

FOREWORD: THE CONTINUING RELEVANCE OF THE *TRANS-PACIFIC PARTNERSHIP*

We are delighted to introduce this special issue of the *Melbourne Journal of International Law* ('MJIL') on the *Trans-Pacific Partnership Agreement* ('TPP'). The special issue developed from fruitful collaboration between MJIL and Melbourne Law School's Global Economic Law Network ('GELN'), and in particular the symposium hosted by GELN at Melbourne Law School on 19–20 May 2016: *The Age of Mega-Regionals: TPP & Regulatory Autonomy in International Economic Law*, which was skilfully managed by Mr Christopher Pidgely. The symposium brought together more than 70 participants from around the globe including presenters from academia, non-governmental organisations, industry, the legal profession, and governmental departments in Australia, New Zealand and South Africa. The symposium benefited from a range of funding sources including the Melbourne Law School Major Collaborative Project Fund and the Australian Research Council (Discovery Project DP130100838 and Linkage Project LP120200028, which involves collaboration with the McCabe Centre for Law and Cancer). Led by Editors Ms Anna Saunders, Ms Kara Connolly and Mr Justin Browne, MJIL issued a call for papers for the TPP special issue in conjunction with the GELN symposium but open to all. The majority of the papers in this special issue were presented at the symposium; all were selected by MJIL through a competitive process and expertly edited by MJIL's Editors and Members.

Since we conceived the symposium, and since the core of the articles in this special issue were written, the world has developed in unexpected directions. In particular, the TPP appears to be but one of many casualties of the United States election held on 8 November 2016. Since then, on 21 November 2016, New Zealand became the first country to enact TPP-implementing legislation, which is specified to come into force on the date that the TPP enters into force for New Zealand.¹ Of course, the entry into force of the TPP requires ratification by either all 12 signatories² or by 'at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013'.³ In effect, then, both the United States and Japan must ratify the TPP for it to come into force in the form signed on 4 February 2016. And while Japan continues to pursue ratification,⁴ United States President-elect Donald Trump has made clear — both before and since his election — his aversion to globalisation and trade liberalisation in general, and the TPP in

¹ *Trans-Pacific Partnership Agreement Amendment Act 2016* (NZ) s 2(1).

² *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) art 30.5.1 ('TPP'). The 12 signatories are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam.

³ *Ibid* art 30.5.2.

⁴ See, eg, Mitsuru Obe, 'Japan Lawmakers Vote to Ratify TPP', *The Wall Street Journal* (online), 4 November 2016 <<https://perma.cc/DUQ7-NXZ3>>; Isabel Reynolds and Takashi Hirokawa, 'Japan's Abe to Make Trade Case to Trump in New York Meeting', *Bloomberg* (online), 14 November 2016 <<https://perma.cc/GE5W-8BJB>>; The Yomiuri Shimbun, 'Japan Forced to Rethink TPP Strategy' *The Japan News* (online), 22 November 2016.

particular. (His plans for bilateral as opposed to regional or multilateral trade deals are less clear, as regards both theory and practice).

Should Mr Trump proceed with his threatened withdrawal from the TPP upon his inauguration,⁵ the TPP in its current form is undeniably dead. However, two alternative futures exist for the TPP. First, at the time of writing, while plans to submit the TPP in the lame-duck session of Congress before Trump's inauguration have been abandoned,⁶ key stakeholders still predict that the United States might agree to renegotiate the treaty.⁷ Second, even if the United States is out, the other negotiating parties may remain committed to the TPP or something very like it, raising the possibility of a 'TPP-11'. Renegotiation would not be easy, particularly given the heavy influence of United States demands and drafting on the TPP text, which for example bears a strong resemblance to existing United States preferential trade agreements.⁸ Moreover, the TPP market absent the United States would be considerably smaller, leading to necessary recalculations of its likely benefits,⁹ which were already contentious.¹⁰

On 30 November 2016, the Joint Standing Committee on Treaties ('JSCOT') of the Parliament of the Commonwealth of Australia released its report on the TPP.¹¹ JSCOT recommended that Australia ratify the TPP, while making certain other recommendations reflecting various concerns with the agreement, such as a recommendation for enhanced transparency in the negotiation of trade agreements by allowing 'security cleared representatives from business and civil society to see the Australian Government positions being put as part of those negotiations'.¹² (In the United States, for example, a suite of advisory

⁵ See, eg, Jenny Leonard, 'Trump Pledges to Withdraw from TPP on Day One of New Administration' (2016) 34(46) *Inside US Trade* (online).

⁶ See, eg, Jack Caporal and Jenny Leonard, 'TPP Opponents, Proponents Say the Deal Has No Chance in the Lame-Duck' (2016) 34(44) *Inside US Trade* (online).

⁷ See, eg, Lien Hoang, 'Hopes for TPP Survival Go Beyond Lame Duck in Congress' (15 November 2016) *International Trade Daily* (online); Jenny Leonard, 'WH Blasts Trump's TPP Withdrawal; Key Lawmakers Hope for Path Forward' (2016) 34(47) *Inside US Trade* (online).

⁸ See generally, eg, Todd Allee and Andrew Lugg, 'Who Wrote the Rules for the Trans-Pacific Partnership?' (2016) 3(3) *Research and Politics* 1; Wolfgang Alschner and Dmitriy Skougarevskiy, 'The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe' (2016) 17 *Journal of World Investment & Trade* 339.

⁹ See, eg, 'Trading Down', *The Economist* (online), 19 November 2016 <<https://perma.cc/77AB-YGGF>>.

¹⁰ See, eg, Peter A Petri and Michael G Plummer, 'The Economic Effects of the Trans-Pacific Partnership: New Estimates' (Working Paper No 16-2, Peterson Institute for International Economics, January 2016); Jeronim Capaldo and Alex Izurieta with Jomo Kwame Sundaram, 'Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement' (Working Paper No 16-01, Global Development and Environment Institute, Tufts University, January 2016); World Bank Group, 'Potential Macroeconomic Implications of the Trans-Pacific Partnership' in *Global Economic Prospects: Spillovers amid Weak Growth* (2016) ch 4. Cf Office of the Chief Economist, Global Affairs Canada, *Economic Impact of Canada's Potential Participation in the Trans-Pacific Partnership Agreement* (12 September 2016).

¹¹ Joint Standing Committee on Treaties, Parliament of Australia, *Report 165 — Trans-Pacific Partnership Agreement* (30 November 2016).

¹² *Ibid* para 5.28.

committees including industry and NGO representatives¹³ provides input into trade policy and negotiations,¹⁴ sometimes also reviewing draft negotiating texts subject to obligations of confidentiality). JSCOT also recommended for future trade agreements ‘independent modelling and analysis ... by the Productivity Commission, or equivalent organisation’, to be provided to JSCOT alongside the national interest assessment prepared by the government.¹⁵ The Australian Greens dissented from JSCOT’s report,¹⁶ while the Australian Labor Party members of the committee submitted ‘additional comments’ expressing concerns with several aspects of the TPP.¹⁷ Separately, the Foreign Affairs, Defence and Trade Committee of the Australian Senate is conducting an inquiry into the TPP and is scheduled to report by 7 February 2017.¹⁸

Why should or might Australia ratify the TPP notwithstanding Trump’s election? While the dissenting and concurring JSCOT comments referred explicitly to Trump and the pointlessness of Australia ratifying the agreement,¹⁹ the majority JSCOT report implicitly acknowledged recent developments in the United States, the United Kingdom and elsewhere in concluding that Australia should take binding treaty action with respect to the TPP:

The Committee is particularly concerned that Australia’s long-term commitment to free trade, from which Australia benefits immensely, is currently at risk from a resurgence of nationalism and isolationism internationally.

The Committee believes that Australia should hold to its principles and continue to promote free trade as a mechanism that provides improvements to the lives of people everywhere.²⁰

Ratification by the remaining TPP countries may thus provide an internal and external political signal — that is, to both domestic constituencies and international actors — of the perceived value of trade liberalisation and foreign investment in promoting national and global welfare, with the conceivable potential to influence the next steps of other TPP countries, if not the United States. At the same time, international developments in 2016, including the outcomes of the United States election and the Brexit vote, as well as the near collapse²¹ of the *Comprehensive Economic and Trade Agreement*²² between

¹³ See, eg, Agricultural Technical Advisory Committee for Tobacco, Cotton, and Peanuts, *The Trans-Pacific Partnership Trade Agreement: Report of the Agricultural Technical Advisory Committee for Tobacco, Cotton, and Peanuts* (25 November 2015) 12.

¹⁴ See International Trade Administration, *Industry Trade Advisory Center* <<http://trade.gov/itac/index.asp>>; Office of the United States Trade Representative, *Advisory Committee Reports on the Trans-Pacific Partnership* <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/advisory-group-reports-TPP>>.

¹⁵ Joint Standing Committee on Treaties, above n 11, para 5.41.

¹⁶ *Ibid* 137.

¹⁷ *Ibid* 123.

¹⁸ See Parliament of Australia, Senate Standing Committee on Foreign Affairs, Defence and Trade, *Proposed Trans-Pacific Partnership (TPP) Agreement* <<https://perma.cc/5FQX-3MNY>>.

¹⁹ Joint Standing Committee on Treaties, above n 11, 124, 138.

²⁰ *Ibid* paras 11.15–16.

²¹ See, eg, Ian Wishart, ‘Belgian Deal Ends Deadlock Over EU–Canada Trade Agreement’ (2016) *International Trade Daily* (online).

²² *Comprehensive Economic and Trade Agreement*, European Union–Canada, signed 30 October 2016 (not yet in force but provisionally applied in part).

Canada and the European Union, signal the need to rethink the manner in which international trade and investment agreements are implemented: in particular, the need for states to better distribute the resulting benefits, as well as providing adequate retraining and compensation in relation to job losses arising from technology and broader ‘economic change’.²³ A revised TPP-11 would be unlikely to delve fully into these issues, which are typically regarded as matters of domestic concern, but the TPP countries themselves could try to do a better job through both internal reforms and improvements to the agreement itself as noted further below.

Even if the TPP is not renegotiated and never enters into force, its successful negotiation and signature are likely to have important and lasting implications for international economic law and broader policy issues. On the one hand, Trump’s attitude to the TPP creates considerable uncertainty for negotiations towards analogous agreements such as the *Transatlantic Trade and Investment Partnership* between the United States and the European Union,²⁴ as well as the *Trade in Services Agreement*,²⁵ a so-called plurilateral agreement under negotiation between 23 parties (including the European Union representing its 28 member states), jointly led by Australia, the European Union and the United States. On the other hand, the demise of the TPP provides further impetus for non-United States agreements such as the *Regional Comprehensive Economic Partnership* (‘RCEP’)²⁶ currently under negotiation by the ten member States of the Association of Southeast Asian Nations (‘ASEAN’) and ASEAN’s existing preferential trade agreement partners: Australia, China, India, Japan, the Republic of Korea and New Zealand.

To the extent that the United States is to withdraw from the globalising world, China will be ready²⁷ to carry out a different kind of ‘pivot to Asia’,²⁸ capitalising on the United States’ failure to ‘write the rules of the road in the 21st century’²⁹ through the TPP. Yet the possibility of such a shift exists alongside the real risk of a major trade war between the United States and China.³⁰ Through RCEP as well as its ongoing bilateral negotiations,³¹ Australia could play a substantial and hopefully tempering role in the development of the new economic and political landscape in the Asian region and beyond.

²³ See, eg, Ronald J Daniels and Michael Trebilcock, ‘A Better Way to Help US Victims of Free Trade’, *Bloomberg* (online), 2 December 2016 <<https://perma.cc/9GYW-ENCA>>.

²⁴ See, eg, Bengt Ljung, ‘Trump Win Put EU–US Talks in Freezer, Ministers Say’ (15 November 2016) *International Trade Daily* (online).

²⁵ See, eg, Brett Fortnam, ‘TiSA Deal Halted by Trump’s Win; Chief Negotiators to Meet Next Month’ (2016) 34(46) *Inside US Trade* (online).

²⁶ See, eg, Jason Scott and David Roman, ‘Trump Trade Snub Set to Boost China’s Bid for Its Own Asia Pact’ (16 November 2016) *International Trade Daily* (online).

²⁷ See, eg, David Tweed, ‘As Trump Kills TPP, China Ready to Fill Trade Void’ (23 November 2016) *International Trade Daily* (online).

²⁸ See, eg, Simon Tisdall, ‘Barack Obama’s “Asian Pivot” Failed. China Is in the Ascendancy’, *The Guardian* (online), 25 September 2016 <<https://perma.cc/6Y48-GM9L>>.

²⁹ White House, Office of the Press Secretary, ‘Statement by the President on the Signing of the Trans-Pacific Partnership’ (Press Release, 3 February 2016) <<https://perma.cc/R5MX-WWHM>>.

³⁰ See, eg, Enda Curran, ‘China Watchers Greet Trump with Trepidation on Trade War Risks’ (9 November 2016) *International Trade Daily* (online).

³¹ For example, Australia is negotiating preferential trade agreements with the European Union, India and Indonesia.

At the level of treaty drafting, TPP provisions are already being duplicated or used as a basis for other treaties and negotiations. For example, in October 2016, the TPP signatories Australia and Singapore signed an agreement to amend their existing preferential trade agreement,³² which includes (for example) unusual provisions from the TPP on both international mobile roaming³³ (as discussed in this special issue by Mr Danny Kotlowitz and Professor Tania Voon) and the exclusion of tobacco control measures from investor–state dispute settlement.³⁴ Similar state practice may be expected in other agreements between TPP-11 countries and also in agreements between TPP-11 countries and other countries. Based on leaked texts, the unusual mobile roaming provisions from the TPP have made their way into negotiations towards the *Trade in Services Agreement*.³⁵ Also based on leaked texts, provisions from the TPP intellectual property chapter (for example regarding copyright exceptions) are being proposed in negotiations for the RCEP.³⁶ Furthermore, given the strong United States imprint on the TPP text, the TPP may be expected to set a baseline in at least some areas in any bilateral deals that the United States itself decides to pursue as part of the new administration’s trade and investment strategy, whatever that may turn out to be in reality.

The TPP offers significant opportunities to promote domestic and international reform in several areas. For example, Viet Nam is said to be undertaking sweeping changes pursuant to TPP requirements.³⁷ The decision to implement such reforms may take account of not only the standards set in the TPP itself (given the possibility of its eventual entry into force in some form, as well as bilateral agreements reached with the United States in conjunction with the TPP labour chapter, as discussed by Associate Professor Joo-Cheong Tham and Professor Keith Ewing in this special issue) but also the TPP’s influence on future treaties, as noted above. Calls for enhanced transparency and improved domestic processes in treaty negotiation and conclusion have also crystallised around the TPP, as evidenced by the JSCOT report just released. The concerns that Associate Professor Amokura Kawharu raises in this special issue regarding the negotiation and conclusion of the TPP in New Zealand provide one example of acute process problems with treaty-making in many countries.

Finally, the TPP offers a rich source of material for reflection and critique. How does its ‘public law-reformed’ version of investor–state dispute settlement³⁸ compare to the European Commission’s proposal for a world

³² *Agreement to Amend the Singapore–Australia Free Trade Agreement*, signed 13 October 2016 (not yet in force), amending the *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) (*SAFTA*), as amended from 24 February 2006, 13 February 2007, 11 October 2007 and 2 September 2011.

³³ *SAFTA* ch 10 art 11 (as per 2016 amendments).

³⁴ *SAFTA* ch 8 art 22 (as per 2016 amendments).

³⁵ *Trade in Services Agreement* (8 June 2016 draft text, published by Wikileaks 15 September 2016) annex (Telecommunications Services) art 20. Available at <<https://wikileaks.org/tisa/document/>>.

³⁶ See, eg, Scott and Roman, above n 26.

³⁷ See, eg, Nguyen Kieu Giang, ‘TPP Changing Vietnam’s Economy, No Matter What Trump Does’ (28 November 2016) *International Trade Daily* (online).

³⁸ Stephan Schill, ‘The European Commission’s Proposal of an “Investment Court System” for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?’ (22 April 2016) 20(9) *ASIL Insights* (online).

investment court?³⁹ Professor Luke Nottage addresses both in this special issue, while Dr Jarrod Hepburn considers enduring public international law questions raised by not only the TPP but also ‘mega-regional’ agreements in general. Such questions of overlapping treaties and the role of domestic law will equally arise, for example, in the RCEP. How to improve on the TPP’s intellectual property chapter in future agreements, in view of Associate Professor Kimberlee Weatherall’s assessment of that chapter as a failure in this special issue? Will the TPP’s approach to fisheries subsidies, as discussed here by Ms Amanda Rologas Tsangalis, find a place in another agreement, or can further progress be made?

As the vision of the TPP as a living agreement recedes, it nevertheless offers a window into the negotiation of trade and investment agreements and the negotiated positions of the 12 TPP countries on a range of matters of crucial importance to the global economy today. Given the rise of nationalism reflected in recent world events, we are pleased to be part of a community engaging with the TPP and its lessons for the future.

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³⁹ European Commission, *Investment in TTIP and Beyond — The Path for Reform* (Concept Paper, May 2015); European Union, ‘Textual Proposal — Trade in Services, Investment and E-Commerce: Chapter II — Investment’ (12 November 2015).