The Trumping of The Trans-Pacific Partnership

Matthew Rimmer

With the victory of Donald Trump, the Trans-Pacific Partnership (TPP) has literally been trumped.

As a Presidential candidate, Barack Obama came to power, promising to renegotiate the North American Free Trade Agreement (NAFTA). As a President, a centrepiece of his administration was the proposal for the TPP, a trade agreement spanning the Pacific Rim. He argued that the trade agreement was essential for the economic and political power of the USA.

The TPP was also ambitious in terms of its membership. The agreement included NAFTA countries such as the USA, Canada, and Mexico. The deal involved Australasian nations, like Australia and New Zealand. The TPP also included South-East Asian countries, such as Singapore, Malaysia, Brunei, Vietnam, and Japan. The TPP also covered a couple of Latin American countries such as Chile and Peru. Notably, the TPP excluded members of the BASIC/BRICS group—such as China, India, Brazil, South Africa, and Russia. Despite its name, the TPP also ignored Pacific Island states. The political geography of the TPP was largely determined by alliances with the USA.

The TPP was sweeping in terms of its subject matter. As well as traditional matters of trade, the agreement also contained extensive prescriptive obligations in respect of intellectual property and investment. The agreement included an extensive Intellectual Property chapter, with provisions on copyright law, trademark law, patent law, and biologics. The TPP also enshrined a controversial Investor-State Dispute Settlement regime (ISDS). Such a regime
would enable corporations to challenge government decision-making in investment arbitration tribunals. The agreement also contained weak protections in respect of public health, the environment, and labor rights.

As a result of its breadth of membership, and the scope of its subject matter, the TPP was highly unstable. The agreement collapsed in the wake of the 2016 United States elections. With the collapse of the TPP, the debate over trade amongst Pacific Rim nations will shift to other arenas and fora.

**The United States of America**

The TPP was a key focal point in the Presidential Race.

After initially supporting the TPP, Hillary Clinton shifted her position, first to one, expressing reservations about the TPP, and then to opposition to the TPP. Such a repositioning by Clinton was the result of a vigorous challenge to Bernie Sanders, and the deep opposition of the Labor Movement to the TPP.

For his part, Donald Trump promised to renegotiate the NAFTA on more favourable terms to the United States. He vowed to “withdraw from the TPP, which has not yet been ratified.” Donald Trump promised his supporters to negotiate “fair trade deals that create American jobs, increase American wages, and reduce America’s trade deficit”.

Clinton attacked Trump’s credentials, arguing that his trademarked, personalised products were manufactured outside the United States:

For his part, Donald Trump argued that Clinton would pass the TPP, if she won the presidency.

In the wake of the Trump victory, the White House has conceded that the TPP is doomed. Previously, Barack Obama was tempted to push ahead with a TPP vote in the US Congress in the lame-duck session. Now, it seems that he has conceded neither the Republicans or the Democrats will support the TPP in the US Congress.

In retrospect, it seems a grand folly that the Obama Administration should have pushed for the TPP, in the middle of a Presidential race between Donald Trump and Hillary Clinton. Lori Wallach of Public Citizen observed:

*The TPP did not elect Trump per se. But with no small thanks to President Obama’s relentless, high-profile campaign throughout the primaries and general election to pass the pact, the TPP pact readily served as a potent symbol of business-as-usual in Washington and its facilitation of growing corporate power over every facet of our lives.*

Presciently, the documentary film-maker Michael Moore warned of a Rust-Belt Brexit against Hillary Clinton in the mid-west states of the United States. He observed that “Clinton’s support of NAFTA helped to destroy the industrial states of the Upper Midwest” and “Trump is going to hammer Clinton on this and her support of TPP and other trade policies.”
Former Clinton Labor Secretary Robert Reich has lamented that trade deals, declining unionization and market concentration created an opening for Donald Trump’s presidency. He observed that “Americans have rebelled by supporting someone who wants to fortify America against foreigners as well as foreign-made goods.” Reich acknowledged that such protectionist sentiments had create unease amongst the political and economic establishment: “The power structure understandably fears that Trump’s isolationism will stymie economic growth.”

For their part, Progressive Leaders have denied that Trump should claim credit for the demise of the TPP. Evan Greer of Fight for the Future commented:

Let’s make one thing clear: Donald Trump didn’t kill the TPP. We did. An unprecedented grassroots movement of people and organizations from across the political spectrum came together to spark an uprising that stopped what would have been nothing less than an outright corporate takeover of our democratic process. Together we sounded the alarm, and made the TPP so politically toxic that no presidential candidate who wanted to be elected could support it.

Arthur Stamoulis, executive director of Citizens Trade Campaign, agreed, saying: “With peoples’ movements united across borders and across sectors, we were able to stop a power grab by some of the most powerful economic and political interests in human history.” Digital rights defenders, the Labor Movement, the environmental and climate activists have said that the TPP collapsed in the face of concerted community action and civil society pressure.

**Australia**

In Australia, the Joint Standing Committee on Treaties has held hearings in respect of the TPP. The Senate Foreign Affairs, Defence and Trade Committee is also investigating the TPP. There have been concerns expressed about copyright law, trade mark law, patent law, and biologics in the hearings.

Moreover, the Productivity Commission has had an inquiry into Australia’s Intellectual Property Arrangements—including those related to trade.

In the wake of the Trump Triumph, the Australian Prime Minister Malcolm Turnbull has warned that protectionism will result in poverty. He has extolled the virtues of free trade agreements. Turnbull has emphasized that the Australian economy needs to be ‘flexible’, ‘competitive’, but ‘fair.’

Foreign Minister Julie Bishop and Trade Minister Steven Ciobo have sought to defend the Australia-United States Free Trade Agreement (AUSFTA), saying that it is running a surplus in favour of the United States. The Ministers have conceded that the TPP’s future under threat. Bishop and Ciobo have noted, though, Australia could otherwise pursue bilateral agreements with countries such as India, Indonesia, and the European Union, and regional agreements—such as the Regional Comprehensive Economic Partnership.

The Australian Labor Party will no doubt be relieved that the Turnbull Government cannot wedge the party, with the TPP. With the Trump victory, Bill Shorten MP has shifted policy tack. He has argued that “Labor’s approach to the Australian economy is buy Australian,
build Australian, employ Australians.” Shadow Minister for Finance Jim Chalmers has emphasized the need for the party to address the concerns of voters who feel trampled by the forces of globalisation and technological change. The Shadow Trade Minister Jason Clare has stressed the need for “Policies that increase real wages, improve living standards, reduce under employment and reverse the rise in inequality.”

Senator Sarah Hanson-Young of the Australian Greens has said: “It would be extremely foolish to continue down the path towards any form of enabling legislation or ratification of the TPP in Australia, considering the circumstances.”

Senator Nick Xenophon feels vindicated over his criticism of the TPP.

There have been few mourners for the end of the TPP in Australia. By and large, the agreement seemed unloved by the larger public.

It has been striking that legislators in Australian Parliament, civil society, and business have been deeply concerned about how DFAT has been conducting trade negotiations. The defeat of the secretive TPP has highlighted the need for transparency, accountability, and public participation in future trade negotiations.

New Zealand

Even though the TPP has collapsed, there remains debate about whether a number of Pacific Rim states will implement TPP legislation, anyway. Jeremy Malcolm of the Electronic Frontier Foundation observed: “The death of the TPP in the United States does not necessarily mean that these implementation plans will be scrapped.” The TPP legislative process has been well-advanced in New Zealand, Japan, and Malaysia.

In the New Zealand Parliament, there has been debate over the implementing legislation for the TPP. New Zealand’s Prime Minister John Key has wondered whether the TPP could be passed at a later date, with cosmetic changes. Key has joked that such an agreement could be dubbed the ‘Trump Pacific Partnership.’

The Trade Minister Todd McClay maintained that the TPP would benefit New Zealand: “Trade is essential to the New Zealand way of life, our standard of living, and our potential to become a more prosperous country.”

Rino Tirikatene of NZ Labour mocked the Key Government’s enthusiasm for the TPP: “In the great scheme of things it was a bad deal, an incredibly bad deal, and that is evidenced today by us passing a piece of legislation that will mean absolutely nothing—absolutely nothing.” He observed: “It is a dead deal, dead rubber, a dead duck, thanks to, I guess, the Don, the great Don, who has come in, over in the US.” He observed: “The TPP is dead, it is over; finito. Kia ora tātou.”

Clare Curran of the NZ Labour supported genuine intellectual property law reforms—such as the introduction of a defence of fair use in copyright law.

Gareth Hughes of the NZ Greens commented that the TPP was a terrible failure:
“All you can do is facepalm. Surely this is the definition of futility. The day after Trump is elected, National is passing the Trans-Pacific Partnership Agreement Amendment Bill. You could not write this stuff. It encapsulates what a failure and a farce this entire 7-year process has been”.

He argued that New Zealand needed to reform and modernise its intellectual property regime—particularly through the introduction of a defence of fair use in copyright law.

Professor Jane Kelsey of the University of Auckland paid tribute to the community campaign against the TPP in New Zealand:

An unprecedented campaign against the TPP brought together Kiwis from every walk of life—doctors, musicians, local governments, Maori, the Internet community, unionists and politicians, and many tens of thousands of ordinary Kiwis who took to the streets all over the country. As we celebrate this victory, for now, we call on all our governments to abandon the failed model they continue to push in other equally toxic negotiations. We will continue to work with international allies to develop a progressive and just alternative based on the people’s needs for the 21st century, not those of the corporations.

Professor Jane Kelsey has observed that the TPP is dead, and New Zealand needs to rethink its approach to negotiating trade agreements in the future.

Canada

In Canada, the Trudeau Government seemed quite ambivalent about the TPP—which it had inherited from the former Harper Government. Trudeau expressed a willingness to renegotiate NAFTA with the new Trump administration.

Maude Barlow, National Chairperson of the Council of Canadians, commented:

The TPP is in full-blown cardiac arrest, thanks to years of international campaigning against this toxic deal, including turning Senate and House elections into contests over rejecting the TPP. But the one thing I know from watching trade agreements is that free trade proponents always try to resuscitate these deals under different names—CETA, TiSA and others. We need to put a ‘do not resuscitate’ order on these corporate deals once and for all.

She warned that there would be potential for policy laundering—with the text from the TPP copied and pasted to future trade agreements.

Professor Michael Geist of the University of Ottawa has recommended that there is a need for the Canadian Government to reconsider its approach to trade negotiations:

The public backlash against trade deals points to a process that leaves many feeling excluded and to terms that are presented publicly for the first time as final. The real opportunity for Ottawa is not just to explore new trade partners but to challenge some of the long-standing assumptions about such deals in order to foster greater public confidence in the outcome.

Geist noted: “Mr. Trudeau’s government inherited a trade policy marked by secrecy, encroachment onto domestic regulation and little ambition to see Canadian policies reflected in the final texts”. He suggested: “The TPP’s demise offers the chance for real change by
pursuing trade agreements that offer economic gains and remain true to the commitment for an open and transparent government.”

**China**

There has been much disquiet about the potential of a trade war between the United States and China over topics such as currency manipulation, domestic subsidies, and intellectual property. Former Australian Foreign Minister Bob Carr, for instance, has been particularly fearful of a conflict.

In his trade policy, Donald Trump promised to “use every lawful presidential power to remedy trade disputes if China does not stop its illegal activities, including its theft of American trade secrets—including the application of tariffs consistent with Section 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962.”

President-Elect Donald Trump could learn from the past fights between the United States and China over intellectual property. President George W. Bush brought a trade action against China over intellectual property in the World Trade Organization. By and large, China was successful in this trade dispute. President Barack Obama has sought to deploy the Department of Justice to tackle cases of trade secret violations.

For its part, China has proven to be an adroit counterpuncher in disputes over intellectual property and trade. First, China has become an intellectual property superpower. The country’s leading companies have acquired and invested in patents, trademarks, designs, and copyright across an array of high tech sectors. Second, China will scrutinise Donald Trump’s protectionist policies, and challenge anything that falls foul of the WTO rules. Finally, China will pursue its own network of trade deals in the Pacific Rim. China has already forged a bilateral trade agreement with Australia, and is pursuing the Regional Comprehensive Economic Partnership (RCEP). Australia has shown enthusiasm for participating in RCEP.

It remains to be seen whether Donald Trump will be able to realise his grand vision in respect of intellectual property and trade.
Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Law in the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC), the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program (QUT IL GG). Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, and Indigenous Intellectual Property. He is currently working on research on intellectual property, the creative industries, and 3D printing; intellectual property and public health; and intellectual property and trade, looking at the Trans-Pacific Partnership, the Trans-Atlantic Trade and Investment Partnership, and the Trade in Services Agreement. His work is archived at SSRN Abstracts and Bepress Selected Works.


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