How the Trans-Pacific Partnership Agreement poses a a threat to national sovereignty over domestic decision making[1]

The Trans-Pacific Partnership Agreement (TPPA) is being described as a 21st century agreement that will reach further behind the border than any previous free trade or investment agreement. As the chief executive of Business New Zealand said during the 15th round of TPPA negotiations in Auckland in December 2012:

> It is true that TPP is more than just a trade negotiation. That's because TPP has the capacity to reach further into domestic economies and domestic policy settings than a conventional trade agreement - as it must if the essential requirements of business are to be addressed and a real difference made, for growth, jobs and community success. [2]

More specifically, the TPPA aims to frame how governments make their domestic policy and regulatory decisions, alongside more extensive rules that constrain the substance of those decisions. These 'disciplines' will, in practice, empower commercial players and advance their interests, and marginalise competing national priorities, advocates and agencies, including democratic political institutions. This additional dimension that makes the TPPA a threat to national sovereignty over decision making processes and institutions.

This paper examines what is different about the proposed agreement, stressing the way the proposed chapters on regulatory coherence and transparency would impose novel disciplines on the policy and regulatory decisions and actions of each Party through such techniques as regulatory impact assessments, and confer rights on affected commercial interests to participate in regulatory processes. It then summarises the cumulative effect of these various chapters, using the example of developing and implementing tobacco control strategies.

The implications for domestic policies are explored in more detail in section six, using the example of Australia's plain packaging policy. Australian tobacco companies have used all available mechanisms to intervene at every stage of the domestic regulatory process. Along the way they have accumulated evidence for use in legal disputes to challenge the plain packaging laws. As section seven records, a similar pattern of behaviour is emerging in relation to New Zealand's proposed plain packaging laws. Tobacco companies accuse both countries of failing to comply with their own 'best practice' regulatory mechanisms and their obligations on intellectual property, technical barriers to trade and investment in their free trade and investment treaties. Moves to embed such disciplines within the TPPA, and guarantee tobacco companies the right to participate actively in decision-making processes, could have serious consequences, especially for countries where such mechanisms do not currently apply.

The penultimate section asks whether general exceptions can restore policy space and regulatory sovereignty. The paper concludes by urging a more systemic analysis of the TPPA and its potential consequences for domestic policy and regulation.

The plain packaging example shows how a commercial player that is deeply hostile to a particular public policy would gain further leverage to harass the

policy makers and gather material through the requirements of notification, consultation, and disclosure of the evidence base for decisions in various chapters, to support threats of, or launching, an investor-state dispute.

1. What is different about the TPPA

The depiction of the TPPA as a gold standard for the 21st century[3] seeks to distinguish it from other international agreements that promote free trade, investment and economic integration among the signatory parties. There are at least six features that aim to make the TPPA unique:

(i) **A seamless regulatory environment for cross-border movement of goods, capital, data and elite personnel** and their related commercial activities. This is not unlike the internal and external synergies sought (more successfully) by the European Union,[4] but would embody US-centric interests and the associated regulatory regime.

(ii) **Targeting** the philosophy and processes, as well as the substance, of the **parties' domestic policy and regulatory decisions**.

(iii) Moving beyond the standard ideological, commercial and mercantilist approach to individual chapters to incorporate cross-cutting themes and **disciplines on all domestic regulatory processes**, irrespective of the subject matter;

(iv) Constructing an all-encompassing regime where the cumulative norms, technical and evidential requirements, decision-making procedures, institutional arrangements, obligations to consult and report, surveillance mechanisms, rights of stakeholder engagement, and legal enforcement make **the whole much more potent than the sum of its parts**;

(v) Extending its horizon beyond the original (currently eleven) parties by promoting it as a **'living agreement'** to which all Asia Pacific countries will accede, without changing its pre-determined rules;[5] and

(vi) Harnessing this US-led regulatory hegemony to **a parallel geopolitical strategy** for the Asia-Pacific, with the aim to either encompass or isolate China.

These high ambitions for the TPPA may not be reflected in the realities of the negotiations or the content of the final text. But they signal the distinctive elements that need to be considered consider when assessing its potential impacts on national policy processes.

2. The scope of the TPPA

The proposed scope of the TPPA is massive. There are more than 20 separate working groups, each of which correspond to a potential chapter or section of the final text or constitute a crosscutting theme.[6]

Only a few chapters involve old-fashioned cross-border commodity trade, such as market access for goods (including agricultural products and textiles),

customs, trade remedies and subsidies. The rest of the working groups deal with governments' behind-the-border powers and activities. Some, notably technical barriers to trade (TBT), sanitary and phytosanitary measures, and government procurement are familiar from the later rounds of the General Agreement on Tariffs and Trade (GATT). Other chapters cover policy and regulatory measures brought under the rubric of 'trade' in the WTO and the early generation free trade agreements (FTAs) – especially services and related investments, intellectual property rights, and trade facilitation – as well as investment protections and investor-enforcement powers in FTAs and bilateral investment treaties (BITs).

Most of these chapters have explicit criteria for decision-making, presumptions of light-touch regulatory approaches, requirements for evidence-based regulation and industry-inclusive processes, and diverse disclosure, notification, consultation and enforcement mechanisms.

These more extensive rules would, in many instances, apply to all levels of government (central, regional and local) and non-government entities exercising delegated authority, such as licensing authorities and professional bodies. Some would also apply to state enterprises, a subject on which the US has tabled a draft text but where the definitions remain uncertain.[7] Other chapters may exempt sub-federal levels, which would disadvantage countries that have unitary governments. Certain chapters may contain annexes that allow the exclusion of certain levels of government, named entities or non-conforming measures. Overall, however, the TPPA rules are intended to have the more extensive and intrusive reach than existing agreements.

The novel features of the TPPA are the chapters on regulatory coherence and transparency. They provide the glue for the behind-the-border disciplines by setting institutional and procedural frameworks for the conduct of domestic regulation, mandating engagement with interested commercial interests, and introducing a general presumption in favour of light-handed regulation.

3. Regulatory Coherence

The US, Australia and New Zealand have promoted a 'best practice' approach to domestic policy and regulation in the TPPA. It is based on the model they themselves have adopted and successfully promoted as voluntary guidelines through both APEC[8] and the OECD.[9] A draft text was leaked in 2011.[10] It is understood that changes have been proposed in response to concerns from a number of parties that the chapter impinges on their internal governance arrangements, including institutional arrangements and divisions of power, national priorities, and constitutional and international obligations. Because the details of those changes are not publicly available, the following comments are based on the 2011 text.

The leaked text proposed a template of pro-market factors that governments should consider when making domestic regulations and pro-business processes they should use in reaching those decisions. It also provided a range of opportunities for TPPA states and corporations to enter the domestic policy and legislative domain and influence decisions in their favour, and for cross-party oversight of compliance with the chapter.

The chapter proposed an enforceable obligation on governments to 'endeavour' to establish a national coordinating agency or mechanism to

promote coordination across their domestic agencies and to review compliance with 'best practice' approaches to regulatory decisions.[11] 'Best practice' included a formal process to review existing, and approve new, regulations and a presumption that 'core good regulatory practices' involve the conduct of regulatory impact assessments (RIA).

The leaked text stopped short of mandating the use of the RIA. It imposed instead an obligation to 'generally encourage' its use when conducting reviews of regulatory measures covered by the chapter. A number of key elements of a RIA were listed. While they were more general than the requirements in Australia, New Zealand and the US, there was a cross-reference to the APEC and OECD documents that are more detailed. The leaked text said an RIA should identify:[12]

(i) the problem and policy objective that the measure intends to address, including its significance and the need for regulatory action;

(ii) potentially effective and reasonably feasible alternatives to achieve the policy objective; and

(iii) where appropriate, the grounds for concluding that the selected alternative achieves the objectives in a way that maximises the net benefit (meaning a cost-benefit analysis).

The RIA should also:[13]

(i) consider whether, for all aspects of the proposed measure, there is a need to regulate to achieve the policy objective or whether the objective could be met by non-regulatory and/or voluntary means;

(ii) assess, to the extent feasible, the costs and benefits of each available alternative, including not to regulate, recognising that some costs and benefits are difficult to quantify and monetise;

(iii) explain why the alternative selected is superior to the other alternatives, including where relevant through the relative size of the net benefits; and

(iv) make decisions based on the best reasonably obtainable scientific, technical, economic, and other information, within the regulatory authority's mandate and resources.

Some policy analysts in Australia, New Zealand and the US have suggested this is relatively unthreatening because their domestic policy regimes are already required to comply with these 'best practice' obligations. However, official reviews have repeatedly found that these governments have a poor record of compliance with their own standards.

The independent review conducted of Australia's compliance in 2012 reported 'substantial dissatisfaction by all major stakeholder groups with the RIA Process' and, notwithstanding recent modifications, there was 'widespread lack of acceptance of and commitment to the RIA process by ministers and agencies'.[14] Compliance in 2010-11 had fallen to its lowest level in percentage terms since the current approach was introduced in 1997.[15]

New Zealand conducted reviews in 2008 and 2009, which concluded that half the Regulatory Impact Statements (RIS) failed to meet the quality assurance criteria. The 2012 review reported an improved result: of 50 RIS initially assessed by their departments or the Treasury's Regulatory Impact Analysis

Team as meeting the requirements, 36 percent actually met the criteria, 50 percent partially complied and 14 percent were totally non-compliant. [16]

In the US, scorecards in intelligibility, analysis and use reported that the average quality of regulatory analysis in 2008 was improving, but the average score across the covered agencies still only averaged 45 percent.[17] Compliance costs are also a significant drain on public policy resources, with one researcher estimating that complex and sophisticated new studies by the Environmental Protection Agency cost close to $2 million.[18]

There are several possible conclusions from these audits. It may be, as critics of 'big government' often argue, that there is a large stock of unnecessary and over-burdensome regulation. Alternatively, the pro-market, pro-business 'best practice' criteria and processes in the RIAs may not be fit for purpose. As discussed below, tobacco policy is a classic example of an intrinsic conflict between industry interests and a public health goal that would see the industry's effective demise.

Moreover, these statistics relate to failure by developed countries. It is quite unrealistic to impose similar obligations on the developing countries in the TPPA grouping, even if were desirable, or on other developing and least developed members of APEC whom they hope would eventually accede to the TPPA.

In addition to RIAs, the leaked regulatory coherence chapter would require regulatory authorities to provide appropriate public access to measures and their supporting documentation, regulatory analyses and data, in accordance with the transparency chapter.[19] Each party must also consider various methods to contribute to successful collaboration among the parties *and their respective stakeholders,*[20] including information exchanges, dialogues or meetings. As demonstrated later in this paper, this provides commercial interests with a license for harassment and access to more ammunition with which to litigate, including through investor-state dispute processes.

Finally, a special regulatory coherence committee of the parties would monitor and review compliance,[21] providing opportunities for states to obstruct or challenge new initiatives on behalf of their companies.

4. Transparency

The obligations in the regulatory coherence chapter are explicitly cross-referenced to states' obligations in the transparency chapter, which, although not leaked, [22] is expected to mandate active participation by affected interests in decisions affecting them.[23] The stand-alone transparency chapter needs to be read alongside the transparency provisions in subject-specific chapters and annexes. This is another US-led chapter, which is expected to impose the following obligations on a Party:[24]

(i) prompt publication of all laws, regulations, procedures and administrative rulings;[25]

(ii) to the extent possible, publish in advance the measures it proposes to adopt;[26]

(iii) to the extent possible, provide interested persons and the other parties a reasonable opportunity to comment on proposed measures;[27]

(iv) publish regulations of general application proposed by central government at least 40 days before comments are due, with an explanation of the purpose of and rationale for the proposed regulations;[28]

(v) publish central government regulations of general application that are adopted with an explanation of their purpose and rationale, and address significant, substantive comments received during the comment period and explain substantive revisions;[29]

(vi) promptly provide information requested and respond to questions on any actual or proposed measure that another party considers might affect the operation of the agreement;[30]

(vii) ensure, wherever possible, that persons of the other party directly affected by an administrative proceeding have reasonable notice and a reasonable opportunity to present facts and arguments to support their position;[31] and

(viii) have procedures for prompt review of final administrative action to be conducted by independent and impartial tribunals, ensuring that parties to the proceedings have a reasonable opportunity to support their position and a decision based on the evidence and submissions of record.[32]

5. The Impact of cumulative constraints domestic policy

The proposed regulatory coherence and transparency chapters focus on process, evidence, documentation, surveillance and participation by industry players, with the former adding a general presumption in favour of light handed regulation. When read in conjunction with the anticipated rules, presumptions, processes and arrangements in other chapters,[33] which are also designed to constrain domestic regulatory decisions the implications of the TPPA reaching further behind the border than any previous agreement becomes very clear.[34] These can be illustrated with reference to governments' tobacco policy decisions.

At the **domestic level,** the diverse chapters in the agreement could impose constraints through:

(i) Substantive rules and prohibitions (goods, TBT, intellectual property, cross-border services, investment);

(ii) Criteria to apply in making decisions (goods, TBT, intellectual property, cross-border services, investment, regulatory coherence);

(iii) Criteria for choosing among available policy options (goods, TBT, intellectual property, cross-border services, investment, regulatory coherence);

(iv) Processes to be used in making decisions (TBT, regulatory coherence, transparency);

(v) Evidential basis for policy decisions (TBT, cross-border services, investment, regulatory coherence);

(vi) Techniques for evaluating policy options (TBT, regulatory coherence);

(vii) Documentation, disclosure and reporting requirements (TBT, intellectual property, regulatory coherence, transparency);

(viii) Administrative arrangements (cross-border services, regulatory coherence);

(ix) Institutional entities and hierarchies among regulatory bodies (cross-border services, regulatory coherence);

(x) Engagement with commercial interests (regulatory coherence, transparency); and

(xi) Domestic review and appeal mechanism (TBT, cross-border services, transparency).

Governments would face an additional layer of **supranational obligations** among TPPA parties, requiring:

(i) Notification to other parties, per chapter;

(ii) Consultations on request, per chapter;

(iii) Committee review of compliance, per chapter;

(iv) Periodic reporting to relevant chapter committees;

(v) Monitoring of compliance with processes in relevant chapters;

(vi) Peer review of compliance with processes in relevant chapters;

(vii) State-state disputes; and

(viii) Investor-state dispute settlement.

The sheer number, complexity and duplication of duties on parties across these chapters would be problematic for any aspect of policy, especially for countries that have limited resources to support the development and implementation of policy initiatives and policy areas that have constrained budgets.

Obligations in the TPPA would also duplicate obligations in the WTO and other FTAs, which might be identical or divergent. Governments have further substantive and reporting obligations that require them to pursue non-commercial objectives that are subordinated in the TPPA, whether under domestic constitutional or public law or in international forums, including the World Health Organization.

In controversial areas of policy the TPPA could therefore provide multiple opportunities for obstruction and delay, the diversion of resources, and brinkmanship by the affected industry, its commercial and academic allies, and patron states. More extensive substantive rules would reduce governments' regulatory options. Because criteria like evidence-based decisions and thresholds, such as necessity tests, are intrinsically contestable the judgments of policy makers are fertile ground for challenge. Chapter-specific disclosure, notification and consultation requirements, combined with the RIA process and transparency rules, would provide further opportunities to exert influence.

The availability of investor-state dispute settlement, especially in the hands of US companies, invites threats of legal action for breach of the TPPA's substantive and procedural rules if a government fails to accept the industry's position. Along the way ,the industry and sympathetic parties can generate and compile evidence for use in subsequent state-state or investor-state disputes. The risks of legal costs and compensation for loss of future profits, with

compound interest, from notoriously unpredictable and often biased investment arbitration tribunals provide the ultimate sanction.[35]

The combined effect could be a significant game changer for innovative policies or attempts to regulate in areas where there is a regulatory void, regulatory or policy failure, new technological factors, or social need.

Conclusion

Commentators on all sides of the TPPA debate tend to focus on individual chapters, such as goods or intellectual property, and the most controversial sectoral issues, such as medicines, the Internet or tobacco. Where they recognise that more than one chapter is involved, they still tend to treat the rules of each chapter in isolation. Solutions and alternatives follow similarly traditional patterns, such as exception provisions that are modelled on earlier agreements of a qualitatively different kind. The interconnections across chapters and the systemic interface between the substantive, ideological and procedural disciplines that pervade the proposed TPPA are either not understood or are largely ignored.

This reflects the way that lawyers perceive of legal rules and that legal disputes are framed: provisions of agreements are abstracted and fettishised, as if they have an existence that is independent of their systemic function in an integrated legal regime and without addressing the practical impact.

TPPA negotiators also work largely in silos on their individual topics, negotiating draft texts that are drawn from existing US FTAs or occasionally elsewhere. Despite the much-heralded 'coherence' of the TPPA there appears to be very little communication between the individual working groups or discussion of the implications of other subject areas.

The legal rules negotiators are expected to ensure technical coherence, while the chief negotiators are supposed to bring the whole picture together through what they call crosscutting themes to develop coherent disciplines. That task is complicated by the complexity and technicalities that infuse the various chapters and the divergent approaches that reflect the way each chapter has been negotiated. There is a very real risk that political trade-offs will be made to conclude the agreement that makes total nonsense of any technical coherence, anyway.

The final text might well achieve the goal of imposing high-level behind-the-border disciplines on governments through market-centric norms, an ideological commitment to light handed regulation, and a structured role for corporate interests to interfere in countries' domestic policy process. But attempting to apply that gold standard in practice would be a technical and practical nightmare for the policy makers who would be legally obliged to comply.

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[1] Professor Jane Kelsey, Faculty of Law, University of Auckland, New Zealand, January 2013

[2] BusinessNZ Phil O'Reilly remarks to TPP Stakeholder Forum, Auckland, NZ, 7 December 2012, www.businessnz.org.nz

[3] eg. USTR Ron Kirk speech to the US Asia Pacific Council annual conference, Washington, 6 May 2011, http://www.eastwestcenter.org/news-center/web-articles/trade-representative-kirk-outlines-asia-focused-trade-agenda-at-east-west-centers-usapc-washington-conf

[4] The Global Europe Strategy that was launched by the European Commission in 2006 and ran until 2010 aims to achieve a seamless regulatory regime within and outside the European Union. For an evaluation see European Commission, *Report on Progress Achieved on the Global Europe Strategy, 2006-2010*, Brussels,
SEC(2010) 1268/2, 2010
[5] 'Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders, Endorsed by TPP Leaders, 12 November 2011; see http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re
[6] Ian F. Ferguson, William H. Cooper, Remy Jurenas, Brock R. Williams, *Trans-Pacific Partnership Negotiations and Issues for Congress*, Congressional Research Services, Washington DC, 24 January 2013, 3. The negotiators have declined to confirm the specific titles of the chapters in the proposed agreement. They are understood to be market access for goods; textiles and apparel; customs; trade remedies; subsidies; trade facilitation; sanitary and phytosanitary measures; technical barriers to trade; government procurement; investment; cross-border trade in services; financial services; telecommunications; e-commerce; temporary movement of natural persons; intellectual property; labour; environment; competition, including state-owned enterprises; supply chains; transparency; regulatory coherence; dispute settlement; exceptions.
[7] *Inside US Trade,* TPP Countries Signal New Proposals To Counter U.S. SOE, IPR Demands', 14 December 2012
[8] *APEC Information Notes on Good Practices for Technical Regulation* based on *APEC Principles to Enhance Competition and Regulatory Reform 1999,*
www.oecd.org/gov/regulatorypolicy/2371601.doc
[9] *OECD/APEC Integrated Checklist on Regulatory Reform 2005,*
www.oecd.org/regreform/34989455.pdf
[10] Trans-Pacific Partnership (TPP), 'Regulatory Coherence', undated
http://publicintelligence.net/trans-pacific-partnership-tpp-leaked-texts-june-september-2011/
[11] Leaked Regulatory Coherence text, Article X.2.1
[12] Leaked Regulatory Coherence text, Article X.3.1.a
[13] Leaked Regulatory Coherence text, Article X.3.1b
[14] David Borthwick and Robert Milliner, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*, Ministry of Finance, Government of Australia, 2012, 9
[15] David Borthwick and Robert Milliner, 15
[16] Castalia Strategic Advisers, *Regulatory impact Analysis Evaluation 2012*, June 2012, Wellington, 6-7
[17] Jerry Ellig and Patrick McLaughlin, *The Quality and Use of Regulatory impact Analysis in 2008*, Working Paper no 10-30, June 2010, Mercatus Centre, George Mason University, USA, 3
[18] Richard D. Morgenstern, *Reflections on the Conduct and Use of Regulatory Impact Analysis at the U.S. Environmental Protection Agency*, Resources for the Future Discussion Paper, Washington DC, USA, April 2011, 3
[19] Leaked Regulatory Coherence text, Article X.3.4
[20] Leaked Regulatory Coherence text, Article X.3.7
[21] Leaked Regulatory Coherence text, Article X.5.1
[22] A proposed Transparency Annex on Healthcare Technologies has been leaked and confirms this general direction. See http://keionline.org/tpp
[23] The chapter will also have a section on corruption.
[24] These predictions are base don Chapter 21 of the US Korea FTA 2012
[25] US Korea FTA Article 21.1.1
[26] US Korea FTA Article 21.1.2a
[27] US Korea FTA Article 21.1.2b
[28] US Korea FTA Article 21.1.3b
[29] US Korea FTA Article 21.1.4c
[30] US Korea FTA Article 21.2
[31] US Korea FTA Article 21.3
[32] US Korea FTA Article 21.4
[33] Although few of the texts from other chapters have been leaked, the likely content can be inferred from existing US FTAs.

[34] Especially the chapters on TBT, sanitary and phytosanitary measures, telecommunications, financial services, investment, competition, state enterprises, cross-border services, government procurement and dispute settlement.
[35] Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory and Transnational Institute, Brussels/Amsterdam, 2012