

# The Environment & the TPP

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Sustainability Council

# “Behind the Border”

- TPP is billed as a Free Trade Agreement
- But the focus is not trade
- It is to go “Behind the Border”
- It is about:

**domestic regulation**  
that can affect  
**returns to foreign investors**

# New Governance: Through What Lens?

- A major multilateral initiative to better align governance with interests of foreign investors
- Rather than a revamp of governance through the lens of sustainability, justice, avoidance of conflict, or even just economic development, is through the lens of foreign investor interests

# A New Mercantilism

- TPP supposedly the antithesis of mercantilism
- In vogue in 16<sup>th</sup>-18<sup>th</sup> century, it used tariffs and similar barriers to protect national interests
- But TPP looks a lot like **mercantilism for corporates**
- Instead of mercantilism in the interest of the nation state, looks to safeguard the interests of borderless corporations
- New IP and other rights set new barriers to commercial and state-backed competitors, just as tariffs set barriers to competing nations

# Proposed Environmental Gain: Enforcement of Treaties

- Proposal is gains for trade **and environment**
- Enforcement indeed often a problem in Multilateral Environmental Agreements (MEAs)
- US pressing hard for enforcement provisions for some MEAs (and not for domestic environmental laws by TPP parties)
- There are **over 230 MEAs** listed with UNEP
- 14 are listed as “major” MEAs within the UN’s Sustainable Development programme

# Major MEA's

- **Biological Diversity**
- Biosafety
- **Climate Change**
- Desertification
- Endangered Species
- Fish Stocks
- Hazardous Wastes
- Marine Pollution
- Migratory Species Pollution
- POPs (Stockholm)
- Protocol: Kyoto
- Protocol: Montreal
- Wetlands



# Treaties the TPP Would Cover

## Major MEAs

- Endangered Species
- Marine Pollution
- Protocol: Montreal
- Wetlands

## Other Treaties

- Convention for the Regulation of Whaling
- Inter-American Tropical Tuna Commission
- Conservation of Antarctic Marine Living Resources

# The Contradictions

The TPP would cover:

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



# 'Forum Shopping' via TPP

- The enforcement is not just highly selective
- Not just 'safe', low cost window dressing
- Sets up notion that TPP is an alternative environmental governance forum
- That global commons issues can be resolved through a regional trade agreement
- Risk is that parties seek out "regulatory discounts" by going to this new partial forum and bypass tougher global forums

# Example: NZ's Climate Change Proposal

- NZ proposed that TPP establish a regional carbon trading market
- TPP not needed to link markets of TPP countries
- **Do need one central body to oversee accounting standards** (currently the UN)
- Risk of a new climate forum is that could end up issuing own “international” carbon currency backed by own (creative) accounting standards

# Super Citizen Rights - ISDS

In addition to the risk of regulatory discounts:

- If foreign investors think expected future profits have been denied them due to a change of regulation, they can exercise **rights no local company would have** and take their case to a special purpose offshore tribunal under Investor State Dispute Settlement (ISDS) provisions
- That tribunal can force the host government to pay damages to the foreign investor and **there is no appeal process**
- Majority of NAFTA cases have involved claims over natural resources or the environment

# Chevron Case

- Chevron polluted the Ecuadorian Amazon
- It argues against a case for damages being held in the US, and for it to be in Ecuador
- An Ecuadorian court fines Chevron \$18 billion
- Chevron then turns to NAFTA ISDS provisions
- A tribunal grants an injunction against Ecuadorian court order, pending a full hearing
- Rather than Chevron paying and then claiming damages, **the tribunal overrules the court!**

# Dow Case

- In 2008 Dow AgroSciences sought \$2m compensation from Canadian government
- Claimed losses from a ban on sale of pesticide products containing 2,4-D
- Settled in 2011 with no compensation being paid
- Result: **Dow got a three year extension** on the sale of a product already banned in many other jurisdictions

# The Chilling Effect

- Australia's Productivity Commission found ISDS provisions not in Australia's interest
- Found that no Australian company had ever used the provisions (one has since)
- "There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements"
- However, does risk a "chilling effect" on willingness of governments to undertake "welfare-enhancing" reforms
- TPP provisions would extend to local Councils

# Australia Not Accepting ISDS

*"The Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."*

Australian Govt Trade Policy Statement, April 2011

# Will GM Free be Free Traded Away?

- NZ requires labelling for >1% of GM content
- US decries labelling for GMOs as a 'trade barrier'
- New Zealand's chief negotiator said its GMO regulations were one of "the top local impediments" to concluding a TPP agreement
- Loss of the right to know when a food product contains GM ingredients could quickly slide into effective loss of the right to choose everyday foods that have been formulated to avoid GMOs
- **83% of New Zealanders support current laws requiring labelling for GM content**