

No Ordinary Deal – Unmasking the Trans-Pacific Partnership Free Trade Agreement

Edited by Jane Kelsey

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The Trans-Pacific Partnership Agreement (TPPA) is a regional ‘trade’ initiative that seeks to enlarge the existing P-4 membership (Brunei Darussalam, Chile, New Zealand and Singapore known as the ‘founding fathers’) to further include Australia, Peru, Vietnam and, most notably, the United States (US). President Obama announced in late 2009 that the US would engage in these negotiations “with the goal of shaping a regional agreement that will have broad-based membership and the high standards worthy of a 21st century trade agreement”. Malaysia has also recently joined these negotiations, which are set to build a platform for other countries to join in. In light of the likely collapse of the 10 years of multilateral negotiations at the World Trade Organization (WTO), the TPPA has gained unprecedented significance as it seems to be promoted as a regional WTO of the Asia-Pacific region—a free trade area with an eye to integrate the entirety of ‘factory Asia’ later on. The US seems to wish for larger Asian economies such as Japan, South Korea and, more importantly, China and India to later join such an economic bloc in which the rules of the game (called ‘regulatory coherence’) are already written in line with its own export interest.

The TPPA is another Free Trade Agreement (FTA) in which the term ‘trade’ seems to have become a misnomer. FTAs are no longer about removing such barriers to ‘trade’ in goods and services, which merely serve narrow interests of domestic industries at the expense of tax payers and consumers (eg the farm lobbies in the US and the European Union). Rather, they increasingly seek to redesign regulatory landscapes in favour of multinational export interests and, more often than not, at the expense of what would constitute ‘sound regulation’ in the circumstances of a domestic economy.

In this light, the advent of Jane Kelsey’s ‘No Ordinary Deal’ could not be more timely. A book of 16 chapters and an epilogue, it opens with a must-read introduction, which provides the essence of most of the arguments throughout the chapters. The book successfully seeks to unmask many features of the beast in an attempt to create an “informed debate that can make a difference” in a highly secretive negotiating environment (preface). While the chapters deal with technical aspects of the complex TPPA agreement, they are still very much accessible to a more general readership.

Gould’s critical account on ‘Political implications for New Zealand’ is not specifically directed at the TPPA or FTAs. Rather, it is a sweeping criticism of ‘neoliberal policies’ as implemented through National-Labour support in the past

25 years in New Zealand. He seems to indicate that New Zealand is better advised to reverse the whole process of trade liberalisation that has taken place not only under old FTAs such as the Australia New Zealand Closer Economic Relations (CER) but also under the concept of multilateralism as embodied in the WTO without examining the economic ramifications of (re)introducing high tariffs and production. The following chapters present a more nuanced approach in their analysis of what has gone wrong in recent FTAs or even specific areas of WTO law. Ranald's account of 'Politics of TPPA in Australia' is very useful in that it contrasts the current political situation with the political context in which the Australia US FTA (AUSFTA) was signed in 2004. According to him, the Gillard Labour government will face much difficulty following the neoliberal path of the Howard coalition government. Part of that is due to a sharp decline in public support for trade agreements owing to the revelations of how AUSFTA has proved to limit policy choices of the Australian Government. Ranald cites three examples in pharmaceutical regulation, public procurement of blood products and water and energy services. On the latter for instance, as these essential services had not been excluded from the scope of commitments owing to "insistence of the US", no restrictions could legally be made on the participation of US companies in any future privatisation schemes of such utilities. Already one initiative regarding the privatisation of an electricity company has been turned down owing to fears of loss of regulatory control over what could become a foreign-owned utility.

Murphy also points to wide opposition of the Australian trade unions vis-à-vis concessions on public procurement in light of the developments after the global financial crisis and wide reliance of the US on financial stimulus packages and buy American provisions. Some of the 'costs' of the AUSFTA are also highlighted by Quiggin in a chapter on 'Lessons from the Australia-US Free Trade Agreement'.. Citing both subjective empirical studies and economic statistical data, Quiggin contends that since the signing of the agreement, US exports have already benefited from the deal in disproportionate amounts while any 'benefit' for the Australian economy even in the distant future at best remains doubtful. Wallach and Tucker, in an important account of 'the US politics and the TPPA', trace Obama's promises of 'change' in trade policy in some of his comments against the North American Free Trade Agreement (NAFTA) earlier in his campaign. They outline the benchmark for Obama's change based on the content of the Trade Reform, Accountability, Development and Employment (TR ADE) Act – a Bill that had the support of majority of the Democrats of the US House of Representatives. Given the public sentiments and the lack of support for NAFTA-like agreements in the US Congress, the authors notably suggest that the TPPA may well become one in a series of unsuccessful overambitious trade pacts such as the Free Trade Area of the Americas or the Multilateral Agreement on Investment that never came into existence.

There are a few policy areas in which the TPPA may create mixed results although any potential benefits would be hardly considerable compared with the huge costs

of such a sovereignty-encroaching FTA. Security implications of a TPPA, according to Buchanan, seem to be one of those areas in which “issue linkage of trade and security” could in theory prove to be “of universal benefits” for fights against criminal activity, trafficking, weapons proliferation and terrorism. Yet that seems to be achievable under stand-alone agreements. Another area in which the TPPA might arguably prove beneficial for the developing countries involved is in labour rights because of the long-standing history of the US Congress to include core labour rights in all its trade agreements. On the impact on indigenous peoples, Alywin points to the problems caused by US FTAs with Chile and Peru as they were completely excluded from the whole process. He concedes, however, that this might not pose challenges of similar magnitude for the Māori in New Zealand owing to their more active participation in international trade in natural resources as well as their representations in trade delegations.

Problems arise, on the issue of ‘cultural assistance measures’ such as quotas for domestic TV programmes. Jock Given explains, in an insightful chapter on ‘culture and information’, how the US lobbies representing major Hollywood Studios push for the TPPA to avoid “cultural exceptions”. He rightly contends that the reservations that have been successfully maintained by Australia regarding local content requirements along with local content laws existing in New Zealand will surely be attacked by the US in the TPPA negotiations. On climate change and emissions embodied in trade, Bertram warns that the likely attempts of the US to open the door in the TPPA for border adjustment measures will come at sizable cost for emission-intensive New Zealand exports, particularly in the agriculture sector. Yet, one could argue that chances remain slim in any foreseeable future for the US to enact a cap and trade system that would include agriculture products and would not entail a *de minimis* exemption for low volume of exports coming from a country like New Zealand.. Furthermore, even if this will be materialised, one might wonder whether this is necessarily a bad thing if it forces highly polluting New Zealand industries to bring their emission levels at least down to those of the US in sectors such as metal, products, chemical products and resources. In fact, Murray and Challies in a chapter on ‘agribusiness and rural livelihood’ interestingly go as far as recommending participants to “adopt a robust emissions trading scheme that brings in agriculture.”

Murray and Challies also raise concerns over the impact of large agribusinesses such as New Zealand’s Fonterra on rural livelihood in Chile, Vietnam and Peru and explore ways to ameliorate such concerns. In a separate section, the authors analyse the US-NZ trade relationship as the only significant agriculture economies in the TPPA which have not yet signed an FTA (the others being Australia and Chile). Their account of the story is in line with Kelsey’s introduction and the chapter on US politics in that it is highly unlikely that the US would realistically give in to pressures exerted by its farm lobbies not to accommodate New Zealand’s request to substantially increase access for its dairy exports.

These findings have to be read along with Adamson's chapter, where the short term trade gains of a TPPA for New Zealand have been found to be significantly outweighed by the costs of giving in to pressures from the US to harmonise quarantine and food safety measures. Adamson makes a strong case for why Australia and New Zealand have to maintain their autonomy with respect to what would be deemed as an "appropriate level of protection" for their economic environment. This is allowed under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) to the extent that such quarantine measures are based on the "best available scientific evidence". For instance, the long-standing measures imposed by Australia on New Zealand apples were recently found by the WTO Appellate Body not to pass this requirement. The US, however, strongly demands other negotiating countries lower, or 'harmonise' their food safety standards. This, according to Adamson, may cost a fortune for "high standard" agriculture exports of Australia and New Zealand in world markets. Regarding the US characterisation of mandatory Genetically- Modified labelling schemes existing on both sides of Tasman as a "technical barrier to trade", Adamson is quite right in seeing this as an example of trade eroding both individual choice and democracy. His recommendation on the need to follow the existing P-4 notion of respecting individual country rights in setting their own standards is well-advised.

Faunce and Townsend contribute another alerting chapter on the TPPA impact on 'Public Health and Medicine Policies'. The chapter outlines the position of the US pharmaceutical industry, as the major policy driver in this area which faces no countervailing forces in the health and medicine sectors of other negotiating countries. The chapter goes through public health and medicine policies of those negotiating countries, including Australia and New Zealand, that are specifically requested to be on a US Trade Representative's 'watch list'. The authors make very relevant recommendations on how these countries, in the "regulatory coherence" game, should rather push for cost- effectiveness provisions, compulsory licensing exceptions, and research exemptions and so on to protect their systems. Frankel's chapter reaches similar conclusions with respect to drawing a balance between public and private interests in intellectual property (IP) rights and, more generally, with respect to the impact of TPPA on IP laws of New Zealand. Noting the high standard of TRIPS-plus provisions in all US FTAs, Frankel raises grave concerns over New Zealand being forced to concede on its IP laws in return for gains in other sectors of its economy.

The last three chapters by Rosenberg (International Capital and Investment), Kelsey (Trade in Services) and Seuffert /Kelsey (The TPPA and Financial Sector Deregulation) deal with issues that are largely intertwined. In particular, chapters 14 and 16 both have a similar but strong message: FTAs should learn from the lessons of the global financial crisis by examining ways to pull back from the failed models that rather seek to block re-regulation and force even more deregulation in the financial sector. Kelsey explains how the ambitious

liberalisation and unfettered non-discrimination principles of FTAs that go well beyond the WTO Agreement on Trade in Services (GATS) (which on its own is over-reaching) is further restricting signatories in their policy choices in all service sectors such as telecommunications, finance, health, distribution, construction and audiovisual services. On the regulation of investment, Rosenberg points to the fact that New Zealand already has its hands tied with respect to what would constitute a more selective but a rather more desirable investment policy than the non-discriminatory ones that are in place. He aptly alludes to some of the systemic risks associated with the investor-state investment disputes, while drawing fruitful lessons from NAFTA.

Overall, the book, as its title and the satire on its front cover reveals, depicts an extremely gloomy picture of the whole TPPA deal and its secrecy. Yet, at the same time, rather than falling – for the most part – into the traps of anti-free trade ideology, the authors make a compelling case against this form of all-inclusive 21st century ‘Free trade Agreement’.. Some of the chapters (eg Gould) do seem to beat the WTO and FTAs with the same stick. It is of course open to question whether, and to what extent a strong rules-based multilateral trading system would benefit small or developing economies and that to a large extent depends on the very nature of those *rules*.. The book however, could perhaps benefit from addressing the dynamic relationship between multilateralism and regionalism—the issue whether the *weakening* of such a multilateral institution as the WTO rather than *improving* it to further accommodate regulatory space for industrial, investment, environmental or other social policies, may lead to the emergence of such suspicious regional initiatives as the TPPA.

However, for the proponents of a strong multilateral trading system with necessary safeguards, the book equally demonstrates how the focus of the TPPA is *not* on the protection of domestic industries through instruments such as high tariffs or large production subsidies. These are mostly non-existent in the highly open economies of TPPA countries such as Australia and New Zealand.. There is rather an alarming trend that seeks to constitutionally lock in measures that might be considered for each individual democracy as excessive regulation (eg TRIPS-plus, investor-state disputes resolution), a lax regulation (eg undermining public health or social programmes) or no regulation at all while one is needed indeed (eg plain-packaging regulations for cigarettes or mandatory labelling for Genetically Modified Organisms, restriction on foreign ownership of sensitive economic sectors or minimum local content requirements in media services). And yet such regulatory commitments are being made by the New Zealand government, amongst others, in an extremely non-transparent negotiating environment in which the real stakeholders (ie all New Zealanders) are largely left out. This is the single strongest message of *No Ordinary Deal* that makes it an extraordinary read for policy makers and for all.

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