Preface

Globalization and its discontents: Joseph Stiglitz and the *Trans-Pacific Partnership*

INTRODUCTION

The *Trans-Pacific Partnership* (TPP) is a mega-regional agreement, spanning the Pacific Rim, involving a dozen nations, and cutting across a score of regulatory fields.¹ In a speech to the Australian Parliament in 2011, the charismatic and eloquent President Barack Obama outlined his ambition to create a regional trade agreement for the Asia-Pacific:

Building on our historic trade agreement with South Korea, we're working with Australia and our other APEC partners to create a seamless regional economy. And with Australia and other partners, we're on track to achieve our most ambitious trade agreement yet, and a potential model for the entire region – the *TPP*. The United States remains the world's largest and most dynamic economy. But in an interconnected world, we all rise and fall together.²

Obama imagined a new era of stability and prosperity in the Asia-Pacific: 'We need growth that is fair, where every nation plays by the rules; where workers rights are respected, and our businesses can compete on a level playing field; where the intellectual property and new technologies that fuel innovation are protected; and where currencies are market driven so no nation has an unfair advantage.'³

Obama added: 'We also need growth that is broad – not just for the few, but for the many – with reforms that protect consumers from abuse and a global commitment to end the corruption that stifles growth.'⁴ He also called for sustainable growth – including 'the clean energy that creates green jobs and combats climate change, which cannot be denied'. Obama noted the challenges of climate change: 'We see it in the stronger fires, the devastating floods, the Pacific islands confronting rising seas.'⁵ He insisted: 'And as countries with large carbon footprints, the United States and Australia have a special responsibility to lead.'⁶ The decade-long negotiations over the *TPP* proved to be tortuous. While the United States was to depart the

¹ *Trans-Pacific Partnership* 2015 (TPP).

² President Barack Obama, 'Speech to the Australian Parliament', White House, 17 November 2011.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

TPP under Obama's successor President Donald Trump, the remaining countries passed the *Comprehensive and Progressive Trans-Pacific Partnership (TPP-11)*.⁷

This text is intended to provide a commentary and a critique of the *TPP* and its revised supplement of the *TPP-11*, particularly focusing upon the intellectual property chapter of the agreement. The focus of this book is President Barack Obama's desire to create an Asia-Pacific mega-regional agreement 'where the intellectual property and new technologies that fuel innovation are protected'.⁸ This account is not merely a summary or a treatise on the *TPP*. This book offers a critique of the *TPP*, highlighting the dissonance between Obama's high ideals that the agreement would be progressive and comprehensive, and the substance of the text. This book focuses upon globalisation and its discontents. The *TPP* expands the intellectual property rights and the investment powers of transnational companies. The *TPP* is a 'Mickey Mouse' trade agreement designed to provide longer and stronger copyright protection in the Pacific Rim, particularly for transnational entertainment companies. The *TPP* seeks to reinforce the power of trade mark holders such as Nike. Although Obama was keen to expand access to health care in the United States, the *TPP* is very much focused upon expanding the intellectual property rights of pharmaceutical drug-makers, the developers of medical diagnostics and biotechnology companies. The secretive trade agreement also provides for stronger remedies and offences in respect of trade secrets. In spite of Obama's rhetoric about the importance of workers and jobs, the *TPP* undermines labour rights. The *TPP* engages in greenwashing, doing little to improve environmental standards and norms in the Pacific Rim. Far from providing leadership on clean energy, the *TPP* is silent on the topic of climate change, for expedient political reasons. Among the main beneficiaries of the *TPP* are fossil fuel companies, which are keen to accelerate the deregulation of the protection of the environment. Obama promised to empower democracies in the Asia-Pacific. The agreement, though, provides special investor rights for foreign companies to challenge the regulations of national governments in investor-state dispute settlement (ISDS) matters.

There has been an expanding universe of scholarship on the intersection of intellectual property and international trade. This book on the *TPP* and the *TPP-11* contributes to that literature on the integration of intellectual property and trade. This Preface provides an outline of the legal and political history of intellectual property and trade in order to put the recent developments in respect of the *TPP* in their proper context. Section 1 focuses upon the *North American Free Trade Agreement* 1993. Section 2 recounts the development of the *TRIPS Agreement* 1994. Section 3 considers the evolution of bilateral TRIPS-Plus agreements, such as the *Australia–United States Free Trade Agreement* 2004. Section 4 focuses upon the failed *Anti-Counterfeiting Trade Agreement* 2011. Section 5 charts the development of the *Trans-Pacific Partnership* 2015, particularly considering questions of intellectual property. Section 6 focuses upon the *Comprehensive and Progressive Trans-Pacific Partnership* 2018 – better known as *TPP-11*. Section 7 provides a brief literature review of academic scholarship on the topic of the *TPP* and the *TPP-11*. Section 8 outlines the methodology of this book, which relies upon the theoretical framework provided by Nobel Laureate Professor Joseph Stiglitz. Finally, this Preface provides an outline of the chapters of this book.

⁷ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018.

⁸ President Barack Obama, 'Speech to the Australian Parliament', White House, 17 November 2011.

1. The North American Free Trade Agreement (NAFTA)

An important precursor to the *TPP* is the *North American Free Trade Agreement* 1993, involving the United States, Mexico and Canada.⁹

Although Bill Clinton was lukewarm about *NAFTA* while running for President, he became a committed supporter of the regional trade deal as President. Overcoming disquiet in the United States, President Bill Clinton signed the *NAFTA* bill in December 1993. In an earlier speech, Bill Clinton was optimistic about the impact of *NAFTA* upon the United States economy: ‘Ours is now an era in which commerce is global and in which money, management, technology are highly mobile.’¹⁰ Clinton maintained that the agreement would create jobs: ‘I believe that *NAFTA* will create 200,000 American jobs in the first two years of its effect.’¹¹ Clinton argued: ‘The environmental agreement will, for the first time ever, apply trade sanctions against any of the countries that fails to enforce its own environmental laws.’¹² Clinton also sought to justify the adoption of the trade agreement as a response to technological change: ‘Nothing can change the fact that technology can be adopted once created by people all across the world, and then rapidly adapted in new and different ways by people who have a little different take on the way the technology works.’¹³ He contended: ‘This debate about *NAFTA* is a debate about whether we will embrace these changes and create the jobs of tomorrow, or try to resist these changes, hoping we can preserve the economic structures of yesterday.’¹⁴

Clinton sought to counter the critics of *NAFTA* who warned that the agreement would be a destroyer of jobs. He maintained that such opposition was rooted in ‘fears and insecurities that are legitimately gripping the great American middle class’.¹⁵ Clinton insisted: ‘The only way we can recover the fortunes of the middle class in this country so that people who work harder and smarter can at least prosper more, the only way we can pass on the American Dream of the last 40 years to our children and their children for the next 40 is to adapt to the changes which are occurring.’¹⁶

Vice President Al Gore added that ‘the United States of America has promoted freer trade and bigger markets for our products and those of other nations throughout the world. *NAFTA* is such an issue.’¹⁷

The signing ceremony was also attended by former Presidents Gerald Ford, Jimmy Carter and George Bush Senior.

Chapter 17 of *NAFTA* deals with the topic of intellectual property. The content of the agreement bears some similarities to the *TRIPS Agreement* 1994. As Paul Goldstein explains, ‘The

⁹ *North American Free Trade Agreement* 32 ILM 289, 605 (1993) (*NAFTA*).

¹⁰ The White House, ‘Remarks By President Clinton, President Carter, President Ford, and Vice President Gore in Signing of NAFTA Side Agreements’, 1993. See also Carl Cannon, ‘Four Presidents Join to Push NAFTA – Bush, Carter, Ford Stand by Clinton’, *The Baltimore Sun*, 15 September 1993.

¹¹ The White House, ‘Remarks By President Clinton, President Carter, President Ford, and Vice President Gore in Signing of NAFTA Side Agreements’, 1993.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

NAFTA negotiations began well after the start of the TRIPs discussions but were completed one year before the *TRIPs Agreement* concluded'.¹⁸

Article 1701 focuses on the nature and scope of obligations. Article 1702 deals with more extensive protection. Article 1703 addresses national treatment. Article 1704 considers the control of abusive or anti-competitive practices or conditions. Article 1705 considers copyright law. Paul Goldstein noted that 'NAFTA's copyright provisions borrowed concepts and language from drafts of the *TRIPs Agreement*'.¹⁹ Article 1706 addressed sound recordings. Article 1707 deals with the protection of encrypted program-carrying satellite signals.

Article 1708 addresses trade marks. Article 1709 deals with patents. Article 1710 concerns the layout designs of semiconductor integrated circuits. Article 1711 focuses on trade secrets. Article 1712 deals with geographical indications. Article 1713 is about industrial designs. Article 1714 considers the enforcement of intellectual property rights. Article 1715 deals with specific procedural and remedial aspects of civil and administrative procedures. Article 1716 relates to provisional measures. Article 1717 concerns criminal procedures and penalties. Article 1718 is about the enforcement of intellectual property rights at the border. Article 1719 relates to co-operation and technical assistance. Article 17.20 deals with protection of existing subject matter. Article 1721 offers some definitions. There are also some annexes dealing with some other subject matter.

In addition to an intellectual property chapter, *NAFTA* has an investment chapter.

There have been a considerable number of conflicts in respect of ISDS under *NAFTA*. Most pertinently, there was a significant conflict over intellectual property and ISDS involving Eli Lilly and the government of Canada. The government of Canada prevailed over Eli Lilly in the dispute.²⁰ There have also been numerous disputes over the regulation of the environment, biodiversity and climate change.²¹ Especially given Vice President Al Gore's passion for climate action, the impact of the ISDS regime in *NAFTA* has had an impact perhaps beyond that imagined by its designers and architects.

In retrospect, President Bill Clinton's optimism about the neo-liberal *NAFTA* trade deal seems misplaced. In 2004, Joseph Stiglitz discussed the broken promises of *NAFTA*.²² Many of the concerns about the impact of *NAFTA* upon jobs and wages became manifest. *NAFTA* proved to exacerbate concerns about the environment. The ISDS regime has been used by multinational companies to challenge regulations, to great effect. In the following decades, *NAFTA* has come under much criticism. The *TPP* has been criticised for being 'NAFTA on steroids'.²³ After campaigning against *NAFTA*, President Donald Trump has replaced *NAFTA* with the *United States-Mexico-Canada Agreement (USMCA)*.²⁴

¹⁸ Paul Goldstein, *International Copyright Law: Principles, Law, and Practice*, Oxford: Oxford University Press, 2001, 48.

¹⁹ *Ibid.*, 48.

²⁰ *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2.

²¹ *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/15/2; *Clayton / Bilcon of Delaware, Inc. v Government of Canada (Bilcon v Canada)*, NAFTA / PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; *Attorney General of Canada v. Mobil et al.*, 2016 ONSC 790; and *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4

²² Joseph Stiglitz, 'The Broken Promise of NAFTA', *The New York Times*, 6 January 2004.

²³ Lori Wallach, 'NAFTA On Steroids', *The Nation*, 27 June 2012.

²⁴ *United States-Mexico-Canada Agreement 2018 (USMCA)* Signed 30 November 2018.

2. The *TRIPS Agreement* 1994

There has been much discussion about the linkage of trade and intellectual property under the *TRIPS Agreement* 1994 in the multilateral regime for world trade.

Frustrated by a lack of perceived progress in the World Intellectual Property Organization (WIPO) on intellectual property standards and norms, the United States government sought to tie together intellectual property and trade in the development of the World Trade Organization (WTO).

The *TRIPS Agreement* 1994 was the product of negotiations, compromises and revisions.²⁵ Article 7 of the *TRIPS Agreement* 1994 gives a good sense of the various objectives of the agreement: 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'²⁶ Article 8 lays down further important principles guiding the agreement. Article 8 (1) provides: 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.'²⁷ Article 8 (2) provides: 'Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.'²⁸

Part I of the agreement deals with general provisions and basic principles. Part II of the agreement considers standards concerning the availability, scope and use of intellectual property rights. There are detailed provisions on copyright law and related rights; trade marks; geographical indications; industrial designs; patents; circuit layouts; and the protection of undisclosed information. There are also provisions on the control of anti-competitive practices in contractual licences. Part III deals with the enforcement of intellectual property rights. There are provisions on general obligations; civil and administrative procedures and remedies; provisional measures; special requirements related to border measures; and criminal procedures. Part IV deals with acquisition and maintenance of intellectual property rights and related inter-partes procedures. Part V relates to dispute prevention and settlement. Part VI focuses on transitional arrangements. Part VII deals with institutional arrangements and final provisions.

Over the past decades, there have been periodic disputes relating to intellectual property under the *TRIPS Agreement* 1994 which have been adjudicated as part of the dispute settlement process. There was an early conflict over copyright law and musical licensing involving the United States government.²⁹ There was a challenge by the European Union against

²⁵ Jayashree Watal and Antony Taubman (eds), *The Making of the TRIPS Agreement*, Geneva: World Trade Organization, 2015.

²⁶ Article 7 of the *TRIPS Agreement* 1994 1869 UNTS 299; 33 ILM 1197 (1994).

²⁷ Article 8 (1) of the *TRIPS Agreement* 1994 1869 UNTS 299; 33 ILM 1197 (1994).

²⁸ Article 8 (1) of the *TRIPS Agreement* 1994 1869 UNTS 299; 33 ILM 1197 (1994).

²⁹ *United States – Section 110 (5) of US Copyright Act*, WT/DS160/R (2000).

Canada's practices of stockpiling and springboarding of pharmaceutical drugs.³⁰ There have been various controversies over intellectual property and access to essential medicines.³¹ Both the United States of America and Australia have challenged the European Union in respect of its approach to the protection of geographical indications between citizens and foreigners.³² The Bush Administration of the United States government brought a WTO action against China over copyright piracy, trade mark counterfeiting and intellectual property enforcement – although it was largely unsuccessful.³³ Australia has successfully defended its plain packaging of tobacco products against the claims of various countries.³⁴ The Trump Administration of the United States government has brought an intellectual property action against the government of China as part of larger trade and innovation conflicts between the two nations.³⁵ Qatar has brought a successful action against Saudi Arabia over copyright infringement of sporting broadcasts.³⁶ A series of disputes and controversies have taken place in the shadows of the *TRIPS Agreement* 1994.

There was agreement in respect of the *Doha Declaration* 2001 to enable nation states to make use of intellectual property flexibilities to tackle public health epidemics, such as HIV/AIDS, malaria and tuberculosis.³⁷ The *WTO General Council Decision* 2003 was designed to enable the export of pharmaceutical drugs to those countries which lacked local manufacturing capacity.³⁸ This decision was in the end incorporated into the *TRIPS Agreement* 1994.³⁹ There remains debate, though, as to whether this mechanism has been adequate to deal with issues related to access to essential medicines. Beyond the specific topic of access to essential medicines, it has been proven to be difficult to get nation states to reach much consensus on the further reform and revision of the *TRIPS Agreement* 1994. There have been stark divisions between developed nations (such as the United States, Japan, Singapore, Australia and

³⁰ *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R (2000).

³¹ For example, see *European Union and a Member State – Seizure of Generic Drugs in Transit – Request for Consultations by India*, WT/DS408/1 (2010), and *European Union and a Member State – Seizure of Generic Drugs in Transit – Request for Consultations by Brazil*, WT/DS409/1 (2010).

³² *EC – Protection for Trademarks and GIs for Agricultural Products and Foodstuffs – Australia Complaint*, WT/DS290/R (2005).

³³ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (2009) and *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (2009).

³⁴ *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018); and *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and WT/DS441/AB/R (9 June 2020).

³⁵ United States Trade Representative, 'Following President Trump's Section 301 Decisions, USTR Launches New WTO Challenge Against China', March 2018.

³⁶ *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* (DS567) (16 June 2020).

³⁷ *Ministerial Declaration: Adopted on 14 November 2001*, WTO Doc WT/MIN(01)/DEC/1 [3] (2001) ('Doha Declaration').

³⁸ *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/L/540 (2003) (Decision of the General Council of 30 August 2003) ('WTO General Council Decision of 30 August 2003').

³⁹ *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (2005) (Decision of 6 December 2005 of the General Council) ('TRIPS Waiver').

members of the European Union), members of the BRICS group (Brazil, India, China, South Africa and Russia), developing countries (represented by the Group of 77) and least developed countries.

The TRIPS Council has hosted debates and discussions between nation states on global issues related to intellectual property and trade. There have been discussions about copyright law, education, literacy and access to knowledge. The rise of new, globally networked information technologies has led to discussions about whether the *TRIPS Agreement* 1994 is suitable for an age of electronic commerce and digital trade. Increasingly, the World Trade Organization itself has been concerned about the extent to which international trade laws and rules are well adapted to deal with new technologies. There has been discussion between the World Trade Organization, the World Intellectual Property Organization and the World Health Organization over patent law and access to essential medicines.⁴⁰ There has been argument over trade mark law and tobacco control. There have been conversations in the TRIPS Council about plant intellectual property and food security. Developments in respect of biotechnology have also raised questions about the global approach to gene patents. As the impacts of global warming become apparent, there has been argument over the relationship between intellectual property, clean technologies and climate change.⁴¹ There has been contest as to whether the *TRIPS Agreement* 1994 should provide better recognition of traditional knowledge and Indigenous intellectual property.⁴² There has also been discussion of the intersection between the *TRIPS Agreement* 1994 and the *Convention on Biological Diversity* 1992.⁴³

The topic of the *TRIPS Agreement* 1994 has attracted much academic attention and scholarship. Nobel Laureate Joseph Stiglitz – a key theorist who will be a touchstone in this book – has been highly critical of the approach taken in respect of this agreement on intellectual property and trade.⁴⁴ He recounts his opposition, as a policy-maker, to the *TRIPS Agreement* 1994:

We had concluded that what separates developed and developing countries is not just the disparity, the gap, in resources, but also the disparity in knowledge, and closing that gap in knowledge is an essential part of successful development. We had become concerned that TRIPS might make access to knowledge more difficult – and thus make closing the knowledge gap, and development more generally, more difficult. We also worried about the effects of TRIPS on access to life-saving medicines;

⁴⁰ World Health Organization, World Intellectual Property Organization and the World Trade Organization, *Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade*, Geneva: World Health Organization, World Intellectual Property Organization, and the World Trade Organization, 2012, reprinted with index 2013.

⁴¹ World Trade Organization, 'Intellectual Property, Climate Change and Development', Extract from Minutes of the TRIPS Council, 11–12 June 2013, and World Trade Organization, 'Contribution of Intellectual Property to Facilitate the Transfer of Environmentally Rational Technology', Extract from Minutes of Meeting of the TRIPS Council, 11 June 2014.

⁴² World Trade Organization, 'The Protection of Traditional Knowledge and Folklore'. Paper IP/C/W/370/Rev.1, revised 9 March 2006, and World Trade Organization, 'Review of Article 27.3(b)'. Paper IP/C/W/369/Rev.1, revised 9 March 2006.

⁴³ World Trade Organization, 'The *TRIPS Agreement* and *Convention on Biological Diversity*'. Paper IP/C/W/368/Rev.1, revised 8 February 2006.

⁴⁴ Joseph Stiglitz, 'Economic Foundations of Intellectual Property Rights' (2008) 57 (6) *Duke Law Journal* 1693–1724.

TRIPS attempted (successfully) to restrict access to generic medicines, putting these drugs out of the financial reach of most in the developing countries.⁴⁵

Stiglitz lamented that the *TRIPS Agreement* imposed ‘an unbalanced intellectual property regime’.⁴⁶ He observed that ‘globalization is one of the most important issues of the day, and intellectual property is one of the most important aspects of globalization, especially as the world moves toward a knowledge economy’.⁴⁷ Stiglitz stressed that ‘how we regulate and manage the production of knowledge and the right of access to knowledge is at the center of how well this *new economy*, the knowledge economy, works and of who benefits’.⁴⁸

Likewise, Graham Dutfield and Uma Suthersanen reflected about the *TRIPS Agreement* 1994 negotiations: ‘Far more attention was paid to the need to satisfy the pharmaceutical and entertainment industries than to ensure an intellectual property regime that was good for public health, education, food security, and the interests of developing countries.’⁴⁹

John Braithwaite and Peter Drahos undertook theoretical and empirical research upon the genesis of this international framework for global business regulation.⁵⁰ Daniel Gervais has looked at the black letter law in respect of the *TRIPS Agreement* 1994.⁵¹ Susan Sell has examined intellectual property and trade from the perspective of international relations and political science.⁵² Peter Yu has explored geopolitical tensions between key member states on global issues in the *TRIPS Agreement* 1994.⁵³ Justin Malbon, Charles Lawson and Mark Davison have also provided an extensive commentary on the *TRIPS Agreement* 1994.⁵⁴ Moreover, Tony Taubman – an international official with the WTO – has sought to provide an overview of the working operation of the regime.⁵⁵

The United States government, though, has been unhappy at the lack of progress and development in raising intellectual property standards at the WTO. The USTR has also been disappointed by the dispute resolution process in the WTO. As a result, the USTR has sought to use other bilateral, plurilateral and regional fora to address some of these issues about intellectual property and trade.

⁴⁵ Ibid., 1694.

⁴⁶ Ibid., 1694.

⁴⁷ Ibid., 1695.

⁴⁸ Ibid., 1695.

⁴⁹ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law: Second Edition*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2020, 12.

⁵⁰ Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* London: Earthscan, 2002.

⁵¹ Daniel Gervais, *The TRIPS Agreement: 4th Edition*, London: Sweet & Maxwell, 2012.

⁵² Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge: Cambridge University Press, 2003.

⁵³ Peter Yu, ‘The Objectives and Principles of the TRIPS Agreement’ (2009) 46 *Houston Law Review* 796–1046; Peter Yu, ‘TRIPS and Its Achilles Heel’ (2011) 18 (2) *Journal of Intellectual Property Law* 479–531; and Peter Yu, ‘TRIPS Wars: Developing Countries Strike Back’ in Alexandra George (ed.) *Flashpoints*, Quid Pro Press, 2016.

⁵⁴ Justin Malbon, Charles Lawson and Mark Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights – A Commentary*, Cheltenham (UK) and Northampton (MA): Edward Elgar, 2014.

⁵⁵ Tony Taubman, *A Practical Guide to Working with TRIPS*, Oxford: Oxford University Press, 2011.

3. *TRIPS* + Agreements

Frustrated by a lack of consensus on the World Trade Organization on intellectual property norms and standards, the United States government then pursued a raft of *TRIPS* + Agreements – bilateral agreements which sought to build upon the foundation of the *TRIPS Agreement* 1994.⁵⁶ The *Singapore–United States Free Trade Agreement* 2003 was a blueprint for such agreements.⁵⁷

The *Australia–United States Free Trade Agreement* 2004 has a *TRIPS* + intellectual property chapter.⁵⁸ The agreement provides a useful case study of bilateral agreements with the United States from this era.

The *AUSFTA* required sweeping changes to Australian copyright law.⁵⁹ As a result of the agreement, Australia had to lengthen the term of copyright protection from a standard of life plus 50 years to life plus 70 years. There was much criticism at the time about the costs of the copyright term extension to Australian copyright users. Moreover, Australia had to also adopt the prescriptive rules of the *Digital Millennium Copyright Act* 1998 (US) in respect of technological protection measures and electronic rights management information. Furthermore, Australia also had to adopt a safe harbours intermediary liability regime, like the United States. In addition to questions of copyright law, there was worry about how *AUSFTA* would affect local content rules.

There was much concern about the impact of *AUSFTA* on patent law, pharmaceutical drugs and the Pharmaceutical Benefits Scheme.⁶⁰ Conservative Prime Minister John Howard denied that Australia was susceptible to the evergreening of pharmaceutical drugs – in spite of cases in the courts about that exact problem.⁶¹ In response, opposition leader Mark Latham, of the Australian Labor Party, agreed to pass *AUSFTA*, with the provision of some anti-evergreening measures. In retrospect, such anti-evergreening measures have proven to have little efficacy in addressing the problems around access to affordable medicines.

Notably, John Howard resisted the inclusion of an ISDS regime in the investment chapter.

There was significant criticism of the overall package of *AUSFTA* at the time by critics such as Linda Weiss, Elizabeth Thurbon and Jon Mathews, who argued that the agreement would undermine Australian sovereignty.⁶²

⁵⁶ Peter Drahos, 'Bilateralism in Intellectual Property', Oxfam, 2001, and Peter Drahos, 'BITs and BIPs: Bilateralism in Intellectual Property' (2001) 4 *Journal of World Intellectual Property* 791–808.

⁵⁷ *Singapore–United States Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2003).

⁵⁸ *Australia–United States Free Trade Agreement (AUSFTA)*, signed 18 May 2004 (entered into force 1 January 2005).

⁵⁹ Matthew Rimmer, 'Robbery under Arms: Copyright Law and the Australia–United States Free Trade Agreement' (2006) 11 (3) *First Monday*.

⁶⁰ Ken Harvey, Thomas Faunce, Buddhima Lokuge and Peter Drahos, 'Will the Australia–United States Free Trade Agreement Undermine the Pharmaceutical Benefits Scheme?' (2004) 181 (5) *Medical Journal of Australia* 256–9.

⁶¹ Robert Chalmers, 'Evergreen or Deciduous? Australian Trends in Relation to the "Evergreening" of Patents' (2006) 30 (1) *Melbourne University Law Review* 29–61.

⁶² Linda Weiss, Elizabeth Thurbon and John Mathews, *How to Kill a Country: Australia's Devastating Trade Deal with the United States*, Sydney: Allen & Unwin, 2004.

In 2015, Professor Shiro Armstrong reflected upon the economic impact of *AUSFTA*.⁶³ He noted: ‘Ten years after *AUSFTA* came into force, there is enough data to estimate the effects of the agreement on trade flows and their economic impact.’⁶⁴ Armstrong suggested: ‘The evidence from a large panel dataset using the gravity model of trade deployed by the Productivity Commission suggests that Australian and US trade with the rest of the world fell – that there was trade diversion – due to *AUSFTA* after controlling for country-specific factors.’⁶⁵ He commented: ‘Estimates also suggest trade between Australia and the United States fell in association with the implementation of *AUSFTA* — also after controlling for country-specific factors.’⁶⁶ In his view, ‘The existence of trade diversion suggests that trade between Australia and the United States could well have fallen even further without *AUSFTA*’.⁶⁷

The *Korea–United States Free Trade Agreement* 2007 also has a comprehensive agreement on intellectual property.⁶⁸ There was also an effort to develop regional agreements – such as the *Dominican Republic–Central America Free Trade Agreement* 2004 – but that was ultimately unsuccessful.⁶⁹

4. The *Anti-Counterfeiting Trade Agreement* (ACTA)

The United States government pressed for the introduction of a *TRIPS++* agreement in the form of the plurilateral *Anti-Counterfeiting Trade Agreement* 2011 (*ACTA*).⁷⁰ The United States Trade Representative (USTR) boasted of the agreement:

ACTA is a groundbreaking initiative by key trading partners to strengthen the international legal framework for effectively combating global proliferation of commercial-scale counterfeiting and piracy. In addition to calling for strong legal frameworks, the agreement also includes innovative provisions to deepen international cooperation and to promote strong intellectual property rights (IPR) enforcement practices. Together, these provisions will help to support American jobs in innovative and creative industries against intellectual property theft.⁷¹

This plurilateral agreement involved negotiations with a range of countries – including the United States, Australia, Canada, New Zealand, Japan, Singapore, South Korea, Mexico, Morocco, the European Union and Switzerland.

The preamble to the agreement noted ‘that effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries and globally’.⁷² The agreement further noted ‘that the proliferation of counterfeit and pirated goods, as well as

⁶³ Shiro Armstrong, ‘The Economic Impact of the Australia–United States Free Trade Agreement’, AJRC Working Paper 01/2015, January 2015.

⁶⁴ *Ibid.*, 14.

⁶⁵ *Ibid.*, 14.

⁶⁶ *Ibid.*, 14.

⁶⁷ *Ibid.*, 14.

⁶⁸ *Korea–United States Free Trade Agreement (KORUS)*, signed 30 June 2007 (entered into force March 2012)

⁶⁹ *Dominican Republic–Central America Free Trade Agreement (CAFTA)*, signed 5 August 2004.

⁷⁰ *Anti-Counterfeiting Trade Agreement* 2011, [2011] ATNIF 22, not yet in force.

⁷¹ United States Trade Representative, *Anti-Counterfeiting Trade Agreement (ACTA)*: Signing Participants in Tokyo, Japan, Press Release, 1 October 2011.

⁷² *Anti-Counterfeiting Trade Agreement* 2011, [2011] ATNIF 22, not yet in force.

of services that distribute infringing material, undermines legitimate trade and sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and, in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public'.⁷³ The agreement represented a desire 'to combat such proliferation through enhanced international cooperation and more effective international enforcement'.⁷⁴

In terms of the content of the agreement, Chapter I dealt with initial provisions and definitions. Chapter II offered a legal framework for the enforcement of intellectual property rights. It covered general obligations, civil enforcement, border measures, criminal enforcement and enforcement of intellectual property rights in the digital environment. Chapter III looked at enforcement practices. Chapter IV discussed international co-operation. Chapter V concerned institutional arrangements. Chapter VI related to final provisions. There was significant evolution of *ACTA* over the course of the negotiations.⁷⁵

The agreement received criticism from an array of civil society organisations. Transparency advocates lamented the lack of transparency, due process and consultation in respect of the agreement.⁷⁶ Digital rights activists were concerned about the impact of *ACTA* upon access to knowledge, education and internet freedom.⁷⁷ Public health experts were worried about the impact of the border measure provisions on access to medicines.⁷⁸ There was a concern by human rights advocates about the expansion of intellectual property measures – particularly in respect of criminal procedures and remedies.⁷⁹ Multilateralists contended that *ACTA* undermined the centrality of international institutions such as the World Trade Organization, and the World Intellectual Property Organization.⁸⁰ Development advocates were concerned that the

⁷³ *Anti-Counterfeiting Trade Agreement* 2011, [2011] ATNIF 22, not yet in force.

⁷⁴ *Anti-Counterfeiting Trade Agreement* 2011, [2011] ATNIF 22, not yet in force.

⁷⁵ Margot Kaminski, 'An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement' (2011) 21 (3) *Albany Law Journal of Science and Technology* 385–444.

⁷⁶ Matthew Rimmer, 'Trick or Treaty? The Australian Debate over the Anti-Counterfeiting Trade Agreement (ACTA)' in Pedro Roffe and Xavier Seuber (eds), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath*, Geneva: International Centre for Trade and Sustainable Development, and Cambridge: Cambridge University Press, 2014, 169–201.

⁷⁷ Cory Doctorow, 'Copyright Kremlinology: Understanding the Secret Copyright Treaty ACTA', *Boing Boing*, 18 February 2010; Maira Sutton and Parker Higgins, 'We Have Every Right to Be Furious About ACTA', Electronic Frontier Foundation, 27 January 2012; Monica Horten, *A Copyright Masquerade: How Corporate Lobbying Threatens Online Freedoms*, London and New York: Zed Books, 2013; Rita Matulionyte, 'ACTA's Digital Chapter: Remaining Concerns and What Can Be Done' in Pedro Roffe and Xavier Seuber (eds), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath*, Geneva: International Centre for Trade and Sustainable Development, and Cambridge: Cambridge University Press, 2014, 115–42.

⁷⁸ MSF Campaign for Access to Essential Medicines, 'The Secret Treaty: Anti-Counterfeiting Trade Agreement (ACTA) And Its Impact on Access to Medicines', Background Paper, October 2010.

⁷⁹ Amnesty International, 'EU Urged to Reject International Anti-Counterfeiting Pact', Press Release, 10 February 2012.

⁸⁰ Peter Yu, 'The ACTA Committee' in Pedro Roffe and Xavier Seuber (eds), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath*, Geneva: International Centre for Trade and Sustainable Development, and Cambridge: Cambridge University Press, 2014, 143–54.

process of *ACTA* paid little respect to the Development Agenda and Sustainable Development Goals.⁸¹

There was fierce resistance to this agreement – particularly in the European Parliament.⁸² A concerted campaign by civil society organisations led to the collapse of the agreement.⁸³

After holding hearings and taking note of the position of the European Parliament and the controversy in the United States, the Joint Standing Committee on Treaties in the Australian Parliament recommended the deferral of ratification of *ACTA*.⁸⁴ There was an unusual consensus between the representatives of all the main parties. The Hon. Kelvin Thomson and the Hon. Melissa Parke from the Australian Labor Party, Senator Scott Ludlam from the Australian Greens, and even Simon Birmingham from the Liberal Party were particularly critical of the agreement. The Committee was concerned about the lack of transparency, due process, public participation and substantive analysis of the treaty. There were also reservations about the ambiguity of the text of the treaty, and its potential implications for the digital economy, innovation and competition, plain packaging of tobacco products and access to essential medicines.

The treaty has led to much debate as to whether the *Trick or Treaty* reforms on the international treaty-making process in Australia had been compromised or undermined.⁸⁵ Reflecting upon the controversy, the Australian economist Peter Martin asked plaintively: ‘Why do we negotiate free trade agreements in secret?’⁸⁶ He highlighted a need to reform our international treaty-making process.

In spite of the profound defeat of the agreement, many of the key concepts in *ACTA* would re-emerge in the new agreement of the *TPP*. Indeed, a number of the doctrines articulated in *ACTA* were further elaborated upon and expanded upon in the *TPP* and *TPP-11*.

5. The Trans-Pacific Partnership

The *Trans-Pacific Partnership (TPP)* is a sweeping trade agreement, covering a dozen countries across the Pacific Rim, including Canada, Mexico, Australia, New Zealand and a bevy of Latin American and Asia-Pacific countries.⁸⁷ The agreement covers scores of topics – includ-

⁸¹ Ahmed Abdel-Latif, ‘Developing Countries and the Contestation of ACTA at the TRIPS Council’ in Pedro Roffe and Xavier Seuber (eds), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath*, Geneva: International Centre for Trade and Sustainable Development, and Cambridge: Cambridge University Press, 2014, 357–75.

⁸² European Parliament, ‘European Parliament Rejects ACTA’, Press Release, 4 July 2012.

⁸³ Andreas Dur and Gemma Mateo, ‘Public Opinion and Interest Group Influence: How Citizen Groups Derailed the Anti-Counterfeiting Trade Agreement’ (2014) 21 (8) *Journal of European Public Policy* 1199–1217; and Pedro Roffe and Xavier Seuber (eds), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath*, Geneva: International Centre for Trade and Sustainable Development, and Cambridge: Cambridge University Press, 2014.

⁸⁴ Joint Standing Committee on Treaties, *Report 126 – Treaty Tabled on 21 November 2011: Anti-Counterfeiting Trade Agreement 2011*, Canberra: Australian Parliament, June 2012.

⁸⁵ Senate Legal and Constitutional References Committee, *Trick or Treaty? The Commonwealth Power to Make and Implement Treaties*, November 1995.

⁸⁶ Peter Martin, ‘Why Do We Negotiate Free Trade Agreements in Secret?’ *The Sydney Morning Herald*, 22 May 2012. See also Peter Martin, ‘What’s Our Trade Minister Up To? What’s He Signing In Our Name?’ *The Sydney Morning Herald*, 7 August 2012.

⁸⁷ *Trans-Pacific Partnership 2015 (TPP)*.

ing market access, intellectual property, investment, agriculture, the environment, tobacco control, drug pricing, labour rights and financial regulation. The negotiations for the *TPP* were shrouded in secrecy. A stream of freedom of information requests about the agreement came about in various jurisdictions.⁸⁸ Legislators, stakeholders and civil society were initially dependent upon leaked texts published by WikiLeaks to obtain a better idea of the substance of the negotiations prior to the release of the final texts.

As Professor Jeffrey Sachs has observed, the *TPP* is a protean agreement: ‘The agreement, with its 30 chapters, is really four complex deals in one.’⁸⁹ He noted: ‘The first is a free-trade deal among the signatories.’⁹⁰ The intent of this part is that ‘Tariff rates would come down to zero; quotas would drop; trade would expand; and protectionism would be held at bay’.⁹¹ Sachs says: ‘The second is a set of regulatory standards for trade.’⁹² In his view, ‘Most of these are useful, requiring that regulations that limit trade should be based on evidence, not on political whims or hidden protectionism.’⁹³ Sachs notes: ‘The third is a set of regulations governing investor rights, intellectual property and regulations in key service sectors, including financial services, telecommunications, e-commerce and pharmaceuticals.’⁹⁴ He reflects: ‘Their common denominator is that they enshrine the power of corporate capital above all other parts of society, including labor and even governments.’⁹⁵ Sachs observes: ‘The fourth is a set of standards on labor and environment that purport to advance the cause of social fairness and environmental sustainability.’⁹⁶ He observes that ‘the agreements are thin, unenforceable and generally unimaginative’.⁹⁷

The *TPP* has a selection of chapters, dealing with traditional matters of trade. Chapter 2 of the *TPP* deals with national treatment and market access.⁹⁸ Chapter 3 of the *TPP* concerns rules of origin and origin procedures.⁹⁹ Chapter 4 of the *TPP* concerns textiles and apparel.¹⁰⁰ Chapter 5 of the *TPP* looks at customs administration and trade facilitation.¹⁰¹ Chapter 6 of the *TPP* relates to trade remedies.¹⁰² Chapter 7 of the *TPP* concerns sanitary and phytosanitary measures,¹⁰³ and Chapter 8 focuses upon technical barriers to trade.¹⁰⁴

⁸⁸ There was an unsuccessful effort by a news organisation to obtain the United States Trade Representative’s documents in the *TPP* in *Intellectual Property Watch v. United States Trade Representative* 205 F.Supp.3d 334 (2016). There was, however, a much more successful action in New Zealand for public disclosure of documents related to the *TPP* by Professor Jane Kelsey of the University of Auckland: *Kelsey v. Minister of Trade* [2015] NZHC 2497; [2016] 2 NZLR 218 (13 October 2015).

⁸⁹ Jeffrey Sachs, ‘TPP is Too Flawed for a Simple “Yes” Vote’, *Boston Globe*, 8 November 2015.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Chapter 2 of the *Trans-Pacific Partnership* 2015 (*TPP*).

⁹⁹ Chapter 3 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰⁰ Chapter 4 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰¹ Chapter 5 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰² Chapter 6 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰³ Chapter 7 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰⁴ Chapter 8 of the *Trans-Pacific Partnership* 2015 (*TPP*).

Chapter 18 of the *TPP* promises to be transformative in terms of the intellectual property chapter.¹⁰⁵ The agreement contains a suite of copyright obligations relating to copyright term extension, online intermediary liability, technological protection measures and civil and criminal copyright enforcement. The *TPP* also contains significant provisions in respect of trade mark law – covering counterfeiting, cybersquatting, well known trade marks, geographical indications and internet domain names. Concern has been raised about how the *TPP* will affect tobacco control measures, such as graphic health warnings and plain packaging of tobacco products.

The agreement also provides for significant obligations in respect of patent law, and related rights such as data protection and biologics. There has been much concern about how such measures will impact upon drug pricing and access to essential medicines. There is also text on access to genetic resources, traditional knowledge and the environment. The *TPP* also proposes criminal procedures and penalties in respect of the disclosure of trade secrets.

In addition, the *TPP* has an investment chapter – Chapter 9 of the *TPP* – with an ISDS regime. This has been perhaps the most controversial of all chapters in the *TPP*. There has been much debate as to whether it is desirable or appropriate that foreign investors be given special rights. There has been discussion as to whether there are appropriate safeguards to allow for the autonomy of nation states to engage in regulation. In addition, there has been debate over whether intellectual property owners should be able to deploy investor clauses in respect of intellectual property rights. There has been much controversy in the Pacific Rim over investor disputes – such as Big Tobacco’s challenge to Australia’s regime for plain packaging of tobacco products, and Eli Lilly’s action against Canada over drug patents. There is also a traditional regime in respect of state versus state dispute settlement.¹⁰⁶

The *TPP* has a chapter on electronic commerce, which is designed to boost digital trade.¹⁰⁷ There is a chapter on telecommunications.¹⁰⁸ The *TPP* has a chapter on matters of financial regulation.¹⁰⁹ There was a concern among some policy-makers and commentators that the agreement promoted a vision of financial deregulation.¹¹⁰ There was a concern as to whether this was an appropriate framework – especially in the wake of the global financial crisis. There is also a chapter dealing with cross border trade in services.¹¹¹

Several chapters deal with matters of commercial law, competition policy and consumer rights. Chapter 15 deals with government procurement.¹¹² Chapter 16 concerns competition policy.¹¹³ Chapter 17 focuses on state-owned enterprises and designated monopolies.¹¹⁴

¹⁰⁵ Chapter 18 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰⁶ Chapter 28 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰⁷ Chapter 14 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰⁸ Chapter 13 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹⁰⁹ Chapter 11 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹⁰ Jane Kelsey, ‘How the Trans-Pacific Partnership Agreement Could Heighten Financial Instability and Foreclose Governments’ Regulatory Space’ (2010) 8 *New Zealand Yearbook of International Law* 3–42.

¹¹¹ Chapter 10 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹² Chapter 15 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹³ Chapter 16 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹⁴ Chapter 17 of the *Trans-Pacific Partnership* 2015 (*TPP*).

Chapter 22 focuses on competitiveness and business facilitation.¹¹⁵ Chapter 24 looks at small and medium-sized enterprises.¹¹⁶ Chapter 26 concerns transparency and anti-corruption.¹¹⁷

There is a curious Annex-A to Chapter 26 which supposedly deals with ‘Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices’.¹¹⁸ This regime seeks to provide greater oversight of health regulatory systems by private companies. In 2015, WikiLeaks first revealed a draft ‘Transparency for Health’ Annex of the Trans-Pacific Partnership.¹¹⁹ Dr Deborah Gleeson of La Trobe University observed that the Annex is ‘clearly intended to cater to the interests of the pharmaceutical industry’.¹²⁰ In her view, the deal did nothing to promote high-quality health care or free trade. Professor Jane Kelsey of the University of Auckland commented that ‘this “transparency” Annex seeks to erode the processes and decisions of agencies that decide which medicines and medical devices to subsidise with public money and by how much’.¹²¹ She highlighted the significant implications of the regime for New Zealand’s Pharmaceutical Management Agency (Pharmac). Likewise, Peter Maybarduk of Public Citizen was concerned that the pact could expose Medicare in the United States to attacks by pharmaceutical companies.¹²² He was also concerned that the agreement would ‘limit Congress’ ability to enact policy reforms that would reduce prescription drug costs for Americans’.¹²³ Professor Brook Baker was also concerned about how the regime would impact upon access to affordable medicines.¹²⁴

The *TPP* also seeks to encourage regulatory harmonisation and coherence. Chapter 21 looks at co-operativeness and capacity building.¹²⁵ Chapter 25 deals with regulatory coherence.¹²⁶

The *TPP* also has an array of other chapters, with much more aspirational text on questions of sustainable development. Jeffrey Sachs laments that such chapters are underdeveloped and threadbare:

Perhaps most disappointing is the lack of creativity in the development, labor and environmental chapters. Yes, they rhetorically defend global economic development, labor standards and environmental sustainability, but they do so without specific enforcement powers.¹²⁷

¹¹⁵ Chapter 22 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹⁶ Chapter 24 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹⁷ Chapter 26 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹⁸ Annex-A of Chapter 26 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹¹⁹ WikiLeaks, ‘“Transparency for Health” Annex of the Trans-Pacific Partnership’, 10 June 2015.

¹²⁰ Deborah Gleeson, ‘The Trans Pacific Partnership’s Healthcare Transparency Annex: Commentary on the Leaked TPP Transparency Chapter Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices Dated December 17, 2014 and released by WikiLeaks in June 2015’, WikiLeaks, 10 June 2015.

¹²¹ Jane Kelsey, ‘The Trans-Pacific Partnership Agreement: Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices’, WikiLeaks, 10 June 2015.

¹²² Peter Maybarduk, ‘Latest TPP Leak Raises Burning Questions about Implications for U.S. Health Care System’, Public Citizen, 10 June 2015.

¹²³ Ibid.

¹²⁴ Brook Baker, ‘Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere’ (2016) 13 (3) *Public Library of Science Medicine* e1001970.

¹²⁵ Chapter 21 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹²⁶ Chapter 25 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹²⁷ Jeffrey Sachs, ‘TPP is Too Flawed for a Simple “Yes” Vote’, *Boston Globe*, 8 November 2015.

There is also a chapter on labour rights, although the impact of this chapter has been hotly contested.¹²⁸ There is a chapter on the environment, which is largely aspirational.¹²⁹ There is a weak chapter on sustainable development.¹³⁰ The agreement does not deal with the topic of climate change – even though that is a pressing environmental crisis not only for the Pacific Rim, but for the world.

Chapter 29 deals with exceptions and general provisions.¹³¹ This chapter contains some miscellaneous provisions on national security, taxation, tobacco control and Indigenous rights.

The *TPP* was intended to be a ‘living agreement’. Australia’s Department of Foreign Affairs and Trade explains this approach to free trade agreements:

Australia’s Free Trade Agreements (FTAs) are not static. They are implemented over time and subject to regular review to maximise the benefits they deliver. Existing FTAs are further developed through committees and working groups established by the agreements, and formal review provisions. Collectively, these form the ‘built-in agenda’ to an agreement. The built-in agenda provides a platform for the parties to examine ways to build on outcomes where possible. Some benefits automatically deepen over time as mandated by an agreement, such as staged tariff cuts.¹³²

DFAT emphasised: ‘The *TPP* includes a commitment for the Parties to review the Agreement within three years of entry into force and at least every five years thereafter.’¹³³ Moreover, DFAT noted: ‘The *TPP* also allows for the accession of other economies, beyond the 12 Parties that negotiated the Agreement. Australia is committed to expanding the *TPP* over time to include other Asia Pacific economies.’¹³⁴ In other words, the parties expected that the *TPP* would evolve and expand over time in terms of its subject matter and its membership.

6. The Comprehensive and Progressive Trans-Pacific Partnership (*TPP-11*)

With the election of President Donald Trump, the United States government has withdrawn from the *TPP*. There has been much debate as to whether the agreement would survive the withdrawal of the United States, given that they had been the architects of the regional trade agreement. For its part, the United States government pressed on with the revision of *NAFTA*, which was passed in 2020 as the *USMCA*.

Nonetheless, after much debate over whether the *TPP* would be viable without the United States, Australia, Japan and Singapore led a revival of the *TPP*. After some equivocation, Canada agreed to join the revised *TPP-11*, subject to the suspension of a number of provisions relating to intellectual property, cultural exceptions and automobiles.¹³⁵ The *TPP-11* was signed in March 2018 and came into force at the end of December 2018.

¹²⁸ Chapter 19 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹²⁹ Chapter 20 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹³⁰ Chapter 23 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹³¹ Chapter 29 of the *Trans-Pacific Partnership* 2015 (*TPP*).

¹³² Department of Foreign Affairs and Trade, ‘Background: FTAs as Living Agreements’.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018 (*TPP-11*).

The *TPP-11* was, awkwardly and clunkily, called the *Comprehensive and Progressive Trans-Pacific Partnership*, even though it was neither comprehensive nor progressive.¹³⁶ The preamble to the *TPP-11* articulated a number of grand aims, objectives and aspirations. The *TPP-11* emphasised that this agreement sought to ‘realise expeditiously the benefits of the TPP through this Agreement and their strategic and economic significance’.¹³⁷ The preamble to the *TPP-11* said that the agreement would ‘contribute to maintaining open markets, increasing world trade, and creating new economic opportunities for people of all incomes and economic backgrounds’, ‘promote further regional economic integration and cooperation between them’ and ‘enhance opportunities for the acceleration of regional trade liberalisation and investment’.¹³⁸ The *TPP-11* also sought to ‘reaffirm the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest’.¹³⁹ There has been much debate as to whether the *TPP-11* actually embodies such values. The *TPP-11* also welcomed ‘the accession of other States or separate customs territories to this Agreement’.¹⁴⁰

As a result of the intervention of Canada, a number of provisions in the *TPP-11* were suspended – notably relating to intellectual property, investment, manufacturing and other miscellaneous matters of trade. However, such provisions could be revived in the future by the consensus of the parties. Article 18.8 on national treatment and intellectual property was partially suspended. In respect of copyright law, the copyright term extension provision in Article 18.63 was suspended. Likewise, the text on technological protection measures in Article 18.68 and Rights Management Information in Article 18.69 and the Protection of Encrypted Satellite and cable signals in Article 18.79 were suspended. The text on legal remedies, internet service providers and safe harbours in Article 18.82 was also suspended. Some of the text on patent law and pharmaceutical drugs was suspended, including parts of Article 18.37 on patentable subject matter; Article 18.46 on patent term adjustments; Article 18.48 on patent term adjustments; and Article 18.50 on protection of test data. The highly controversial Article 18.51 on biologics were suspended. Annex 18-E and Annex-F were suspended.

The Open Source Industry Australia Company Secretary Jack Burton commented upon the approach of suspending certain articles:

CPTPP is a ticking time bomb ... Nobody has any idea if & when those suspended provisions may be reinstated. If they are ever reinstated, we will have a situation just as bad as if the original *TPP* had come into force. In the meantime, we have something even worse: two thirds of the original anti-trade, anti-innovation restrictions proposed in *TPP*, plus complete uncertainty about if & when the other third might be resurrected. One must ask why the offensive provisions were merely suspended. If the remaining 11 Parties genuinely believed that those provisions were unsuitable, why not remove them completely and irrevocably?¹⁴¹

¹³⁶ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018 (*TPP-11*).

¹³⁷ Preamble of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Open Source Industry Australia Ltd, ‘*CPTPP* is a Ticking Time Bomb: Controversial “Suspended” Provisions Could Return at Any Time’, Press Release, 23 February 2018.

This is a good point – if the parties were seriously concerned about the impact of the provisions, they would have been deleted altogether. As it stands, the suspended provisions represent an effort to entice the United States back to the bargaining table for a future rejoining of the *TPP*.

Some side letters concerned matters of intellectual property. Australia signed a number of letters with Chile and Vietnam regarding Article 18.47 on the Protection of Undisclosed Test or Other Data for Agricultural Chemical Products, recognising that the Parties could establish conditions, limitations and exceptions in respect of such an Article.¹⁴² Australia also reached an agreement with Vietnam regarding Article 18.53 on Measures Relating to the Marketing of Certain Pharmaceutical Products, recognising that the Parties could establish conditions, limitations and exceptions in respect of such an Article.¹⁴³

As a result of qualms about the operation of ISDS, there were a number of suspended provisions relating to Chapter 9 of the investment chapter. There was a suspension of language relating to ‘investment agreement’ and ‘investment authorisation’. The Australian Department of Foreign Affairs and Trade explained the effect of such suspensions:

This narrows the scope of ISDS. Foreign investors can no longer make an ISDS claim for violation of private investment contracts with the Government, or investment authorisations. Foreign investors can still bring an ISDS claim for a violation of an investment obligation, such as expropriation or the minimum standard of treatment. Expropriation is where a government takes over, or nationalises, an investor’s property. The minimum standard of treatment means a government has to treat a foreign investor fairly, such as giving them due process in a local court.¹⁴⁴

Thus, under the *TPP-11*, the investor-state dispute settlement regime would still be in operation, but its scope would be a little circumscribed.

There were also a miscellaneous range of other provisions suspended. Article 5.7 on express shipments was partially suspended. Article 11.2 on the scope of financial services was partially suspended, as well as all of Annex 11-E. Article 13.21 on the resolution of telecommunications disputes was partially suspended. Article 15.8 and Article 15.24 on government procurement were partially suspended. From the environment chapter, Article 20.17 on conservation and trade was partially suspended. From the chapter on transparency and anti-corruption, Article 26-A on transparency and procedural fairness for pharmaceutical products and medical devices was also suspended.

Furthermore, there were a number of side letters between the parties, particularly in respect of cultural exceptions. For instance, Australia and Canada agreed to recognise that Canada could enjoy various policy flexibilities in the cultural industries sector.¹⁴⁵ Likewise, New Zealand and Canada agreed to recognise that Canada could have various policy liberties in

¹⁴² Memorandum of Understanding between Australia and Chile regarding Article 18.47, Side-letter to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018; and Memorandum of Understanding between Australia and Vietnam regarding Article 18.47, Side-letter to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018.

¹⁴³ Memorandum of Understanding between Australia and Vietnam regarding Article 18.53, Side-letter to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018.

¹⁴⁴ Department of Foreign Affairs and Trade, *TPP-11 Suspensions Explained*.

¹⁴⁵ Agreement between Australia and Canada Regarding the Cultural Industries Sector, Side-letter to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018.

the cultural industries sector.¹⁴⁶ The side letters stipulated that Canada ‘may adopt or maintain discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development and may adopt or maintain measures that restrict access to online foreign audio-visual content’.¹⁴⁷ Michael Geist observed: ‘This leaves the door open for the Canadian government to move into regulating services like Netflix or in theory trying to block services like Netflix.’¹⁴⁸ It was curious that Australia and New Zealand did not ask for countervailing flexibilities in respect of cultural policy. The protection of local culture was an important issue during the negotiations over the *Australia–United States Free Trade Agreement* 2004.¹⁴⁹ As the work of Tania Voon has shown, there has been a long history of debate over trade and cultural products.¹⁵⁰

7. Scholarship on the *TPP*

In light of this robust national and international debate about the *TPP*, there is a need for a consideration of the details of the *TPP*, and the opportunities and the risks involved with the intellectual property chapter and other related chapters. The *TPP* promises to transform the regulation of a wide range of subjects across the Pacific Rim. The mega-regional agreement is considered to be of great economic, commercial, social and environmental significance by the dozen participants in the negotiations. This book will seek to improve both the process and the substance of negotiating agreements in respect of intellectual property and trade.

There is a growing literature on the topic of the *TPP* and *TPP-11*, covering both the negotiations and the substantive content of the chapters. No doubt now the *TPP-11* is in force, the literature will expand further – particularly to take into account the implementation and the operation of the *TPP-11*, and the future expansion of its membership.

In Australia, Tania Voon offered an early legal analysis of the *TPP*, considering trade liberalisation and international co-operation.¹⁵¹ Andrew Mitchell, Elizabeth Sheargold and Tania Voon have considered the *TPP* in light of the evolution of Australian policy on trade and investment.¹⁵² In their book, they emphasise the importance of Australia maintaining

¹⁴⁶ New Zealand – Side Instruments – Culture, Side-letter to the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* 2018.

¹⁴⁷ Ibid.

¹⁴⁸ Emily Jackson, ‘CPTPP Side Deals Leave Door Open for Canada to Regulate Netflix, Experts Say’, *Financial Post*, 8 March 2018.

¹⁴⁹ *Australia–United States Free Trade Agreement (AUSFTA)*, signed 18 May 2004 (entered into force 1 January 2005); Anna George, ‘A Decade On, Is the Australia-US FTA Fit for the 21st Century?’, *The Conversation*, 22 October 2014; Shiro Armstrong, ‘The Costs of Australia’s “Free Trade” Agreement with America’, *Inside Story*, 28 April 2015; and Elizabeth Thurbon, ‘10 Years after the Australia–US Free Trade Agreement: Where To for Australia’s Trade Policy?’ (2015) 69 *Australian Journal of International Affairs* 463–7.

¹⁵⁰ Tania Voon, *Cultural Products and the World Trade Organization*, Cambridge: Cambridge University Press, 2007.

¹⁵¹ Tania Voon (ed.), *Trade Liberalisation and International Co-Operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2013.

¹⁵² Andrew Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment*, Cheltenham (UK) and Northampton (MA): Edward Elgar Publishing, 2017.

regulatory autonomy in international negotiations over trade and investment. They discuss the importance of rebalancing standards in respect of intellectual property, services, investment and the environment. Deborah Gleeson has explored the public health dimensions of the *TPP*.¹⁵³ Building upon her past work, Kyla Tienhaara has considered the debate over investor-state dispute settlement in Australia.¹⁵⁴ Elizabeth Thurbon has investigated the politics of the *TPP* in Australia.¹⁵⁵ Patricia Ranald and the civil society organisation AFTINET have considered whether the *TPP* will adversely impact fair trade and labour rights.¹⁵⁶ Benedict Kingsbury and his colleagues have considered global economic ordering after the *TPP*.¹⁵⁷

In New Zealand, Jane Kelsey from the University of Auckland has made a notable contribution to the literature, focusing upon the implications of the *TPP* and the *TPP-11* for New Zealand and the Pacific region.¹⁵⁸

In Canada, Scott Sinclair and Stuart Drew have edited a citizen's guide to the *TPP*.¹⁵⁹ Michael Geist from the University of Ottawa has provided a running commentary on the *TPP* and *TPP-11* – particularly focusing upon intellectual property, electronic commerce, cultural protections and investor-state dispute settlement. Gus van Harten from Osgoode Hall Law School has been focused upon investor-state dispute settlement – ranging across *NAFTA*, *CETA*, *TPP*, *TPP-11* and the *USMCA*. Maude Barlow from the Council of Canadians has been largely concerned with the impact of trade and investment agreements upon the environment, and climate change.¹⁶⁰ Naomi Klein has been particularly concerned about the nexus between trade and climate change.¹⁶¹

¹⁵³ Joel Lexchin and Deborah Gleeson, 'The Trans-Pacific Partnership Agreement and Pharmaceutical Regulation in Canada and Australia' (2016) 46 (4) *International Journal of Health Services* 597–613; and Deborah Gleeson and Ronald Labonte, *Trade Agreements and Public Health: A Primer for Health Policy Makers, Researchers and Advocates*, Singapore: Palgrave Macmillan, 2020.

¹⁵⁴ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge: Cambridge University Press, 2009; and Kyla Tienhaara, 'These TPP Safeguards Won't Protect Us from ISDS', *ABC News*, 26 March 2015.

¹⁵⁵ Elizabeth Thurbon, 'There's No Point to Australia's Push to Ratify the *TPP*', *The Conversation*, 25 January 2017, and Elizabeth Thurbon, 'Re: The Comprehensive and Progressive Agreement for Trans-Pacific Partnership', Joint Standing Committee on Treaties, the Australian Parliament, 24 April 2018.

¹⁵⁶ Patricia Ranald, 'The Trans-Pacific Partnership: Reaching Behind the Border, Challenging Democracy' (2015) 26 (2) *The Economic and Labour Relations Review* 241–60; and Patricia Ranald, 'The Senate Is Set to Approve It, But What Exactly Is the Trans-Pacific Partnership?', *The Conversation*, 16 October 2018.

¹⁵⁷ Benedict Kingsbury et al. (ed.), *Megaregulation Contested: Global Economic Ordering after TPP*. Oxford: Oxford University Press, 2019.

¹⁵⁸ Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*, Wellington: Bridget Williams Books Inc., 2010; and Jane Kelsey, *Hidden Agendas: What We Need to Know about the Trans-Pacific Partnership Agreement (TPPA)*, Wellington: Bridget Williams Books Limited, 2013.

¹⁵⁹ Scott Sinclair and Stuart Trew (ed.), *The Trans-Pacific Partnership and Canada: A Citizen's Guide*, Toronto: James Lorimer & Company Ltd, 2016.

¹⁶⁰ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, New York: The New Press, 2013; and Matthew Rimmer, 'Blue Future: Maude Barlow, Water Rights, Investor Clauses, and Trade Deals', *Medium*, 5 August 2014, and *InfoJustice*, 5 August 2014.

¹⁶¹ Naomi Klein, *This Changes Everything: Capitalism vs The Climate*, New York: Simon & Schuster, 2014; and Naomi Klein, *No is Not Enough: Resisting Trump's Shock Politics and Winning the World We Need*, London: Allen Lane, 2017.

Blayne Haggart has compared and contrasted the approaches of the United States, Canada, and Mexico to copyright law and trade policy.¹⁶² He has highlighted contradictions in United States trade policy, particularly espousing copyright maximalism and internet freedom, simultaneously.¹⁶³ There has been consideration of how the *TPP* will raise public policy issues in particular for Mexico.¹⁶⁴ Debora Halbert has considered the geopolitics of the *TPP*.¹⁶⁵ She noted: ‘Despite the end of the TPP [for the United States] we can expect that President Trump will actively pursue IP maximalist policies and thus align with both Democratic and Republican administrations before him.’¹⁶⁶

In the United States, Margot Kaminski has considered the capture of international intellectual property through the US trade regime.¹⁶⁷

Trade researchers C.L. Lim, Deborah Elms and Patrick Low have also been doing work on the implications of the *TPP* for the Pacific Rim region.¹⁶⁸ Peter Yu has explored the ramifications of the exclusion of BRICS countries, other emerging economies and the European Union from the deal.¹⁶⁹ Julien Chaisse, Henry Gao and Chang-Fa Lo have explored whether the *TPP* will be a new model for trade agreements, particularly in South East Asia.¹⁷⁰ Kung-Chung Liu and Julien Chaisse have investigated the future of Asian trade deals, looking at intellectual property.¹⁷¹ Thilo Rensmann has examined more broadly the emergence of mega-regional trade agreements – of which the *TPP* is a leading example.¹⁷² Lisa Toohey has considered international economic integration in light of mega-regional free trade agreements such as the *TPP*.¹⁷³

¹⁶² Blayne Haggart, *Copyright: The Global Politics of Digital Copyright Reform*, Toronto: the University of Toronto Press, 2014; and Blayne Haggart, ‘Modern Free Trade Agreements are not about Free Trade’, Centre for International Governance Innovation, 11 April 2017.

¹⁶³ Blayne Haggart and Michael Jablonski, ‘Internet Freedom and Copyright Maximalism: Contradictory Hypocrisy Or Complementary Policies’ (2017) 33 (3) *The Information Society: An International Journal* 103–118.

¹⁶⁴ Francois Duhamel and Raul Bringas, ‘Impact of Trans-Pacific Partnership’s Intellectual Property Rights Issues for Mexico and China’ in Shoujun Cui and Manuel Perez Garca (ed.), *China and Latin America in Transition*, New York: Palgrave Macmillan US, 2016, 189–204.

¹⁶⁵ Debora Halbert, ‘The Curious Case of Monopoly Rights as Free Trade: The TPP and Intellectual Property and Why It Still Matters’ (2017) 7 *Journal of Information Policy* 204–227.

¹⁶⁶ *Ibid.*, 224.

¹⁶⁷ Margot Kaminski, ‘The Capture of International Intellectual Property Law through the U.S. Trade Regime’ (2014) 87 *Southern California Law Review* 977–1052.

¹⁶⁸ C.L. Lim, Deborah Elms and Patrick Low (ed.), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement*, Cambridge: Cambridge University Press, 2012. See also Minh Nguyen and Deborah Elms, ‘TPP Rules for Digital Trade in Asia’, Asian Trade Centre, 29 November 2016.

¹⁶⁹ Peter Yu, ‘TPP and Trans-Pacific Perplexities’ (2014) 37 *Fordham International Law Journal* 1129–81.

¹⁷⁰ Julien Chaisse, Henry Gao and Chang-fa Lo (eds), *Paradigm Shift in International Economic Law Rule-Making*, Singapore: Springer, 2017.

¹⁷¹ Kung-Chung Liu and Julien Chaisse (eds), *The Future of Asian Trade Deals and IP*, Oxford: Hart Publishing, 2019.

¹⁷² Thilo Rensmann (ed.), *Mega-Regional Trade Agreements*, Cham (Switzerland): Springer, 2017.

¹⁷³ Lisa Toohey, ‘Politics, Power and Process: The TPP and Dispute Settlement Choices for Asian States’, *The Trans-Pacific Partnership: A Paradigm Shift in International Trade Regulation*, Singapore: Springer Nature, 2017, 87–104; Gillian Moon and Lisa Toohey (eds), *The Future of International*

There has been consideration of the implications of the *TPP* for China and India.¹⁷⁴ Rather provocatively, Peter Drahos has even argued that China should join the *TPP*.¹⁷⁵ For its part, China has been pursuing its own mega-regional trade and infrastructure project, One Belt, One Road.¹⁷⁶ Moreover, China and India have also been part of the negotiations over the *Regional Comprehensive Economic Partnership (RCEP)*.

There is also a growing consideration of the expansion of the *TPP* to include a range of other nations. South Korea has considered joining the *TPP*. The Philippines, Taiwan, Thailand and Indonesia have also been contemplated as potential members of the agreement. Even in the throes of Brexit,¹⁷⁷ the United Kingdom has been contemplating membership of the *TPP*.

8. Methodology

In terms of its methodology, this book draws upon the work of Professor Joseph Stiglitz, a Nobel Laureate in Economics and Sydney Peace Winner. In his body of work, Stiglitz provides a useful framework to consider the intersection between intellectual property, trade, and sustainable development. His classic book *Globalization and Its Discontents* considered the impact of international trade frameworks upon government decision making.¹⁷⁸ For the Roosevelt Institute, Stiglitz consolidated his critique of the *TPP*.¹⁷⁹ He argues that the *TPP* lacks democratic legitimacy because of the lack of transparency, accountability and public participation in the negotiations. Stiglitz contends that the *TPP* will have an adverse impact upon labour rights, public health and the environment and climate. He warns that investor-state dispute settlement will impact regulatory decision-making and domestic court decisions. Stiglitz doubts that the *TPP* will help curb the rise of China (as Obama had intended).

In a 2005 book with Andrew Charlton, Joseph Stiglitz explored how to achieve fair trade for all and bring trade into harmony with sustainable development.¹⁸⁰ The work, among other things, calls for a reform of intellectual property law, policy and practice.

In his book *Globalization and Its Discontents Revisited: Anti-Globalization in the Era of Trump*, Stiglitz reconsiders his past work on globalisation in light of recent developments.¹⁸¹ He contends that the benefits of globalisation have been less than its advocates claimed, and

Economic Integration: The Embedded Liberalism Compromise Revisited, New York: Cambridge University Press, 2018.

¹⁷⁴ Amitendu Palit, *The Trans-Pacific Partnership, China and India: Economic and Political Implications*, London and New York: Routledge, 2014.

¹⁷⁵ Peter Drahos, 'China, the *TPP* and Intellectual Property' (2016) 47 (1) *IIC – International Review of Intellectual Property and Competition Law* 1–4.

¹⁷⁶ Peter Rimmer, 'China's Belt and Road Initiative: Underlying Economic and International Relations Dimensions' (2018) 32 (3) *Asian-Pacific Economic Literature*.

¹⁷⁷ Oonagh Fitzgerald and Eva Lein (eds), *Complexity's Embrace: The International Law Implications of Brexit*, Waterloo: CIGI Press, 2018.

¹⁷⁸ Joseph Stiglitz, *Globalization and Its Discontents*, New York: W.W. Norton & Company, 2002.

¹⁷⁹ Joseph Stiglitz, *Tricks of the Trade Deal: Six Big Problems with the Trans-Pacific Partnership*, Roosevelt Institute, 28 March 2016.

¹⁸⁰ Joseph Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development*, Oxford: Oxford University Press, 2005.

¹⁸¹ Joseph Stiglitz, *Globalization And Its Discontents Revisited: Anti-Globalization in the Era of Trump*, New York: W.W. Norton & Company, 2017.

its costs have been more significant than anticipated. Stiglitz was critical of the ‘Washington Consensus’ on free trade:

The notion was that by freeing markets – stripping away the regulations that constrained the economy – and incentivizing individuals and firms, through lower tax rates, the power of markets would be unleashed. Economies would grow, and even if those at the top got a larger share of the pie, everyone, even those at the bottom, would prosper. Better to have a smaller share of a much bigger pie than a larger share of a small pie. The results of this experiment, tried in countries around the world, are now in: it has been a dismal failure.¹⁸²

Stiglitz observed that Trump sought to capitalise on anger over the uneven distribution of the benefits and costs of globalisation. He contends, though, that the protectionism of Trump will only exacerbate problems further. Criticising Trump’s ‘America First’ policy, Stiglitz seeks to articulate a progressive vision of trade and globalisation.

Throughout his academic career, Joseph Stiglitz has considered intellectual property in a number of contexts. He has been particularly concerned about the problem of intellectual property and inequality.¹⁸³ In the area of access to essential medicines, Stiglitz has been critical of the impact in respect of patents relating to pharmaceutical drugs.¹⁸⁴ He had advocated alternative models of research and development, such as medical prizes.¹⁸⁵ Stiglitz was a critic of Myriad Genetics’ patents in respect of genetic testing for breast cancer and ovarian cancer.¹⁸⁶ He observed that such patents raised larger questions in respect of inequality. Stiglitz has been conscious of the tensions between intellectual property and education.¹⁸⁷ He has contended that there is a need to consider the original goal of intellectual property in terms of promoting learning. Stiglitz has also worried about the relationship between intellectual property and agriculture.¹⁸⁸ He has looked at plant breeders’ rights, access to genetic resources and plant genetic resources. Stiglitz has also considered the role of intellectual property in respect of the diffusion of clean technologies.¹⁸⁹ He has advocated various reforms to accelerate climate action.¹⁹⁰ Stiglitz has emphasised that rewriting rules of the American economy should include

¹⁸² Ibid., xliii–xliv.

¹⁸³ Joseph Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future*, New York: W.W. Norton & Company, 2013.

¹⁸⁴ Joseph Stiglitz, ‘Scrooge and Intellectual Property Rights’ (2006) 333 *British Medical Journal* (2006) 1279–80.

¹⁸⁵ Joseph Stiglitz, ‘Prizes, Not Patents’, *Project Syndicate*, 6 March 2007.

¹⁸⁶ Joseph Stiglitz, ‘How Intellectual Property Reinforces Inequality’, *The New York Times*, 14 July 2013. See also Joseph Stiglitz, *The Great Divide: Unequal Societies and What We Can Do About Them*, New York: WW Norton & Company, 2015.

¹⁸⁷ Joseph Stiglitz and Bruce Greenwald, *Creating a Learning Society: A New Approach to Growth, Development, and Social Progress*, New York: Columbia University Press, 2014.

¹⁸⁸ Dean Baker, Arjun Jayadev and Joseph Stiglitz, ‘Innovation, Intellectual Property, and Development: A Better Set of Approaches for the 21st Century’, AccessIBSA, 2017.

¹⁸⁹ Claude Henry and Joseph Stiglitz, ‘Intellectual Property, Dissemination of Innovation and Sustainable Development’ (2010) 1 (3) *Global Policy* 237–51.

¹⁹⁰ Mario Cimoli, Giovanni Dosi, Keith Maskus, Ruth Okediji, Jerome Reichman and Joseph Stiglitz (eds), *Intellectual Property Rights: Legal and Economic Challenges for Development*, Oxford: Oxford University Press, 2014.

intellectual property law reform.¹⁹¹ He has also contended that the European Union would also benefit from reforms in respect of intellectual property, competition policy and trade law.¹⁹² Following up on such work, Stiglitz and his collaborators have also considered how African states would benefit from law reform as well.¹⁹³

In collaboration with Dean Baker and Arjun Jayadev, Joseph Stiglitz has been articulating a better set of approaches in respect of innovation, intellectual property and development for the twenty-first century.¹⁹⁴ Stiglitz and his collaborators have argued for the reform of intellectual property laws to better fulfil the United Nations' Sustainable Development Goals. This framework enunciated by Joseph Stiglitz and his collaborators will be applied in terms of the analysis of the *TPP* and *TPP-11* across a range of fields of intellectual property.

In his 2019 book on *People, Power, and Profits*, Stiglitz has called for the development of a 'progressive capitalism for an age of discontent'.¹⁹⁵ He elaborates upon his critique of Trump's 'America First' trade policy:

While globalization, and especially poorly managed trade liberalization, has contributed to deindustrialization, unemployment, and inequality, Donald Trump's protectionist policies won't solve any of these problems. Indeed, his mindless undoing of the global rules-based system may make some of them worse. Renegotiating trade agreements will neither reduce the trade deficit nor lead to a return of manufacturing jobs. This is because the trade deficit is determined largely by macroeconomic factors, not by trade agreements.¹⁹⁶

Joseph Stiglitz's collaborator Dean Baker has raised a strong criticism that corporate rent-seekers have sought to influence and capture the processes of globalisation.¹⁹⁷

There are some important parameters and limitations and boundaries to this study. Given the sweeping subject matter of the *TPP*, this book focuses on intellectual property, and some related matters in respect of electronic commerce, investment and general exceptions. This research monograph is not intended to be a comprehensive commentary on the whole of the *TPP*. Given the dozen countries involved in the negotiations over the *TPP* and the *TPP-11*, some limitations are necessary in terms of the scope of this study. In terms of its focal points, this book particularly focuses upon the jurisdictions of the United States, Canada, Australia and New Zealand.

¹⁹¹ Joseph Stiglitz, with Nell Abernathy, Adam Hersh, Susan Holmberg and Mike Konczal, *Rewriting the Rules of the American Economy: An Agenda for Growth and Shared Prosperity*, New York and London: W.W. Norton & Company, 2016.

¹⁹² Joseph Stiglitz with Carter Dougherty and the Foundation for European Progressive Studies, *Rewriting the Rules of the European Economy: An Agenda for Growth and Shared Prosperity*, New York: W.W. Norton & Co, 2020.

¹⁹³ Akbar Norman, Joseph Stiglitz and Ravi Kanbur (eds), *The Quality of Growth in Africa*, New York: Columbia University Press, 2019.

¹⁹⁴ Dean Baker, Arjun Jayadev and Joseph Stiglitz, 'Innovation, Intellectual Property, and Development: A Better Set of Approaches for the 21st Century', AccessIBSA, 2017.

¹⁹⁵ Joseph Stiglitz, *People, Power, and Profits: Progressive Capitalism for an Age of Discontent*, New York and London: W.W. Norton & Company, 2019.

¹⁹⁶ *Ibid.*, 89.

¹⁹⁷ Dean Baker, *Rigged: How Globalization and the Rules of the Modern Economy Were Structured to Make the Rich Richer*, Washington DC: Center for Economic and Policy Research, 2016.

9. Outline of Parts and Chapters

The introduction will provide an outline of the history and the evolution of the *TPP*. In particular, it will explore the positions of key political leaders in the late stages of the debate – President Barack Obama and his successor President Donald Trump, Prime Minister Justin Trudeau of Canada and Prime Minister Malcolm Turnbull of Australia. The introduction will consider the relationship between intellectual property, trade and investment in the agreement. It will outline the various elements of intellectual property considered in the Pacific Rim trade agreement and consider the rise of the *TPP*, particularly during the Presidency of Barack Obama. It will chart the divisions among the Democrats over the *TPP* and the fall of the agreement, with the United States leaving the negotiations under the leadership of President Donald Trump. The introduction will examine the revival and resurrection of the *TPP-11*. It will critically analyse the suspensions and the side-letters which are part of this compromise deal and will chart the ratification of the *TPP-11* by a number of member states, leading to the agreement coming into force in 2019.

Part I of the book considers the *TPP*, copyright law, the creative industries, and internet freedom.

Chapter 1 considers the debate on the *TPP*, copyright law and the public domain. Drawing upon research into intellectual property and trade, this piece of work provides a critical evaluation of the copyright regime proposed by the *TPP*. In particular, this study focuses upon four key participants in the trade negotiations – the United States, Canada, Australia and New Zealand. The argument is that the regime will have a negative impact upon creativity, innovation and competition in the Pacific Rim. The chapter considers the objectives of copyright law and policy under the *TPP*. It contends that traditional objectives of copyright law have been supplanted in the *TPP* by the corporatist push to protect the foreign investments of multinational corporations engaged in the distribution of copyright works. The chapter focuses upon the impact of the copyright term extension in the *TPP* and the treatment of orphan works. This measure has been suspended as a result of the demands of Canada in the *TPP-11*.

Chapter 2 examines the nature and scope of copyright exceptions under the *TPP*. This debate takes place against the background of a larger international debate over copyright limitations and exceptions. It explores the possibilities of the defence of fair dealing, the extended defence of fair dealing in Canada and the defence of fair use in the United States. It also considers the recognition of particular, purpose-specific copyright exceptions – for instance, relating to disability rights. The conclusion considers the fate of the copyright proposals in the *TPP* under the Trump Administration.

Chapter 3 considers the text on the *TPP* relating to technological protection measures and internet service providers. The *TPP* was an effort by the United States government under President Barack Obama to export key features of the *Digital Millennium Copyright Act 1998* (US) (*DMCA*). Drawing upon the work of Joseph Stiglitz, this chapter expresses concern that the *TPP* would entrench *DMCA* measures in the laws of a dozen Pacific Rim countries. The chapter focuses upon intermediary liability under the *TPP*. Elements of the safe harbours regime in the *DMCA* – with its takedown and notice scheme – have been embedded into the international agreement. The chapter examines technological protection measures – especially in light of a constitutional challenge to the *DMCA*. It also looks at electronic rights management. In passing, this chapter mentions the suite of civil remedies, criminal offences

and border measures introduced under the *TPP*. It concludes that the model of the *DMCA* is unsuitable for a template for copyright protection in the Pacific Rim. It contends that our future copyright laws need to be responsive to new technological developments in the digital age.

Part II of the book concerns electronic commerce. Chapter 4 considers the *TPP*, privacy, electronic commerce, and digital trade. The electronic commerce chapter is an important element of the *TPP*. For their part, multinational information technology companies are attracted to the electronic commerce chapter of the *TPP*. The Computer and Communications Industry Association (CCIA) has supported the *Trans-Pacific Partnership*. Its members include a broad section of the information technology industry, including Amazon, eBay, Facebook, Google, Microsoft, Netflix, PayPal, Pinterest, Samsung, TiVo and Yahoo! The Internet Association has expressed support for the *TPP*. While harbouring some reservations about the intellectual property measures in the agreement, the Big Information Technology companies in the Internet Association were attracted by the electronic commerce chapter. Somewhat even more surprisingly, the Consumer Electronics Association has lent its support to the *TPP*. However, critics of the electronic commerce chapter have been concerned about how the agreement will impact data sovereignty, privacy, consumer rights, open source software and network neutrality. Such provisions remained intact even after the renegotiation of the *TPP-11*.

Part III of this book considers the *TPP*, trade mark law and related rights. In particular, it considers the treatment of trade marks, counterfeiting, cybersquatting, internet domain names and geographical indications. There is also a brief mention of the growing tensions between trade mark holders and public health advocates – particularly around tobacco control and plain packaging of tobacco products, alcohol regulation and food nutrition.

Chapter 5 provides a critical analysis of the *TPP* and its treatment of trade mark law. It analyses draft texts of the trade agreement, as well as the final version of the international trade agreement. This chapter considers President Barack Obama's pitch for the *TPP* at Nike headquarters. It examines the criticism of his position by fair trade activists, unions and culture-jammers. The chapter evaluates the provisions on trade mark law in the *TPP*. Special attention is paid to the treatment of well-known marks. The chapter considers the provisions on counterfeiting in the *TPP*. There are certainly echoes of the provisions in *ACTA*. The chapter examines the text on internet domain names and cybersquatting. The conclusion considers the contradictions and paradoxes of President Donald Trump on the *TPP* – on the one hand, withdrawing from the agreement; on the other hand, supporting an expansive approach to the protection of trade mark law.

Chapter 6 explores how the *TPP* deals with intellectual property, investor-state dispute settlement, graphic health warnings and the plain packaging of tobacco products. Investor-state dispute settlement (ISDS) poses significant challenges in respect of tobacco control, public health, human rights and sustainable development. Two landmark ISDS rulings provide procedural and substantive guidance on the interaction between ISDS and tobacco control. The ISDS action by Philip Morris against Uruguay in respect of graphic health warnings raised important procedural and substantive issues. The ISDS matter between Philip Morris and Australia over the plain packaging of tobacco products highlighted matters in respect of abuse of process. In the *TPP*, there was a special exclusion for tobacco control measures in respect of ISDS. There was also a larger discussion about the role of general public health exceptions. In the *Comprehensive Economic and Trade Agreement (CETA)*, there was a debate about the

application of ISDS to intellectual property rights. In the European Union, there has been discussion of the creation of an international investment court. In the renegotiation of *NAFTA*, there have even been calls to abolish ISDS clauses altogether, from both Republicans and Democrats. This chapter concludes that there is a need to protect tobacco control measures implementing the *WHO Framework Convention on Tobacco Control* 2003 from further investor and trade challenges.

Chapter 7 focuses on geographical indications and trade mark law. In particular, it examines the tensions between the United States and the European Union in respect of geographical indications. The text of the *TPP* represented an effort by the United States to subject geographical indications to higher levels of oversight and regulation.

Part IV considers the *TPP*, patent law and related rights, such as biologics, data protection and trade secrets.

Chapter 8 considers the *TPP* and agriculture. In particular, it explores plant intellectual property rights and food labelling. Agriculture has been a sensitive issue during the *TPP* negotiations. In Canada, there were dramatic protests by dairy farmers over the *TPP*, with tractors and cows encircling the Canadian Parliament. Stephen Harper's Conservative government promised a large compensation package to dairy farmers. Justin Trudeau's Liberal government engaged in consultations over the *TPP*. Obviously agriculture will be a sensitive issue. There are a large number of parts of the *TPP* dealing with agriculture, food security, farming and plant intellectual property. As a result, assessing the benefits and costs for the sector under the *TPP* is a complex equation. This chapter considers the nexus between intellectual property, trade and agriculture. It considers plant breeders' rights, agricultural patents and trade mark law and food labelling. The chapter also examines ISDS in the context of agriculture, food labelling and farming.

Chapter 9 examines the *TPP* and the intersection of intellectual property, public health, and access to essential medicines. The *TPP* put forward a radical model for the regulation of intellectual property and access to medicines across the Pacific Rim. The trade agreement makes reference to the framework established by the *TRIPS Agreement* 1994, the *Doha Declaration on the TRIPS Agreement and Public Health* 2001 and the *WTO General Council Decision* 2003 (which was incorporated into the *TRIPS Agreement* 1994 as an amendment in 2017). Nonetheless, it does little to positively advance public health and access to medicines. The *TPP* seeks to maximise the intellectual property rights of pharmaceutical drug companies. The agreement had extensive provisions on patentable subject matter, patent standards, patent term extensions and evergreening, patent registration linkages and border measures. As a result of public outcry, a number of key provisions were suspended as part of the *TPP-11*. The World Health Organization and the United Nations Secretary-General's High Level Panel on Access to Medicines have highlighted the need to ensure that public health and access to medicines are not undercut by regional trade agreements such as the *TPP*.

Chapter 10 considers the treatment of intellectual property and biotechnology under the *TPP*. The biotechnology industry was an influential lobbyist during the *TPP* negotiations. There was a significant debate over the scope of patentable subject matter. Meanwhile, domestic courts in United States and Australia took a narrow interpretation of patentable subject matter in litigation over genetic testing for breast cancer and ovarian cancer. There has also been controversy over measures related to data protection, the protection of biologics and trade secrets. President Barack Obama had vigorous debates with Prime Minister Malcolm Turnbull

over the treatment of biologics. As a result of pressure from Canada, the provisions on biologics have been suspended in the *TPP-11*. However, there will no doubt be future debate over the protection of biologics. The Trump Administration has demanded special protection of biologics as part of the *USMCA*.

Part V focuses on trade secrets. Chapter 11 explores how the *TPP* has sought to strengthen the protection of trade secrets throughout the Pacific Rim. The United States Congress has passed the *Defend Trade Secrets Act* 2016 (US). The United States Trade Representative has pushed for the inclusion of criminal penalties and procedures in international trade agreements such as the *TPP*. Nonetheless, concern has been raised that the closed model of trade secrets protection in the *TPP* could have a chilling effect upon innovation, knowledge diffusion and entrepreneurship. In light of the case of Aaron Swartz, there is particular concern about how the language about computer crimes in the *TPP* will be interpreted. Moreover, there is concern about how the trade secrets provisions of the *TPP* will impact upon journalism, whistleblowing and freedom of speech. There is a lack of adequate defences and safeguards in the text in respect of freedom of the press, whistleblowing and public policy in the *TPP*. Given the United States' departure from the *TPP* under President Donald Trump, there was an opportunity to revise – or even abandon altogether – the text on trade secrets in the *TPP*. However, controversially, such provisions were not among those suspended, at the behest of Canada. The Trump Administration has pushed for the protection of trade secrets – particularly as part of its trade conflict with China. Indeed, in 2020 the Trump Administration obtained further guarantees from China with respect to the protection of trade secrets. Moreover, the Trump Administration has demanded heightened protection of trade secrets under the *USMCA*.

Part VI of the book considers how the *TPP* will impact upon access to genetic resources, traditional knowledge and Indigenous intellectual property. This Part considers the impact of the *TPP* upon biodiversity, the environment, sustainable development and climate change.

Chapter 12 contends that the *TPP* fails to meet the expectations created by President Barack Obama, the White House and the US Trade Representative about the environmental value of the agreement. First, it considers the relationship of the *TPP* to multilateral environmental treaties. Second, it explores whether the provisions in respect of the environment are enforceable. Third, it examines the treatment of trade and biodiversity in the *TPP*. Fourth, it considers the question of marine capture fisheries. Fifth, there is an evaluation of the cursory text in the *TPP* on conservation. Sixth, the chapter considers trade in environmental services under the *TPP*. The conclusion laments the overall weak environment chapter of the *TPP*. It also highlights that a number of other chapters of the *TPP* will also have a negative impact upon the protection of the environment – including the investment chapter, the intellectual property chapter, the technical barriers to trade chapter, and the text on public procurement. Such areas deserve further academic study to obtain a comprehensive understanding of the *TPP*.

Chapter 13 highlights the tensions between the *TPP* and substantive international climate action. It is submitted that the *TPP* undermines effective and meaningful government action and regulation in respect of climate change. The intellectual property chapter provides little in the way of flexibility to allow for access to clean energy to combat climate change. The investment chapter empowers fossil fuel companies to take action against government regulations. The environment chapter does not even mention the phrase 'climate change'. The palimpsest of the negotiations reveals that the text on climate change was erased during the discussions.

This chapter maintains that there is a need for trade agreements to boost and support climate action.

Chapter 14 examines whether the *TPP* provides sufficient recognition of traditional knowledge, Indigenous intellectual property and, more broadly, Indigenous rights, as recognised by the *United Nations Declaration on the Rights Of Indigenous Peoples 2007 (UNDRIP)*. This chapter considers key chapters of the *TPP* relating to access to Indigenous intellectual property genetic resources, informed consent, and benefit-sharing. It examines the chapter on intellectual property and focuses upon access to genetic resources, informed consent and benefit sharing. It investigates developments on Indigenous intellectual property in jurisdictions in the Pacific Rim such as the United States, Canada and Australia. It considers the developments in respect of Indigenous intellectual property in New Zealand under the *Treaty of Waitangi*. It focuses upon the international norms and standards established by *UNDRIP*.

In light of the analysis of the *TPP* and the *TPP-11*, the conclusion makes recommendations for a truly progressive approach to intellectual property, trade and globalisation. Drawing upon theoretical insights from the work of Joseph Stiglitz, the conclusion offers policy solutions in respect of improving the transparency, accountability and democratic participation involved in the trade-making process. Moreover, the conclusion also provides a series of recommendations in respect of the various disciplines of intellectual property law – copyright law and electronic commerce; trade mark law, plain packaging of tobacco products and geographical indications; patent law, biologics and trade secrets; and access to genetic resources, clean technology and Indigenous intellectual property. There is also a discussion of the intersection of intellectual property and ISDS. The conclusion highlights the need for intellectual property reform in the Pacific Rim in light of the United Nations Sustainable Development Goals.