub.2/2002/9

²⁷ E/CN.4/2005/51/Add.3

²⁸ A/69/299

²⁹ A/69/299

³⁰ A/HRC/10/5/Add.2

³¹ <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>

³² Inside US Trade, Daily News, 'U.S., Canada Confirm Sept. 1-10 As Dates For TPP Hanoi Meeting', posted: August 18, 2014

³³ <http://dfat.gov.au/trade/agreements/tpp/news/Pages/news.aspx>

³⁴ See for example endnote 24 and http://www.budget.senate.gov/democratic/public/_cache/files/c54409ba-8b75-4ec9-809b-239ff753a070/2.26.2015-tpp-letter-to-ambassador-froman.pdf

³⁵ A/HRC/10/5/Add.2

³⁶ E/CN.4/2002/54

³⁷ E/CN.4/Sub.2/2002/9

³⁸ <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.

³⁹ <https://ustr.gov/trade-agreements/free-trade-agreements>

⁴⁰ Addendum I and II, <https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf>

⁴¹ A/HRC/10/5/Add.2

⁴² E/CN.4/Sub.2/1999/11

⁴³ A/HRC/26/31

www.ustr.gov
<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.
<http://www.reuters.com/article/2012/05/13/us-usa-trade-kirk-idUSBRE84C0AQ20120513>
<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.
http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm
http://wto.org/english/tratop_e/dda_e/chair_texts11_e/chair_texts11_e.htm
<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>
<http://www.itsourfuture.org.nz/wp-content/uploads/2015/02/THE-EU-OMBUDSMAN%C2%B9S-INQUIRY-INTO.pdf>
<http://www.itsourfuture.org.nz/wp-content/uploads/2015/02/TTIP-v-TPPA.pdf>
http://www.budget.senate.gov/democratic/public/_cache/files/c54409ba-8b75-4ec9-809b-239ff753a070/2.26.2015-tpa-letter-to-ambassador-froman.pdf
<http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>
E/CN.4/Sub.2/2002/9
A/HRC/27/55
http://www.citizen.org/documents/ssprivatizationreport_0607.pdf
www.citizen.org/documents/oxy-v-ecuador-memo.pdf
<http://www.citizen.org/documents/gtw-chevron-release.pdf>
http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm
http://www.wto.org/english/res_e/booksp_e/trade_profiles14_e.pdf
<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>
<http://wtocentre.iift.ac.in/workingpaper/TPP%20PAPER.pdf>
Eg Japan is insisting on keeping tariffs on 7 sensitive products in the TPP: beef and pork; dairy; sugar; wheat and barley; and rice, Inside US Trade, 'Beef, Pork, Dairy Are Likely Sticking Points In U.S.-Japan Agriculture Talks', February 24, 2014
<http://www.ers.usda.gov/media/1692509/err176.pdf>
A/HRC/10/5/Add.2
E/CN.4/2004/10
E/CN.4/Sub.2/2002/9
<http://www.nppc.org/wp-content/uploads/TPP-2-21-14-Tariff-Elimination-Analysis.pdf>
https://www.fidh.org/IMG/pdf/positionpaperFIDH-HRIA_finalfevrier2008.pdf
http://www.wcoomd.org/en/topics/nomenclature/~/media/WCO/Public/Global/PDF/Topics/Nomenclature/Overview/Surveys/Duties%20Revenue/DutySurveyHSC52_Dec2013ENrevEd.ashx
<http://www.imf.org/external/pubs/ft/wp/2005/wp05112.pdf>
<https://ustr.gov/trade-agreements/free-trade-agreements>
http://www.twn.my/title2/par/Export_Taxes.doc
http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm
<https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>
<https://ustr.gov/trade-agreements/free-trade-agreements>
<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpa-chapter-chapter-negotiating-14>
E/CN.4/Sub.2/2002/9
E/CN.4/2006/44
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
A/HRC/27/55
A/69/299
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13792&LangID=E>
E/CN.4/2005/47
E/CN.4/Sub.2/2001/13
E/CN.4/Sub.2/2001/10
<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en

⁹¹ <https://ustr.gov/trade-agreements/free-trade-agreements>

⁹² <https://ustr.gov/trade-agreements/free-trade-agreements>

⁹³ <http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf> to monitor potential impacts of trade rules on human rights and guide trade rule and policy making, A/HRC/27/55 and is recommended by various human rights treaty bodies: eg see E/C.12/1/Add.100, para. 56; CRC/C/15/Add.232, para. 48; CEDAW/C/COL/CO/6, at para. 29; CEDAW/C/PHI/CO/6, para. 26; CEDAW/C/GUA/CO/6, para. 32.

⁹⁴ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E@>

⁹⁵ E/CN.4/2004/40

⁹⁶ E/CN.4/Sub.2/2003/9

⁹⁷ E/CN.4/2004/49/Add.1

⁹⁸ A/HRC/10/5/Add.2

⁹⁹ A/HRC/19/59/Add.5

¹⁰⁰ A/HRC/19/59/Add.5

¹⁰¹ http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf

¹⁰² <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.

¹⁰³ http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf which has further information about each of these.

¹⁰⁴ <http://www.twn.my/title2/twninfo492.htm>

¹⁰⁵ https://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf

¹⁰⁶ <http://www.ohchr.org/Documents/HRBodies/SP/A.HRC.19.44.EFSonly.pdf>

¹⁰⁷ <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=298&file=Annexe1>.

¹⁰⁸ <http://www.hrc.co.nz/wp-content/uploads/2013/08/HRF-over-arching-report-FINAL.doc>.

¹⁰⁹ http://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_mar15_2004.pdf

¹¹⁰ http://www.iisd.org/pdf/2005/investment_investsd_sept6_2005.pdf

¹¹¹ http://www.iisd.org/pdf/2008/itn_feb5_2008.pdf

¹¹² http://www.iisd.org/pdf/2005/investment_investsd_sept6_2005.pdf,

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2074>. More details about the case are available at

http://www.iisd.org/pdf/2005/investment_investsd_sept15_2005.pdf and <http://www.italaw.com/cases/412>.

¹¹³ <http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf> and *TECO v Guatemala* in

<http://www.citizen.org/documents/investor-state-chart.pdf>

¹¹⁴ http://www.iisd.org/pdf/2008/itn_feb5_2008.pdf

¹¹⁵ http://www.iisd.org/pdf/2007/itn_june13_2007.pdf

¹¹⁶ http://www.citizen.org/documents/ssprivatizationreport_0607.pdf

¹¹⁷ <http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>

¹¹⁸ <http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>

¹¹⁹ <http://www.italaw.com/sites/default/files/case-documents/ita0221.pdf>

¹²⁰ See for example: A/HRC/27/55, A/67/268, A/HRC/15/31, A/HRC/23/37, A/69/299,

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹²¹ <http://www.twn.my/title2/FTAs/info.service/2012/fta.info.223.htm>

¹²² E/CN.4/2002/54

¹²³ E/CN.4/2004/10

¹²⁴ E/CN.4/2004/10

¹²⁵ E/CN.4/2004/10

¹²⁶ E/CN.4/2004/10

¹²⁷ E/CN.4/2002/54

¹²⁸ E/CN.4/2006/44

¹²⁹ E/CN.4/2005/47

¹³⁰ E/CN.4/2005/47
¹³¹ A/HRC/10/5/Add.2
¹³² A/HRC/10/5/Add.2
¹³³ E/CN.4/2002/54
¹³⁴ E/CN.4/2004/40
¹³⁵ http://www.ohchr.org/Documents/Issues/Food/BN4_SRRTF_WTO_EN.pdf
¹³⁶ A/HRC/10/5/Add.2
¹³⁷ A/HRC/10/5/Add.2
¹³⁸ A/56/210
¹³⁹ A/56/210
¹⁴⁰ <http://enforcement.trade.gov/esel/philippines/86-a09.html>
¹⁴¹ E/CN.4/2004/10
¹⁴² A/HRC/10/5/Add.2
¹⁴³ A/56/210
¹⁴⁴ http://www.ohchr.org/Documents/Issues/Food/BN4_SRRTF_WTO_EN.pdf
¹⁴⁵ <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2014-NTE-Report>
¹⁴⁶ Inside U.S. Trade, Daily News, ‘Senior U.S. Official All But Rules Out Obama-Abe Breakthrough On TPP This Week’, Posted: April 21, 2014
¹⁴⁷ <http://www.isakson.senate.gov/public/index.cfm/2014/1/11-senators-urge-tpp-negotiators-to-address-barriers-to-chicken-trade>
¹⁴⁸ A/HRC/10/5/Add.2
¹⁴⁹ A/HRC/10/5/Add.2
¹⁵⁰ <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
¹⁵¹ http://www.iisd.org/pdf/2009/thirst_for_distant_lands.pdf
¹⁵² A/65/281
¹⁵³ http://www.ohchr.org/Documents/Issues/Food/BN4_SRRTF_WTO_EN.pdf
¹⁵⁴ A/64/170
¹⁵⁵ ‘Seeds of hunger: intellectual property rights on seeds and the human rights response’, 3DThree, 2009.
¹⁵⁶ https://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf
¹⁵⁷ A/56/210
¹⁵⁸ A/64/170
¹⁵⁹ https://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf
¹⁶⁰ A/60/350
¹⁶¹ <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
¹⁶² https://www.evb.ch/fileadmin/files/documents/Saatgut/2014_07_10_Owning_Seed_-_Accessing_Food_report_def.pdf
¹⁶³ <https://www.med.govt.nz/business/intellectual-property/pdf-docs-library/plant-variety-rights/review-of-the-pvra-1987-pdf>
¹⁶⁴ <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/patents/review-of-patents-act/boundaries-to-patentability/review-of-the-patents-act-1953-boundaries-to-patentability-pdf>
¹⁶⁵ A/HRC/13/33
¹⁶⁶ A/HRC/10/5/Add.2
¹⁶⁷ A/56/210
¹⁶⁸ E/CN.4/2004/40
¹⁶⁹ A/57/356
¹⁷⁰ A/HRC/10/5/Add.2
¹⁷¹ E/CN.4/2004/10
¹⁷² A/56/210
¹⁷³ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8477&LangID=E>
¹⁷⁴ A/59/385
¹⁷⁵ A/67/268
¹⁷⁶ A/67/268
¹⁷⁷ A/67/268

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f5&Lang=en
<http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled.pdf>
<http://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-bse-doctor-cnt>
<http://www.cdc.gov/ncidod/dvrd/vcjd/>
http://www.cdc.gov/parasites/trichinellosis/gen_info/faqs.html
<http://naldc.nal.usda.gov/naldc/download.xhtml?id=10229&content=PDF>
<http://www.ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled.pdf>
<http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
A/HRC/19/59
A/56/210
<http://www.globalizationandhealth.com/content/7/1/21>
http://www.who.int/nutrition/publications/code_english.pdf
Article 5.1
Article 5.2
Article 5.3
http://www.iatp.org/files/Wrong_Model_GATS_Trade_Liberalisation_and_Chil.htm
A/HRC/19/59
A/HRC/19/59
<http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
A/HRC/19/59
A/HRC/19/59
http://apps.who.int/gb/ebwha/pdf_files/WHA63-REC1/WHA63_REC1-P4-en.pdf
http://apps.who.int/gb/ebwha/pdf_files/WHA63-REC1/WHA63_REC1-P4-en.pdf
http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_R14-en.pdf
www.who.int/dietphysicalactivity/MarketingFramework2012.pdf
<http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
<http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
E/CN.4/2006/44
E/CN.4/2004/10
E/CN.4/2006/44
<https://ustr.gov/trade-agreements/free-trade-agreements>
<https://ustr.gov/trade-agreements/free-trade-agreements>
<http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
A/HRC/19/59
E/CN.4/2004/10
A/58/330
http://documents.foodandwaterwatch.org/doc/ICSID_web.pdf
E/CN.4/2006/44
<https://ustr.gov/trade-agreements/free-trade-agreements>
<https://ustr.gov/trade-agreements/free-trade-agreements>
<https://ustr.gov/trade-agreements/free-trade-agreements>
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12150&LangID=E>
http://www.washingtonpost.com/politics/elizabeth-warren-other-democrats-raise-concerns-about-free-trade-pact-with-asia/2014/12/17/19de1c48-8632-11e4-b9b7-b8632ae73d25_story.html re this letter
<http://www.warren.senate.gov/files/documents/TPP.pdf>
E/CN.4/2004/40
E/CN.4/2002/54
E/CN.4/2006/44
E/CN.4/2006/44
E/CN.4/2005/47
<https://ustr.gov/trade-agreements/free-trade-agreements>
<https://ustr.gov/trade-agreements/free-trade-agreements>
<https://ustr.gov/trade-agreements/free-trade-agreements>

²²⁹ E/CN.4/2005/47
²³⁰ <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
²³¹ E/CN.4/2002/54
²³² <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
²³³ A/57/356
²³⁴ A/HRC/20/15/Add.2
²³⁵ Inside U.S. Trade - 01/30/2015, 'Despite Progress, New York TPP Round May Not Be Last Technical Meeting'
²³⁶ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536254
²³⁷
²³⁸ http://www.unaids.org/sites/default/files/en/dataanalysis/knowyourresponse/countryprogressreports/2014countries/VNM_narrative_report_2014.pdf
²³⁹ <http://www.pepfar.gov/documents/organization/222187.pdf>
²⁴⁰ http://www.unaids.org/sites/default/files/en/dataanalysis/knowyourresponse/countryprogressreports/2014countries/VNM_narrative_report_2014.pdf
²⁴¹ <http://www.pepfar.gov/documents/organization/145740.pdf>
²⁴² E/CN.4/2005/51/Add.3
²⁴³ The pharmaceutical provisions in addendum one of the latest leak were identified as coming from the USA in a previous leak, <http://keionline.org/sites/default/files/Wikileaks-secret-TPP-treaty-IP-chapter.pdf>.
²⁴⁴ <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>, A/61/338
²⁴⁵ E/CN.4/Sub.2/2001/13
²⁴⁶ E/CN.4/Sub.2/2001/13
²⁴⁷ E/CN.4/Sub.2/2001/13
²⁴⁸ A/HRC/11/12
²⁴⁹ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536254
²⁵⁰ <http://www.ftc.gov/sites/default/files/documents/reports/emerging-health-care-issues-follow-biologic-drug-competition-federal-trade-commission-report/p083901biologicsreport.pdf>
²⁵¹ from 2014 FTC workshop on biologics: <http://www.ftc.gov/news-events/events-calendar/2014/02/follow-biologics-workshop-impact-recent-legislative-regulatory> (has transcript)
²⁵² http://www.gphaonline.org/media/cms/Ltr_to_FDA_on_biosimilars_INN_June_2014.FINAL.pdf
²⁵³ from 2014 FTC workshop on biologics: <http://www.ftc.gov/news-events/events-calendar/2014/02/follow-biologics-workshop-impact-recent-legislative-regulatory> (has transcript)
²⁵⁴ <http://www.fiercepharma.com/story/why-does-alexions-soliris-cost-500k-plus-uk-gatekeepers-want-know/2014-03-04>
²⁵⁵ E/CN.4/2004/49/Add.1
²⁵⁶ http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf
²⁵⁷ See for example <http://hiaconnect.edu.au/wp-content/uploads/2014/02/TPP-policy-brief-FINAL-17-FEB-2014.pdf>
²⁵⁸ <http://infojustice.org/archives/6039>
²⁵⁹ http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf
²⁶⁰ E/CN.4/Sub.2/2001/13
²⁶¹ A/69/299
²⁶² A/69/299
²⁶³ A/69/299
²⁶⁴ A/69/299
²⁶⁵ <https://ustr.gov/trade-agreements/free-trade-agreements>
²⁶⁶ <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD>. Both have been sued before under ISDS, <http://www.italaw.com/cases/138>, http://www.italaw.com/cases-by-respondent?field_case_respondent_tid=152.
²⁶⁷ A/69/299
²⁶⁸ <http://www.citizen.org/documents/investor-state-chart.pdf>
²⁶⁹ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en

270

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en

271 E/CN.4/Sub.2/2003/9

272 http://www.who.int/fctc/text_download/en/

273 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en

274 Robert Stumberg, Safeguards for Tobacco Control: Options for the TPPA, 39 AM. J.L. & MED. 386 (2013).

275 Stumberg, *supra*, at 395.

276

<http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf>

277 <http://www.bloomberg.com/news/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena.html>

278 See Jane Kelsey, International Trade Law And Tobacco Control: Trade And Investment Law Issues Relating To Proposed Tobacco Control Policies To Achieve An Effectively Smokefree New Zealand By 2025, 36 (2012).

279 Kelsey, *supra*, 15.

280 Stumberg, *supra*, at 392. See also FCTC, Article, 5.3: 'In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law'.

281

<http://www.turanga.org.nz/sites/turanga.org.nz/files/Kelsey%20Trade%20Law%20Tobacco%20Control%20Report.pdf> eg Appendix 1

282 http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf

283

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en

284 <http://hiaconnect.edu.au/wp-content/uploads/2014/02/TPP-policy-brief-FINAL-17-FEB-2014.pdf>

285 See http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf for more details

286 <http://hiaconnect.edu.au/wp-content/uploads/2014/02/TPP-policy-brief-FINAL-17-FEB-2014.pdf>

287 A/HRC/26/31

288 A/HRC/26/31

289 E/CN.4/2004/49/Add.1

290 A/HRC/26/31

291 <https://ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>

292 http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf

293 A/HRC/26/31

294 Inside U.S. Trade, Daily News, 'U.S. Backs Malaysian TPP Proposal Aiming To Protect Product Formulas', Posted: January 9, 2013

295 Inside U.S. Trade, Daily News, 'U.S. Backs Malaysian TPP Proposal Aiming To Protect Product Formulas', Posted: January 9, 2013

296 <http://www.nationmultimedia.com/opinion/TPP-vs-RCEP-A-new-Washington-Beijing-tug-of-war-30195647.html>

297 http://www.washingtonpost.com/world/asia_pacific/south-korea-asks-to-join-pacific-trade-deal-washington-says-not-so-fast/2015/04/15/85d7396a-e39e-11e4-ae0f-f8c46aa8c3a4_story.html

298 A/HRC/26/31

299 <https://ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>

300 A/HRC/26/31

301 A/HRC/26/31

302 A/HRC/26/31

303 A/HRC/26/31

304 A/HRC/26/31

305 http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf

306 A/HRC/26/31

307 <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

308

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
309

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
310

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
311

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
312 A/HRC/26/31
313

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
314

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
315

<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>
316 A/HRC/18/37
317

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en
318 A/61/338

<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>
319

<https://ustr.gov/trade-agreements/free-trade-agreements>
320

<https://ustr.gov/trade-agreements/free-trade-agreements>
321

E/CN.4/2004/49/Add.1
322

A/69/299
323

<http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf> analysed at
324 http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf

<http://big.assets.huffingtonpost.com/WarrenBrownTPPLetter.pdf>
325

<http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/index.html>
326

http://www.washingtonpost.com/business/economy/trade-deals-a-closely-held-secret-shared-by-more-than-500-advisers/2014/02/28/7daa65ec-9d99-11e3-a050-dc3322a94fa7_story.html
327

<http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/26/heres-why-obama-trade-negotiators-push-the-interests-of-hollywood-and-drug-companies/>
328

<http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/26/heres-why-obama-trade-negotiators-push-the-interests-of-hollywood-and-drug-companies/>
329

A/HRC/26/31
330

A/HRC/26/31
331

E/CN.4/2004/49/Add.1
332

A/HRC/26/31
333

E/CN.4/2004/49/Add.1
334

A/HRC/26/31
335

A/HRC/26/31
336

A/HRC/27/55
337

338

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en
339

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en
340

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/15/31

³⁴¹ <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>
³⁴² <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>
³⁴³ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en
³⁴⁴ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/15/31
³⁴⁵ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/15/31
³⁴⁶ <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>
³⁴⁷ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/15/31
³⁴⁸ E/CN.4/Sub.2/2003/9
³⁴⁹ http://www.citizen.org/documents/ssprivatizationreport_0607.pdf
³⁵⁰ <http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>
³⁵¹ <http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>
³⁵² <http://www.italaw.com/sites/default/files/case-documents/ita0221.pdf>
³⁵³ http://www.citizen.org/documents/ssprivatizationreport_0607.pdf
³⁵⁴ <http://www.italaw.com/sites/default/files/case-documents/ita0061.pdf>
³⁵⁵ <http://www.italaw.com/sites/default/files/case-documents/ita0065.pdf>
³⁵⁶ http://documents.foodandwaterwatch.org/doc/ICSID_web.pdf
³⁵⁷ <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>
³⁵⁸ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/15/31
³⁵⁹ <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>
³⁶⁰ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en
³⁶¹ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en
³⁶² A/HRC/27/55
³⁶³ See for example: Methanex v USA, Metalclad v Mexico, Glamis Gold v USA, Lone Pine v Canada, <http://www.citizen.org/documents/investor-state-chart.pdf>,
³⁶⁴ http://www.citizen.org/documents/NAFTAREport_Final.pdf
³⁶⁵ <http://www.naftaclaims.com/disputes/mexico/Metalclad/MetalcladMexicoPostHearingBrief.pdf>
³⁶⁶ <http://multinationalmonitor.org/hyper/mm1095.07.html>
³⁶⁷ Metalclad v Mexico, <http://www.citizen.org/documents/investor-state-chart.pdf>,
³⁶⁸ Including Bayview Irrigation District, et. al. v. Mexico, Sun Belt v. Canada, Abitibi-Bowater v Canada, <http://www.citizen.org/documents/investor-state-chart.pdf>,
³⁶⁹ http://www.citizen.org/documents/NAFTAREport_Final.pdf
³⁷⁰ <http://www.citizen.org/documents/investor-state-chart.pdf>
³⁷¹ <http://www.citizen.org/documents/investor-state-chart.pdf>
³⁷² http://www.citizen.org/documents/NAFTAREport_Final.pdf
³⁷³ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/33/Add.4
³⁷⁴ <http://www.citizen.org/documents/investor-state-chart.pdf>
³⁷⁵ A/HRC/27/55
³⁷⁶ Bayliss, K. (2001) Water privatisation in Africa: lessons from three case studies, Public Services International Research Unit (PSIRU), London.
³⁷⁷ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en
³⁷⁸ E/CN.4/Sub.2/2003/9
³⁷⁹ A/HRC/27/55
³⁸⁰ <https://ustr.gov/trade-agreements/free-trade-agreements>
³⁸¹ <https://ustr.gov/trade-agreements/free-trade-agreements>
³⁸² A/66/269
³⁸³ A/69/402

383 A/69/402
 384 A/69/402
 385 E/CN.4/Sub.2/2002/9
 386 A/69/402
 387 A/69/402
 388
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en
 389 A/69/402
 390 A/69/402
 391 A/69/402
 392 <http://www.encharter.org/index.php?id=679>
 393 http://corporateeurope.org/sites/default/files/profitng-from-crisis_0.pdf
 394 Article II.7.6
 395 E/CN.4/2000/6
 396 www.ustr.gov
 397 http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.
 398 3D → Trade - Human Rights - Equitable Economy. The Philippines: Impact of copyright rules on access to
 education (2009), available at http://www.crin.org/docs/3DCRC_PhilippinesJun09.pdf.
 399 'The State of the Right to Education Worldwide, Free or Fee: 2006 Global Report',
<http://www.katarinatomasevski.com/>
 400 'The State of the Right to Education Worldwide, Free or Fee: 2006 Global Report',
<http://www.katarinatomasevski.com/>
 401
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en
 402 http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf
 403 A/HRC/10/7
 404
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en
 405 <http://www.wsj.com/articles/SB10001424127887323375204578269940952611204>
 406 <http://www.wsj.com/articles/SB10001424127887323375204578269940952611204>
 407
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en
 408 A/HRC/10/7
 409 A/HRC/10/7
 410 <http://www.wsj.com/articles/SB10001424127887323375204578269940952611204>
 411 <http://www.wsj.com/articles/SB10001424127887323375204578269940952611204>
 412 A/HRC/10/7
 413 Joseph Stiglitz, former Chief Economist at the World Bank, (2006). Making globalization work. Penguin Books. London. See also:
 • Detragiache, E, Tressel, T & Gupta, P. (2006), Foreign Banks in Poor Countries: Theory and Evidence – an IMF Working Paper, IMF. Washington DC. 2006.
 • G.enesis Analytics. (2004). A survey of the SADC region: South African financial institutions, regional policies and issues of access. G.enesis Analytics. Johannesburg. June 2004.
 • Brownbridge, M, & Gayi, S. (1999). Progress, Constraints and limitations of financial sector reforms in least developed countries. IDPM. June 1999.
 • <http://www.wdm.org.uk/resources/reports/trade/takingthecredit09032009.pdf>
 414 A/HRC/10/7
 415 Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System, September 2009 Report, at 38-39. Available at:
http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.

⁴¹⁶ Impact of the Global Financial Crisis on Sub-Saharan Africa, IMF 2009, <http://www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf>.
⁴¹⁷ <http://www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf>
⁴¹⁸ A/HRC/10/7
⁴¹⁹ E/CN.4/1996/17
⁴²⁰ http://www.bilaterals.org/spip.php?page=print&id_article=6315
⁴²¹ Eg http://www.ciel.org/Publications/TTIP_Monitor_Edition1_Dec2013.pdf
⁴²² Eg http://www.ciel.org/Publications/ToxicPartnership_Mar2014.pdf
⁴²³ Eg http://ciel.org/Publications/LCD_TTIP_Jan2015.pdf
⁴²⁴ <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/1290/Default.aspx>
⁴²⁵ See investment disputes in Annex 1
⁴²⁶ <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>
⁴²⁷ <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>
⁴²⁸ Article 104, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>
⁴²⁹ www.ustr.gov
⁴³⁰ <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf>
⁴³¹ <http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>
⁴³² Eg http://www.ciel.org/Publications/TTIP_Monitor_Edition1_Dec2013.pdf and www.ecocouncil.dk/dk/documents/.../1542-140425-baskut-tuncak
⁴³³ A/HRC/21/48
⁴³⁴ <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/InvestmentCountryProfiles.aspx>
⁴³⁵ <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/InvestmentCountryProfiles.aspx>
⁴³⁶ E/CN.4/2006/42
⁴³⁷ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴³⁸ A/HRC/26/28
⁴³⁹ A/HRC/26/28
⁴⁴⁰ See for example: www.twn.my/title2/par/Export_Taxes.doc
⁴⁴¹ See WTO document WT/TPR/S/292 available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx
⁴⁴² The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁴³ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁴⁴ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁴⁵ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁴⁶ A/57/356
⁴⁴⁷ A/57/356
⁴⁴⁸ A/HRC/13/33/Add.2
⁴⁴⁹ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁵⁰ A/HRC/21/39
⁴⁵¹ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁵² The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁵³ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁵⁴ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁵⁵ The Guiding Principles on Extreme Poverty and Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁵⁶ <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/InvestmentCountryProfiles.aspx>
⁴⁵⁷ <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/InvestmentCountryProfiles.aspx>

⁴⁵⁸ The Guiding Principles on Extreme Poverty and Human Rights,
<http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁵⁹ A/HRC/26/28
⁴⁶⁰ A/HRC/15/22
⁴⁶¹ The Guiding Principles on Extreme Poverty and Human Rights,
<http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>
⁴⁶² http://www.citizen.org/documents/ssprivatizationreport_0607.pdf
⁴⁶³ http://www.citizen.org/documents/ssprivatizationreport_0607.pdf
⁴⁶⁴ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12150&LangID=E>
⁴⁶⁵ A/HRC/26/28
⁴⁶⁶ http://www.washingtonpost.com/politics/elizabeth-warren-other-democrats-raise-concerns-about-free-trade-pact-with-asia/2014/12/17/19de1c48-8632-11e4-b9b7-b8632ae73d25_story.html re this letter
<http://www.warren.senate.gov/files/documents/TPP.pdf>
⁴⁶⁷ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/17/34
⁴⁶⁸ Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System, September 2009 Report, at 38-39. Available at:
http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.
⁴⁶⁹ A/66/265
⁴⁷⁰ <http://www.traidcraft.co.uk/media/e0e6f8ab-eb5e-4341-86b8-bc63f12f1356>
⁴⁷¹ A/HRC/23/37
⁴⁷² <http://www.ohchr.org/Documents/Issues/Development/IEDebt/DebtRestructuring.pdf>
⁴⁷³ A/HRC/25/50/Add.3
⁴⁷⁴ <http://www.ohchr.org/Documents/Issues/Development/IEDebt/DebtRestructuring.pdf>
⁴⁷⁵ http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf
⁴⁷⁶ http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf
⁴⁷⁷ http://corporateeurope.org/sites/default/files/profitng-from-crisis_0.pdf
⁴⁷⁸ <http://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf>,
http://corporateeurope.org/sites/default/files/profitng-from-crisis_0.pdf
⁴⁷⁹ A/HRC/23/37
⁴⁸⁰ A/HRC/23/37
⁴⁸¹ A/HRC/23/37
⁴⁸² <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12150&LangID=E>
⁴⁸³ http://www.washingtonpost.com/politics/elizabeth-warren-other-democrats-raise-concerns-about-free-trade-pact-with-asia/2014/12/17/19de1c48-8632-11e4-b9b7-b8632ae73d25_story.html re this letter
<http://www.warren.senate.gov/files/documents/TPP.pdf>
⁴⁸⁴ A/65/260
⁴⁸⁵ http://www.southcentre.int/wp-content/uploads/2013/11/Trade-Report-on-Food-Security_EN.pdf
⁴⁸⁶ A/HRC/20/23
⁴⁸⁷ <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>
⁴⁸⁸ A/65/260
⁴⁸⁹ A/HRC/23/37
⁴⁹⁰ A/66/216
⁴⁹¹ <http://hiaconnect.edu.au/wp-content/uploads/2014/02/TPP-policy-brief-FINAL-17-FEB-2014.pdf>
⁴⁹²
<http://www.turanga.org.nz/sites/turanga.org.nz/files/Kelsey%20Trade%20Law%20Tobacco%20Control%20Report.pdf>
⁴⁹³ http://hiaconnect.edu.au/wp-content/uploads/2015/03/TPP_HIA.pdf
⁴⁹⁴ A/RES/61/295
⁴⁹⁵ <http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf>
⁴⁹⁶ <https://www.med.govt.nz/business/intellectual-property/pdf-docs-library/plant-variety-rights/review-of-the-pvra-1987-pdf>
⁴⁹⁷ <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/patents/review-of-patents-act/boundaries-to-patentability/review-of-the-patents-act-1953-boundaries-to-patentability-pdf>
⁴⁹⁸ E/CN.4/2005/88
⁴⁹⁹ A/RES/61/295

<http://www.spada.co.nz/documents/Sub-WTODoc.pdf>
 E/CN.4/2005/88/Add.3
http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47_en.pdf
 E/CN.4/2004/80/Add.2
 Glamis Gold case, http://www.citizen.org/documents/NAFTAREport_Final.pdf
<http://www.citizen.org/documents/investor-state-chart.pdf>
https://www.citizen.org/documents/NAFTA_10_mexico.pdf
 A/RES/61/295
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4760&Lang=en
 A/HRC/4/29
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4760&Lang=en
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4760&Lang=en
 See for example the results of Internet searches for:
 - patent "orthopaedic device" site:uspto.gov
 -patent "orthopaedic device" site:wipo.int
<http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ClassifyYourDevice/ucm051530.htm>
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/37
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/37
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/37
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6429&Lang=en
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/37
 A /HRC/20/26
 A/HRC/20/26
<http://infojustice.org/archives/7025>
 A/HRC/28/57
 Article QQ.H.4, <https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf>
 Article QQ.H.7, <https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf>
 See for example <http://fairdeal.net.nz/2012/07/extension-of-copyright-duration-will-impact-libraries-and-library-users>
 Article QQ.G.10d), <https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf>
 A/HRC/17/38
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en
 A/HRC/17/38
 A /HRC/20/26
 A/HRC/25/53
 A/HRC/22/43
 A/HRC/25/53
 A/HRC/22/43
 A/HRC/25/53
 A/HRC/25/53
 A/HRC/25/53
 A/HRC/25/53
 A/HRC/25/53
 A/HRC/25/53

540 A/HRC/22/43
 541 A/HRC/25/53
 542 See for example <http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf> which the German government settled, see investment chapter in Annex 1
 543 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12150&LangID=E>
 544 http://www.washingtonpost.com/politics/elizabeth-warren-other-democrats-raise-concerns-about-free-trade-pact-with-asia/2014/12/17/19de1c48-8632-11e4-b9b7-b8632ae73d25_story.html re this letter
<http://www.warren.senate.gov/files/documents/TPP.pdf>
 545 A/68/176
 546 http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.
 547 Eg <http://www.twm.my/title2/ge/ge16.pdf> and <http://www.twm.my/title2/ge/ge06.pdf>
 548 http://www.ase.tufts.edu/gdae/policy_research/CapCtrlsLetter.html
 549 <http://citizen.typepad.com/eyesontrade/2012/12/imf-endorses-capital-controls-while-us-tpp-negotiators-try-to-ban-them.html>
 550 ILSA Journal of International and Comparative Law (Vol. 10:297,2004)
 551 A/68/176
 552 <http://www.ohchr.org/Documents/Issues/Solidarity/ProposedDraftDeclarationSolidarity.pdf>
 553 A/68/176
 554 <http://www.ohchr.org/Documents/Issues/Solidarity/ProposedDraftDeclarationSolidarity.pdf>
 555 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 556 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 557 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 558 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 559 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 560 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 561 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 562 http://www.ohchr.org/documents/issues/intorder/2015-03-30_information_note_free_trade_agreements.doc
 563 Inside US Trade, ‘TPP Ministerial Now Planned For Guam, But Could Depend On TPA: Sources’, May 06, 2015
 564 http://www.ohchr.org/Documents/Issues/IntOrder/A-HRC-24-38_en.pdf
 565 <http://www.nytimes.com/2013/06/08/technology/tech-companies-bristling-concede-to-government-surveillance-efforts.html?pagewanted=all>
 566 http://www.ohchr.org/Documents/Issues/IntOrder/A-HRC-24-38_en.pdf
 567 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-45_en.pdf
 568 http://www.ohchr.org/Documents/Issues/IntOrder/A-HRC-24-38_en.pdf
 569 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-45_en.pdf
 570 http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.
 571 Eg <http://www.twm.my/title2/ge/ge16.pdf> and <http://www.twm.my/title2/ge/ge06.pdf>
 572 http://www.ase.tufts.edu/gdae/policy_research/CapCtrlsLetter.html
 573 <http://citizen.typepad.com/eyesontrade/2012/12/imf-endorses-capital-controls-while-us-tpp-negotiators-try-to-ban-them.html>
 574 ILSA Journal of International and Comparative Law (Vol. 10:297,2004)
 575 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-45_en.pdf
 576 http://www.washingtonpost.com/politics/elizabeth-warren-other-democrats-raise-concerns-about-free-trade-pact-with-asia/2014/12/17/19de1c48-8632-11e4-b9b7-b8632ae73d25_story.html re this letter
<http://www.warren.senate.gov/files/documents/TPP.pdf>
 577 http://www.ohchr.org/Documents/Issues/IntOrder/A-HRC-24-38_en.pdf
 578 <http://www.citizen.org/documents/gtw-chevron-release.pdf>
 579 Investment tribunal’s repeated orders to violate the Constitution: <http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf>, http://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf, <http://www.italaw.com/sites/default/files/case-documents/italaw1274.pdf>.
 580 E/CN.4/2004/60
 581 E/CN.4/1995/39
 582 A/HRC/11/41
 583 A/HRC/11/41

584 <http://www.citizen.org/documents/gtw-chevron-release.pdf>
585 Investment tribunal's repeated orders to violate the Constitution: <http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf>, http://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf,
<http://www.italaw.com/sites/default/files/case-documents/italaw1274.pdf>.
586 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
587 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
588 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
589 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
590 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12150&LangID=E>
591 http://www.washingtonpost.com/politics/elizabeth-warren-other-democrats-raise-concerns-about-free-trade-pact-with-asia/2014/12/17/19de1c48-8632-11e4-b9b7-b8632ae73d25_story.html re this letter
<http://www.warren.senate.gov/files/documents/TPP.pdf>
592 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
593 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
594 http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf
595 <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>
596 http://www.iiapp.org/media/cases_pdfs/Foresti_v_South_Africa.rev.pdf
597 A/68/279
598 <https://ustr.gov/tpp/outlines-of-TPP>, <http://www.dfat.gov.au/trade/agreements/tpp/Documents/tpp-overview.docx>
599 Texts are available at: <https://ustr.gov/trade-agreements/free-trade-agreements>
600 Inside U.S. Trade, Daily News, 'At Ministerial, TPP Countries Remain At Odds Over Export Subsidies Rules',
posted: November 5, 2014
601 <http://www.nppc.org/wp-content/uploads/TPP-2-21-14-Tariff-Elimination-Analysis.pdf>
602 <https://ustr.gov/trade-agreements/free-trade-agreements>
603 [https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-](https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-10)
negotiating-10
604 <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2014-TBT-Report>
605 <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2014-TBT-Report>
606 <http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf>
607 E/CN.4/Sub.2/2002/9
608 http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm
609 http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm
610 http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm
611 http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm
612 <http://www.dfat.gov.au/trade/agreements/tpp/Documents/tpp-overview.pdf>
613 Article 1.3a), http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm
614 http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm
615 http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_03_e.htm#article16B5
616 E/CN.4/Sub.2/2002/9
617 E/CN.4/Sub.2/2002/9
618 E/CN.4/Sub.2/2002/9
619 <http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf>
620 http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm
621 P 135, 'Serving Whose Interests? The political economy of trade in services agreements', Jane Kelsey, 2008.
622 http://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm
623 <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/Stumberg-Guide-to-GATS-Dom-Reg-5-19-10.pdf>
624 https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm
625 <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/s/wpdr/w45.doc>
626 <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/Stumberg-Guide-to-GATS-Dom-Reg-5-19-10.pdf> and http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf
627 <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/Stumberg-Guide-to-GATS-Dom-Reg-5-19-10.pdf>
628 WTO document S/WPDR/W/44, available from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

⁶²⁹ E/CN.4/Sub.2/2002/9

⁶³⁰ http://www.iatp.org/files/Wrong_Model_GATS_Trade_Liberalisation_and_Chil.htm

⁶³¹ <http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/s/wpdr/w45.doc>

⁶³² E.g. Article 12.10.1 of the Peru-USFTA, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>

⁶³³ 2a) of https://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#annfin

⁶³⁴ See for example <http://www.citizen.org/documents/report-prudential-measures.pdf>

⁶³⁵ <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>. The substance of the provisions are largely unchanged in a later version which leaked, although some of the provisions were reordered, <https://wikileaks.org/tpp-investment/>. Article numbers refer to the 2015 version.

⁶³⁶ Article II.1

⁶³⁷ Article II.2

⁶³⁸ <http://www.ncsl.org/ncsl-in-dc/task-forces/policies-labor-and-economic-development.aspx#trade>

⁶³⁹ Article II.4 and II.11

⁶⁴⁰ Article II.5 and II.11

⁶⁴¹ Article II.9 and II.11

⁶⁴² Article II.9.3c) and g)

⁶⁴³ https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file420_9500.pdf

⁶⁴⁴ Article II.11 of the leaked TPP investment chapter and Article 11.6 of https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file234_9537.pdf which is likely to be the same in the TPP.

⁶⁴⁵ Article II.6

⁶⁴⁶ http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

⁶⁴⁷ http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

⁶⁴⁸ <http://www.citizen.org/documents/MST-Memo.pdf>

⁶⁴⁹ http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

⁶⁵⁰ <http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf>, <http://www.citizen.org/documents/rdc-v-guatemala-rebuttal.pdf> and the TECO case in <http://www.citizen.org/documents/investor-state-chart.pdf>.

⁶⁵¹ Article II.7

⁶⁵² Annex II-B

⁶⁵³ ‘rare circumstances’ was added to the US Model BIT in 2004, <http://investmentpolicyhub.unctad.org/IIA/CountryIris/223#iiaInnerMenu>. The only US BITs signed since then (and so are presumably the only ones to have the ‘rare circumstances’ requirement) are with Rwanda and Uruguay, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu>. The only case under these BITs (According to <http://www.italaw.com/>) is pending against Uruguay and it seems likely to raise expropriation, (<http://www.lanacion.com.ar/1689711-uruguay-se-expone-a-un-juicio-en-el-ciadi>) even though the BIT has the ‘rare circumstances’ requirement, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2380>. Awards are from <http://www.italaw.com/>.

⁶⁵⁴ DS 114, Panel Report dated 17 March, 2000

⁶⁵⁵ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm

⁶⁵⁶ http://www.wto.org/english/docs_e/legal_e/legal_e.htm

⁶⁵⁷ <http://www.collinsdictionary.com/dictionary/english/public-welfare>

⁶⁵⁸ Article II.7.5

⁶⁵⁹ Article 31h), http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm#5

⁶⁶⁰ <http://www.cptech.org/ip/health/cl/recent-examples.html>

⁶⁶¹ http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

⁶⁶² http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

⁶⁶³ Article II.8

⁶⁶⁴ Eg http://www.bu.edu/pardeeschool/files/2014/12/Leaked-TPP-Policy-Brief-Pages.pdf?utm_source=GEGI+TPP+Policy+Brief+ebblast&utm_campaign=GEGI+TPP+Policy+Brief+Eblast&utm_medium=email

⁶⁶⁵ <https://www.citizen.org/documents/general-exception.pdf>

⁶⁶⁶ Eg http://www.bu.edu/pardeeschool/files/2014/12/Leaked-TPP-Policy-Brief-Pages.pdf?utm_source=GEGI+TPP+Policy+Brief+ebblast&utm_campaign=GEGI+TPP+Policy+Brief+Eblast&utm_medium=email

⁶⁶⁶ Annex II-E and II-F
⁶⁶⁷ Section B
⁶⁶⁸ Article II.18 only allows claimants to initiate disputes (which are defined as investors in Article II.1)
⁶⁶⁹ Article II.28.1
⁶⁷⁰ http://www.iisd.org/itn/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf see para 1827 of
http://www.pca-cpa.org/showpage.asp?pag_id=1599
⁶⁷¹ Article II.28.1
⁶⁷² See for example www.citizen.org/documents/oxy-v-ecuador-memo.pdf
⁶⁷³ <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>
⁶⁷⁴ http://www.iisd.org/pdf/2011/dci_2010_stakes_of_states.pdf
⁶⁷⁵ http://www.iisd.org/pdf/2011/dci_2010_stakes_of_states.pdf
⁶⁷⁶ <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>
⁶⁷⁷ Article II.18 and II.19
⁶⁷⁸ <http://www.italaw.com/sites/default/files/case-documents/ita0221.pdf>:
⁶⁷⁹ Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', (2012) 50 Osgoode Hall Law Journal,
<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=ohlj>
⁶⁸⁰ Annex II.G
⁶⁸¹ Article II.1 definition of negotiated restructuring
⁶⁸² http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf
⁶⁸³ http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf
⁶⁸⁴ Annex II.H
⁶⁸⁵ Annex II-I
⁶⁸⁶ Annex II-M
⁶⁸⁷ Article II.15
⁶⁸⁸ www.citizen.org/documents/oxy-v-ecuador-memo.pdf
⁶⁸⁹ <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/memoranda2012/D%20Atanasova,%20CA%20Martinez%20and%20J%20Ostransky%20-%20Counterclaims%20in%20ISDS%20under%20IIAS%20FINAL.pdf>
⁶⁹⁰ 'What's Yours is Mine: Conflict of Law and Conflict of Interest Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration' by W. Shipley. www.transnational-dispute-management.com
Issue : Vol. 11, issue 1 Published : January 2014
⁶⁹¹ E/CN.4/Sub.2/2003/9
⁶⁹² E/CN.4/Sub.2/2002/9
⁶⁹³ http://documents.foodandwaterwatch.org/doc/ICSID_web.pdf
⁶⁹⁴ E/CN.4/Sub.2/2003/9
⁶⁹⁵ Sources: Public Citizen. "NAFTA chapter 11 investor-to-state cases: Bankrupting democracy." September, 2001. Accessible at: <http://www.citizen.org/documents/ACFI86.PDF>; Public Citizen. "The ten year track record of the North American Free Trade Agreement: Undermining sovereignty and democracy." *Public Citizen's NAFTA at Ten Series*. Accessible at: http://www.citizen.org/documents/NAFTA_10_democracy.pdf
⁶⁹⁶ For more information see Public Citizen, Table of Foreign Investor State Cases.
<http://www.citizen.org/documents/investor-state-chart.pdf>
⁶⁹⁷ Chevron has since refused to accept responsibility and clean up the pollution, instead resorting to a two-decade legal battle with Ecuador. Despite losing this fight in Ecuadorian courts in 2011 and being fined \$18 billion dollars in damages, Chevron is now looking to use investor-state dispute settlement mechanisms to avoid justice. Sources: "Chevron's toxic legacy in Ecuador." *Rainforest Action Network*. Accessible at: <http://ran.org/chevrans-toxic-legacy-ecuador>
⁶⁹⁸ For more details, see: Wallach, Lori and Ben Beachy. "Occidental v. Ecuador Award Spotlights Perils of Investor-State System." *Public Citizen Memorandum*, November 21, 2012. Accessible at: <http://www.citizen.org/documents/oxy-v-ecuador-memo.pdf>
⁶⁹⁹ For an in depth legal analysis of Occidental v. Ecuador, see: Wallach, Lori and Ben Beachy. "Occidental v. Ecuador Award Spotlights Perils of Investor-State System." *Public Citizen Memorandum*, November 21, 2012. Accessible at: <http://www.citizen.org/documents/oxy-v-ecuador-memo.pdf>

⁷⁰⁰ <http://www.citizen.org/documents/investor-state-chart.pdf> and <http://www.citizen.org/documents/eli-lilly-investor-state-factsheet.pdf>

⁷⁰¹ Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement (NAFTA). September 6, 2013. <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>

⁷⁰² The formal notice of intent submitted by Lone Pine Resources Inc. on November 8, 2012, can be found here: <http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf>. For a summary of the legal conflict, also see: Solomon, Ilana. "Fracking causes friction between trade and environment." *Huff Post Green*, November 16, 2012. Accessible at: http://www.huffingtonpost.com/ilana-solomon/fracking-causes-friction-b_2146939.html

⁷⁰³ Segall, Craig. "Look before the LNG leap: Why policymakers and the public need fair disclosure before exports of fracked gas start." *Sierra Club Policy Brief*, 2012. Accessible at: <http://content.sierraclub.org/naturalgas/content/new-report-look-lng-leap>

⁷⁰⁴ *Ibid* 7.

⁷⁰⁵ <http://www.citizen.org/documents/rengo-memo-03-12.pdf>

⁷⁰⁶ Sources: Warren, Bill. "Pay the polluter \$800 million! Trade deal injustice for the children of La Oroya." *Friends of the Earth New Releases and Updates*, April 16, 2012. Accessible at: <http://www.foe.org/news/archives/2012-04-pay-the-polluter-800-million-trade-deal-injustice-fo>; Tucker, Todd. "Renco group uses trade pact foreign investor provisions to chill Peru's environment and health policy, undermine justice." *Public Citizen Brief*, March, 2012. Accessible at: <http://www.citizen.org/documents/rengo-memo-03-12.pdf>

⁷⁰⁷ Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12). Accessible at: <https://icsid.worldbank.org/ICSID/FrontServlet>

⁷⁰⁸ "Vattenfall seeks recompense for German nuclear phase-out." *DW*, December, 2012. Accessible at: <http://www.dw.de/vattenfall-seeks-recompense-for-german-nuclear-phaseout/a-16473507>

⁷⁰⁹ International Institute for Sustainable Development. Background Paper on Vattenfall v. Germany Arbitration. http://www.iisd.org/sites/default/files/pdf/2009/background_vattenfall_vs_germany.pdf

⁷¹⁰ International Institute for Sustainable Development. News in Brief. July 19, 2012. <http://www.iisd.org/itn/2012/07/19/news-in-brief-8/>

⁷¹¹ 'French Company, Veolia, Launches Claim Against Egypt Over Terminated Waste Contract And Labor Wage Stabilization Promises' *Investment Arbitration Reporter*, June 27, 2012

⁷¹² E/CN.4/Sub.2/2003/9

⁷¹³ <http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf>

⁷¹⁴ <http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf>

⁷¹⁵ <http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf>

⁷¹⁶ A/69/299

⁷¹⁷ A/69/299

⁷¹⁸ A/69/299

⁷¹⁹ A/69/299

⁷²⁰ A/69/299

⁷²¹ A/69/299

⁷²² A/69/299

⁷²³ A/69/299

⁷²⁴ A/69/299

⁷²⁵ A/69/299

⁷²⁶ A/69/299

⁷²⁷ A/69/299

⁷²⁸ A/69/299

⁷²⁹ Article II.22.1

⁷³⁰ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E@>

⁷³¹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E@>

⁷³² <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E@>

⁷³³ Article II.18 and definition of 'claimant' in Article II.1.

⁷³⁴ E/CN.4/Sub.2/1999/11

⁷³⁵ E/CN.4/Sub.2/1999/11

⁷³⁶ <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>

⁷³⁷ E/CN.4/Sub.2/1999/11

⁷³⁸ Consolidated text at the point negotiations were stopped: <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>
from <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>.
⁷³⁹ <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>
⁷⁴⁰ <http://www.iisd.org/itn/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/>
⁷⁴¹ <http://www.ncsl.org/ncsl-in-dc/task-forces/policies-labor-and-economic-development.aspx#trade>
⁷⁴² <http://www.citizen.org/documents/isds-quote-sheet.pdf>
⁷⁴³ <https://tpplegal.wordpress.com/open-letter/>
⁷⁴⁴ http://www.thestar.com/news/canada/2014/09/25/new_german_objections_threaten_canadaeu_trade_deal.html
⁷⁴⁵ http://www.citizen.org/documents/NAFTAReport_Final.pdf
⁷⁴⁶ http://www.citizen.org/documents/NAFTAReport_Final.pdf
⁷⁴⁷ <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>
⁷⁴⁸ http://www.courtsofnz.govt.nz/speechpapers/BarbariansattheGate_2014_09_04.pdf
⁷⁴⁹ http://www.globalarbitrationreview.com/cdn/files/gar/articles/AGs_Opening_Speech_ICCA_Congress_2012.pdf
⁷⁵⁰ <https://tpplegal.wordpress.com/open-letter/>
⁷⁵¹ <https://www.gov.uk/government/publications/costs-and-benefits-to-the-uk-of-an-eu-us-investment-protection-treaty>.
⁷⁵² Eg see <http://citizen.typepad.com/eyesontrade/2014/12/congressional-leaders-reject-wall-streets-push-for-deregulatory-trade-pacts.html> and those in <http://www.citizen.org/documents/isds-quote-sheet.pdf> which includes specific opposition to ISDS in the TPP
⁷⁵³ <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>
⁷⁵⁴ <https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf>
⁷⁵⁵ Article QQ.A.8
⁷⁵⁶ <ftp://ftp.fao.org/docrep/fao/007/y5714e/y5714e00.pdf> and
<http://www.upov.int/export/sites/upov/upovlex/en/conventions/1991/pdf/act1991.pdf>
⁷⁵⁷ Article QQ.G.6
⁷⁵⁸ Article QQ.A.8:
⁷⁵⁹ Article QQ.A.8:
⁷⁶⁰ Article QQ.E.1.3
⁷⁶¹ Article QQ.E.1.3
⁷⁶² Article QQ.E.1.4
⁷⁶³ http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf
⁷⁶⁴ <http://www.foodsafety.govt.nz/elibrary/industry/data-protection-agricultural-discussion-document/covec-data-protection-report.pdf>
⁷⁶⁵ See for example http://www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf
⁷⁶⁶ Article QQ.E.12
⁷⁶⁷ Addendum I: Article QQ.E.14
⁷⁶⁸ Addendum I: Article QQ.E.16.1
⁷⁶⁹ Addendum I: Article QQ.E.16.2
⁷⁷⁰ Addendum I: Article QQ.E.21:
⁷⁷¹ Article QQ.E.13
⁷⁷² http://www.aph.gov.au/~media/wopapub/senate/committee/freetrade_ctte/submissions/sub533_pdf.ashx
⁷⁷³ http://www.aph.gov.au/~media/wopapub/senate/committee/freetrade_ctte/submissions/sub533_pdf.ashx
⁷⁷⁴ Addendum I: Article QQ.E.17
⁷⁷⁵ <http://aids2012.msf.org/wp-content/uploads/2012/07/TPP-Issue-Brief-IAC-July2012.pdf>
⁷⁷⁶ <https://www.citizen.org/documents/Oxfam-America-Analysis-of-USTR-TEAM-White-Paper.pdf>
⁷⁷⁷ Article QQ.E.23
⁷⁷⁸ E/CN.4/Sub.2/2001/10
⁷⁷⁹ <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-6>
⁷⁸⁰ <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-6>
⁷⁸¹ Canada-Pharmaceutical Patents case, DS 114, Panel Report dated 17 March, 2000, p. 162
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm. This case was not appealed.

⁷⁸² See for example Article 22.1.2 of the Peru-USFTA:
https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file841_9542.pdf
⁷⁸³ Article XIV(c)ii) http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIV
⁷⁸⁴ http://www.ohchr.org/Documents/Issues/DigitalAge/A-HRC-27-37_en.doc
⁷⁸⁵ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15200&LangID=E>
⁷⁸⁶ See for example Article 19.2b) Peru-USFTA,
https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file834_9518.pdf
⁷⁸⁷ Article 5.3 http://who.int/ftc/text_download/en/
⁷⁸⁸ http://who.int/ftc/guidelines/adopted/article_5_3/en/
⁷⁸⁹ <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificTransparency.pdf>
⁷⁹⁰ See for example: <http://infojustice.org/archives/5814>, <http://infojustice.org/download/tpp/tpp-civil-society/Oxfam-Paper-on-the-TPPA-leaked-IP-chapter.pdf>,
<http://www.theguardian.com/commentisfree/2013/dec/06/the-tpp-negotiations-could-be-a-bitter-pill-to-swallow-for-australians>, <http://www.pha.org.nz/documents/392-pharmac.pdf>, <http://infojustice.org/archives/8694>.
⁷⁹¹ <https://wikileaks.org/tpp2/static/pdf/tpp-treaty-environment-chapter.pdf>, <https://wikileaks.org/tpp2/static/pdf/tpp-chairs-report.pdf>
⁷⁹² http://www.miti.gov.my/storage/documents/065/com.tms.cms.document.Document_9bb0617c-c0a8156f-34330fb9-37a3988d/1/TPPA%20Workshop%20-%20For%20MITI%20Portal.pdf
⁷⁹³ See for example Article 22.1 of the Peru-USFTA:
https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file841_9542.pdf
⁷⁹⁴ <http://wikileaks.org/IMG/pdf/tpp-salt-lake-extracts-.pdf>
⁷⁹⁵ <http://www.citizen.org/documents/MST-Memo.pdf>
⁷⁹⁶ See for example Article 22.1 of the Peru-USFTA:
https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file841_9542.pdf
⁷⁹⁷ <https://www.citizen.org/documents/general-exception.pdf>
⁷⁹⁸ http://www.iatp.org/files/Wrong_Model_GATS_Trade_Liberalisation_and_Chil.htm
⁷⁹⁹ See for example Article 22.3.6 of the Peru-USFTA, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>
⁸⁰⁰ Paragraph 8: <https://tpplegal.files.wordpress.com/2012/05/wai-2358-a76-brief-of-evidence-of-expert-witness-dr-j-kelsey-dated-22-06-121.pdf>
⁸⁰¹ Paragraph 3.14, <https://tpplegal.files.wordpress.com/2012/05/wai-2358-a97-j-kelsey-dr-jane-kelseys-response-to-the-boe-of-dr-penelope-ridings-dated-6-07-12-6-07-122.pdf>.
⁸⁰² https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_59941926/Wai2358W.pdf
⁸⁰³ Article 2106, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>
⁸⁰⁴ Article 2107, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>
⁸⁰⁵ Article 2005, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf> via
Annex 2106 of <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>
⁸⁰⁶ <http://www.miti.gov.my/miti/resources/fileupload/Slides%20-TPP%20Media%20Meeting%2020022014.pdf>
⁸⁰⁷ E/CN.4/Sub.2/2002/9
⁸⁰⁸ <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-14>
⁸⁰⁹ <https://ustr.gov/trade-agreements/free-trade-agreements>