

Manchester Journal of International Economic Law

Volume 11 Issue 1 2014
ISSN 1742-3945

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Manchester Journal of International Economic Law

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**Manchester Journal
of
International Economic Law**

Volume 11

2014

Issue 1

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Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review

Raj Bhala*

ABSTRACT: *The Trans-Pacific Partnership (TPP) could be the most economically and politically significant free trade agreement (FTA) in the Asia-Pacific region. Conceived in 2006 by just four small countries, it now embraces 12 that account for 40 percent of global Gross Domestic Product (GDP). It looks to be a 21st century accord in terms of the breadth and depth of trade barriers it identifies and disciplines.*

But, with plenty of likely exceptions, TPP appears to fall short of a 'free' trade accord in the Neo-Classical Economic sense. It seems to manage trade in sensitive sectors. Worse yet, negotiated in an almost shamefully non-transparent manner, TPP may well advance an American corporate agenda, with insufficient regard to the most pressing matter in the Asia-Pacific region: poverty alleviation.

1. OVERVIEW

1.1. Key Negotiating Objectives

The *Trans-Pacific Strategic Economic Partnership*, or *TPP*, is a vehicle for trade liberalization through expanded market access, and increased foreign direct investment (FDI), for the United

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The author gratefully acknowledges the generous assistance of Professor Asif Qureshi, School of Law, Korea University, Seoul, Korea, and Dr Xuan Gao, Office of the General Counsel, International Fund for Agricultural Development, and the thoughtful comments and suggestions received in presenting this article to audiences in India during a three week lecture tour of Hyderabad, Mumbai (Bombay), and Delhi in February-March 2014, especially those at Gateway House in Mumbai.

States and countries in the Asia-Pacific region. This vehicle, in the form of a free trade agreement (FTA), contains 29 Chapters plus Annexes covering market access for thousands of tariff lines.¹ Despite its potential economic and political significance, *TPP* has attracted relatively little attention in academic legal writing.² That is in part because of the thick veil of secrecy, pierced only by occasional draft texts posted on WikiLeaks, which enshrouded *TPP* negotiations.³ To study *TPP* is to pour through a vast amount of media accounts, couple them with a scattering of other sources, and draw inferences.

Accordingly, this review of *TPP* is tentative. Much depends on official material yet to be made publicly available. Nevertheless, the broad picture and many key details of *TPP* already are clear. This review sets them out and examines them amidst the diverse array of competing interests articulated by governments involved, and not involved, in *TPP* talks, and by non-governmental organizations (NGOs). The review raises many questions, at least as many as it answers. It also casts doubt on two points. First, *TPP* is not likely to be a pure, across-the-board, 'free' trade agreement. Rather, it will be a 'managed' trade agreement, because it will tolerate tariff and non-tariff impediments in some sectors for some time. Second, *TPP* is not an obviously development-friendly undertaking. It advances the interests of large capitalist firms, and creates opportunities for small and medium sized enterprises (SMEs). It raises legal and regulatory standards. But, what *TPP* does to generate economic growth that leads to poverty alleviation, or simply to reduce the gap between Main Street and Wall Street that exists in America and every other *TPP* country, is not at all certain.

Overall, *TPP* negotiating objectives focus on the elimination or reduction of tariff and non-tariff barriers (NTBs) for all goods (agricultural and industrial) in the Harmonized Tariff Schedule (HTS), and on liberalizing foreign direct investment (FDI) and creating investor-state dispute settlement (ISDS) mechanisms. Accordingly conventional issues of tariff and NTBs, customs, and rules of origin (ROOs) are covered. Negotiations regarding newer trade issues, such as regulatory cooperation and coherence, e-commerce and digital technology (coupled with reasonable data privacy protections), and intellectual property (IP) protection (including for patents, trademarks, copyrights, geographical indications (GIs)), trade secrets, and data) also are covered, as are issues of state owned enterprises (SOEs), government procurement, labour and the environment, sanitary and phytosanitary (SPS) measures, and trade capacity building. With respect to services, which play a key role in the *TPP* negotiations, important

¹ See Len Bracken, 'TPP Ministers Plan December Meeting In Singapore as Negotiations Continue', 30 *International Trade Reporter* (BNA) 1663 (31 October 2013).

² Among the few articles are: Patrick B. Fazzone, 'The Trans-Pacific Partnership – Towards a Free Trade Agreement of Asia-Pacific?', *Georgetown Journal of International Law*, 2012, 43: 695-743; Meredith Kolsky Lewis, 'The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?', *Boston College International & Comparative Law Review*, 2011, 34: 27-52; Susan K. Sell, 'TRIPs Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP', *Journal of Intellectual Property*, 2011, 18: 447-478. The Congressional Research Service (CRS) published a study: Ian Fergusson, William Cooper, Remy Jurenas & Brock Williams, 'The Trans-Pacific Partnership Negotiations and Issues for Congress', Congressional Research Service (15 April 2013).

³ In the wake of a February 2013 disclosure to the *New York Times* by former United States National Security Agency (NSA) contractor Edward Snowden that the Australian Signals Directorate spied on an American law firm representing Indonesia in trade talks with the United States, American Secretary of State John Kerry stated in February 2014 that the United States 'does not collect intelligence to afford a competitive advantage to U.S. companies or U.S. commercial sectors'. Quoted in Brian Flood, 'Kerry Says U.S. Doesn't Collect Intelligence To Advantage U.S. Commercial Interests', 31 *International Trade Reporter* (BNA) 358 (20 February 2014).

sectors like finance and telecommunications, and modes of delivery like temporary entry, are included.⁴

1.2. Five Hallmarks

Five hallmarks characterize the *TPP*, as follows:⁵

1st: Market Access

TPP affords comprehensive, albeit imperfect, market access. That is, it (via Chapters 1-6) sets the rules for duty-free access to goods markets, with complete tariff elimination a core objective, and lifts barriers to trade in services, government procurement, and FDI. Service and investment market access is based on a Negative List, so all sectors (including financial services) presumptively are covered unless specifically exempted.

Like any FTA, *TPP* truthfully manages trade rather than liberalizes it fully, immediately, and unconditionally. *TPP* contains exceptions for sensitive products and sectors, and temporary entry of persons providing services. So, despite the bold aspirations of the United States in concocting the *TPP*, the accord is not synonymous with pure free trade. Three points are pertinent here.

First, viewed vertically, within a particular sector, each *TPP* country has its sensitivities that it protects to one degree or another. That is no surprise, *i.e.*, it is a reality of all bilateral, regional, and multilateral negotiations.

Second, also viewed within a particular sector, sometimes *TPP* pits one domestic firm in the same industry against another. That occurs when firms within an industry are integrated, in different degrees, in international value added (*i.e.*, global supply) chains. For instance, for footwear, the American company New Balance engages in domestic production, whereas Nike produces shoes overseas.⁶ Predictably, Nike is keener on market access into the United States from abroad than is New Balance.

Third, viewed horizontally, *TPP* involves tradeoffs. For instance, Vietnam covets market access for textile and apparel (T&A) items, which is a sensitive area for the United States. Conversely, the United States is keen on market access for financial services, which is a sensitive sector for Vietnam. Therein is trade-off and the makings of a deal: market access for T&A in exchange for financial services.⁷

⁴ See Len Bracken, 'TPA Digital, Data Flows Objective Meshes With U.S. Negotiating Policies, Vastine Says', 31 *International Trade Reporter* (BNA) 188 (30 January 2014); Murray Griffin, 'TPP Should Set Benchmark for Rules on State-Owned Enterprises, Forum Told', 29 *International Trade Reporter* (BNA) 370 (8 March 2012).

⁵ See 'Trans-Pacific Partnership: Trade Ministers Report to Leaders', 8 October 2013, posted at www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/report-rapport.aspx?lang=eng; Len Bracken, 'New Zealand Agriculture Coalition Warns Against "Non-Comprehensive" TPP Outcome', 31 *International Trade Reporter* (BNA) 280 (6 February 2014); Len Bracken, 'Trade Ministers Seek TPP "Landing Zone" After Confirming Principles at Bali Meeting', 30 *International Trade Reporter* (BNA) 1624 (24 October 2013); Len Bracken, 'TPP Leaders Reaffirm 2013 Conclusion; Report Provides Features of Agreement', 30 *International Trade Reporter* (BNA) 1602 (17 October 2013).

⁶ See Len Bracken, 'TPP Ministers Plan December Meeting In Singapore as Negotiations Continue', 30 *International Trade Reporter* (BNA) 1663 (31 October 2013).

⁷ *Id.*

2nd: Regional

TPP is regional, not bilateral or multilateral, in character. It has a single tariff schedule and common rules of origin. Those rules of origin (in Chapter 7) are designed to facilitate trade within the *TPP*, and encourage cumulation across the region so as to promote production and supply chains in the region. (Chapter 8 covers supply chains.) *TPP* also deals with customs (in Chapter 9), e-commerce (in Chapter 10), and express delivery, all with a view to facilitate business development and trade in the Asia-Pacific region. Further toward that end, *TPP* (in Chapter 11) promotes regulatory coherence in respect of standards.

3rd: Cross-Cutting

TPP (in Chapters 12-17) deals with cross-cutting issues, *i.e.*, topics that cut across traditional boundaries. There are four such issues: regulatory requirements that pose NTBs, including transparency (Chapter 12); business facilitation to enhance competitiveness (Chapter 13); SMEs (Chapter 14); and customs, trade facilitation, and capacity building (Chapters 15-17).

TPP addresses these topics for good reason. Regulatory requirements are among the most significant impediments to market access. That is particularly true for among modern, developed capitalist economies: aside from tariff peaks on sensitive products, they have bound their most favoured nation (MFN) tariffs at low levels, thanks to over half a century of multilateral trade rounds and dozens of FTAs. Hence, in exporting to one another, as well as to emerging markets, they face a plethora of NTBs.

Among those NTBs are regulatory barriers, post-border measures that can have protectionist effects, like conventional quotas, licensing schemes, and other quantitative restrictions, but which are difficult to see and navigate from afar. So, *TPP* improves, makes more transparent, and calls for coordination among regulatory processes. *TPP* helps facilitate business by treating production and supply chains in a holistic manner. It supports SMEs by providing them with information and resources. And, *TPP* seeks to contribute to economic development, sometimes through partnerships between the public and private sectors.

4th: Novel

TPP covers new trade issues, such as ones arising with e commerce and the digital economy (Chapter 18), environmentally-friendly (or ‘green’) growth (Chapter 19), and public health (Chapters 19-20, which deal with IP issues). The accord sets disciplines at a high level, despite the complexity and sensitivity of these issues. *TPP* seeks to discipline ‘digital protectionism’, which takes various forms, such as restrictions on data flows across borders (e.g. prohibitions on a company transferring personal information outside of a domestic jurisdiction), preferences in government procurement for local information technology (IT) products, and IP infringement.⁸ It also seeks to provide appropriate protections for digital privacy.

5th: Live

TPP is a live agreement, in that it is slated for updating as events in trade, FDI, and technology

⁸ Rossella Brevetti, ‘BSA Says Pending Trade Talks Offer Chance to Update Digital Trade Rules’, 31 *International Trade Reporter* (BNA) 260 (6 February 2014).

warrant, thus making it less likely to grow outdated or stale, as has occurred with some WTO agreements. Likewise, *TPP* anticipates new countries joining the accord.

As for the balance of the 29 Chapters not referenced above, there are initial and final provisions (Chapters 21 and 22 respectively), plus Chapters on telecommunications (Chapter 23), dispute settlement (24), SPS measures (25), TBT measures (26), labour (27), trade remedies (28) and exceptions (29).⁹

These hallmarks, while embraced by leaders from the *TPP* negotiating countries at their October 2013 meeting on the sidelines of the Asia Pacific Economic Cooperation (APEC) summit in Bali, Indonesia, are generic. Filling in details with specific language acceptable to all of them proved difficult. That was true even though they tried to use secrecy to minimize contentiousness: throughout at least the first 19 rounds, they never released publicly any negotiating texts.

2. MEMBERSHIP

2.1. Origins and Early Membership Expansion

The agreement to negotiate toward a *TPP FTA* went into effect in 2006 with four original members, the so-called ‘P-4’: Brunei Darussalam; Chile; New Zealand; and Singapore. The parties expanded, in steps, to become the United States, Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. As of April 2014, there were three additional negotiating countries (discussed below): Canada; Japan; and Mexico.

In 2008, the United States was the first country outside of the P-4 to seek membership in the existing agreement.¹⁰ Then, in November 2009 President Barack H. Obama officially announced the United States would join the *TPP* talks with a view to establishing the *FTA* with ‘like minded’ trading partners.¹¹ At that time, there were seven countries involved. Malaysia and Vietnam joined the negotiations in November 2010, after the third round of talks, raising the number to nine. With their entry, *TPP* talks still included only four of the 10 members of the Association of South East Asian Nations (ASEAN), namely, Brunei, Malaysia, Singapore, and Vietnam. That said, according to an October 2013 Asian Development Bank Report, *The Asian Economic Integration Monitor*, *TPP* is far more ambitious than the ASEAN *Regional Comprehensive Economic Partnership (RCEP)*.¹² And, in December 2013-January 2014, the United States began technical consultations with the Philippines on its entry into *TPP*.¹³

⁹ See Len Bracken, ‘Trade Ministers Seek *TPP* ‘Landing Zone’ After Confirming Principles at Bali Meeting’, 30 *International Trade Reporter* (BNA) 1624 (24 October 2013).

¹⁰ See Stephen Joyce, ‘United States Agrees to Launch Negotiations On Joining Trans-Pacific Economic Agreement’, 25 *International Trade Reporter* (BNA) 1382 (25 September 2008).

¹¹ See Len Bracken, ‘USTR’s Marantis Cites Progress on *TPP*, Says Tough Issues Remain at this Stage’, 29 *International Trade Reporter* (BNA) 1330 (16 August 2012) (quoting President Obama); Murray Griffin, ‘Inaugural Trans-Pacific Partnership Negotiations Launched in Australia’, 27 *International Trade Reporter* (BNA) 389 (18 March 2010).

¹² See Yu-Tzu Chiu, ‘Conflicts of Interest May Undermine Year-End Conclusion of *TPP* Talks, ADB Says’, 30 *International Trade Reporter* (BNA) 1689 (31 October 2013).

¹³ See ‘U.S., Philippines Establish Work Program, Begin Technical Consultations on *TPP* Talks’, 31 *International Trade Reporter* (BNA) 595 (27 March 2014); Yu-Tzu Chiu, ‘Kerry Says U.S. Welcomes Upcoming *TPP* Discussions with the Philippines’, 31 *International Trade Reporter* (BNA) 47 (2 January 2014).

Did the likelihood of additional countries joining the *TPP FTA* fade in and after 2010? The answer is a definite ‘no’. A consensus of existing negotiating countries is required for a new country to join. But, if countries are able to meet the high standards required by *TPP* rules, then they could be considered for inclusion in the discussions. Canada, Japan, and Mexico showed strong interest in joining the *TPP* talks.¹⁴ Subsequently, Colombia, Costa Rica, Laos, Philippines, Taiwan, and Thailand expressed an interest in joining.¹⁵ However, by the 17th round of negotiations in May 2013 in Peru, Thailand lost interest in *TPP*, perhaps because of domestic political problems¹⁶

In November 2011, alongside a summit of the *Asia Pacific Economic Cooperation (APEC)* forum meeting, Japan, along with Canada, made clear its interest to enter *TPP* negotiations. Japan’s decision increased the likelihood of difficult negotiations over market access in Japan for agricultural products Japan deems sensitive, most notoriously, rice. In April 2012, at the Sixth Summit of the Americas in Cartagena, Colombia, Colombia and Costa Rica – neither of which is an *APEC* member – asked to participate in *TPP* talks.¹⁷ In June 2012, the nine existing *TPP* parties formally invited Canada and Mexico to join the *TPP* negotiations, thus raising the number of participants to 11.¹⁸ Canada and Mexico formally joined the talks in October 2012.¹⁹

Starting in May 2012, Costa Rica indicated its interest in joining *TPP* negotiations.²⁰ Costa Rica was keenly aware that after the *North American Free Trade Agreement (NAFTA)* entered into force on 1 January 1994, Central American countries were negatively affected by the margin of preference accorded to American, Canadian, and Mexican exporters to the North American market. It took another 10 years for those countries to recover, via the *Central American Free Trade Agreement-Dominican Republic (CAFTA-DR)*. So, Costa Rica was keen to avoid a rerun of this history: being left out of major FTA negotiations, and then having to scramble to regain a margin of preference, only to take years to get it back. Indeed, Costa Rica learned a lesson from *CAFTA-DR*: as of May 2013, its trade had grown 70 percent since

¹⁴ See Amy Tsui, ‘U.S. Discusses with Mexico Joining Talks on TPP Following Japan, Canada Meetings’, 29 *International Trade Reporter* (BNA) 293 (23 February 2012); Amy Tsui, ‘TPP Members Meet on Sidelines of APEC, Seek Broad Outline of TPP Deal by November’, 28 *International Trade Reporter* (BNA) 860 (26 May 2011).

¹⁵ See Toshio Aritake, ‘Japan Announces Bid to Join TPP Talks; Minister Predicts 0.66 Percent GDP Increase’, 30 *International Trade Reporter* (BNA) 422 (21 March 2013); Amy Tsui, ‘TPP Spurs Another Economic Pact; Asian Countries Closely Watching TPP Action’, 30 *International Trade Reporter* (BNA) 108 (17 January 2013).

¹⁶ See Lucien O. Chauvin, ‘Seventeenth TPP Round Starts in Peru, Official is Confident of Wrap-Up by Year’s End’, 30 *International Trade Reporter* (BNA) 738 (23 May 2013).

¹⁷ See Lucien O. Chauvin, ‘Canada Makes Strong Pitch to Join TPP; Colombia, Costa Rica Also Express Interest’, 29 *International Trade Reporter* (BNA) 616 (19 April 2012).

¹⁸ See Peter Menyasz, Daniel Pruzin & Amy Tsui, ‘Canada, Mexico Invited to Join TPP Talks, Expected to Enter Negotiations in Early Fall’, 29 *International Trade Reporter* (BNA) 1004 (21 June 2012).

¹⁹ Canadian motivations for entry were not based on short-term market access gains. For Canada, 70 percent of trade already was with TPP negotiating countries, 62 percent of which was with the United States. The real benefits were (1) gaining market access in countries with which Canada did not have an FTA, (2) covering new, non-tariff issues such as electronic commerce, digital media, and third-party logistics, and synchronizing regulatory standards at high levels, and (3) defending Canada against erosion of trade preferences it enjoyed under the *North American Free Trade Agreement (NAFTA)*. Notably, *NAFTA* was the last major FTA into which Canada entered – two decades earlier. See Peter Menyasz, ‘Report Says TPP Deal’s Relevance to Canada Based on Strategy, Defence’, 30 *International Trade Reporter* (BNA) 1415 (12 September 2013).

²⁰ See Rossella Brevetti, ‘Costa Rica Will Reiterate TPP Interest During Obama’s Visit, Trade Minister Says’, 30 *International Trade Reporter* (BNA) 654 (2 May 2013).

CAFTA-DR entered into force fully in 2009, and America easily was its largest trading partner.²¹ FTAs benefited Costa Rica, and in April it added another one: with Peru.

2.2. Controversial Japanese Entry

Japan, boasting the third largest economy in the world, formally declared its intention to join the *TPP* negotiations in March 2013. After all, it had some of the world's most prominent corporations, such as Nippon Steel, Sony, and Toyota, keenly interested in exportation and global integration.²² Japan was invited to join in April 2013.²³ With Japan included, the 12 *TPP* countries accounted for 40 percent of world Gross Domestic Product (GDP), one-third of all international trade, over 775 million consumers, and 40 percent of total American trade in goods.²⁴

Japan's entry into *TPP* negotiations was particularly controversial, in part because of the long history of complex trade disputes between it and the United States.²⁵ Such disputes covered key goods sectors like beef (on which Japan maintained a 38.5 percent tariff, and imposed controversial phytosanitary restrictions), and autos and auto parts (against which Japan has a host of market access impediments).²⁶ The disputes also implicated uniquely Japanese safety, noise, and pollution standards that added to the cost of production of foreign competitors and served as NTBs. Beyond agricultural and industrial goods, America and Japan quarrelled over services sectors like insurance, particularly in respect of the existence of (1) Japan Post Insurance, and (2) insurance business cooperatives, called *kyosai*, which benefit from tax advantages over private foreign insurers, and which are not subject to regulation by Japan's Financial Services Agency (FSA). Nevertheless, the United States could not ignore the fact Japan was negotiating an FTA with Australia, which almost certainly would enter into force before *TPP*.²⁷ This shade of competitive imperialism meant American exporters would be at a disadvantage in the Japanese market relative to their Australian producers of like products – hence the incentive to include Japan in *TPP* and thereby keep pace with the Aussies.

²¹ See Lucien O. Chauvin, 'Costa Rica Strengthens Local Trade Ties, Aims for Involvement with Asia-Pacific Region', 30 *International Trade Reporter* (BNA) 655 (2 May 2013). While there is no requirement to be a member of the Asia Pacific Economic Cooperation (APEC) forum to join TPP talks, all countries in those talks are APEC members, while Costa Rica is not. See *id.*

²² See Len Bracken, 'Japanese Participation in TPP Talks Has Not Slowed Process, Cutler Says', 30 *International Trade Reporter* (BNA) 1779 (14 November 2013).

²³ See Len Bracken, 'USTR Official Sketches Challenges, Potential in Japan Joining TPP Talks', 30 *International Trade Reporter* (BNA) 726 (16 May 2013); Len Bracken & Toshio Aritake, 'TPP Trade Ministers Give Japan Green Light to Join Talks Pending Domestic Procedures', 30 *International Trade Reporter* 592 (25 April 2013); Len Bracken, 'U.S. Welcomes Japan Joining TPP Talks; Bilateral Deal Reached on Autos, Insurance', 30 *International Trade Reporter* (BNA) 575 (18 April 2013); Rossella Brevetti, 'Levin Says Framework with Japan is Inadequate for Entry into TPP', 30 *International Trade Reporter* (BNA) 576 (18 April 2013).

²⁴ See David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9; Amrit Dhillion, 'Indian Official Denies Reports that U.S. Has Pushed Country to Join TPP Talks', 30 *International Trade Reporter* (BNA) 1375 (5 September 2013); Rossella Brevetti, 'Conclusion of TPP Talks this Year Challenging, but Possible, Official Says', 30 *International Trade Reporter* (BNA) 401 (21 March 2013).

²⁵ See Len Bracken, 'U.S. to Continue Consultations with Japan as TPP Member States Consider Candidacy', 30 *International Trade Reporter* (BNA) 421 (21 March 2013).

²⁶ See Peter Menyas, 'Canadian Business Sector Hopeful TPP Negotiations Making Progress', 30 *International Trade Reporter* (BNA) 466 (28 March 2013).

²⁷ See Len Bracken, "'Big Gaps' Remain in Japanese TPP Offer On Agricultural Market Access, Cutler Says', 31 *International Trade Reporter* (BNA) 503 (13 March 2014).

The invitation to Japan, by consensus of the then-existing *TPP* negotiating countries, was issued only after the United States and Japan agreed on a bilateral arrangement covering autos, insurance, NTBs, and *TPP* scope. The bilateral deal covered ‘offensive’ areas in which one or the other country had an export interest, and ‘defensive’ areas in which one or the other country had and import protection interest.²⁸ Clashes were inevitable when those two areas coincided, such as for rice, where the American interest was offensive, and the Japanese interest defensive.

The key points of the April 2013 bilateral deal between America and Japan permitting Japanese entry into *TPP* were as follows:

(1) *Measures on Autos* –

Auto market access has been a trade tension between the United States and Japan since the 1980s. The tension is exacerbated by the rise of third country competitors, such as China and India. In 2001, America and Japan accounted for 38 percent of world production. In 2011, their share fell to 21 percent.²⁹ Japan, of course, responded partly by making more cars in the United States, thus jumping *NAFTA* barriers, including its 62.5 percent Regional Value Content (RVC) ROO for cars. The American approach has been quintessentially American: to shout at Japan that it must reduce its auto trade barriers. Surely, the fact Japanese auto firms occupy 94 percent of the Japanese market justifies the approach.³⁰

Under the bilateral deal, Japan agreed to discuss auto market access, the results of which would be part of its *TPP* market access schedule. Such market access would include a more than doubling of the number of vehicles Japan admits annually under its Preferential Handling Procedure (PHP), which is a faster and more efficient way for American car companies to export to Japan.³¹ Consequently, those companies would be permitted to export up to 5,000, rather than 2,000, cars to Japan.

Among NTBs, the United States called on Japan to change its vehicle safety and performance test standards, especially ones concerning fuel consumption and noise.³² America demanded Japan modify its progressive motor vehicle tax scheme, whereby Japan taxes cars with small engines (below 0.66 litres) lightly, but puts high levies on cars with large engines.³³ Query whether such American demands made sense for Japan, which imports virtually all its oil and refined gasoline: were those controversial methods environmentally-friendly, discouraging

²⁸ See Len Bracken, ‘USTR Will Seek Public Comments on Talks with Japan in Context of TPP’, 30 *International Trade Reporter* (BNA) 689 (9 May 2013).

²⁹ See Chatham House, ‘The World’s Industrial Transformation’ (July 2013), posted at www.chathamhouse.org; Stephanie I. Cohen, ‘Lawmakers Defend Japanese Automakers, Highlight Investments Ahead of TPP Talks’, 30 *International Trade Reporter* (BNA) 1287 (15 August 2013).

³⁰ See Len Bracken & Toshio Aritake, ‘U.S. Cites Need for More Work on Autos In Negotiations With Japan Related to TPP’, 30 *International Trade Reporter* (BNA) 1688 (31 October 2013).

³¹ See Len Bracken & Toshio Aritake, ‘U.S. Cites Need for More Work on Autos In Negotiations With Japan Related to TPP’, 30 *International Trade Reporter* (BNA) 1688 (31 October 2013).

³² See Toshio Aritake, ‘U.S., Japan, Begin Bilateral Talks; Agenda Includes Automobiles, Insurance’, 30 *International Trade Reporter* (BNA) 1286 (15 August 2013).

³³ In 2013, the Japanese Ministry of Internal Affairs and Communications proposed decreasing the motor vehicle acquisition tax rate from 5 to 2 percent, and doubling the 7,000 yen road tax rate for cars with engine displacements of less than 0.66 litres – so-called ‘kei’ cars. Rural Japanese, over half of whom drive such cars, rejected the proposal. Accordingly, the Japanese government considered raising taxes on large engine displacement cars. See Toshio Aritake, Automobiles, ‘Insurance on Agenda at Fourth Round of U.S.-Japan Meeting’, 30 *International Trade Reporter* (BNA) 1817 (21 November 2013).

gas guzzling cars?

Japan also agreed to creation of both a regular and accelerated dispute settlement provision on autos. The latter would allow for the re-imposition, or snap back, of MFN tariffs.

The United States pledged to phase out tariffs on Japanese cars, under the longest staging period (*i.e.*, staging category) decided under *TPP*, and with a schedule that is back loaded so the phase outs occur at the end of the staging period. During that period, tariffs on Japanese cars would exceed those provided for in the *Korea-United States Free Trade Agreement (KORUS)*, which entered into force on 15 March 2012.

(2) *Measures on Insurance* –

Japan agreed to address the issue of an un-level competitive playing field caused by the activities of Japan Post Insurance, an insurance company owned by the Japanese government that has statutory, regulatory, and governmental privileges that distort competition in its favour vis-à-vis private foreign insurers. Japan said it would not approve new or modified cancer insurance, or insurance for stand-alone medical products, issued by Japan Post, until it decides that equivalent conditions of competition exist between Japan Post and private insurers, and Japan has adopted properly functioning business management system. That decision, said Japan, would take several years.

Also related to Japan Post, Japan said it would address level competitive playing field issues created by and international express delivery services Japan Post provides.

(3) *Measures on NTBs* –

Japan agreed to discussions on NTBs, the results of which would be binding, and would entail amendments to Japanese law. From the American perspective, aside from a general lack of transparency, such NTBs and the issues they presented included:

(a) FDI:

There were difficulties to mergers and acquisitions (M&A), *i.e.*, barriers to foreign companies merging with or acquiring Japanese companies, and there was a need to strengthen the role of *bona fide* independent corporate boards of directors.

(b) Standards:

Greater flexibility in setting and applying standards, accepting international standards, and in respect of SPS measures, accelerating and streamlining risk assessments on food additives, fungicides, and gelatin/collagen for human consumption, were necessary.

(c) Government Procurement:

The process of bidding in government procurement needed improvement.

(d) Competition Policy:

Procedural fairness in antitrust cases in Japan needed to be ensured.

(e) Intellectual Property Rights (IPRs):

Japan needed to strengthen IP protection and enforcement, especially for copyright and trademark, including through civil and criminal enforcement proceedings, and the use of technology, uphold core principles on geographic indications (GIs), and safeguard the use of generic terms.

(4) *TPP Scope* –

Japan agreed to negotiate on certain tariff and NTB issues, some of which international trade agreements never previously had covered.

Under the bilateral deal, there would be parallel tracks of negotiations: the regular *TPP* talks, and bilateral talks between the United States and Japan. Presumably, eventually all *TPP* participants would benefit from the bilateral deal. Its terms would be incorporated into *TPP*, in the same way bilateral commercial agreements between World Trade Organization (WTO) Members and an applicant are ‘multilateralized’ during the WTO accession process. Some *TPP* countries (like some WTO Members in accession talks with an applicant) almost certainly rode freely on aggressive American negotiating tactics and positions with Japan.

To be sure, the bilateral deal did not satisfy all American officials. For example, Senator Sander Levin (Democrat-Michigan) objected the provisions on autos were vague, the level of American cars imported under the PHP program remained commercially insignificant, and there was no discussion of currency manipulation by Japan to keep the *yen* artificially undervalued relative to the dollar. He pointed out in 2012, Japan exported 1.7 million cars to the United States, while America exported just 13,500, *i.e.*, Japan exports in a day what the United States does in a year.³⁴ Ford Moto Company chimed in, with its Vice President for International Governmental Affairs, saying:

Japan is the most closed auto market in the world. ... [It has] a rolling set of barriers over the decades ranging from outright exclusion of importers, to harassment of import brands, and unique regulatory requirements that are often applied to a low volume import, creating excessive cost.³⁵

He tacked on another complaint: Japan manipulates the relative value of the *yen*, depressing it so as to disadvantage American vis-à-vis Japanese goods in world markets.

Senator Levin was not alone in his concerns, particularly as regards the auto sector. In March 2013, over 40 Senators and Members of the House of Representatives signed a letter warning Japan should not be allowed to join without addressing its unfair barriers to American auto exports. Those barriers included:³⁶

- (1) Currency manipulation.
- (2) Discriminatory taxation.

³⁴ See Len Bracken, ‘U.S. Welcomes Japan Joining TPP Talks; Bilateral Deal Reached on Autos, Insurance’, 30 *International Trade Reporter* (BNA) 575 (18 April 2013); Rossella Brevetti, ‘Levin Says Framework with Japan is Inadequate for Entry into TPP’, 30 *International Trade Reporter* (BNA) 576 (18 April 2013).

³⁵ James Politi & Aaron Stanley, ‘Ford Aims Trade Talks Barb at Japan’, *Financial Times*, 17 July 2013, at 4 (quoting Steve Biegun).

³⁶ See Len Bracken, ‘Over 40 Lawmakers Express Concerns Regarding Japan’s Interest in Joining TPP’, 30 *International Trade Reporter* (BNA) 423 (21 March 2013).

- (3) Cumbersome and expensive certification procedures for foreign cars.
- (4) Complex and changing safety, noise, and pollution standards that were not consistent with international guidelines.
- (5) Refusal by many Japanese auto dealers to sell foreign cars.
- (6) Zoning restrictions making it difficult for a foreign dealer to establish a car dealership.
- (7) Poor enforcement of Japanese antitrust laws.
- (8) Government incentives to buy Japanese cars.
- (9) Consumer preferences skewed by decades of government campaigns to promote Japanese cars.

Japan vigorously contested the American allegations, saying they exemplified the phenomenon of capture of government officials by a well-heeled constituent group. As one Japanese industry official put it:

The Obama Administration is acting like a messenger boy for American industry. It seems to be taking orders from Detroit, insurers, and other business interests, and assigning bureaucrats to pass on those demands to Japan.³⁷

After all, the Big Three – Chrysler, Ford, and General Motors, all headquartered in Michigan – compelled renegotiation of *KORUS* to get better terms for themselves, so why not try again in *TPP*, before Japan enters and the FTA is completed?

Japan also said American demands to establish targets for its car exports to the United States was redolent of the managed trade in autos in the 1980s under the 1981 *Voluntary Restraint Agreement (VRA)*.³⁸ And, American demands that Japan simply accept United States standards for automobile safety and environmental pollution, so that American cars would not have to undergo Japanese pre-registration inspections, smacked of disrespect for Japanese sovereignty.

Yet, American politicians had key statistics on their side. Japan is the third largest auto market in the world. The typical import penetration ratio for OECD countries with large auto sectors is over 40 percent. But, in Japan (as of 2012), the foreign auto import penetration ratio was just 5.9 percent. In addition, American cars comprised less than 1 percent of the Japanese auto market, while Japanese cars account for roughly 40 percent of all vehicles sold in America.³⁹

Were such disparities the result of tough, but fair, competition in the home market of the powerful Japanese automakers like Honda and Toyota? Were they entirely attributable to the superior quality of Japanese cars? Or, were they the result of the aforementioned barriers? In particular, was currency manipulation really to blame as ‘the 21st century barrier to free

³⁷ Quoted in Toshio Aritake, ‘U.S., Japan Exchange Heated Discussions On Autos at Tokyo TPP Talks, Sources Say’, 30 *International Trade Reporter* (BNA) 1856 (28 November 2013).

³⁸ See Toshio Aritake, ‘Japan’s Amari Urges U.S. to Cooperate to Achieve Final Agreement on TPP’, 31 *International Trade Reporter* (BNA) 169 (23 January 2014).

³⁹ See Bebe Raupé, ‘TPP Stymied Until Congress Approves Trade Promotion Authority, Portman Says’, 30 *International Trade Reporter* (BNA) 1452 (19 September 2013) (discussing remarks by former United States Trade Representative (USTR) Senator Robert Portman (Republican-Ohio)).

trade?⁴⁰

American politicians were joined by labour unions.⁴¹ In a June 2013 hearing before the United States International Trade Commission (ITC), the American Federation of Labour and Congress of Industrial Organization (AFL-CIO) said the commitments by Japan in the April 2013 bilateral deal were insufficient. They failed to deal with auto parts, currency manipulation, labour rights, or ROOs. The USTR followed the politicians and labour unions, demanding Japan acknowledge and incorporate the same motor vehicle safety and environmental standards as the United States uses.⁴² The demand was more than just unrealistic; it likely was not in the interests of the Japanese people.

Yet, do these complaints, and the August 2013 statement of the United States Trade Representative (USTR), Ambassador Michael Froman, reflect both historical ignorance and political ingratitude? Recalling his work in Japan in 1989 as a law student, the USTR opined:

[T]here was also a pervasive sense of inequity – that Japan’s competitiveness was in part due to export opportunities available in the rest of the world that Japan did not provide in its home market, that Japan’s success came at the expense of others. That sense of unfairness had a corrosive effect on our bilateral relationship.⁴³

Against this statement is the simple fact is Japan has been a steadfast American ally since its defeat at American hands in the Second World War.

Japan has supported America in all its ventures, from fighting Communism on the Korean and Vietnamese peninsulas, to its more recent marches of folly (to borrow the title from Barbara Tuchman’s classic study).⁴⁴ Japanese economic success was, and remains, vital to its political support for American foreign policy. Conversely, American military might, including its nuclear umbrella, protected Japanese economic assets. That was the deal. It may be in the interests of both countries to rewrite the deal, but is it uncharitable of American officials to whine about Japan playing unfairly? Japan gave what America asked for over half a century, and under its American-written Constitution, developed into a flourishing, multi-party democracy to boot.

To be fair to the United States, it was not the only country dubious about Japanese entry into *TPP*. Australia, New Zealand, and Canada all fought Japanese entry into the *TPP* negotiations, and Canada ‘resisted until the end’.⁴⁵ These countries wanted Japan to concede to lower agricultural tariffs on barley, beef, beets, dairy products, rice, pork, sugar, and wheat, in

⁴⁰ See Bebe Raupé, ‘TPP Stymied until Congress Approves Trade Promotion Authority, Portman Says’, 30 *International Trade Reporter* (BNA) 1452 (19 September 2013) (quoting Ziad Ojakil, Vice President for Government Affairs, Ford).

⁴¹ See Len Bracken, ‘Labour Cites Exchange Rate Manipulation at ITC Hearing on Japan Joining TPP Talks’, 30 *International Trade Reporter* (BNA) 899 (13 June 2013).

⁴² See Toshio Aritake, ‘Japan, U.S. Trade Chiefs to Meet in Davos; Next TPP Ministers Meeting Set for February’, 31 *International Trade Reporter* (BNA) 64 (9 January 2014).

⁴³ Quoted in Len Bracken, ‘Froman Says TPP-Linked U.S.-Japan Talks Off to “Good Start,” Cites Persistent Barriers’, 30 *International Trade Reporter* (BNA) 1324 (22 August 2013).

⁴⁴ See Barbara W. Tuchman, *The March of Folly – From Troy to Vietnam* (New York, New York: Random House, 1984).

⁴⁵ See Len Bracken & Toshio Aritake, ‘TPP Trade Ministers Give Japan Green Light to Join Talks Pending Domestic Procedures’, 30 *International Trade Reporter* 592 (25 April 2013) (quoting an unnamed Japanese government official).

return for their endorsement to join. They had maximum leverage on Japan before acquiescing to Japanese entry, and they tried to use it.

Australia, for one, proved successful. After seven years of negotiations, in April 2014, it announced a significant bilateral *Economic Partnership Agreement (EPA)* with Japan. Their deal included (*inter alia*) reductions by Japan in tariffs on Australian beef.⁴⁶ (Australia took a less aggressive stance with Japan than did the United States, seeking a 50 percent cut to the Japanese beef tariff, from 38.5 to 19 percent, not duty-free treatment). Japan also agreed to raise the quota threshold for duty-free treatment on the largest Australian export to Japan: cheese. Australia won similar concessions – expansion of low-tariff import quotas – for other dairy products, and sugar. For its part, Australia dropped its tariffs on cars, electronics, and white goods.

The Australia-Japan *EPA* could be a precedent for a deal with the United States and other countries, meaning they could not expect better-than-Aussie treatment for their exports. America did not appear to think so, of course. It looked askance at the *EPA*, being ‘downright dismissive’, said the *Financial Times*, saying it was ‘significantly less ambitious than what leaders agreed to seek’.⁴⁷ That seemed rather rude toward two steadfast friends and allies, Australia and Japan.

Despite its agreement to the *EPA*, Japan was not single-minded about *TPP* entry. Joining those talks was controversial even within Japan, given the traditional inward-looking approach of some powerful constituencies, especially the farm sector.⁴⁸ Some Japanese officials called for full exemptions from *TPP* commitments for barley, beef, dairy products, sugar, wheat, and, of course, rice. At negotiations in Singapore in December 2013, the United States rejected as utterly unrealistic a Japanese proposal that it phase out tariffs on barley, beef, dairy products, pork, rice, sugar, and wheat across 99 years after *TPP* takes effect.⁴⁹ Undeterred, Japan hoped to exempt health insurance, and medical and pharmaceutical reimbursement services, from the *TPP*.

But, as newly elected Japanese Prime Minister Shinzo Abe said in March 2013, when announcing the intention of his country to participate in the negotiations, to remain inward looking would doom economic growth prospects in Japan, and leave the country behind others. Hence, ‘[t]he real threat to Japan is doing nothing.’⁵⁰ Yet, even Prime Minister Abe indicated he would fight to defend each of the aforementioned special interest groups.

⁴⁶ See ‘Japan and Australia Agree Trade Deal’, *BBC NEWS*, 8 April 2014, posted at www.bbc.com/news/business-26917871; Toshio Aritake, ‘Japan, U.S. Set for TPP Talks Before Obama’s Visit to Japan’, 31 *International Trade Reporter* (BNA) 691 (10 April 2014); Toshio Aritake, ‘Minister Says Progress in Talks with U.S. May Not Be Sufficient to Conclude Agreement’, 31 *International Trade Reporter* (BNA) 694 (10 April 2014).

⁴⁷ See Shawn Donnan, Jamie Smyth & Ben McLannahan, ‘Australia-Japan Trade Agreement Dismissed by U.S.’, *Financial Times*, 8 April 2014, at 2.

⁴⁸ See Toshio Aritake, *Japan Announces Bid to Join TPP Talks; Minister Predicts 0.66 Percent GDP Increase*, 30 *International Trade Reporter* (BNA) 422 (21 March 2013).

⁴⁹ See Toshio Aritake, ‘Japan, U.S. Trade Chiefs to Meet in Davos; Next TPP Ministers Meeting Set for February’, 31 *International Trade Reporter* (BNA) 64 (9 January 2014).

⁵⁰ Quoted in Toshio Aritake, ‘Japan Announces Bid to Join TPP Talks; Minister Predicts 0.66 Percent GDP Increase’, 30 *International Trade Reporter* (BNA) 422 (21 March 2013).

In February 2014, the outlines of a possible compromise emerged for a bilateral accord that would enable full Japanese participation in *TPP* talks.⁵¹ Perhaps Japan could eliminate tariffs, on a phased basis, on beef, pork, and other meats. It also could change its environmental and motor vehicle safety regulations to ease entry of American vehicles into Japan. In return, the United States would drop its insistence on complete tariff repeal for dairy products, rice, sugar, and wheat, allow a 20 instead of 10 year tariff phase out period, and eliminate its 2.5 and 25 percent tariffs on cars and trucks, respectively.

2.3. Enter Korea?

Assuming successful completion of both *TPP* and the United States – European Union *Transatlantic Trade and Investment Partnership (T-TIP)*, 10 of the largest 15 economies in the world would be in either of these agreements, with America in both. The other five would be Brazil, China, India, Korea, and Russia. In November 2003, China, Japan, and Korea started studying the possibility of an FTA, and began talks in March 2013.⁵² In May 2012, Korea expressed interest in joining the *TPP*, which it reaffirmed in September and throughout the fall 2013.⁵³

For Korea, that interest reflected a trade policy change: it relied on bilateral FTAs, and had 46 of them (as of November 2013), including with the European Union and United States, and was negotiating new ones with China, Indonesia, and Vietnam.⁵⁴ Joining *TPP* would mean focusing on multi-party FTAs.

Notably, Korea garnered support from Mexico for its bid to join the *TPP* talks.⁵⁵ Mexico, after all, was the 6th largest trading partner (in 2012) of Korea, hence Korean entry would further link the two countries and secure reciprocal market access opportunities. In December 2013, the United States expressed support for Korean entry into the *TPP*, albeit perhaps after an initial bilateral agreements between Korea and existing *TPP* countries.⁵⁶

2.4. Why Not India?

In contrast to China, Japan, and Korea, India sat on the sidelines of *TPP* negotiations, watching

⁵¹ See Toshio Aritake, 'Japan-U.S. Working-Level TPP Meetings Set for Next Week in Washington, D.C.', 31 *International Trade Reporter* (BNA) 503 (13 March 2014); Toshio Aritake, 'Japan's Amari Urges U.S. to Make Concessions on Bilateral TPP Talks', 31 *International Trade Reporter* (BNA) 357 (20 February 2014) (explaining Japan's point that it cannot make one-sided concessions to American demands, but expects mutually agreeable compromises based on reciprocity); Toshio Aritake & Brian Flood, 'Japan's Foreign Minister Hopes to Seal TPP Talks with U.S. During Washington Visit', 31 *International Trade Reporter* (BNA) 318 (13 February 2014); Len Bracken, 'Participation of Japan in First Tranche Of TPP Is "Highly Desirable," Official Says', 31 *International Trade Reporter* (BNA) 279 (6 February 2014).

⁵² See Toshio Aritake, 'Japan Announces Bid to Join TPP Talks; Minister Predicts 0.66 Percent GDP Increase', 30 *International Trade Reporter* (BNA) 422 (21 March 2013).

⁵³ See James Lim, 'South Korea Moves Closer to Deciding Whether to Join trans-Pacific Negotiations', 30 *International Trade Reporter* (BNA) 1822 (21 November 2013); James Lim, 'South Korea Weighs Decision On Participating in TPP Talks', 30 *International Trade Reporter* (BNA) 1412 (12 September 2013); Amy Tsui, 'Korea Interested in Joining TPP Later, After Korea FTA is Implemented, Bark Says', 29 *International Trade Reporter* (BNA) 834 (24 May 2012).

⁵⁴ See James Lim, 'South Korea Weighs Decision On Participating in TPP Talks', 30 *International Trade Reporter* (BNA) 1412 (12 September 2013).

⁵⁵ See Maja Wallengren, 'Mexican President Encourages South Korea To Join Trans-Pacific Partnership Negotiations', 30 *International Trade Reporter* (BNA) 1562 (10 October 2013).

⁵⁶ See Len Bracken & James Lin, 'Froman Welcomes Korean Interest in TPP, Says Entry Would Follow Initial Agreement', 30 *International Trade Reporter* (BNA) 1895 (5 December 2013).

and analysing them, but expressing no interest in joining them.⁵⁷ In August 2013, Rajeev Kher, Additional Secretary in the Indian Ministry of Commerce, whose portfolio included trade negotiations, confirmed: ‘no one has invited India to join the *TPP*’, and that ‘America has not formally asked India, and we are not thinking about joining the *TPP*.’ Why not? That is, what accounted for the Indian position? The Secretary explained:

[O]n one level, the *TPP* is a simple trade agreement, but there are a *host of non-trade issues such as intellectual property and labour issues, and everyone knows India’s position on these*, so it would be premature for India, as a developing country, to join the *TPP*. It’s too soon in the day for us to get on board.⁵⁸

That Indian participation in *TPP* would be in America’s interest in forging a ‘new economic architecture’ (as Vice President Joe Biden and Secretary of State John Kerry put it on visits to India) is undeniable.⁵⁹ But, that helps explain Indian hesitancy: since the era of Prime Minister Jawaharlal Nehru, India has championed non-alignment, steering a course among major powers, and remaining suspicious of any close alliance that might turn India into a political proxy or open it to economic neocolonialism.

So, India has pursued the *RCEP* with the 10-country *ASEAN* group. *RCEP* involves *ASEAN* plus six countries as FTA partners: India, plus Australia, China, Japan, Korea, and New Zealand. *RCEP* is an easier engagement for India than *TPP*. That is because it already has bilateral FTAs with *ASEAN*, Japan, and Korea, and (as of September 2013) was negotiating ones with Australia and New Zealand. India’s key concern in *RCEP* is dominance by China. In contrast, as Professor Arpita Mukherjee, Senior Fellow at the Indian Council for Research on International Economic Relations (ICRIER) in New Delhi, put it:

[w]ith the *TPP*, it [India] will face an even bigger problem in that America will exert a lot of pressure. With the current state of India’s economy and economic reforms, *India won’t be able to deliver on all sorts of regulatory and trade commitments*. If India can’t even conclude its trade deal with the EU, how can it do one with the *TPP*, *when it means dealing with an even more demanding U.S., which has always imposed high standards in trade agreements?* With the *TPP*, we will need a lot of laws and regulations and new policies on government procurement if we hope to deliver on the commitments we will have to make. I doubt India can do this.⁶⁰ [*emphasis added*]

So, in addition to India having different policies on issues linked to trade, like intellectual property and labour rights, and in addition to concern about dominance by America, what accounts for India being on the sidelines of *TPP* is India itself: it cannot implement in its legal system, and enforce ‘on the street’, 21st century regulatory standards that America expects.

⁵⁷ See Amy Tsui, ‘TPP Spurs Another Economic Pact; Asian Countries Closely Watching TPP Action’, 30 *International Trade Reporter* (BNA) 108 (17 January 2013).

⁵⁸ Quoted in Amrit Dhillon, ‘Indian Official Denies Reports that U.S. Has Pushed Country to Join TPP Talks’, 30 *International Trade Reporter* (BNA) 1375 (5 September 2013) [*emphasis added*].

⁵⁹ Amrit Dhillon, ‘Indian Official Denies Reports that U.S. Has Pushed Country to Join TPP Talks’, 30 *International Trade Reporter* (BNA) 1375 (5 September 2013).

⁶⁰ Quoted in Amrit Dhillon, ‘Indian Official Denies Reports that U.S. Has Pushed Country to Join TPP Talks’, 30 *International Trade Reporter* (BNA) 1375 (5 September 2013).

This point ought to give pause to the United States. Why pursue relentlessly a *TPP*, however economically logical the higher standards in it may be, if they are so high they drive India into the arms of China? Surely as a matter of *real politic*, American interests are better served by having the world's largest democratic market economy – India – in the *TPP*, than having it opt to partner with China. Further, on grounds of social justice, is it proper for America to pursue a *TPP* that alienates the country with the largest number of absolutely poor people in the world? Must a *TPP* foist every American regulatory preference on other countries? Is there no way to forge a *TPP* that is development friendly?

2.5. Why Not Taiwan?

Like India, Taiwan is absent from the *TPP* list, despite (by June 2013) expressing an interest or at least having an observer status. Until the early 2000s, the United States was the largest trading partner of Taiwan, but by 2013 China and Japan had moved into the top two positions.⁶¹ Still, given the long-standing geopolitical strategic importance of Taiwan to the United States, reflected partly in the 1979 *Taiwan Relations Act*, including Taiwan made sense from an American perspective.

So, does exclusion of China from *TPP* negotiations (discussed below) extend to Taiwan? The answer is obvious to officials in Beijing, but equally and oppositely obvious to the American Chamber of Commerce (AmCham) in Taipei.⁶² Its June 2013 White Paper, *Taiwan At A Crossroads*, urged the Taiwan government to press for inclusion in *TPP*, and mobilize public support toward that goal. AmCham said Taiwan significantly underperforms as a destination for FDI, attracting low levels in comparison with other Asian countries, such as Korea. Inclusion in *TPP* would help boost FDI, and help Taiwan avoid becoming commercially isolated in the Far East. *TPP* inclusion would give a competitive spur to Taiwanese goods and services, and enhance market access for them, across the region.

There was support for including Taiwan from among some American politicians. For example, in August 2013, Senator Robert Menendez (Democrat-New Jersey), Chairman of the Senate Committee on Foreign Relations, called for including Taiwan in *TPP* negotiations.⁶³ He cautioned Taiwan would need to be willing to agree to strong intellectual property protections, high regulatory, labour, and environmental standards, and rules against currency manipulation. But, he noted the importance of open, transparent, and deep ties between the United States and Taiwan. For its part, in September, Taiwan clearly affirmed its interest in joining the talks, and the American Chamber of Commerce in Taipei (AmCham Taipei) supported the idea, at least if Taiwan was willing to liberalize significantly its trade and investment rules.⁶⁴

Including Taiwan, but not China, would be politically unacceptable to the Chinese

⁶¹ See Yu-Tzu Chiu, 'Taiwan Aims to Strengthen Ties; Hopes to Join Trans-Pacific Partnership', 30 *International Trade Reporter* (BNA) 1856 (28 November 2013).

⁶² See Yu-Tzu Chiu, 'American Chamber Urges Taiwan to Join TPP, Facilitate Domestic, Foreign Investment', 30 *International Trade Reporter* (BNA) 902 (13 June 2013).

⁶³ See 'Senator Menendez Offers Support, Conditions For Taiwan's Accession to Trans-Pacific Talks', 30 *International Trade Reporter* (BNA) 1326 (22 August 2013).

⁶⁴ See Yu-Tzu Chiu, 'Official Reiterates Taiwan's TPP Aims; Cites Economic Liberalization Efforts', 30 *International Trade Reporter* (BNA) 1491 (26 September 2013).

Communist Party (CCP). But, excluding China, as well as Taiwan, would be difficult for the Taiwanese economy: 29 percent of Taiwanese trade is with the Mainland.⁶⁵ Inclusion of both countries would ensure preferential market access for Taiwanese producers, and might also spur them to improve their products as they face strong competitors from other *TPP* countries on a level playing field.

Once *TPP* is complete, new countries could join by fulfilling the requirements of an accession provision in the accord. But, if that new country happened to be large, then entry might be difficult insofar as that country, or existing *TPP* members, would seek renegotiation of key commitments in the *TPP*. With its large economy, Taiwan might face such demands.

Of course, complicating matters for eventual Taiwanese entry – or for that matter, that of India or any other prominent country – is the fact *TPP* negotiations are secret. It is difficult for non-participants to know precisely what commitments are being negotiated, and thus to anticipate what might be expected of them. Being out of the negotiations means running the risk of being presented with a comprehensive trade deal *fait accompli*.

3. LOGIC

3.1. Negotiating Rounds

Even though the initial deal to negotiate *TPP* dates from 2006, the inaugural five-day round of *TPP* discussions did not occur until March 2010, in Melbourne, Australia.⁶⁶ The second round of talks began on 14 June 2010, in San Francisco, California. Negotiating sessions covered market access, TBT, legal and institutional issues, cross-border services, competition policy, investment, and the environment.⁶⁷ Brunei hosted the third round in October of the same year, and the fourth round has held in December in Auckland, New Zealand. The fifth round of talks was held in Santiago, Chile between 14-18 February 2011. Negotiations included the areas of goods market access, investment, rules of origin and intellectual property. Discussions also included areas of labour services, government procurement and competition policy. The sixth round of talks took place in Singapore in late March 2011, and Vietnam sponsored the seventh round of talks the week of 20 June 2011.

By March 2012, an 11th round of *TPP* talks had been held, that one in Melbourne, Australia, and a 12th round transpired in Dallas in May 2012.⁶⁸ In December 2012, Auckland hosted the 15th round, and in March 2013, the 16th round was held, in Singapore.⁶⁹ Lima, Peru, hosted the 17th round in May 2013, the 18th round occurred in July 2013 in Kota Kinabalu,

⁶⁵ See Rebecca Helm, 'Taiwan Needs Trans-Pacific Partnership, But Challenges Remain, Speakers Say', 30 *International Trade Reporter* (BNA) 1027 (4 July 2013).

⁶⁶ See Murray Griffin, 'Inaugural Trans-Pacific Partnership Negotiations Launched in Australia', 27 *International Trade Reporter* (BNA) 389 (18 March 2010).

⁶⁷ See Amy Tsui, 'Negotiators Discuss How to Start Drafting Texts for Next Round of TPP Talks in October', 27 *International Trade Reporter* (BNA) 899 (17 June 2010).

⁶⁸ See Rossella Brevetti, 'USTR Kirk Says Other Countries Showing Interest in TPP Negotiations', 29 *International Trade Reporter* (BNA) 756 (10 May 2012); Murray Griffin, 'Trade Officials Cautious on TPP Timing, Say Expansion Contingent on "Consensus"', 29 *International Trade Reporter* (BNA) 413 (15 March 2012).

⁶⁹ See Amy Tsui, 'End of Year TPP Agreement Unlikely Unless Sensitive Issues Resolved Soon', 30 *International Trade Reporter* (BNA) 107 (17 January 2013).

Malaysia, the 19th round in Bandar Seri Begawan, Brunei, and the 20th round in Canada.

An early overall goal was to conclude *TPP* talks by the time of the Asia-Pacific Economic Cooperation (APEC) forum leaders' summit in November 2011 in Honolulu. It was thought *TPP* could be a possible foundation for a broad trade agreement between the 21 economies in APEC.⁷⁰ Almost certainly, the collapse of the Doha Round in July and December 2008, and the failure to resuscitate the Round thereafter, helped motivate interest in a *TPP FTA*. That goal proved impossible to meet, as did subsequent deadlines like year-end 2013. Hence, *TPP* rounds were slated to continue into 2014.

3.2. Cross-Border Rationales

The basic arguments for the *TPP* are a combination of negative and positive ones. On the negative side, ambitious, horizontal multilateral trade liberalization through the Doha Round is dead, and bilateral FTAs with small countries are commercially insignificant. GATT-WTO rules need updating, particularly in areas such as electronic commerce, cloud computing, and environmental and labour standards.⁷¹ But, because of so-called 'won't do countries' among the WTO Members, the 'can do countries' in the WTO are stymied in their reform efforts.⁷²

So, on the negative side, *TPP* is an opportunity to open up trade among like-minded countries. As among many examples, consider market access opportunities for American companies in Vietnam. Cargill exports hog feed to Vietnam, and GE exports capacitors to that country.⁷³ *TPP* might enhance their ability to do so. And, within the United States, the benefits could redound to many states. Consider California: from that state, Clorox exports charcoal and cleaning products to Brunei; Hilmar Ingredients exports lactose to New Zealand; and DairyAmerica exports sweetened dairy products to Vietnam.⁷⁴ If the WTO cannot produce a significant multilateral trade agreement to benefit such companies, then surely the *TPP* is a second best solution.

Such opportunities also exist for other countries. Consider Japan.⁷⁵ In October 2013, it announced it would seek the elimination of *sake* tariffs in other countries. To be sure, Australia and Singapore imported *sake* duty free, and the United States imposed a specific duty of just 3 cents per litre. But, Canada imposed 12.95 Canadian cents per litre, Malaysia 25.5 *ringgit* (roughly U.S. \$ 8.00 per litre), and Vietnam a 35.5 percent *ad valorem* duty. If these barriers fell, Japan signalled it would lower its specific duty on sake, which was 70.40 *yen* per litre, and

⁷⁰ See Lucien O. Chauvin, 'Peru Optimistic for Fifth Round of TPP Talks in Chile Next Week', 28 *International Trade Reporter* (BNA) 230 (10 February 2011).

⁷¹ See David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9.

The death of the Doha Round is a reality notwithstanding the December 2013 Bali Ministerial Conference agreements on trade facilitation and public stockholding for food security. A careful review of their details suggests they are long on exhortations but short on hard law obligations.

⁷² David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9 (quoting former World Bank President and USTR Robert Zoellick).

⁷³ See Len Bracken, 'Trade Ministers Seek TPP "Landing Zone" After Confirming Principles at Bali Meeting', 30 *International Trade Reporter* (BNA) 1624 (24 October 2013).

⁷⁴ See Len Bracken, 'Business Roundtable Releases Studies On Potential TPP Benefits to U.S. States', 30 *International Trade Reporter* (BNA) 1532 (3 October 2013).

⁷⁵ See Toshio Aritake, 'Japan to Seek Tariff Elimination on Sake Exports, May Consider Slashing Wine Tariffs', 30 *International Trade Reporter* (BNA) 1646 (24 October 2013).

its barrier on wine, wine, which was the lesser of 125 *yen* (roughly \$1.30) per litre or 15 percent.

On the positive side, a *TPP* could enhance American economic, political, and military ties in the Asia-Pacific region, and it could cover topics with WTO-Plus provisions, or topics not normally subject to disciplines in FTAs.⁷⁶ A *TPP* would cover 40 percent of global GDP (as of June 2013, based on the negotiating countries at that time). Notably, were there to be a *T-TIP*, then *TPP* (thanks to American participation) it would cover an additional 40 percent of global GDP.⁷⁷ Put simply, a *TPP* and *T-TIP* would make Doha Round trade liberalization commercially insignificant for the United States – they, not a WTO deal, are the big prize.

The collapse of multilateral trade negotiations amidst *TPP* negotiations created an intriguing dis-connect. It is not unusual for FTAs to front run GATT-WTO market access liberalization. But, what about FTAs front running multilateral rule-writing? That is, what happens when an FTA creates new rules, not found in the GATT-WTO regime? To some degree, that scenario occurred with respect to rules in *NAFTA* on services and intellectual property. They were a foundation for Uruguay Round outcomes on those topics – the *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)* and *General Agreement on Trade in Services (GATS)*. But, *TPP* is far more ambitious in scope and rationale than just IP and services. Might it, then, contribute to the practical irrelevance of the WTO as a crucible for international trade law? Or, might it be a spur to the WTO, as *TPP* standards eventually get multilateralized?⁷⁸

3.3. Four American Motivations

Motivations for American participation in the *TPP FTA* talks were varied, and to some degree a matter of speculation. One possibility (intimated above) was competitive liberalization. With Doha Round talks dead, the United States sought market access through regional and bilateral venues. Indeed, in fall 2013, so worried was the American business community that the Administration of President Barack H. Obama might agree to concessions not in the interests of Corporate America, simply to finish a deal by year-end, that it warned the Administration not to rush.⁷⁹ Conversely, critics of *TPP* saw in this motivation little else than a ‘giant corporate power grab’ eroding sovereignty over matters like access to medicines and food safety.⁸⁰

A second possible motivation followed logically from the first. Stymied at the multilateral level, the United States sought a ‘comprehensive and high standard’ agreement among a plurilateral coalition of the willing. What did it mean by ‘comprehensive and high standard’⁸¹ To the Obama Administration, as its officials often repeated, it signified a ‘21st

⁷⁶ See Bernard K. Gordon, ‘Trading Up in Asia – Why the United States Needs the Trans-Pacific Partnership’, 91 *Foreign Affairs* 17-22 issue 4 (2012).

⁷⁷ See Len Bracken, ‘New Zealand Minister Sees Future TPP, TTIP Agreements Overtaking WTO Talks’, 30 *International Trade Reporter* (BNA) 804-805 (30 May 2013).

⁷⁸ See Monika Ermert, ‘Big Trading Blocks Moving at Breakneck Pace to Raise Free Trade Standards’, *Intellectual Property Watch*, 22 May 2013, posted at www.bilaterals.org.

⁷⁹ See Shawn Donnan, ‘Business Warns on TPP Talks’, *Financial Times*, 27 September 2013, at 5.

⁸⁰ See David Pilling & Shawn Donnan, ‘Trans-Pacific Partnership: Ocean’s Twelve’, *Financial Times*, 23 September 2013, at 9.

⁸¹ See Len Bracken, ‘CRS Report Highlights Issues for Hill Concerning Trans-Pacific Partnership Pact’, 30 *International Trade Reporter* (BNA) 653 (2 May 2013).

century' FTA, a 'gold standard' among trade deals:⁸²

(1) Inclusion of all products and sectors in respect of trade liberalization of agricultural and industrial products, and services, with no special or *a priori* exceptions (carve outs), but with no re-opening of market access commitments already made via existing United States FTAs with *TPP* negotiating countries, namely, Australia, Chile, Peru, and Singapore;⁸³

(2) Establishment of rigorous disciplines that are stronger than those in WTO agreements (*i.e.*, WTO Plus rules), including rules set out in the *KORUS*, and rules about SPS measures, including harmonization of standards, lab testing, mutual recognition of reciprocal SPS regimes, and prompt information-sharing, consultations, and dispute settlement procedures;⁸⁴

(3) Enhanced protection for IP rights, including ones pertaining to pharmaceuticals and trade secrets, and a 12-year period of protection for regulatory data for biologics (explained below), that is, protection going beyond that required by the WTO *TRIPs Agreement* (*i.e.*, *TRIPs* Plus rules);

(4) Coverage of trade-related issues, including rules to bolster openness and transparency in government procurement, ensure the free flow of data across borders (albeit not IPR-related data), protection of foreign direct investment (FDI) rights, rules on competition policy, state owned enterprises (SOEs), energy, standards for labour and the environment, and even protections for national security.

However, not necessarily all 535 Members of Congress and the Senate necessarily agreed with this four-pronged Obama Administration definition.

Some of them were inclined to view trade liberalization as responsible for the hollowing out of the American industrial heartland. They, and others, also pointed out that countries in *TPP* negotiations with which the United States did not have a bilateral FTA, namely, Brunei, Malaysia, New Zealand, and Vietnam, had goals antithetical to American sectoral interests. For example, Vietnam had particular views on T&A and footwear ROOs, which could lead to greater market access for its exports than other *TPP* countries, and some American legislators, were willing to tolerate. As another instance, New Zealand regarded dairy as a sensitive sector, even though it was the largest dairy exporter in the world, and just one company monopolistically provides over 90 percent of milk supply in that country.⁸⁵ That *status quo* was not necessarily acceptable to American and other dairy interests.

Even countries like Canada, with which the United States had an FTA, had sensitivities – those of Canada under its supply management system being dairy products (cheese and milk),

⁸² See David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9; 'Trade, Partnership, and Politics', *The Economist*, 24 August 2013, at 40.

⁸³ See Amy Tsui, 'U.S. Seeks TPP Chapter on SPS Barriers that Resolves Disputes Earlier, Siddiqui Says', 29 *International Trade Reporter* (BNA) 835 (24 May 2012).

⁸⁴ *Id.*, TPP countries would have the option of taking their dispute to the WTO.

⁸⁵ See Len Bracken, 'U.S. Dairy Welcomes Japan's Interest in TPP; Senators Stress Market Access, Competition', 30 *International Trade Reporter* (BNA) 403 (21 March 2013).

eggs, and poultry.⁸⁶ That system has been in place since 1966, and is administered by the Canadian Dairy Commission under the *Canadian Dairy Commission Act*, *Financial Administration Act*, and *Public Service Labour Relations Act*. It entails government-set production quotas (based on anticipated domestic demand and supply conditions, and export opportunities), and other coordinated federal and provincial policies, so as to maintain price stability. Many farmers, especially in Ontario and Quebec, benefit; indeed, they rely on supply management, as overall their sector is not productive, in contrast to the Canadian beef, corn, pork, and wheat sectors.⁸⁷ Interestingly, the system skews price differentials to such a degree that many Canadian consumers buy milk across the border in the United States.

Excluding a sector from FTA is not unprecedented, though it would violate a foundational *TPP* goal. The 1989 *Canada-United States Free Trade Agreement (CUSFTA)* excluded dairy goods and poultry, and the 1994 *NAFTA* provisions on dairy products reportedly left the United States unsatisfied. Of course, America has its own sensitive goods: sugar, as well as T&A. The 2005 *United States-Australia FTA* contains no provisions on sugar, and the 2012 *KORUS* excludes rice. Likewise, for Mexico, cars and electronic products are sensitive.⁸⁸ Legally, when an FTA excludes a sector, market access occurs under WTO commitments, which may include imposition of an MFN tariff, entail a tariff rate quota (TRQ) whereby no tariff (or a low one) is imposed on in-quota shipments, and a higher MFN duty is levied on over-quota shipments. At issue, then, for *TPP* critics was whether *TPP* truly would enhance market access in sensitive sectors without compromising American (or Canadian or other pertinent) jobs and incomes.

A third possible American motivation for *TPP* was to vie for influence in the strategically important Asia-Pacific region with the People's Republic of China (PRC), which most definitely was excluded from the talks. The *TPP* idea initially was thought up by Brunei, Chile, New Zealand, and Singapore. In 2008, America showed interest, possibly because it saw it as a vehicle to advance its foreign policy and national security goals in Asia.⁸⁹

Asia, after all, is the most important region in the world, accounting for 40 percent of global trade.⁹⁰ For America (as of August 2012), 60 percent of its exports, and 75 percent of its agricultural exports, go to the Asia-Pacific region. The PRC has an active FTA agenda, and has expanded its ties with neighbouring Taiwan under the *Economic Cooperation Framework Agreement (ECFA)*. This possibility manifestly puts American trade strategy in the broader context of its national security policy, and is redolent of Cold War efforts in the 1950s and 1960s to forge alliances in the Far East, such as through the *South East Asia Treaty Organization (SEATO)*. In a word, this motivation for *TPP* is 'containment' of China, or at least

⁸⁶ See Len Bracken, 'Froman, Vilsack Pledge to Work with Japan, Canada on Agriculture Market Access Offers', 31 *International Trade Reporter* (BNA) 476 (13 March 2014).

⁸⁷ See Len Bracken, 'Canadian Dairy Supply System Seen As Obstacle to Concluding TPP Talks', 31 *International Trade Reporter* (BNA) 597 (27 March 2014).

⁸⁸ See Maja Wallengren, 'Mexico May Be Willing to Cede Ground on Import Tariffs to Advance TPP Talks', 30 *International Trade Reporter* (BNA) 429 (21 March 2013).

⁸⁹ See David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9.

⁹⁰ See Len Bracken, 'USTR's Marantis Cites Progress on TPP, Says Tough Issues Remain at this Stage', 29 *International Trade Reporter* (BNA) 1330 (16 August 2012).

of its economic clout in the Asia-Pacific region, *à propos* the strategy used against the former Soviet Union.⁹¹

A fourth possibility is a more cynical one. It is that the *TPP FTA* is nothing more than motion, with no *bona fide* expectation of progress, by the United States. That is, as the Administration of President Obama lacked fast-track trade negotiating authority, at least engaging in *TPP* talks helped immunize it from the criticism that it had a ‘do nothing’ trade policy.

3.4. Problem of American Trade Negotiating Authority

With the expiry of *Trade Promotion Authority (TPA)* on 30 June 2007, the Obama Administration offered its *TPP* negotiating partners the modest comfort that it was adhering to procedures under that *TPA*.⁹² So, for example, on 24 April 2013, the USTR notified Congress of its intent to include Japan in the *TPP* talks.⁹³ That notification triggered a 90-day consultation period with Congress on negotiating objectives concerning Japan. Still, without *TPA*, those partners could not rest assured that Congress would agree to an up-or-down, no-amendment vote on a final *TPP* deal. Congress might agree to enact *TPA* retroactively to cover *TPP* – or, it might not. Worse yet, as of December 2013, the Administration had not even sought renewal of *TPA*.

TPA, of course, creates a framework in which parties negotiating with the United States can rely on USTR commitments, knowing Congress will not unwind those commitments, or demand greater reciprocity for them, when Congress considers a trade deal. In return, the USTR (that is, the relevant Administration) must notify Congress of its trade negotiations, adhere to objectives Congress sets, and keep Congress actively informed. Strict time frames apply, culminating in an up-or-down (yes-or-no) vote.⁹⁴

Therein lays the problem created by uncertainty over Congressional renewal of *TPA*. Trade negotiating partners are unlikely to table their best concessions if they are concerned about the credibility of the USTR to do the same. That is, if Congress might unwind a reciprocal concession agreed on by the USTR, then why offer the USTR the best concession in the first place?

Finally, in January 2014, Congress considered a *TPA* bill – the *Bipartisan Congressional Trade Priorities Act of 2014 (BCTPA)*, a proposed four-year extension of Presidential trade negotiating authority introduced simultaneously in the Senate and House.⁹⁵ This bill allowed

⁹¹ American officials have denied this intention. See Amy Tsui, ‘TPP Spurs Another Economic Pact; Asian Countries Closely Watching TPP Action’, 30 *International Trade Reporter* (BNA) 108 (17 January 2013).

⁹² See Len Bracken, ‘CRS Report Highlights Issues for Hill Concerning Trans-Pacific Partnership Pact’, 30 *International Trade Reporter* (BNA) 653 (2 May 2013).

⁹³ See Len Bracken, ‘USTR Notifies Hill of Intent to Include Japan in Trans-Pacific Partnership Negotiations’, 30 *International Trade Reporter* (BNA) 651 (2 May 2013).

⁹⁴ See Rossella Brevetti, ‘Sen. Baucus Wants TPA Measure Introduced by June, Passed in 2013’, 30 *International Trade Reporter* (BNA) 652 (2 May 2013).

⁹⁵ See House Resolution 3830/Senate Bill 1900, posted at www.govtrack.us/congress/bills/113/hr3830. See also Nancy Ognanovich & Len Bracken, ‘Democrats Averse to 2014 Consideration Of Trade Promotion Authority, Durbin Says’, 31 *International Trade Reporter* (BNA) 293 (13 February 2014) (reporting Senate Democrats did not support the White House on the legislation).

for an up-or-down, no amendment vote on trade agreements. It included the elements from the May 2007 BTDA, such as a requirement for stronger labour and environmental provisions that were updated to reflect America's newest FTAs. No longer was it acceptable for an FTA partner to enforce its existing law. Rather, it had to meet higher levels of protection.

Furthermore, the *BCTPA* included topics that since the BTDA then had gained in prominence. Most notably among them were electronic commerce (both facilitating it while protecting cross-border data flows), SOEs (subjecting them to commercial disciplines), SPS measures (insisting on strong, enforceable rules against unscientific regulatory barriers), and currency manipulation (prohibiting it to gain an unfair commercial advantage). Congress also required the USTR to consult and report with it, with provisions mandating every Senator and Congressman have access to negotiating texts, and accrediting any and all of them as negotiators (as opposed to a cap of five from each Committee of pertinent jurisdiction). The *BCTPA* also forbade any changes to United States law without express Congressional action, meaning no FTA rules could be self-executing. And, the bill allowed for Congress to pass a disapproval resolution retroactively, whereby fast-track procedures would not apply.

However, one argument against the bill was it was outdated. No longer were trade negotiations focused mainly on conventional tariff or non-tariff barriers like quantitative restrictions for which customs authorities were responsible. Rather, they were about post-border regulatory barriers to market access, on how legislatures and supervisory agencies handle issues such as banking safety and soundness, food safety, and data privacy. So, the idea of a single, up-or-down no amendment vote on an FTA in Congress following negotiations conducted nearly in their entirety by the Executive Branch was outmoded.

3.5. Hostile Regionalism and Containing China

As just suggested, the reality of *TPP* seems to be it is far more than about regional economic integration. It is very much about national security, specifically, containing the PRC. The Chinese Communist Party (CCP) and its supporters assert the ascent of the PRC to the world stage of political economy is a 'peaceful rise'. Many observers are sceptical, seeing a belligerent nationalism underlying many CCP moves. Asian countries such as Japan, Korea, and the Philippines have sought to reinforce their strategic relationships with the United States in the face of territorial disputes with China in the South China Seas and concerns about freedom of navigation.⁹⁶

Militarily, the United States has responded with a June 2012 re-balancing of its overall assets to a 60-40 tilt in Asia, de-emphasizing the Middle East, as commitments in Iraq and Afghanistan wound down. Economically, the United States answered with *TPP*, a deal all the more compelling given the flop of the Doha Round. Simply put, the *TPP* was the 'keystone of ... [President Barack H. Obama's] foreign policy "pivot" to Asia,⁹⁷ 'the cornerstone of Mr.

⁹⁶ See Len Bracken, 'Japan's TPP Negotiating Team to be Formed outside Cabinet, Isolated from Protectionists', 30 *International Trade Reporter* (BNA) 444 (28 March 2013).

⁹⁷ 'Trading Principles', *Financial Times*, 4 October 2013, at 8.

Obama's rebalancing to Asia'.⁹⁸

So, *TPP* contains China in at least two respects. First, most obviously, China is not included in the FTA arrangement. Its exports do not benefit from the margin of preference (the difference between MFN and *TPP* rates), as do those within *TPP* countries. As a *Financial Times* commentator put it, *TPP* is 'ABC – Anyone But China'.⁹⁹ (The acronym normally is used to mean 'American-Born Chinese'.)

Second, China is not included in the upward level movement of trade-related rules. For example, whereas *TPP* members sign onto regulatory coherence provisions, and thus upgrade their systems on this topic, China does not, or at least does not by virtue of the *TPP*. As Professor Zaki Laïdi of Sciences Po in Paris put it: 'the strategic objective is to contain China's rise by setting a high bar for regulatory standards.'¹⁰⁰ So, via *TPP*, a gap between the sophistication of *TPP* versus Chinese trade-related rules is created. China, having had no say in writing the rules, ultimately is forced to accept them if it seeks market access for its products in *TPP* countries. As the *Financial Times* put it, 'the U.S. aims to set up a new set of trade, investment, and intellectual property protections that will bind its [China's] future behaviour.'¹⁰¹

Succinctly put, excluding China from *TPP* might be characterized as a trade strategy of 'hostile regionalism', which fits into a broad national security architecture.¹⁰² But, might this containment strategy be counterproductive? Could it isolate China to the extent it ceases to comply with adverse WTO Panel and Appellate Body rulings, and participate with a view to being a responsible stakeholder in the global economy? Perhaps in an effort to address these issues, President Barack H. Obama agreed to a request from Chinese President Xi Jinping in June 2013.¹⁰³ He promised to establish a formal mechanism to keep Chinese trade officials abreast of *TPP* negotiations, *i.e.*, some transparency for China, but certainly no participation.

Of course, China did not sit back passively in the face of those negotiations. Not only did it 'actively evaluat[e]' *TPP*, in the words of Gar Hucheng, the head of the Ministry of Commerce (MOFCOM), but also it pursued FTAs of its own.¹⁰⁴ Its partners included Australia, Japan, and Korea, each of which was engaged in FTA talks. That meant China might not be frozen out of *TPP*-level rules, insofar as those partners wrote them into their deals with China. China also pursued a major regional accord of its own, the *Regional Comprehensive Economic Partnership (RCEP)*.

3.6. Asymmetric American Bargaining Power

One other normative point about the self-interest of the United States in the *TPP* is worth

⁹⁸ See Edward Luce, 'Obama's Trade Agenda Hangs on a Thin Reid', *Financial Times*, 3 February 2014, at 11.

⁹⁹ Geoff Dyer, 'China's Chair Left Unoccupied at Obama's Free Trade Party', *Financial Times*, 2 April 2013, at 5.

¹⁰⁰ Zaki Laïdi, 'Free Trade Deals Show that Power Politics is Back', *Financial Times*, 1 April 2013, at 9.

¹⁰¹ Edward Luce, 'Obama's Trade Agenda Hangs on a Thin Reid', *Financial Times*, 3 February 2014, at 11.

¹⁰² See Claire Compton, 'China Integration into Multilateral System Requires U.S. to Make Way, Economist Says', 30 *International Trade Reporter* (BNA) 947 (20 June 2013).

¹⁰³ See Len Bracken, 'U.S., China Agree to Set Up Mechanism for Information Exchange on TPP Process', 30 *International Trade Reporter* (BNA) 867 (13 June 2013).

¹⁰⁴ Quoted in Michael Standaert, 'China Actively Following TPP Negotiations, Official Says, But No Signals on Joining', 31 *International Trade Reporter* (BNA) 504 (13 March 2014).

considering.¹⁰⁵ By excluding China from *TPP* negotiations, the United States enjoyed considerably greater leverage in influencing outcomes than it might otherwise have. Indeed, in the Doha Round, where China is present, the Eagle and Dragon fought to a stalemate over issues such as a Special Safeguard Mechanism (SSM) in agricultural negotiations, and sectoral agreements in non-agricultural market access (NAMA) talks.

So, why not keep China out of the *TPP*, not merely to increase the probability of a successful deal, but also to enjoy asymmetric bargaining power in negotiating the terms of that deal? There are three answers to that question. First, inclusion of Japan potentially undermines this argument. Negotiations with Japan proved difficult indeed. Second, are even the smaller countries in the talks, such as Malaysia, truly that cowed by the United States? Perhaps not. Third, China outside of *TPP* was leverage for countries, such as Japan, inside *TPP*. They could – and did – argue that if the United States pressed them too hard, then they could participate in an FTA with China, such as a tripartite deal involving China, Japan, and Korea, or even in *RCEP*.¹⁰⁶

3.7. Transparency Problems

Critics, including members of the United States Congress, NGOs like Public Citizen, and renowned scholar Professor Jane Kelsey of the University of Auckland Faculty of Law, have castigated the *TPP* negotiations for being non-transparent.¹⁰⁷ That is partly because of the confidential, single-undertaking approach of the negotiating countries.¹⁰⁸ Even briefings were limited, for example, to the Industry Trade Advisory Committees (ITACs), and given only on a confidential basis to these ‘cleared advisors’ that represent 16 sectors in the American economy.¹⁰⁹ Notably, the critics included legislators from Australia, Canada, Japan, Malaysia, Mexico, Peru, and New Zealand, who in February 2014 issued a joint letter calling for greater transparency in *TPP* negotiations and disclosure of draft texts.¹¹⁰

‘Single undertaking’ refers to the method that no provision, and no text, is agreed to until

¹⁰⁵ See Claire Compton, ‘China Integration into Multilateral System Requires U.S. to Make Way, Economist Says’, 30 *International Trade Reporter* (BNA) 947 (20 June 2013) (discussing remarks of Arvind Subramanian, Senior Fellow, Peterson Institute for International Economics).

¹⁰⁶ See Toshio Aritake, ‘Biden Calls for Japanese Concessions To Bring About Early Completion of TPP’, 30 *International Trade Reporter* 1898 (5 December 2013).

¹⁰⁷ See e.g. Jane Kelsey, ed., *No Ordinary Deal – Unmasking the Trans-Pacific Partnership Free Trade Agreement* (New South Wales, Australia: Allen & Unwin, 2010); Stephanie Cohen, ‘House Lawmakers “Worried” About Final TPP Agreement, Issues That May Be Excluded’, 30 *International Trade Reporter* (BNA) 1941 (12 December 2013) (reporting on House Democrats ‘berating the lack of transparency ... about what will be included in the free trade deal’).

¹⁰⁸ See Len Bracken, ‘Trans-Pacific Partnership to Focus on IP, Competition, Environment Texts, USTR Says’, 30 *International Trade Reporter* (BNA) 398 (21 March 2013).

¹⁰⁹ See Len Bracken, ‘USTR Briefs Cleared Advisors on TPP Issues In Advance of Singapore Ministerial Meeting’, 31 *International Trade Reporter* (BNA) 363 (20 February 2014).

The 16 sectors (in order of ITAC 1 through ITAC 16) are: (1) Aerospace Equipment; (2) Automotive and Capital Goods; (3) Chemicals, Pharmaceuticals, Health/Science Products and Services; (4) Consumer Goods; (5) Distribution Services; (6) Energy and Energy Services; (7) Forest Products; (8) Information and Communications Technologies, Services, and Electronic Commerce; (9) Nonferrous Metals and Building Materials; (10) Services and Finance Industries; (11) Small and Minority Business; (12) Steel; (13) Textiles and Clothing; (14) Customs Matters and Trade Facilitation; (15) Intellectual Property Rights; and (16) Standards and Technical Barriers. See *id.* Critics could say, with a tinge of cynicism, that Corporate America was both being briefed and briefing, the latter to ensure the USTR was doing its bidding.

¹¹⁰ See Len Bracken, ‘USTR Briefs Cleared Advisors on TPP Issues In Advance of Singapore Ministerial Meeting’, 31 *International Trade Reporter* (BNA) 363 (20 February 2014).

all provisions in all texts are agreed to (put colloquially, ‘nothing is decided finally until everything is decided’). As the *TPP* calls for 29 texts – that is, Chapters – closing them out one-by-one means all 29 must be completed before each of them truly is finished. ‘Confidential’ means that none of the texts is released to the public until the single undertaking is agreed. Likewise, in September 2013, Friends of the Earth said the closed-door negotiating process and secrecy of the draft texts meant there were ‘no opportunities for civil society engagement’.¹¹¹

To be sure, the USTR contended it sought input from stakeholders in business, labour and environment organizations, the public health sector, and academia.¹¹² It has held large conference calls to convey information. Those efforts have failed to quell the criticism, as it declined to provide negotiating texts for outside review.

4. TRADITIONAL MARKET ACCESS

4.1. Market Access Generally

As an FTA, the *TPP* was designed to eliminate as many tariff and non-tariff barriers as possible, and as quickly as possible. The immediate result would not be pure free trade in the Neo-Classical Economic sense, but at least it would be serious, if not radical, trade liberalization.

Accordingly, in Honolulu in 2011, *TPP* countries agreed they would eliminate all their tariffs for trade within the *TPP*.¹¹³ But, they also agreed not every country would be obliged to cut their tariffs at the same rate. And, subsequently, they seemed to backslide on their comprehensive product coverage commitment, as they sought to protect sensitive sectors.

The *TPP* countries agreed at the 19th round in Brunei in August 2013 they would eliminate 75 percent of their tariffs.¹¹⁴ Japan also contemplated raising its ‘tariff liberalization rate’, meaning the percentage of tariff lines set at zero, from 84-88 percent under its bilateral FTAs to 90 percent under the *TPP*.¹¹⁵ That rate would pertain both to tangible and intangible products. Japan said it also would protect, possibly with ‘iron barriers’, six ‘sacred’ sectors in agriculture: beef, dairy products, pork, rice, sugar, and wheat.¹¹⁶ The number of farm

¹¹¹ Quoted in Rossella Brevetti, ‘Business Groups Tell TPP Negotiators Deal Being Discussed Still Falls Short’, 30 *International Trade Reporter* (BNA) 1490 (26 September 2013).

¹¹² See Rossella Brevetti, ‘USTR Froman Reaches Out To Key Stakeholders in TPP Talks’, 30 *International Trade Reporter* (BNA) 1412 (12 September 2013).

¹¹³ See Shawn Donnan & Ben Bland, ‘Partners Look for Japan’s “Fourth Arrow” in Trade Talks’, *Financial Times*, 8 October 2013, at 2.

¹¹⁴ See Len Bracken, ‘TPP Partners Pursuing “75 Percent” Goals Regarding Legal Texts, Tariffs in Brunei’, 30 *International Trade Reporter* (BNA) 1365 (5 September 2013).

¹¹⁵ See Toshio Aritake, ‘Japanese Business Lobby Urges Adoption of Common Tariff Table’, 30 *International Trade Reporter* (BNA) 1370 (5 September 2013).

¹¹⁶ Toshio Aritake, ‘Negotiators Hold Tokyo, Washington Meetings On Intellectual Property Rights, Automobiles’, 30 *International Trade Reporter* (BNA) 1645 (24 October 2013) (quoting Japanese Prime Minister Shinzo Abe and TPP negotiator Kazuhisa Shibuya in respect of ‘iron barriers’); Shawn Donnan & Ben Bland, ‘Partners Look for Japan’s “Fourth Arrow” in Trade Talks’, *Financial Times*, 8 October 2013, at 2 (quoting a pledge of the Japanese government to farmers); David Pilling & Shawn Donnan, ‘Trans-Pacific Partnership: Ocean’s Twelve’, *Financial Times*, 23 September 2013, at 9.

commodities in these ‘sacred’ sectors totalled 586, or 7 percent of all traded goods.¹¹⁷

Rice was the most holy, with a tariff against imports of 778 percent.¹¹⁸ Japan’s tariff on beef was 38.5 percent, on butter, 360 percent, on powdered milk, 218 percent, on sugar, 328 percent, and on wheat, 252 percent. It also had a barley tariff of 256 percent. Japan had just 1.67 million farmers, out of a working population totalling 62.83 million.¹¹⁹ They had been shrinking in numbers for decades, and their small output, coupled with high food prices, suggested – using neo-classical economic free trade logic – Japan should drop its tariffs and boost farm imports. Yet, Japanese farmers remained politically powerful. A key reason was the Japanese population feared a further decline in their food self-sufficiency rate: it was just 40 percent, and they preferred it to increase. In other words, for Japan, ‘sacred’ meant ‘food security’.

So, while at least Japan was having a debate about trade liberalization in those sectors, the depth of feeling about their ‘sacredness’ was considerable. In October 2013, Toshio Yamada, a Member of the Diet from the rural Toyama Prefecture, asked rhetorically: ‘Why should Japan take its own underpants off?’¹²⁰ Indeed, the Diet (Japan’s legislature) passed a non-binding resolution calling for no elimination of tariffs in these sectors.¹²¹ Japanese negotiators argued that market access for imported farm products could be enhanced in a commercially meaningful way without complete elimination of tariffs.¹²² However, Japan’s ‘sacred’ concerns were met with another sacrosanct principle: free trade. New Zealand and Singapore urged total tariff elimination by all countries – apparently the original goal of a *TPP*. And, the United States pointed out that in *KORUS*, all agricultural tariff lines, save for rice, went to zero.¹²³

4.2. Common Tariff Rate?

Would *TPP* countries have a common tariff rate, also called a common tariff table?¹²⁴ That would be distinct from a common external tariff (CET), as the *TPP* was not planned as a customs union (CU). Rather, on merchandise traded among *TPP* countries that remained subject to a non-zero tariff, that tariff would be the same for all *TPP* countries. So, for example,

¹¹⁷ Quoted in Jonathan Soble & Shawn Donnan, ‘Abe Push for Trade Pact Sparks Party Infighting’, *Financial Times*, 15 October 2013, at 3. See also Toshio Aritake, ‘Japan’s Amari Urges U.S. to Make Concessions on Bilateral TPP Talks’, 31 *International Trade Reporter* (BNA) 357 (20 February 2014) (explaining Japan’s point that it cannot make one-sided concessions to American demands, but expects mutually agreeable compromises based on reciprocity); Toshio Aritake, ‘U.S., Japan fail to Reach Agreement On Agricultural Tariffs in TPP Talks’, 30 *International Trade Reporter* (BNA) 1898 (5 December 2013) (reporting the USTR unsuccessfully urged Japan to ‘phase out and eventually repeal’ duties on the sensitive areas, totalling 586 tariff lines).

¹¹⁸ See Toshio Aritake, *Japan, U.S. Set for TPP Talks Before Obama’s Visit to Japan*, 31 *International Trade Reporter* (BNA) 691 (10 April 2014).

¹¹⁹ See Toshio Aritake, *Japan, U.S. Set for TPP Talks Before Obama’s Visit to Japan*, 31 *International Trade Reporter* (BNA) 691 (10 April 2014).

¹²⁰ Quoted in Jonathan Soble & Shawn Donnan, *Abe Push for Trade Pact Sparks Party Infighting*, *Financial Times*, 15 October 2013, at 3.

¹²¹ See Len Bracken, ‘“Big Gaps” Remain in Japanese TPP Offer On Agricultural Market Access, Cutler Says’, 31 *International Trade Reporter* (BNA) 503 (13 March 2014).

¹²² See Len Bracken, ‘U.S. Insisting on Agricultural Access from Japan, Canada in TPP, Froman Says’, 31 *International Trade Reporter* (BNA) 525 (20 March 2014).

¹²³ See Len Bracken, ‘U.S., Japan TPP Talks See “Limited Progress;” Grassley Presses for Comprehensive Coverage’, 31 *International Trade Reporter* (BNA) 555 (20 March 2014).

¹²⁴ See Toshio Aritake, ‘Japanese Business Lobby Urges Adoption of Common Tariff Table’, 30 *International Trade Reporter* (BNA) 1370 (5 September 2013).

the tariff on sugar might be 25 percent for all *TPP* countries for sugar traded amongst them (but each would maintain its non-preferential sugar duty for sugar from outside the *TPP*).

Australia and Singapore, as well as the Japanese Business Federation (Nippon Keidanren), supported a common tariff rate. They argued its virtue was simplicity. But, Canada, Mexico, and the United States objected. They sought to keep high tariffs on sensitive products, like autos and sugar. To do so, they wanted the freedom to set tariffs bilaterally, not be subject to a common *TPP* duty.

4.3. Agricultural Issues

Not surprisingly, several *TPP* negotiating countries were hesitant to open to free trade their entire agricultural sectors.¹²⁵ Canada, Mexico, and New Zealand all resisted American pressure for full access to their markets. Conversely, Australia – lamenting the exclusion of sugar from its bilateral FTA with the United States – sought access to the American sugar market via *TPP*.¹²⁶

The United States chafed at barriers like the 298 and 245 percent Canadian tariffs on butter and cheese, respectively. It saw Frontera, the multinational New Zealand dairy giant, as a monopoly, holding roughly 90 percent of the market share for dairy products in that country.

Japan, unsurprisingly given its historic farm sector protections, also objected to aggressive American-style trade liberalization. Japan put import tariffs on roughly 9,000 items, 834 of which are farm products, and a few of which it regards as sensitive.¹²⁷ Yoshimasa Hayashi, the Japanese Minister of Agriculture, Forestry, and Fisheries, identified his country's key sensitivities: beef, dairy products, pork, rice, and wheat – the 'sacred' ones (as noted above).

So, in connection with the 19th round in August 2013 in Brunei, the Japan Sugar Refiners' Association argued abolition of tariff and non-tariff barriers on sugar would 'crush' the Japanese domestic cane and beet sugar industries.¹²⁸ The Japan Chicken Association, and Japan Pork Industry, said removing duties and non-tariff measures on chicken and pork would 'wipe out' their industries.¹²⁹ Similar arguments were made to keep protection high on beef, dairy products, rice, and wheat. Of course, for the United States, sugar was a sensitive sector with a powerful protectionist lobby.¹³⁰

The debate over agricultural market access also covered ROOs. Mexico, but not its dairy

¹²⁵ See David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9; Maja Wallengren, 'Mexico's Dairy Sector Lobbies Government for Trade Exemptions in Final TPP Agreement', 30 *International Trade Reporter* (BNA) 502 (4 April 2013).

¹²⁶ See Len Bracken, 'Trade Experts Cautiously Optimistic As TPP Trade Ministers Seek Landing Zones', 31 *International Trade Reporter* (BNA) 130 (16 January 2014).

¹²⁷ See Toshio Aritake, 'Cuts in Agriculture Tariffs Would Cause \$30 Billion Loss, Japanese Official Says', 30 *International Trade Reporter* (BNA) 1453 (19 September 2013).

¹²⁸ Toshio Aritake, 'Japanese Industry Lobbyists Stake Out Negotiators in Brunei', 30 *International Trade Reporter* (BNA) 1371 (5 September 2013).

¹²⁹ *Id.*

¹³⁰ See David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9.

lobby (the Dairy and Milk Producers Chamber, Canilec), backed the ‘accumulation of origin’ rule.¹³¹ Under this, contributions to a product from two or more *TPP* countries would confer origin on a dairy product.

There is more to trade liberalization in agriculture than lowering tariffs and rationalizing NTBs. Subsidies must be cut to help level the cross-border playing field. Ironically, for all its free trade rhetoric, the United States was unenthusiastic about doing so. Two documents posted by WikiLeaks in December 2013 showed the only *TPP* country unwilling to eliminate all its export subsidies was the United States.¹³²

4.4. Textile and Apparel (T&A) Issues

The United States is the third largest exporter of T&A merchandise in the world (as of November 2013).¹³³ While its T&A industry has suffered considerable downsizing in the late 20th and early 21st centuries in the face of competition from developing countries, its vaunted status sometimes is forgotten. Both facts – decline yet continued prominence – help explain why America pressed for restrictive, sometimes protectionist, *TPP* T&A importation rules.

One instance concerned phasing out of tariffs. The United States – as of December 2013 – proposed to cut T&A duties by 35 percent from their MFN levels.¹³⁴ (Whether the base was bound or applies was not clear.) Duties would stay at that lower level for 10 years, and drop to zero in the eleventh year. Simply put, duty-free treatment would not come to the T&A sector for a decade.

Another instance concerned T&A ROOs. The United States championed a tight Yarn Forward preferential ROO. (The only more restrictive rule than Yarn Forward is Fiber Forward, whereby the fibre, such as cotton, must be grown in the FTA area.) That would mean a T&A article would have to be made from yarns, fabrics, sewing threads, and other inputs that originate within a *TPP* country (or countries) to qualify for preferential tariff treatment.¹³⁵ In effect, for duty-free treatment for the finished article, all materials used in a T&A article, such as a garment, would need to originate within the *TPP* zone.

The United States also called for an exception to the Yarn Forward rule for inputs in short supply.¹³⁶ A Short Supply List identifies exceptions to the ROO for material not available in a commercially meaningful quantity from within the pertinent FTA area.¹³⁷ If material is in short

¹³¹ Maja Wallengren, ‘Mexico’s Dairy Sector Lobbies Government for Trade Exemptions in Final TPP Agreement’, 30 *International Trade Reporter* (BNA) 502 (4 April 2013).

¹³² See Brian Flood, Leaked TPP Documents Show Fault Lines Underlying Singapore Ministerial Meeting, 30 *International Trade Reporter* (BNA) 1943 (12 December 2013).

¹³³ See Stephanie Cohen, ‘Vietnam Sector to Benefit from Eventual TPP Agreement’, 30 *International Trade Reporter* (BNA) 1817 (21 November 2013).

¹³⁴ See Michael Standaert, ‘Vietnam, Other Countries Set to Benefit by Straddling Two Major Trade Agreements’, 30 *International Trade Reporter* (BNA) 1899 (5 December 2013).

¹³⁵ See Len Bracken, ‘Lawmaker Stresses TPP Yarn-Forward Rule; Coalition Notes Short-Supply List on Agenda’, 30 *International Trade Reporter* (BNA) 1367 (5 September 2013); ‘Groups Address Yarn-Forward Provisions in TPP in Competing Letters to USTR Kirk’, 29 *International Trade Reporter* (BNA) 1588 (4 October 2012).

¹³⁶ See Len Bracken, ‘Froman Presses Japanese on Autos in TPP; Rep. Camp Sees Moving Ahead Without Japan’, 31 *International Trade Reporter* (BNA) 690 (10 April 2014).

¹³⁷ See Len Bracken, ‘Lawmaker Stresses TPP Yarn-Forward Rule; Coalition Notes Short-Supply List on Agenda’, 30 *International Trade Reporter* (BNA) 1367 (5 September 2013).

supply, then it can be sourced from outside that area, incorporated into the T&A article, and that article still can receive duty-free treatment. The Yarn Forward proposal reflected long-standing American practice in its FTAs, and also was logical in that the majority of the value of a finished T&A product comes from its components, not from final assembly. Likewise, the existence of a Short Supply List was familiar in American trade rules.

Notably, whenever there is opposition in trade negotiations to a Yarn Forward ROO, a Short Supply List can be a device for compromise. For example, acceptance of the tough Yarn Forward rule may be gained in exchange for a generous List. Opposition can come not only from T&A exporters in other countries, but also domestic constituencies in an importing country, such as T&A retailers that source inputs or merchandise from overseas.

In the *TPP* context, the American Yarn Forward did indeed face opposition. The Hosiery Association of the United States called for a ‘knit-to-shape, assembly only’ preferential ROO.¹³⁸ This ROO would cover legwear, like socks and hosiery, which fall under the 4-digit HTS heading 6115. So, *TPP* origin would be conferred simply by converting a yarn from any source (including outside the *TPP*) into legwear components that are knitted or crocheted from that yarn directly to a specific shape. (However, the Yarn Forward ROO would apply to hosiery made of cotton yarns, or from blended cotton-polyester fabrics.) The Hosiery Association feared that if a Yarn Forward rule applied to HTS heading 6115, then any hosiery article knit in the United States from an American yarn would be ineligible for preferential treatment under the *TPP* if it contained more than 7 percent of its yarn from outside the *TPP*.

The Hosiery Association agreed the Yarn Forward ROO was a consistent baseline rule in American FTAs, but said the United States did not apply it consistently. It cited so-called ‘gimped yarns’, which are (as defined by United States Customs and Border Protection (CBP)) as a yarn around which another yarn (or filament or strip) is wrapped, where the core yarn does not twist with the cover yarn wrapped around it.¹³⁹ The Association explained all of America’s FTAs exclude gimped yarns from the Yarn Forward rule. That is because certain core and cover yarns are not made in the United States. Consequently, American legwear manufacturers can source gimped yarn from third countries, and still obtain a preference under an FTA. But, if under the *TPP* gimped yarns were included in the Yarn Forward rule, then these producers would be harmed, because their products would be excluded from *TPP* preferences.

The Association said its more relaxed ROO proposal would not lead to American hosiery and sock production facilities relocating outside the United States. After all, it had made major capital investments in American production facilities, and benefited from the efficient, inexpensive supply of electricity available in the United States. Buttressing the argument of the Association was another fact, one pointed out by Bob Kirke, the Executive Director of the Canadian Apparel Federation.

¹³⁸ See ‘Groups Address Yarn-Forward Provisions in TPP in Competing Letters to USTR Kirk’, 29 *International Trade Reporter* (BNA) 1588 (4 October 2012).

¹³⁹ *Id.*

Mr. Kirke urged the correct ROO for a *TPP* should be Fabric Forward.¹⁴⁰ Though *NAFTA* contains the Yarn Forward rule, Fabric Forward was the rule of the 1989 *Canada – United States FTA* that preceded *NAFTA*. Under the more relaxed Fabric Forward rule, American chain apparel stores like Forever 21 and Hollingers benefit. They produce and export quick turnaround garments. Precisely because they do not have to make every aspect of the garment in the United States under a Fabric Forward rule, their garments are quick turnaround ones. Indeed, Mr. Kirke observed, thanks to chain apparel stores and their expansion into Canada, the fastest growing T&A exporter to Canada was the United States (as of October 2012).

But, the American Fiber Manufacturing Association, American Manufacturing Trade Coalition, and National Council of Textile Organizations all fought the Hosiery Association *TPP* proposal.¹⁴¹ They claimed it would allow producers to source their yarns for man-made fibre hosiery and socks, or for hosiery and socks cotton-polyester made of a blend of cotton, polyester, and/or nylon, from outside the *TPP* countries. Only for an article containing 100 percent cotton or polyester would the sourcing have to be from within the *TPP* zone. Consequently, American manufacturers of acrylic, nylon, and other man-made fibre yarns would be hurt. From where would they source?

China. Thus, China would collaborate with countries like Malaysia and Vietnam, which seek to increase their T&A exports to the United States, to the detriment of the American manufacturers of these man-made fibres. Worse yet, some of the Chinese inputs were subsidized, produced by Chinese state owned enterprises (SOEs), and some of the Vietnamese manufacturers were SOEs. Both China and Vietnam preferred to see a departure in the *TPP* agreement from the traditional American yarn-forward rule in favour of greater flexibility, or at least a generous short supply list. For them, T&A were sectors of keen export interest.¹⁴² Moreover, Vietnam imports nearly all of its fabric, most of it from China.¹⁴³ So, a Yarn Forward ROO would damage the Sino-Vietnamese T&A supply chain.

Notably, in October 2012 the Congressional Research Service (CRS) issued a report stating Asian manufacturers would be the principal beneficiaries of anticipated T&A provision in a *TPP*.¹⁴⁴ That is because the duties the United States applied on T&A articles were as high as 32 percent, and overall – as reported in November 2013 by the equity research firm China International Capital Corporation (CICC) – *TPP* country tariffs on T&A range from 17.3 to 32 percent.¹⁴⁵ They would enjoy duty free treatment under a *TPP*.

Vietnam, in particular, would benefit. Vietnam is second only to China as the largest

¹⁴⁰ See Amy Tsui, 'Textile Groups Spar over Vietnam's Inclusion in TPP Ahead of Auckland Negotiating Round', 29 *International Trade Reporter* (BNA) 1691 (25 October 2012).

¹⁴¹ See Groups Address Yarn-Forward Provisions in TPP in Competing Letters to USTR Kirk, 29 *International Trade Law* (BNA) 1588 (4 October 2012).

¹⁴² See David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9.

¹⁴³ See Stephanie Cohen, 'Vietnam Sector to Benefit from Eventual TPP Agreement', 30 *International Trade Reporter* (BNA) 1817 (21 November 2013).

¹⁴⁴ See Amy Tsui, 'CRS Report Says TPP May Benefit Asian Apparel, Textile Manufacturers', 29 *International Trade Reporter* (BNA) (11 October 2012).

¹⁴⁵ See Stephanie Cohen, *supra* note 143.

exporter of garments to the United States – and that is without a duty preference. Vietnamese T&A exports to America surged by 15,000 percent between 2000 and 2012.¹⁴⁶ In 2011, Vietnam accounted for 7.1 percent of all T&A exports to the United States; the next year, the figure was 7.6 percent.¹⁴⁷ China accounted for 40.2 percent. Of all tariffs the United States collects from Vietnam, 73 percent are on apparel items, and 17 percent form footwear.¹⁴⁸ So, *TPP* duty free treatment would only enhance the status of Vietnamese T&A merchandise in the United States.

Still, officially the USTR stuck to its position that a Yarn Forward rule would be appropriate for a *TPP*, and would limit access of Asian exporters like Vietnam to the American market.¹⁴⁹ Congress was split on this ROO.¹⁵⁰ In May 2013, 76 Members of the House of Representatives wrote to the USTR calling for a strong Yarn Forward rule. They wanted to ensure T&A merchandise qualified for *TPP* preferential treatment only if it is made from yarns, fabrics, sewing threads, and other inputs originating in *TPP* countries. They were joined in a separate letter from five Senators: inputs from non-*TPP* suppliers, such as China, should disqualify a T&A article from a duty preference, so no list of products exempt from the yarn-forward ROO should be agreed.¹⁵¹ In August 2013 came another letter to the USTR, this one from North Carolina Republican Representative Patrick McHenry.¹⁵² He, with 167 signers from both parties, demanded a strong Yarn Forward rule.

In contrast, 15 Senators also wrote the USTR in May 2013, calling for it to reconsider this ROO, and take a more flexible approach. The more flexible approach on sourcing of supplies also was backed by the American Apparel & Footwear Association (AAFA).¹⁵³ Global supply changes make a Yarn Forward rule unworkable. To get duty-free treatment, that rule requires all materials used to make a garment to originate and be assembled in a *TPP* country, but those chains engage in production activities in multiple countries. Moreover, because of onerous documentation requirements for compliance with the rule, many companies

¹⁴⁶ Amy Tsui, ‘Competing Views on Textile Provisions in TPP Talks Emerge from House, Senate’, 29 *International Trade Reporter* (BNA) 756 (19 May 2012).

¹⁴⁷ See Stephanie Cohen, *supra* note 143.

¹⁴⁸ See Len Bracken, ‘Apparel Makers Call for Flexibility in Trans-Pacific Partnership’, 30 *International Trade Reporter* (BNA) 728 (16 May 2013).

¹⁴⁹ See Amy Tsui, ‘Textile Groups Spar over Vietnam’s Inclusion in TPP Ahead of Auckland Negotiating Round’, 29 *International Trade Reporter* (BNA) 1691 (25 October 2012).

¹⁵⁰ See Len Bracken, ‘Marantis Meets Vietnamese President, Others on Key Issues Concerning TPP Talks’, 30 *International Trade Reporter* (BNA) 650 (2 May 2013).

The competing letters essentially were repeats of missives from May 2012, sent to President Barack H. Obama, in which 76 House Members advocated strong Yarn Forward rules. They also called for extended phase out periods on American tariffs for Vietnamese products, which would be justified by Vietnam being a non-market economy (NME), and electronic tracking of yarn and fabric used by Vietnamese producers, to catch fraud, namely, the use of inputs from China. See Amy Tsui, ‘Competing Views on Textile Provisions in TPP Talks Emerge from House, Senate’, 29 *International Trade Reporter* (BNA) 756 (19 May 2012). In contrast, 15 Senators criticized an across-the-board Yarn Forward rule, with no short supply exception, ‘overly broad’. *Id.* Interestingly, the United States had financial leverage on its TPP negotiating partners: in 2010, 68 percent of all American tariffs (totalling nearly \$1.2 billion) collected from TPP countries were clothing and home linens. See *id.*

¹⁵¹ See Len Bracken, ‘Democratic Senators Oppose Supply List for Textiles in Trans-Pacific Partnership’, 30 *International Trade Reporter* (BNA) 689 (9 May 2013).

¹⁵² See Len Bracken, ‘Lawmaker Stresses TPP Yarn-Forward Rule; Coalition Notes Short-Supply List on Agenda’, 30 *International Trade Reporter* (BNA) 1367 (5 September 2013).

¹⁵³ See Len Bracken, ‘Apparel Makers Call for Flexibility in Trans-Pacific Partnership’, 30 *International Trade Reporter* (BNA) 728 (16 May 2013).

never bother to source yarns and fabrics from a *TPP* country in the first place. Even a Short Supply List is not sufficient flexibility, because it is limited to items on the list.

The AAFA used Vietnam as an example. It is part of the global supply chain of AAFA companies. But (as of May 2013), only 2 percent of Vietnamese yarn and fabric needs were satisfied by other *TPP* countries, excluding Japan, or 12 percent, including Japan.¹⁵⁴ In other words, AAFA members with facilities in Vietnam had to look outside *TPP* for about 78 percent of their yarn and fabric inputs for garments made in those facilities. Of course, lobbying groups like the National Cotton Council opposed any flexibility that might allow Vietnam to source T&A inputs or merchandise from China, and then export it through Vietnam and obtain a *TPP* preference.

As intimated, one possible compromise was an exception in the form of a Short Supply provision, which exists in some American FTAs: if merchandise in a specific product category in the Harmonized Tariff Schedule of the United States (HTSUS) were unavailable in a commercially meaningful quantity from *TPP* countries, then the Yarn Forward rule would not apply to it.¹⁵⁵ Rather, the Cut-and-Sew Forward ROO would apply, meaning the merchandise at issue would qualify for *TPP* treatment as long as it is cut and sewn in one or more *TPP* countries. This rule is more flexible than Yarn Forward, because cutting and sewing is a more advanced stage in T&A manufacturing than spinning yarn. The yarn to make the T&A merchandise could come from outside the *TPP* region. The United States tabled a Short Supply proposal as early as the 17th round of negotiations in May 2013 in Lima.¹⁵⁶ Vietnam responded saying it needed time to study the proposal.

A more dramatic potential compromise was to eschew a Yarn Forward ROO, and use a Change in Tariff Heading (CTH) rule, an RVC rule, or a hybrid involving both.¹⁵⁷ Under a CTH rule, any product in an apparel chapter of the HTS – *i.e.*, Chapter 61 or 62 – would have to be transformed within the *TPP* region from an article from any heading other than in Chapter 61 or 62. An RVC rule would mean the total value of the processes (including inputs created) within the *TPP* region would have to sum to a minimum percentage, such as 35 percent, of the total value of the garment. Notably, the Trans-Pacific Partnership Apparel Coalition, which included the AAFA, recommended a CTH or RVC rule.

Also calling for flexibilities beyond the T&A ROO beyond a Short Supply List was the Retail Industry Leaders Association (RILA).¹⁵⁸ In a December 2013 press release, it pointed out the fastest growing markets for American yarn and fabric exporters are not subject to the Yarn Forward Rule. The implication was it was hypocritical of the United States to insist on an inflexible one.

¹⁵⁴ *Id.*

¹⁵⁵ See Len Bracken, 'Marantis Meets Vietnamese President, Others on Key Issues Concerning TPP Talks', 30 *International Trade Reporter* (BNA) 650 (2 May 2013).

¹⁵⁶ See Lucien O. Chauvin, 'Progress Made as Latest Round Ends; Questions Remain on Japan's Upcoming Role', 30 *International Trade Reporter* (BNA) 773-774 (30 May 2013).

¹⁵⁷ See Len Bracken, 'Apparel Makers Call for Flexibility in Trans-Pacific Partnership', 30 *International Trade Reporter* (BNA) 728 (16 May 2013).

¹⁵⁸ See Len Bracken, 'Retail Leaders Back Senate, House Letters Seeking Flexible Rules for Apparel in TPP', 30 *International Trade Reporter* (BNA) 1941 (12 December 2013).

In respect of flexibilities, RILA offered a number of options: a Fabric Forward ROO (whereby the origin of yarn used to make a fabric does not matter); a Cutting and Sewing Forward ROO (whereby an article may be manufactured from fabric of any origin, and the origin of the yarn used to make the fabric, as well as the origin of sewing thread, narrowing elastics, and pocketing fabric, does not matter, hence duty-free treatment is accorded as long as all components are cut or knit, and sewn, within the *TPP* region); cumulation (allowing for component materials from multiple *TPP* countries), Regional Value Content (RVC, whereby preferential treatment is accorded based on a numerical threshold for value added within the *TPP* region); and export matching.¹⁵⁹ Indeed, RILA pointed out there are precedents for all such options: they exist in various FTAs to which the United States is a party.

4.5. Footwear Issues

Like T&A, footwear is a sensitive sector for many importing countries, and of keen export interest to some developing countries. In *TPP* negotiations, the former group sought restrictive ROOs: all inputs into footwear would have to be manufactured in a *TPP* country to secure duty free treatment.¹⁶⁰ That would protect their domestic footwear industries. But, it would restrict the flexibility of producer-exporters to make sourcing decisions.

The latter group hoped for a rule of origin such as a 50 percent value added test. Originating content in footwear would have to exceed 50 percent to be considered *TPP* merchandise eligible for duty free treatment.¹⁶¹ Interestingly, in anticipation of such a rule, and of a Yarn Forward T&A rule, as of December 2013, Chinese companies began shifting some operations to Vietnam. Relatively higher Chinese labour costs were a further incentive for them to do so. To be sure, China retained competitive advantages over the likes of Vietnam – and, for that matter, the Indian Sub-Continent – in respect of higher quality and lower logistical costs.¹⁶²

Would free trade in footwear under the *TPP* truly hurt the American shoe industry? Not necessarily, at least not companies producing athletic footwear. In August 2013, the Footwear Distributors and Retailers of America (FDRA) reported on a study of the effects of immediate duty elimination on athletic footwear.¹⁶³ The benefits to consumers through lower prices, and to the domestic industry in respect of innovation and increased jobs, would outweigh declines in output and revenue. Those declines would be one percent or less. The real loser would be China: American companies would shift sourcing from China to Vietnam.

In other words, the already small share of the American market held by domestic producers would not be compromised, and Vietnam would take from China some share in that

¹⁵⁹ *Id.*

¹⁶⁰ See Len Bracken, *TPP Leaders Reaffirm 2013 Conclusion; Report Provides Features of Agreement*, 30 *International Trade Reporter* (BNA) 1602 (17 October 2013).

¹⁶¹ See Michael Standaert, 'Vietnam, Other Countries Set to Benefit By Straddling Two Major Trade Agreements', 30 *International Trade Reporter* (BNA) 1899 (5 December 2013).

¹⁶² *Id.*

¹⁶³ See Len Bracken, 'Study Probes Effects on U.S. Producers of Footwear under TPP-Related Scenario', 30 *International Trade Reporter* (BNA) 1325 (22 August 2013).

market. All that said, American shoemakers feared competition from Vietnam.¹⁶⁴ To them, their sector was sensitive.

4.6. Services

Throughout *TPP* negotiations, the United States was adamant about securing enhanced market access for its service providers. Financial services were at the top of the list.¹⁶⁵ That meant the American negotiating team sought to have other countries eliminate as many regulatory barriers to foreign bank entry as possible.

At the same time, the United States sought to protect its own bank regulatory regime.¹⁶⁶ That included the Volcker Rule, promulgated in December 2013 by five Federal regulatory agencies pursuant to the 2010 *Dodd-Frank Act*.¹⁶⁷ The Rule barred insured depository institutions (and their holding companies, subsidiaries, and other affiliates) from proprietary trading. They Rule differentiated between legitimate trading on behalf of a client, or for risk hedging, from trading for the profit of the institution. The Rule also barred insured depository institutions from owning or sponsoring a hedge fund or private equity fund.

4.7. Government Procurement Issues

For the United States, that *TPP* should cover government procurement was beyond question. But, whether government procurement rules in a *TPP* should allow *TPP* countries to maintain local preference rules was in controversy. For instance, should Malaysia – the 17th largest trading nation in the world, and a Muslim majority, multi-party democracy – be allowed to retain race-based preferences for Malays (*bumiputras*) over foreign goods and services providers when its SOEs issue bids?¹⁶⁸

Ironically, another example was whether the United States should be permitted to maintain its ‘*Buy American*’ provisions.¹⁶⁹ Some American FTAs have a national treatment obligation under which firms from foreign countries that are parties to the FTA are given the same access to government procurement contracts (above a certain U.S. dollar threshold) as are domestic firms. These rules require waiver of *Buy American* procurement rules.

On the one hand, that waiver encourages more open, competitive procurement markets. Further, discrimination in procurement decisions in favour of American firms by the United

¹⁶⁴ See Ben Bland, ‘U.S. Tries to Calm Asia Allies on Trade Talks’, *Financial Times*, 7 October 2013, at 2.

¹⁶⁵ See Brian Flood, ‘Leaked TPP Documents Show Fault Lines Underlying Singapore Ministerial Meeting’, 30 *International Trade Reporter* (BNA) 1943 (12 December 2013).

¹⁶⁶ See K. Claire Compton, ‘Volcker Rule Next Step in Regulation Work; Lew Says Trade Talks Won’t Weaken Stands’, 30 *International Trade Reporter* (BNA) 1928 (12 December 2013).

¹⁶⁷ See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Public Law 111-203, 124 Stat. 1376-2223, House Resolution 4173, 21 July 2010. The Act amended all major United States financial regulatory statutes: *Commodity Exchange Act*; *Consumer Credit Protection Act*; *Federal Deposit Insurance Act*; *Federal Deposit Insurance Corporation Improvement Act of 1991*; *Federal Reserve Act*; *Financial Institutions Reform, Recovery, and Enforcement Act of 1989*; *International Banking Act of 1978*; *Protecting Tenants at Foreclosure Act*; *Securities Exchange Act of 1934*; and *Truth in Lending Act*.

¹⁶⁸ See Ben Bland, ‘U.S. Tries to Calm Asia Allies on Trade Talks’, *Financial Times*, 7 October 2013, at 2; David Pilling & Shawn Donnan, ‘Trans-Pacific Partnership: Ocean’s Twelve’, *Financial Times*, 23 September 2013, at 9; ‘Trade, Partnership, and Politics’, *The Economist*, 24 August 2013, at 40.

¹⁶⁹ See Amy Tsui, ‘House Members Urge TPP Talks Retain “Buy American” for Government Procurement’, 29 *International Trade Reporter* (BNA) 755 (10 May 2012).

States federal or state governments may be met with discrimination against such firms by foreign central and sub-central governments in their choices to buy goods and services from the private sector. On the other hand, waiver also can mean taxpayer dollars in one country, such as the United States, end up bolstering the manufacturing firms of another country, such as *TPP* members. Indeed, those other firms may be Chinese, which could operate out of a *TPP* member, like Vietnam. Additionally, any disciplines in a *TPP* on *Buy American* rules may limit the policy space of United States federal and state governments. They might not be able to enact procurement policies favouring local companies without the approval of all *TPP* members.

5. NON-TRADITIONAL MARKET ACCESS

5.1. Trade Facilitation and Trans-shipment

Once customs classification and valuation formalities are completed, a range of non-tariff barriers at or near a border can impede market access for merchandise. ‘Red tape’ is the term sometimes used to capture many such barriers (though corruption is yet an additional hurdle), and *TPP* negotiators aimed to streamline procedures by cutting that tape as far as possible. In so doing, they pledged to build on the WTO Agreement on Trade Facilitation to which Members agreed in December 2013 at the 9th Ministerial Conference in Bali, Indonesia.¹⁷⁰ What, exactly, ‘build on’ meant was unclear, as they did not disclose the text of their Trade Facilitation Chapter.

Apparently, *TPP* negotiators sought, first, to ensure customs authorities employed best practices and, second, hoped to link firms in the *TPP* zone into regional production, or supply chain, networks. That meant, third, they sought to ensure non-*TPP* countries did not falsely misrepresent their goods as originating within the zone. In other words, attendant to rules facilitating trade, there needed to be tight ROOs that insured duty free, quota free (DFQF) treatment was accorded only to bona fide *TPP* merchandise.

5.2. SOE Issues

For the United States, as with government procurement, with SOEs, there was no doubt *TPP* should cover them. But, what exactly should the rules say? That question begged another: what ‘SOEs’ should be covered by *TPP*?

Provisions in a *TPP* that might emerge on SOEs could become a template for future regional trade agreements (RTAs), and perhaps the WTO. The GATT-WTO texts speak of SOEs operating in accordance with normal commercial considerations. Ideally, the *TPP* would lay out whether a matter or decision concerning or by an SOE has an effect on non-SOE competitors, and then impose appropriate disciplines.¹⁷¹ The United States argued *TPP* negotiations should deal specifically with situations such as where an:¹⁷²

¹⁷⁰ See Len Bracken, ‘TPP Customs, Trade Facilitation Text is “Particularly Far Advanced,” Froman Says’, 31 *International Trade Reporter* (BNA) 502 (13 March 2014).

¹⁷¹ *Id.*

¹⁷² See Len Bracken, ‘TPP Members Grapple with Japan’s Entry, Ways to Speed Talks Ahead of 17th Round’, 30 *International Trade Reporter* (BNA) 495 (4 April 2013).

- (1) SOE enjoys advantages in its home country, such as direct support, preferential financing, selective enforcement of laws, or regulatory exemptions.
- (2) SOE from one country and private business association of another country compete in that other country, or in a third country;
- (3) SOE is engaged in government procurement;
- (4) SOE is a holding company with many entities under it;
- (5) SOE gains preferential access to export credits; and
- (6) SOE benefits from exemptions in domestic bankruptcy law that allow it to continue in operation.

Such topics deserved coverage, given the continued prominence of SOEs in many countries.

For example (as of March 2012), SOEs constitute 80 percent of the value of China's stock market, 62 percent of the market capitalization of the Russian stock market, and 38 percent of that in Brazil.¹⁷³ SOEs also play prominent roles in Malaysia, Singapore, and Vietnam,¹⁷⁴ and they resisted disciplines on them.¹⁷⁵ In Japan, the Post Office is an SOE. In the United States, Fannie Mae and Freddie Mac may be considered as such. And, of course, in some countries – Vietnam, for example – SOEs reportedly 'are used by senior Communist Party officials as a cash cow for favoured projects and sometimes as personal piggy banks.'¹⁷⁶

If America had its way, then *TPP* would be the first trade agreement to contain a full Chapter on disciplines on SOEs. To be sure, the concern about the un-level playing field they enjoyed in their domestic markets was well known for decades, even when GATT was drafted in 1945-1947. However, the increased prominence of SOEs, and particularly the fact their activities no longer are limited to their home countries, but extend into foreign markets, impelled *TPP* negotiators to deal with them.¹⁷⁷

Doing so created controversy, of course. Developing countries argued for generous transition periods. They said they needed time to for their SOEs to transition toward commercial-based decision-making.¹⁷⁸

Australian health organizations feared *TPP* provisions on SOEs would damage state-owned public hospitals.¹⁷⁹ That could happen if (1) the definition of 'SOE' was unclear,

¹⁷³ See Murray Griffin, 'TPP Should Set Benchmark for Rules on State-Owned Enterprises, Forum Told', 29 *International Trade Reporter* (BNA) 370 (8 March 2012).

¹⁷⁴ See Len Bracken, 'TPP Talks in Bali Focus on Environment, Intellectual Property, State-Owned Enterprises', 30 *International Trade Reporter* (BNA) 1563 (10 October 2013).

¹⁷⁵ See e.g. Daniel Pruzin, 'TPP Ministers Wrap Up Meeting with No Deal or New Deadline', 30 *International Trade Reporter* (BNA) 1916 (12 December 2013) (reporting on resistance by Malaysia to SOE commitments).

¹⁷⁶ David Pilling & Shawn Donnan, 'Trans-Pacific Partnership: Ocean's Twelve', *Financial Times*, 23 September 2013, at 9.

¹⁷⁷ See Len Bracken, 'TPP Members Grapple with Japan's Entry, Ways to Speed Talks Ahead of 17th Round', 30 *International Trade Reporter* (BNA) 495 (4 April 2013).

¹⁷⁸ See Len Bracken, 'TPP Ministers Plan December Meeting In Singapore as Negotiations Continue', 30 *International Trade Reporter* (BNA) 1663 (31 October 2013).

¹⁷⁹ See 'Australian Health Groups Concerned TPP Talks Will Impact State-Owned Hospitals', 30 *International Trade Reporter* (BNA) 1325 (22 August 2013). Those organizations were the Australian Fair Trade and

or (2) those provisions applied not only to central governments, but also provincial ones. On the one hand, it was understandable to ensure through SOE disciplines that if they compete commercially with private enterprises, they do not receive unfair advantages from their state owners. On the other hand, SOEs that exist for a public purpose, even if they have some commercial operations, should be exempt. Examples included not only Australian hospitals, but also the Australia Post and the National Broadband Network. Accordingly, these organizations championed a clear exclusion of such entities from the ‘SOE’ definition.

Certainly, the United States was concerned about crafting the definition of ‘SOE.’¹⁸⁰ It needed to be broad enough to encompass activities of entities that truly are governmental or acting as agents for a government and are engaged in commercial trade. But, it should not include universities, public utilities, or hospitals. Relatedly, SOEs ought to be subject to the same dispute settlement mechanism, and held to the same high standards of transparency, as private enterprises under the *TPP*.

Also in the United States, the American Federation of Labour and Congress of Industrial Organization (AFL-CIO) had its own concerns. As with any trade agreement, the *TPP* galvanized labour unions around issues of wage degradation and job loss.¹⁸¹ Additionally, the AFL-CIO drew a link between foreign SOEs and national security threats.¹⁸² It called for an automatic trigger of a national security review by the Committee on Foreign Investment in the United States (CFIUS) for any investment of a foreign SOE in America. This trigger, said the AFL-CIO, should be built into the domestic regulatory requirement provisions of the *TPP*. The purpose of such a review would be not only to ensure sensitive goods or technologies do not fall into enemy hands, but also to check that a would-be foreign SOE acquirer behaves like a commercial enterprise and does not ‘corner’ a particular market in the United States.¹⁸³

5.3. Regulatory Coherence Issues

‘Regulatory coherence’ was a quintessential 21st century issue covered in *TPP* discussions, and the subject of a Chapter dedicated to that subject. The term refers to the design, review, and implementation of regulations, and cooperation among regulatory agencies in different countries.¹⁸⁴ Simply put, it concerns convergence and equivalence among regulations of different countries.

TPP negotiators examined how they might centralize review of proposed measures, use regulatory impact assessments (such as cost-benefit analyses and risk management studies),

Investment Network, Public Health Association of Australia, Australian Healthcare and Hospitals Association, Australian Federation of AIDS Organizations, and People’s Health Movement Australia. See *id.* They sent a letter, dated 12 August 2013, to Richard Marles, Minister of Trade, Australia, detailing their concerns.

¹⁸⁰ See Rossella Brevetti, ‘Michaud Calls for Strong Measures in TPP TO Address Power of State-Owned Enterprises’, 30 *International Trade Reporter* (BNA) 1529 (3 October 2013) (discussing the views of Representative Mike Michaud (Democrat-Maine)).

¹⁸¹ See ‘Unions Rally in Minneapolis to Protest Trans-Pacific Partnership Negotiations’, 30 *International Trade Reporter* (BNA) 1326 (22 August 2013).

¹⁸² See Len Bracken, ‘Labour Cites Exchange Rate Manipulation at ITC Hearing on Japan Joining TPP Talks’, 30 *International Trade Reporter* (BNA) 899 (13 June 2013).

¹⁸³ *Id.*

¹⁸⁴ See Len Bracken, ‘TPP Members Grapple with Japan’s Entry, Ways to Speed Talks Ahead of 17th Round’, 30 *International Trade Reporter* (BNA) 495 (4 April 2013).

take stock periodically of existing measures, and engage in planning as to what future regulations might be needed. In so doing, the negotiators were dealing with what, in truth, is both an old and new concept. Regulatory coherence is old in that it has long been understood that regulations can be NTBs to trade – even though that rubric has not always been used. It is new in that *TPP* talks specifically addressed it at a level more advanced than the *WTO Agreements on Sanitary and Phytosanitary Standards (SPS)* or *Technical Barriers to Trade (TBT Agreement)*.

For example, at the 17th round of negotiations in Peru in May 2013, the United States tabled a proposal for a ‘Rapid Response Mechanism’ (RRM), a feature not in those treaties, nor in any of America’s FTAs.¹⁸⁵ The RRM would address SPS and TBT impediments quickly, especially in view of the special needs of exporters of agricultural products, which are time-sensitive and perishable. The RRM would:¹⁸⁶

- (1) provide immediate (i.e., within days), detailed notification to importers and exporters about risk detection, assessment, and management measures implemented by a particular TPP country, and
- (2) grant them expedited reviews by neutral experts, to be completed within 15 days, about such measures.

Consequently, the RRM would alleviate the problem of goods being stuck at a port, denied entry because of those measures, yet losing value daily. Moreover, it would help *TPP* countries build trust and confidence in each other’s regulatory apparatuses, and encourage efficient dispute resolution. Coupled with the RRM would be the substantive criteria that any SPS measure at issue be supported by risk-based, scientific decision making.

6. INTELLECTUAL PROPERTY BATTLES

6.1. Copyright

On IP, all *TPP* countries were so concerned about so many issues that the Chapter governing the topic was the longest of any in the FTA, and consumed the most time to negotiate.¹⁸⁷ For the President’s Export Council (PEC), the way to address all the issues was clear: *TPP* should contain IP provisions at least as strong as those in America’s most recent FTAs, particularly *KORUS*, and also should add protections for trade secrets.¹⁸⁸ That position was not universally shared among *TPP* negotiating countries.

¹⁸⁵ See Lucien O. Chauvin, ‘Seventeenth TPP Round Starts in Peru, Official is Confident of Wrap-Up by Year’s End’, 30 *International Trade Reporter* (BNA) 738 (23 May 2013). In this proposal, the United States was backed (inter alia) by a coalition of agricultural and food organizations led by Cargill and the National Pork Producers Council (NPPC). See Len Bracken, ‘Pork Producers, Cargill Relay Core Principles To Trade Negotiators Engaged in TPP Talks’, 30 *International Trade Reporter* (BNA) (5 September 2013).

¹⁸⁶ See Lucien O. Chauvin, ‘U.S.-Proposed Rapid Response Mechanism Would Set Up Immediate Notification Process’, 30 *International Trade Reporter* (BNA) 738 (23 May 2013).

¹⁸⁷ See Len Bracken, ‘U.S. Chamber Seeks Trade Secrets Clauses in TPP, Pinpoints Other Policy Preferences’, 30 *International Trade Reporter* (BNA) 1364 (5 September 2013).

¹⁸⁸ See Brian Flood, ‘Obama Meets Export Council, Expresses Optimism for Trade Promotion Authority’, 30 *International Trade Reporter* (BNA) 1465 (26 September 2013)

To begin, among the many IP issues, one was enforcement.¹⁸⁹ New Zealand, for instance, observed that counterfeit films cost its movie industry – which includes hits by producer Sir Peter Jackson like *The Hobbit* – over U.S. \$100 million annually.¹⁹⁰ But, that was not their only subject.

At the 13th round of negotiations in July 2012 in San Diego, California, the United States put forward its first proposal on IP.¹⁹¹ It concerned copyright, and the United States said the aim of its proposal was to balance the need for strong protection of copyright interests, on the one hand, with the need for exceptions for fair use for commentary, criticism, reporting, research, and scholarship, on the other hand. Accordingly, America proposed *TPP* contain the same exceptions and limitations on copyright protection as exist under American law (e.g. a fair use exception, and the same safe harbours that exist under the *Digital Millennium Copyright Act*, which also are found in Article 18:4(7)(d)-(e) of *KORUS*).¹⁹² Moreover, the United States sought an extension of copyright protection from 50 to 70 years.¹⁹³

The American proposal had a three step test on exclusive right of reproduction, namely, it is up to a country to permit reproduction of a work, without the express consent of the author:¹⁹⁴

- (1) in special cases,
- (2) if the reproduction does not conflict with normal exploitation of the work, and
- (3) if the reproduction does not unreasonably prejudice the interests of the author).

This test was developed in 1967, and – as the United States pointed out – is manifest in and thus consistent with the *TRIPs Agreement* (including Article 13), *Berne Convention for the Protection of Literary and Artistic Works* (including Article 9(2)), and the *World Intellectual Property Organization (WIPO) Copyright Treaty*.

However, some commentators queried whether this test might be construed too broadly.¹⁹⁵ Article 2*bis* of the *Berne Convention* allows for political speech to be excluded from copyright protection. These commentators said political speech should not be subject to the three-part test, but rather granted the same fair use exception as under the *Convention*. In other words, the *Convention* does not mandate the use of the test in every possible instance of fair use. But, by referring expressly to criticism, comment, news reporting, teaching, scholarship, and research, the American proposal for the *TPP* seems to demand all fair use

¹⁸⁹ See Len Bracken, 'TPP Members Grapple with Japan's Entry, Ways to Speed Talks Ahead of 17th Round', 30 *International Trade Reporter* (BNA) 495 (4 April 2013).

¹⁹⁰ *Id.*

¹⁹¹ See Len Bracken, 'USTR's Marantis Cites Progress on TPP, Says Tough Issues Remain at this Stage', 29 *International Trade Reporter* (BNA) 1330 (16 August 2012).

¹⁹² See Tony Dutra & Amy Tsui, 'USTR Proposing Exceptions and Limitations on TPP Copyright Protection, Enforcement', 29 *International Trade Reporter* (BNA) (12 July 2012).

¹⁹³ See Monika Ermert, 'Big Trading Blocks Moving at Breakneck Pace to Raise Free Trade Standards', *Intellectual Property Watch*, 22 May 2013, posted at www.bilaterals.org.

¹⁹⁴ See Tamlin H. Bason, 'Leaked TPP Copyright Text Purportedly Expands Berne Convention's Three-Part Test', 29 *International Trade Reporter* (BNA) 1341 (16 August 2012).

¹⁹⁵ *Id.*

exceptions meet the three-step test, thus expanding rather dramatically the scope of copyright protection.

6.2. Third Party Pre-Grant Patent Opposition

How easy ought it to be for a third party to oppose granting of a patent, before that patent is granted? In other words, should it be simple for a third party to challenge the standards under which a patent would be granted, and thereby possibly prevent its granting? In February 2011, the United States said ‘not easy’. It argued against pre-grant opposition under *TPP*. A third party ought to be able to put up only post-grant opposition.

By August 2013, America softened its position, saying reasonable pre-grant opposition procedures were acceptable. The American shift was in line with an August 2013 proposal by Canada, Chile, Malaysia, New Zealand, and Singapore for a provision in the *TPP* IPR Chapter expressly allowing for pre-grant opposition procedures. Their idea was that ‘[e]ach Party shall provide a procedure for third persons to oppose the grant of a patent, either before or after the grant of a patent, or both.’¹⁹⁶

Why the shift? The problem with allowing third parties only post-grant opposition is the patent owner enjoys the benefits of the patent throughout the pendency of the patent challenge litigation. Such disputes can take years to resolve, and are expensive. Third parties face these disincentives to mount post-grant challenges, whereas they do not if they are allowed to make a pre-grant challenge. In the September 2011 *America Invents Act*, the United States changed its domestic posture: it created pre-grant patent opposition procedures. So, its shift in *TPP* talks reflected the *Act*.

Still, the United States faced opposition from other countries. Most other *TPP* countries with pre-grant opposition procedures had no exceptions to those procedures, and did not permit a patent seeker to conceal its patent application. The *America Invents Act* seemed to tolerate a patent seeker avoiding a pre-grant challenge by asking the United States Patent and Trademark Office (PTO) to keep secret its application until a final decision on patentability.¹⁹⁷ Only then would a challenge be entertained.

6.3. 25 Year Pharmaceutical Patent Protection

Agreeing on a period for patent protection of pharmaceuticals requires a compromise between developers of medicines that incur hundreds of millions, sometimes billions, of dollars to research, test, and market a new drug and patients for whom those drugs are designed, many of whom cannot pay full price for them. The *TRIPs Agreement* (in Article 33) sets the period at 20 years, an increase from the traditional American period of 17 years. Apparently not content with that increase, the United States sought in *TPP* negotiations an additional 5 years, for a total of 25 years.

¹⁹⁶ Quoted in Len Bracken, ‘U.S. Supports More Flexible Approach To Patent Opposition in TPP, USTR Says’, 30 *International Trade Reporter* (BNA) 1896 (5 December 2013).

¹⁹⁷ *Id.*

At the 19th round in August 2013, it won.¹⁹⁸ None other than Mexico claimed a 25 year period for pharmaceutical products was a ‘done deal’. However, Mexico explained the extension from 20 to 25 years would not be automatic. To the contrary, 20 years would remain the baseline period. A five-year extension could be granted on a case-by-case (that is, drug-by-drug) basis, upon application. The applicant – presumably a pharmaceutical company – would have to prove the particular medicine for which it sought an extension (1) took considerably more time and money than the average of 10 years, and (2) there was a valid need to expending the extra time and funds.

Why did Mexico, a developing country, support the idea? Its pharmaceutical industry is the second most important on (measured in terms of value). It accounts for sales of \$14 billion (in 2012), 78,000 direct and 300,000 indirect jobs, and grew 14 percent (between 2007 and 2009).¹⁹⁹ Its National Pharmaceutical Industries Chamber, Canifarma, represents both generic and non-generic firms. Canifarma understood the Mexican pharmaceutical sector had developed to the point that portions of it could benefit from extended patent protection, but other parts – plus poor patients – needed access to cheap drugs. The discretionary 5-year extension seemed to strike the right balance.

6.4. Biologics and Data Exclusivity

The treatment of biological medical products was another point of major IP controversy in *TPP* negotiations. The broad issue is balancing incentives to innovate and develop new medicine versus ensuring wide access to medicines for underprivileged people. The specific issue is the period of protection for these products, which also are called ‘bio-pharmaceutical medicines’, or known commonly by the short-hand term ‘biologics’.²⁰⁰ Biologics are created from living organisms, and the medicine is used to treat cancer, diabetes, and other diseases.

Under the 2012 health care reform law championed by President Obama (i.e. the Affordable Care Act, commonly called ‘Obamacare’), a branded biologic (that is, a biological medical product that is patented) enjoyed 12 years of market exclusivity. Major multinational pharmaceutical companies that make such brands are Baxter, Eli Lilly, Novartis, and Pfizer. For them, the 12-year test data protection period equates to non-patent exclusivity. During those 12 years, no generic biological drug – also called a ‘biosimilar’ – lawfully can enter into the market in competition with the branded biologic, if the biosimilar relied on the same data as did the branded biologic. Rather, a generic producer must conduct its research and development, including clinical trials, just as did the branded drug producer. Only after the expiry of the 12 year period can a generic manufacturer use test data from the clinical trials conducted by producers of the brand name drug as a basis for making the generic drug.

¹⁹⁸ See Maja Wallengren, ‘Mexican Official Says Agreement Reached To Extend Pharmaceutical Rights Protections’, 30 *International Trade Reporter* (BNA) 1365 (5 September 2013).

¹⁹⁹ *Id.*

²⁰⁰ See Len Bracken, ‘TPP Ministers To Brief Leaders Oct. 8 On Margins Of APEC Summit in Indonesia’, 30 *International Trade Reporter* (BNA) 1561 (10 October 2013); Len Bracken, ‘U.S. Negotiating “Biologics” Proposal, Marking End to “Period of Reflection”’, 30 *International Trade Reporter* (BNA) 1366 (5 September 2013); Bronwyn Mixter, ‘Lawmakers Urge President to Protect Biologic Exclusivity in Trade Negotiations’, 29 *International Trade Law* (BNA) 1341 (16 August 2012).

Obviously, ‘biosimilar’ medicine is a less expensive, follow-on, generic version of the original, expensive ‘biologic’ drug.²⁰¹ American negotiators sought to vault the American legal standard of 12-year biologics exclusivity into the *TPP*. Predictably, the Pharmaceutical Research and Manufacturers of America (PhRMA) backed the American position. Its members include Amgen, Genetech (part of the Roche Group), Pfizer, Merck, Novartis, Eli Lilly, Johnson & Johnson, and GlaxoSmithKline, each of which makes biologics.²⁰² If that were the *TPP* rule, then biosimilar producers could not avoid ‘reinventing the wheel’ by using data generated by the branded producer. In turn, they could not save research and development costs, and hence not price biosimilars as cheaply as they would like to.²⁰³

That is, the nature of the 12-year exclusivity is one of data protection. Another company, such as a generic manufacturer, cannot use the data created by the inventor (innovator) of the branded biologic for 12 years after the patent has expired – so called ‘test data’. A generic manufacturer might seek to use those data to develop a biosimilar. This 12 year period runs subsequent to the 20 or 25 years of patent protection. Hence, the effective market exclusivity enjoyed by the branded biologic over the biosimilar competition is a whopping 32 (20 plus 12) or 37 (25 plus 12) years. That is far above the simple 20-year *TRIPs* standard.

Obviously, the longer the period of protection for branded biologics, the slower the access to the market makers of generic drugs have for their biosimilars. In turn, high monopoly prices, and consequent high health care costs and limited access for poor populations to life-saving and life-enhancing medicines, result. Defenders of this idea pointed out significant research and development (R&D) costs need to be recouped if pharmaceutical companies are going to have an incentive to innovate.

Not surprisingly, these (and other) IP proposals contemplated for *TPP* attracted strong criticism. Among the charges were the IP provisions would impede the delivery of low-cost medicines (*i.e.*, generics) to treat HIV/AIDS and malaria to poor countries by extending monopoly protection for old, branded drugs, and would extend copyright protection to an unreasonably long period.²⁰⁴ Critics touted the concept of ‘patent delinking’, whereby the cost of R&D is separated from the cost of the pharmaceutical product.²⁰⁵ R&D expenses are covered by grants, or other monetary incentives, so as to assure pharmaceutical countries they can profit from a new, lowly-priced, medicine they invent.

Pharmaceutical industries in developing, and even some developed, countries participating in the *TPP* talks, such as Australia, Brunei, Canada, Chile, Mexico, Peru, and Vietnam, opposed American efforts to extend periods of patent protection and fix data

²⁰¹ See Len Bracken, ‘TPP Members Grapple with Japan’s Entry, Ways to Speed Talks Ahead of 17th Round’, 30 *International Trade Reporter* (BNA) 495 (4 April 2013).

²⁰² See Len Bracken, ‘TPP Chief Negotiators, Key Experts Gather In Salt Lake City to Advance Negotiations’, 30 *International Trade Reporter* (BNA) 1816 (21 November 2013).

²⁰³ See Len Bracken, ‘U.S. Negotiating “Biologics” Proposal, Marking End to “Period of Reflection”’, 30 *International Trade Reporter* (BNA) 1366 (5 September 2013).

²⁰⁴ See Bernard K. Gordon, ‘Trading Up in Asia – Why the United States Needs the Trans-Pacific Partnership’, 91 *Foreign Affairs* 17-22 issue 4 (2012).

²⁰⁵ See Lucien Chauvin, ‘Stakeholders Focus on IPR, Investment at Trans-Pacific Partnership Talks in Peru’, 30 *International Trade Reporter* (BNA) 739 (23 May 2013).

exclusivity rules.²⁰⁶ Underlying the American positions they said was the greed of large, rich country pharmaceutical companies, which would injure not only generic producers, but more poignantly poor patients in poor countries. They feared the cost of medication would rise, and generics no longer would be available, if the standards for IP protection in the *TPP* were too high.

To be fair, the evidence was not all on their side. For instance, since the 1 February 2009 implementation of the *Peru Trade Promotion Agreement (PTPA)*, the cost of medicines had fallen, and the supply of generics increased – and the *PTPA* raised IP standards. Still, the opponents were not persuaded. Peru accepted that the *PTPA* had addressed new issues, including second use patents. But, it objected to any effort by the United States to foist its *Stop Online Piracy Act (SOPA)* onto *TPP* as a potential restriction on free speech. Peru said *TPP* should go no further on IP obligations than does the *PTPA*.²⁰⁷ Indeed, even in the United States, NGOs like the Access to Medicines Program of Public Citizen said the *TPP* might ‘lock in the United States to patent controls for biologicals that are still under debate at home.’²⁰⁸

Budgetary concerns within the United States mattered, too. The Office of Management and Budget (OMB), which is responsible for devising a budget to pay for drugs under Medicare and Medicaid programs, opposed a 12-year data exclusivity period.²⁰⁹ A 7-year period would accelerate the marketing of biosimilars, allowing for faster price reductions and thereby reduced health care costs. In other words, the PhRMA positioned pushed in *TPP* negotiations by the USTR was more than a disservice to American biosimilar producers. It also was a threat to the United States government budget deficit. After all, America was no more immune from rising drug costs than a developing country. Eleven of the last 12 cancer drugs brought to market (as of September 2013) cost over \$100,000 per course of treatment.²¹⁰ That price tag one Americans and foreigners alike could not afford.²¹¹

In November 2013, WikiLeaks released a draft of the IP Chapter that contained a proposal on data protection that was not as rigorous as the American regime.²¹² The leaked text, spanning 95-pages containing 941 brackets (indicating points on which no agreement was reached), was dated 30 August 2013, and reflected contributions at the 19th negotiating round in Brunei. The proposal, made by Canada, Chile, New Zealand, Malaysia, and Singapore, and

²⁰⁶ See Maja Wallengren, ‘TPP Partners Agree to Exempt Four Countries from Extended IP Pharmaceutical Provisions’, 30 *International Trade Reporter* (BNA) 1738 (7 November 2013); Maja Wallengren, ‘Mexico’s Pharmaceutical Industry Opposes Proposed Extension of IP Protections in TPP’, 30 *International Trade Reporter* (BNA) 501 (4 April 2013).

²⁰⁷ See Lucien O. Chauvin, ‘Seventeenth TPP Round Starts in Peru, Official is Confident of Wrap-Up by Year’s End’, 30 *International Trade Reporter* (BNA) 738 (23 May 2013).

²⁰⁸ ‘Progress Made as Latest Round Ends; Questions Remain on Japan’s Upcoming Role’, 30 *International Trade Reporter* (BNA) 773-774 (30 May 2013) (characterizing remarks of Peter Maybarduk, Head of the Access Program).

²⁰⁹ See Len Bracken, ‘U.S. Negotiating “Biologics” Proposal, Marking End to “Period of Reflection”’, 30 *International Trade Reporter* (BNA) 1366 (5 September 2013).

²¹⁰ *Id.*

²¹¹ Reportedly, in October 2013 the United States proposed that four TPP developing countries could avail themselves of temporary exemptions on extended patent rights. See Maja Wallengren, ‘Mexican Minister Says TPP Negotiators Draft Final “Action Plan” For IP Chapter’, 30 *International Trade Reporter* (BNA) 1603 (17 October 2013).

²¹² See Len Bracken, ‘Leaked TPP Text on IPR Includes Proposal on Data Protection from Five Countries’, 30 *International Trade Reporter* (BNA) 1820 (21 November 2013).

supported by Vietnam, essentially called for protection of data at the level of that in the *TRIPs Agreement*:

Where a Party requires, as a condition of marketing, regulatory or sanitary approval for pharmaceutical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves considerable effort, that Party shall protect such data against unfair commercial use. In addition, each Party shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data is [*sic*] protected against unfair commercial use. ...

Each Party may provide that the protection of data under paragraph 1, *inter alia*:

- is limited to undisclosed test or other data, the origination of which involves a considerable effort;
- is limited to pharmaceutical products that do not contain a new chemical entity that has been previously approved for marketing in the Party;
- is limited to pharmaceutical products which utilize a new chemical entity;
- is available only once per pharmaceutical product;
- is not available for new uses or indications, new dosage forms or methods of making a pharmaceutical product;
- is limited to a period of time as determined by the Party; or
- may be waived to facilitate the marketing, regulatory or sanitary approval of a pharmaceutical product that is the subject of a voluntary or compulsory license, or a license otherwise issued pursuant to the *TRIPs*.²¹³

Thus, the proposal did not include any provision or proposal for data exclusivity, in contrast to United States law.

That is, *TPP* did not appear to have a rule for test data exclusivity for biologics, whereas the American rule protected data for 12 years. But, *TPP* did contain a placeholder, *i.e.*, an indication of a possible specific provision on biologics, surely at America's insistence. Civil society groups, including Médecins Sans Frontières (MSF) Access Campaign and the Global Access to Medicines Program of Public Citizen, explained the United States was nearly alone in its insistence on data exclusivity, as most other *TPP* countries were against binding *TRIPs Plus* commitments.

The leaked text also indicated the United States, with Japan, opposed a proposal by the same five countries – Canada, Chile, New Zealand, Malaysia, and Singapore – calling for an enhancement of the role of IP in economic development.²¹⁴ Conversely, the American-Japanese proposal to make it illegal to deny a patent based on the lack of enhanced efficiency of that patented item was rejected by all other *TPP* countries. The proposal was designed to facilitate secondary patents.

²¹³ *Id.*

²¹⁴ *Id.*

Likewise, an American proposal on patent term adjustment, which would allow (at the request of a patent holder) for lengthening of a patent as compensation for unreasonable delays in granting a patent, was opposed by Canada, New Zealand, and Japan. The proposal stated:

For purposes of this subparagraph, an unreasonable delay at least shall include a delay in the issuance of the patent of more than four years from the date of filing of the application in the territory of the Party, or two years after a request for examination of the application has been made, whichever is later. ... Periods attributable to actions of the patent applicant need not be included in the determination of such delays. Any patent term adjustment under this article shall confer all of the exclusive rights of a patent subject to the same limitations and exceptions that would otherwise apply to the patent absent any adjustment of the patent term.²¹⁵

Given this and the above-mentioned American positions, it is difficult to escape the conclusion that the United States was driven, indeed captured, by the interests of PhRMA, with little regard to effects of those positions on economic development or poverty alleviation. In contrast, generic producers showed flexibility to compromise. The Generic Pharmaceutical Association, the members of which include Impax Laboratories, Momenta Pharmaceuticals, Mylan Pharmaceuticals, Perrigo Pharmaceuticals, Teva Pharmaceuticals, supported a data exclusivity period of 7 years under United States law, but thought it premature to have any such period in the *TPP*.²¹⁶

After all, the resistance of nearly all *TPP* countries to data exclusivity reflected their domestic legal position: for them, the American proposal would be a significant change in their laws. Some of them afforded no regulatory data protection for biologics, others granted 5 years, and still others gave 8 years.²¹⁷ In November 2013, the United States suggested it might accept a tailored approach, allowing for differences across *TPP* countries.²¹⁸ More flexibility could be allowed poorer countries, but less for richer ones, as America had agreed in its FTAs with Peru and Korea, respectively. So, that month, negotiators announced they agreed four countries – Brunei, Chile, Peru, and Vietnam – could have an exemption from the *TPP* Chapter on IP, specifically, the provisions mandating enhanced protection for pharmaceuticals.²¹⁹ These diverse countries would be treated as developing, and not have to provide extended patent protection for human or veterinary medicine, or for biologics.

In December 2013, WikiLeaks published two further *TPP* documents showing unpopular American positions on IP issues.²²⁰ The United States insisted on a Transparency Annex on Medicines, in the context of the *TPP* Transparency Chapter. It sought to permit pharmaceutical companies to challenge a *TPP* government for subsidizing medicines and

²¹⁵ *Id.*

²¹⁶ See Len Bracken, 'TPP Chief Negotiators, Key Experts Gather In Salt Lake City to Advance Negotiations', 30 *International Trade Reporter* (BNA) 1816 (21 November 2013).

²¹⁷ See Len Bracken, 'Hatch Says TPP with Committed Partners Better Than Deal Weak on IPR, Data Flows', 30 *International Trade Reporter* (BNA) 1869 (5 December 2013).

²¹⁸ See Len Bracken, 'U.S. Discussing Tailored Approach to IPR for Medicines in Trans-Pacific Partnership', 30 *International Trade Reporter* (BNA) 1896 (5 December 2013).

²¹⁹ See Maja Wallengren, 'TPP Partners Agree to Exempt Four Countries From Extended IP Pharmaceutical Provisions', 30 *International Trade Reporter* (BNA) 1738 (7 November 2013).

²²⁰ See Brian Flood, 'Leaked TPP Documents Show Fault Lines Underlying Singapore Ministerial Meeting', 30 *International Trade Reporter* (BNA) 1943 (12 December 2013).

medical devices. Whether that was the same proposal the United States had made in 2011 was unclear, but Australia and Japan backed the Annex idea. The United States also favoured a tax on medicine pricing boards.

6.5. Trade Secrets and Criminal Liability

Should a thief of a trade secret face criminal liability? The United States Chamber of Commerce thought so, and urged *TPP* include such a provision.²²¹ The Chamber argued (in August 2013) innovation and protection of trade secrets are intimately related. It said a trade secret is ‘property’, and as such should be governed by laws on theft.

Such property is stolen to help the thief differentiate its product or price, or improve the efficiency of its supply chain. Sometimes, the thief is an employee of one country, who simply purloins the secret, joins another company, and shares it with that second company. Air Canada, Deutsche Bank, and DuPont have been among the many victims.²²² (In the Air Canada case, the employee gave its trade secrets to WestJet, which then protected the employee from liability.) That trade secret theft was increasing in the Asia-Pacific region, despite the existence of civil penalties in many *TPP* countries, was proof criminal liability was needed as a deterrence.

6.6. March 2014 UNITAID Critique of American *TRIPs* Plus Proposals

In April 2014, UNITAID published a stinging critique of American *TPP TRIPs* Plus proposals.²²³ Examining the leaked November 2013 text posted on Wikileaks, UNITAID claimed those proposals would:

- (1) Reduce standards of patentability (*e.g.*, by allowing evergreening).
- (2) Limit exclusions from patentability (also by permitting evergreening).
- (3) Weaken disclosure requirements.
- (4) Eliminate the ability to oppose a patent prior to the granting of that patent (*i.e.*, prohibit pre-grant opposition, which is a safeguard).
- (5) Impede (via trademark rules) the ability of generic producers to make and sell medicines by circumscribing their ability to use names, colours, or shapes that are similar to those used by the producer of the original patented medicine.
- (6) Impede civil prosecutions in patent cases, and civil and criminal prosecutions in trademark cases, because of rebuttable presumptions that a patent or trademark is valid, and because of limits on defences raised in infringement cases.

²²¹ See Len Bracken, ‘U.S. Chamber Seeks Trade Secrets Clauses in TPP, Pinpoints Other Policy Preferences’, 30 *International Trade Reporter* (BNA) 1364 (5 September 2013).

²²² *Id.*

²²³ See UNITAID, ‘The Trans-Pacific Partnership Agreement: Implications for Access to Medicines and Public Health’, March 2014, *posted at* www.unitaid.eu/images/marketdynamics/publications/TPPA-Report_Final.pdf; ‘UNITAID Concerned That TPP Negotiations Undermine Public Health Goals’, 13 November 2013, *posted at* www.unitaid.eu/en/resources/press-centre/statements/1289-unitaid-concerned-that-tpp-negotiations-undermine-public-health-goals; Daniel Pruzin, ‘Study Claims U.S. IP Proposals for TPP Could “Seriously Hamper” Medicine Access’, 31 *International Trade Reporter* (BNA) 670 (10 April 2014).

Overall, the rules the United States advocated for *TPP* would ‘delay generic market entry and competition’.

To be sure, UNITAID had a bias counter to that of American pharmaceutical producers. Based at the World Health Organization (WHO), it is a facility established in 2006 by the Brazilian, British, Chilean, French, and Norwegian governments to purchase pharmaceuticals. It buys medicines to treat HIV-AIDS, malaria, and tuberculosis in bulk so as to negotiate price reductions and then provide the medicines at low-cost to low-income countries. *TRIPs* Plus *TPP* rules would be orthogonal to the efforts to UNITAID to make medicines more available and affordable in poor countries. Manifestly, the UNITAID critique highlighted how sophisticated IP issues in the context of a major FTA had devolved to a simple zero sum game.

7. GOING YET FURTHER

7.1. ISDS Issues

Should the *TPP* have a Chapter, akin to *NAFTA* Chapter 19, which allows for a private foreign direct investor to take action directly a host government using an international arbitral mechanism? The United States and several other *TPP* negotiating countries thought an ISDS mechanism was a good idea.

They did not want investors from their countries to be subject to weak or corrupt domestic legal systems and institutions in host nations. They preferred tribunals administered by the International Center for Settlement of Investment Disputes (ICSID), which is an independent international institution in the World Bank Group created via the 1966 *Convention on the Settlement of Investment Disputes Between States and Nationals of other States*. Over 140 countries (as of July 2013) are *ICSID Convention* members.²²⁴ Notably, the United Nations Conference on Trade and Development (UNCTAD) reported in May 2013 that 70 percent of publicly available decisions from investor-state tribunals in 2012 favoured the investor against the host state. And, the number of cases increased by tenfold since 2000, from 50 to over 500.

Indeed, thanks to two documents published in December 2013 by WikiLeaks, the breathtaking scope of the American position, backed by Japan, was clear.²²⁵ These two countries proposed any ISDS mechanism cover all major contracts between a foreign investor and host state. That meant investment contracts in sectors like hydrocarbon exploration, mining, and public works would be subject to ISDS. The United States and Japan also wanted ISDS rules to override any choice of forum provision in a contract.

The WikiLeaks documents also showed substantial disagreements among *TPP* negotiators, despite almost ritualistic USTR proclamations of significant progress after each negotiating session. Indeed, Australia – publicly and adamantly – opposed the ISDS idea, partly

²²⁴ See Len Bracken, Group Points to Japanese Legal System in Opposing Investor-State Tribunals for TPP, 30 *International Trade Reporter* (BNA) 1059 (11 July 2013).

²²⁵ See Brian Flood, ‘Leaked TPP Documents Show Fault Lines Underlying Singapore Ministerial Meeting’, 30 *International Trade Reporter* (BNA) 1943 (12 December 2013).

because of a negative experience from a major case in its country.²²⁶ A leaked 2012 edition of the *TPP* Investment Chapter contained a footnote exempting it from the investor-state arbitration mechanism.²²⁷ Simply put, Australia saw the idea ‘as a threat to the government’s ability to stand up to multinationals.’²²⁸

Arguably, countries like Australia and Japan, with high-quality legal systems, should be exempt. Allowing disputes in which they are involved to proceed via international arbitration would undermine their legal systems and threaten their environmental, health, and public interest laws.

Australia was not alone in its concerns about the Investment Chapter.²²⁹ Several countries objected to application of ISDS procedures to certain sectors, particularly finance.²³⁰ Thus, the spectre of country exemptions and sectoral carve outs loomed. Canada pointed out a *TPP* ISDS mechanism might allow cigarette companies to sue to governments over anti-smoking regulations. And, NGOs concerned about the environmental effects of hydraulic fracturing (‘fracking’) feared oil companies might use the mechanism to sue governments over strict environmental rules.

In November 2013, the *TPP* parties agreed to negotiate over the possibility of including either or both of two kinds of dispute settlement mechanisms, and international arbitration. The former would be for FDI within a particular *TPP* country. The latter would be for trade and business disputes across borders between *TPP* parties. Interestingly, arbitration procedures and documents would be disclosed publicly, so ‘that each arbitration case may be viewed as precedential by other *TPP* members,’ thus the disclosure ‘would act as a restraining force against abuse by other members not involved in the arbitration’.²³¹

7.2. Labour Rights

A number of commentators argued certain countries, such as Vietnam, should not be included in *TPP* talks.²³² That was because they had poor, if not abysmal, records on labour, environmental, or human rights. Vietnam, in particular, had been cited by the United States Department of Labour in its annual report on child or forced labour. So, for example, the American Manufacturing Trade Action Coalition (AMTAC) said Vietnam should be excluded, because it could not maintain the ‘baseline political and moral commitments’ of the *TPP*.²³³

Other commentators, such as the American Apparel and Footwear Association (AAFA),

²²⁶ Rossella Brevetti, ‘Business Groups Tell TPP Negotiators Deal Being Discussed Still Falls Short’, 30 *International Trade Reporter* (BNA) 1490 (26 September 2013).

²²⁷ See Len Bracken, ‘Group Points to Japanese Legal System in Opposing Investor-State Tribunals for TPP’, 30 *International Trade Reporter* (BNA) 1059 (11 July 2013).

²²⁸ ‘Trade, Partnership, and Politics’, *The Economist*, 24 August 2013, at 40.

²²⁹ See David Pilling & Shawn Donnan, ‘Trans-Pacific Partnership: Ocean’s Twelve’, *Financial Times*, 23 September 2013, at 9.

²³⁰ See Rossella Brevetti, ‘Business Groups Tell TPP Negotiators Deal Being Discussed Still Falls Short’, 30 *International Trade Reporter* (BNA) 1490 (26 September 2013).

²³¹ Toshio Aritake, ‘Members Agree to Introduce Mechanisms For Arbitration, Investor-State Disputes’, 30 *International Trade Reporter* (BNA) 1779 (14 November 2013).

²³² See Amy Tsui, ‘Textile Groups Spar over Vietnam’s Inclusion in TPP Ahead of Auckland Negotiating Round’, 29 *International Trade Reporter* (BNA) 1691 (25 October 2012).

²³³ *Id.*

disagreed.²³⁴ They argued the best way to improve labour conditions in Vietnam was to engage that country constructively. Rather than push them into better labour laws by ostracizing them – a technique that might flop – why not pull them up by including them in *TPP*? Of course, it was likely the Association had members that wanted duty free access to the American market for goods made in their production facilities in Vietnam.

7.3. Environmental Protection

At the 19th round in Brunei in August 2013, the USTR declared that increased trade from *TPP* ‘is not likely to result in *significant* adverse environmental impacts in the U.S.’²³⁵ In its *Interim Environmental Review*, the USTR acknowledged risks from:

- (1) ‘incremental increases’ in pollution owing to greater trade traffic at important ports like Los Angeles and Long Beach,
- (2) invasive species (e.g. carried by commercial marine vessels and spread by ballast water discharges and hull fouling, and made worse by an increased volume of trade brought on by *TPP*), and
- (3) higher domestic production of environmentally unfriendly items like liquefied natural gas (LNG), using environmentally unfriendly methods like hydraulic fracturing, with a view to exportation.²³⁶

But overall, it said ‘the likelihood and magnitude of any increased risks resulting from the proposed *TPP* agreement, while difficult to quantify, appear to be *small*.’²³⁷ In turn, the USTR asserted risks to wildlife and endangered species, and to ecosystems, from increased trade associated with liberalized rules under a *TPP*, were inconsequential.

These statements were susceptible to two critiques. First, what did the USTR mean by ‘significant’ and ‘small’? That adjective made all the difference in whether *TPP* damages the American environment. Second, why was the USTR concerned only about environmental effects in America? A global power, the United States, has global interests: environmental degradation generated by increased trade flows anywhere ought to be of concern to the United States, all the more so given that pollution, like goods, services, and intellectual property, flows across boundaries.

Nonetheless, the United States insisted it would call for a strong Environmental Chapter

²³⁴ *Id.*

²³⁵ Quoted in Stephanie Cohen, ‘USTR Seeks Public Comments on Interim Environmental Report’, 30 *International Trade Reporter* (BNA) 1371 (5 September 2013). The statement was made in connection with seeking public comments on the USTR Interim Review of the Trans-Pacific Partnership (TPP) Agreement. Under the *United States Trade Act of 2002*, the President must conduct an environmental review of certain trade deals, and report the results to the Senate Committee on Finance, and the House Committee on Ways and Means. See *id.*

²³⁶ Stephanie Cohen, ‘USTR Seeks Public Comments on Interim Environmental Report’, 30 *International Trade Reporter* (BNA) 1371 (5 September 2013). Note LNG production is regulated under the *Natural Gas Act of 1938* and various environmental laws, but in 2013 the United States began authorizing LNG exportation. Other TPP countries, such as Australia, Canada, and Malaysia, also are increasing production with a view to exportation. See *id.*

²³⁷ See Stephanie Cohen, ‘USTR Seeks Public Comments on Interim Environmental Report’, 30 *International Trade Reporter* (BNA) 1371 (5 September 2013).

in any *TPP* agreement.²³⁸ In fact, it urged a *TPP* could have positive environmental impacts by upgrading environmental laws and enforcement in other countries with a view to conserving natural resources and disseminating environmentally friendly technologies and services. So, said the United States, the Chapter ought to include:

- (1) An obligation to put into national laws a ban on trading across *TPP* borders products that have been illegally obtained. That is, the United States sought to see implemented into the laws of *TPP* countries a bar trade in illegally harvested timber (which threatens biodiversity and exacerbates deforestation), illegally taken wildlife (such as live tiger cubs, tiger parts and rhino horns), plus rules on fisheries management (to avoid circumscribe unregulated fishing, for example, shark finning, and thereby avoid more depletion of stocks so as to allow for their rejuvenation).²³⁹
- (2) An obligation to report and share information promptly on issues relating to anti-trafficking, including for law enforcement purposes.
- (3) A mechanism for cooperation among *TPP* regulatory and law enforcement authorities, such as working groups, exchanges of personnel, joint meetings and exercises, and regional networks.
- (4) Partnerships with NGOs, the private sector, and the scientific and local communities to address illegal trade in wildlife, and promote supply chain management innovations.

The United States noted that in all of its FTAs since the 10 May 2007 *Bipartisan Trade Deal (BTD)*, it has included reference to seven major multilateral environmental agreements (MEAs). And, it insisted *TPP* ‘environmental provisions be legally binding’.²⁴⁰

The American insistence met with scepticism from Malaysia, Singapore, and Vietnam, which were dubious about inclusion of environmental or labour provisions in a *TPP* agreement.²⁴¹ Even Australia and New Zealand, which boast strong conservation regimes, questioned whether provisions in a *TPP* Environmental Chapter should be binding. As for inclusion of MEAs by reference in *TPP*, as of January 2014, only Malaysia supported the United States: Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, and Vietnam all opposed the American position on MEAs.²⁴² That was true even though all *TPP* countries had signed at least one of those MEAs listed in the *BTD*, namely, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, which is designed to prevent poaching of at-risk animals and trafficking in their parts, such as rhinos and their horns.

²³⁸ See Len Bracken, ‘U.S. Pushing for Strong Environment Text in Trans-Pacific Partnership Negotiations’, 30 *International Trade Reporter* (BNA) 579 (18 April 2013).

²³⁹ See James Politi, ‘U.S. Strives to Win Over Green Campaigners in TPP Discussions’, *Financial Times*, 22 November 2013, at 3.

²⁴⁰ Len Bracken, ‘U.S. Tobacco Offer Seeks to “Make Explicit” Right to Regulate, Prevent Trade Disputes’, 30 *International Trade Reporter* (BNA) 1369 (5 September 2013).

²⁴¹ See ‘Trans-Pacific Partnership to Focus on IP, Competition, Environment Texts, USTR Says’, 30 *International Trade Reporter* (BNA) 398 (21 March 2013).

²⁴² See Len Bracken, ‘Groups Flag Lack of Enforceability in Leaked TPP Environmental Chapter’, 31 *International Trade Reporter* (BNA) 168 (23 January 2014).

Scepticism also came from environmental NGOs.²⁴³ In its October 2013 comments to the USTR Interim Environmental Review, Oceana, a non-profit dedicated to marine conservation, called on the USTR to include special provisions in a *TPP* to protect marine wildlife. In particular, fishing subsidies should be limited, illegal, unreported, and unregulated fishing should be subject to penalties, and at-risk creatures like sharks should be conserved. All such measures would help combat over-exploitation of the oceans. Oceana pointed out 8 of the *TPP* negotiating countries were in the top 20 marine fishing nations (measured by individual percentages of the annual catch), and all *TPP* countries accounted for 36 percent of the global catch. So, some disciplines, particularly on the \$16 billion in annual fishing subsidies spent by the *TPP* countries, were needed.

Moreover, said Oceana, climate change emissions from shipping goods within the *TPP* should be reduced.²⁴⁴ Oceana said emissions could be cut in one of two ways: operating rules for vessels, like slower speeds (to cut fuel consumption), and rules on carbon dioxide emissions, such as indexing performance standards to those emissions.

The scepticism from NGOs appeared well founded. On 15 January 2014, a copy of the consolidated text of the *TPP* Environmental Chapter, along with a Report from the Chairs, both dated 24 November 2013 appeared on WikiLeaks.²⁴⁵ The Sierra Club and World Wildlife Fund (WWF) argued the United States had not adhered to the *BTB* pledges. They said the language was vague and unenforceable, with no binding obligations to protect animals, fish, forests, or the climate. Michael Brune, Executive Director of the Sierra Club, said:

This draft Chapter falls flat on every single one of our issues – oceans, fish, wildlife, and forest protections – and in fact rolls back on the progress made in past free trade pacts.²⁴⁶

That was for good reason. The draft Chapter was unclear as to how *TPP* countries would adhere to multilateral environmental obligations, because it simply did not mention any of the seven major MEAs that were explicitly listed in previous United States FTAs. The leaked document also omitted mention of punishments for breaches of environmental obligations. The USTR reacted with a blog post saying it intended to follow through on its insistence of enforceability.²⁴⁷

7.4. Special Mention of Tobacco?

TPP contains a general exception provision akin to GATT Article XX. One such exception

²⁴³ See Stephanie Cohen, 'Groups Press USTR To Add Climate Change, Marine Conservation Provisions to Agreement', 30 *International Trade Reporter* (BNA) 1565 (10 October 2013). Other NGOs raising concerns similar to those of Oceana were the Humane Society International (HSI) and Wildlife Conservation Society. See *id.*

²⁴⁴ *Id.*

²⁴⁵ See Len Bracken, 'Groups Flag Lack of Enforceability in Leaked TPP Environmental Chapter', 31 *International Trade Reporter* (BNA) 168 (23 January 2014).

²⁴⁶ Quoted in Shawn Donnan, 'Greens Fear U.S. U-Turn on Trade Deal Vows', *Financial Times*, 16 January 2014, at 3.

²⁴⁷ See Len Bracken, 'Groups Flag Lack of Enforceability in Leaked TPP Environmental Chapter', 31 *International Trade Reporter* (BNA) 168 (23 January 2014).

Subsequently, the USTR cites *TPP* as an opportunity to implement the United States National Strategy for Combatting Wildlife Trafficking. See 'USTR Froman Cites *TPP* as Supporting Strategy to Combat Wildlife Trafficking', 31 *International Trade Reporter* (BNA) 365 (20 February 2014).

authorizes protection against merchandise if that protection is necessary to protect human life or health. At the 19th round in Brunei in August 2013, the United States proposed supplementing this exception with specific language for tobacco health measures. That is, in its ‘Elements of Revised Tobacco Proposal’, America advocated language in the general exception provision to make explicit the provision allows a *TPP* country to adopt a health measure against tobacco.²⁴⁸ With such language, there would be no doubt a country could regulate tobacco, and not face legal challenge.²⁴⁹ If a dispute arose over a measure, then public health officials in the disputing countries would have to engage in non-binding consultations before any formal challenge to the measure.

The United States justified the proposal, which reflected a policy change from treating all agricultural products equally, ‘because tobacco is a unique product – it is highly addictive, always harmful to human health, and the single most preventable cause of death in the world.’²⁵⁰ Never mind the fact the United States did not couple this proposal with a special market access provision on tobacco, such as one specifically authorizing *TPP* countries to ban its importation entirely. (The United States feared discrimination against American farmers, hence the need to press for tariff elimination on all farm product exports.) It would have been philosophically consistent to do both: press for an import ban, and allow necessary health measures, in respect of tobacco. Alas, at least America seemed to be earnest about its general exception proposal. The proposal came with a special consultative mechanism for health regulators: they would meet to exchange views on new regulations, and anticipate disputes before they arise.²⁵¹

But, the American proposal met with opposition from both business and civil society.²⁵² On the free trade side, 16 business and agricultural organizations in the United States opposed any product-specific reference in the *TPP* general exception provision. They argued the provision already encompasses tobacco, by virtue of its broad language. Trying to qualify or clarify the provision by mentioning a particular product may complicate matters, lead to unforeseen adverse repercussions, and undermine the long-standing American trade policy that restrictions on importation for health purposes be based on sound scientific evidence. These groups represented Corporate America via the Emergency Committee for American Trade (ECAT). Agreeing with ECAT were the American Farm Bureau, American Meat Institute, Biotechnology Industry Organization, Council of the Americas, Distilled Spirits Council of the U.S., Inc., Grocery Manufacturers Association, National Association of Manufacturers, National Foreign Trade Council, National Pork Producers Council, National Oilseed Processors Association, National Turkey Federation, North American Export Grain

²⁴⁸ See Brian Flood, ‘State Attorneys General Ask USTR To Exempt Tobacco from TPP Talks’, 31 *International Trade Reporter* (BNA) 227 (30 January 2014).

²⁴⁹ See Len Bracken, ‘U.S. Tobacco Offer Seeks to “Make Explicit” Right to Regulate, Prevent Trade Disputes’, 30 *International Trade Reporter* (BNA) 1369 (5 September 2013).

²⁵⁰ Len Bracken, ‘USTR Unveils Tobacco Regulation Proposal for TPP; Industry, NGOs Oppose Provisions’, 30 *International Trade Reporter* (BNA) 1368 (5 September 2013) (quoting Bill Corr, United States Deputy Secretary, Department of Health and Human Services).

²⁵¹ See Len Bracken, ‘U.S. Tobacco Offer Seeks to “Make Explicit” Right to Regulate, Prevent Trade Disputes’, 30 *International Trade Reporter* (BNA) 1369 (5 September 2013).

²⁵² See Len Bracken, ‘USTR Unveils Tobacco Regulation Proposal for TPP; Industry, NGOs Oppose Provisions’, 30 *International Trade Reporter* (BNA) 1368 (5 September 2013).

Association, U.S. – ASEAN Business Council, U.S. Chamber of Commerce, and United States Council for International Business.

Fair trade groups in civil society reached the same result, but for radically different reasons. They argued GATT Article XX is a weak provision, and almost never in the annals of GATT-WTO jurisprudence is it successful as a defence by an importing country to justify its trade-restrictive measure. In brief, a general exception to justify tobacco regulation is parlous. So, what these groups preferred was a stronger safe harbour to allow *TPP* countries time and policy space to develop tough measures against tobacco importation. They also said tobacco companies should not have easy recourse to the ISDS mechanism to challenge the tobacco control policies of a host country.

In January 2014, the National Association of Attorneys General wrote to the USTR, Ambassador Michael Froman, calling for America to back a proposal like one offered by Malaysia: exempt tobacco entirely from any *TPP*.²⁵³ Forty-five state Attorney Generals (AGs) signed the letter, in which they stated the August 2013 ‘Elements of Revised Tobacco Proposal’:

fails to recognize the unique status of tobacco as a harmful product; would not eliminate the need for arbitration to determine whether a [regulatory] measure falls within the exception; and in any event would apparently apply only to the *TPP* trade provisions and thus would have no impact on investor-state arbitration that the tobacco industry uses as a tool to challenge and stymie legitimate measures that countries (including their federal, state, and local governments) adopt to reduce tobacco use.²⁵⁴

The AGs were interested in the matter because, in addition to federal regulation of tobacco, states also restrict the product. For example, they impose rules about consumer ages, fire safety, indoor smoking, licensing, marketing and retail displays, minimum prices, and taxation. Their regulations help protect citizens in their states from tobacco-related diseases, and thus reduce state health care expenditures. The AGs feared tobacco companies could challenge their rules under *TPP*, possibly directly using the ISDS mechanism, or indirectly by pushing a country to bring a case.

7.5. Currency Manipulation

No American trade agreement contains provisions on currency manipulation. But, should provisions on ‘currency manipulation’, however that term is defined, be included in a *TPP*? The Canadian Minister of International Trade, Ed Fast, thought ‘no’. Currency manipulation is a

²⁵³ See Letter to Ambassador Michael Froman, Office of the United States Trade Representative, from National Association of Attorneys General, 29 January 2014, posted at www.atg.state.vt.us/news/attorneys-general-call-on-trade-representative-to-preserve-tobacco-regulation.php; Brian Flood, ‘State Attorneys General Ask USTR To Exempt Tobacco from TPP Talks’, 31 *International Trade Reporter* (BNA) 227 (30 January 2014).

²⁵⁴ Quoted in Brian Flood, ‘State Attorneys General Ask USTR To Exempt Tobacco from TPP Talks’, 31 *International Trade Reporter* (BNA) 227 (30 January 2014).

macroeconomic matter best dealt with outside a trade negotiation.²⁵⁵ Likewise, the President of the United States Chamber of Commerce, Thomas Donahue, thought currency manipulation is too complicated a challenge for inclusion in a *TPP*.²⁵⁶

Their views did not mirror those in Congress. A bipartisan group of 230 members of the House of Representatives thought ‘yes’, lending their opinion, via a 6 June 2013 letter, to President Barack H. Obama in June 2013.²⁵⁷ They dubbed ‘currency manipulation’ and ‘unfair trade practice’, and highlighted the link between the American trade deficit, caused in part by undervalued foreign currencies relative to the dollar, on the one hand, and American job loss, on the other hand. Undervaluation boosts foreign exports to the United States, yet impedes American exports to foreign destinations. The Congressional Representatives cited think-tank research that one million American jobs had been lost, and sent overseas, because of currency manipulation.²⁵⁸

The letter from Capitol Hill was followed by advocacy from labour unions.²⁵⁹ Their officials testified to the United States International Trade Commission (ITC) on 11 June that exchange rate manipulation was among their chief concerns about the *TPP*. The unions were unified, and included the American Federation of Labour and Congress of Industrial Organization (AFL-CIO), and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). They pointed out direct intervention by the Bank of Japan (BOJ) in foreign exchange (FX) markets had caused a 23 percent drop in the value of the *yen* relative to the dollar, thus allowing the BOJ to accumulate vast foreign reserves and giving Japanese auto producers an unfair price advantage in exportation. They argued currency manipulation is a subsidy that potentially wipes out quickly any market access gain from cuts to tariff or non-tariff hurdles.

So, urged the AFL-CIO and UAW, the *TPP* should have a mechanism to countervail it.²⁶⁰ One possibility would include a tariff ‘snap back’ remedy, whereby currency manipulation would trigger an increase in duty rates back to pre-*TPP* levels. If that manipulation occurred prior to expected *TPP* tariff cuts, then the snap back would be extended for a period equal to the duration of manipulation. Another possibility was to put into the *TPP* anti-manipulation rules proposed in Congress, such as the *Currency Exchange Rate Oversight Reform Act of 2013*. This legislation (Senate Bill 1114) would, if enacted, allow the United States to use its trade remedies to help American manufacturers injured by currency manipulation.

²⁵⁵ See Rossella Brevetti & Peter Menyas, ‘Canada’s Fast Says Currency Issues Should Be Handled outside Trade Talks’, 30 *International Trade Reporter* (BNA) 1531 (3 October 2013).

²⁵⁶ See Yuriko Nagano, ‘Address Currency Manipulation Outside TPP, U.S. Chamber CEO Says in Tokyo Appearance’, 30 *International Trade Reporter* 1531 (3 October 2013).

²⁵⁷ See Len Bracken, ‘Majority of House Lawmakers Urge Obama to Include Currency Manipulation in TPP’, 30 *International Trade Reporter* (BNA) 901 (13 June 2013).

²⁵⁸ That research was published by the Peterson Institute for International Economics in Washington, D.C. See Len Bracken, ‘Majority of House Lawmakers Urge Obama to Include Currency Manipulation in TPP’, 30 *International Trade Reporter* (BNA) 901 (13 June 2013).

²⁵⁹ See Len Bracken, ‘Administration in Consultations With Hill, Stakeholders on Currency in Trade Pacts’, 30 *International Trade Reporter* (BNA) 1818 (21 November 2013); Len Bracken, ‘Labour Cites Exchange Rate Manipulation at ITC Hearing on Japan Joining TPP Talks’, 30 *International Trade Reporter* (BNA) 899 (13 June 2013).

²⁶⁰ See Len Bracken, ‘Labour Cites Exchange Rate Manipulation at ITC Hearing on Japan Joining TPP Talks’, 30 *International Trade Reporter* (BNA) 899 (13 June 2013).

In September 2013, 60 Senators issued another letter demanding currency manipulation be addressed in *TPP* talks.²⁶¹ Their letter, to United States Treasury Secretary Jack Lew, and USTR Michael Froman, reiterated the same arguments made by the House and labour unions: there was no level playing field without a market determined exchange rate, and eliminating trade barriers via *TPP* was pointless if countries effectively re-impose those duties by undervaluing their currencies. What was noteworthy about the Senate letter was its explicit link to an empirical study about job losses. The letter cited a study by the Peterson Institute for International Economics estimating that foreign currency manipulation had cost between 1 and 5 million American jobs. Feeling their concerns remained unaddressed, as the USTR had yet to propose any currency disciplines in *TPP* talks, in January 2014, Senators Debbie Stabenow (Democrat-Michigan) and Lindsey Graham (Republican-South Carolina) repeated their concerns in a letter to President Barack H. Obama.²⁶²

Not to be left out among the pro-inclusion forces, Ford Motor Company announced it would oppose *TPP* if the deal failed to cover currency issues. Said Joe Hinrichs, President of Ford for the Americas, at a February 2014 speech at the Chicago Auto Show: *TPP* 'is not likely to generate any net benefits for American manufacturers if it does not address the critical issue of currency manipulation.'²⁶³

For advocates favouring *TPP* provisions on currency manipulation, a corollary question was what those provisions should state. Should they embody guidelines established by the International Monetary Fund (IMF) on currency manipulation? Advocates of coverage of the topic in the *TPP* said 'yes'.²⁶⁴ They explained these guidelines define 'currency manipulation', and the *TPP* could include the definition and supplement it with an enforcement mechanism against undervaluation.²⁶⁵

7.6. Relationship to Extant FTAs

A critical, unanswered question about *TPP* is whether and how it would relate to a country's existing FTAs.²⁶⁶ How would rights and duties under *TPP* affect the provisions of those FTAs?²⁶⁷ Various anomalies could arise between any extant FTA and a *TPP*, such as those the

²⁶¹ See Rossella Brevetti, 'Senators Say Currency Manipulation Should Be Addressed in TPP Negotiations', 30 *International Trade Reporter* (BNA) 1464 (26 September 2013).

²⁶² See Rossella Brevetti, 'Sens. Stabenow, Graham Reiterate Concerns on Currency Manipulation', 31 *International Trade Reporter* (BNA) 98 (16 January 2014).

²⁶³ Quoted in Rossella Brevetti & Mark Clothier, 'Sen. Brown Welcomes Ford Remarks On TPP and Currency Manipulation', 31 *International Trade Reporter* (BNA) 294 (13 February 2014).

²⁶⁴ See Rossella Brevetti, 'Senators Say Currency Manipulation Should Be Addressed in TPP Negotiations', 30 *International Trade Reporter* (BNA) 1464 (26 September 2013) (discussing the views of Representative Sander Levin (Democrat-Michigan)).

²⁶⁵ See Rossella Brevetti, 'IMF Guidelines on Currency Manipulation Should Be Part of TPP, Trade Counsel Says', 30 *International Trade Reporter* (BNA) 1489 (26 September 2013).

²⁶⁶ See Rossella Brevetti, 'Business Groups Tell TPP Negotiators Deal Being Discussed Still Falls Short', 30 *International Trade Reporter* (BNA) 1490 (26 September 2013).

²⁶⁷ Conversely, *TPP* ought to be straightforward with respect to countries not bound by an FTA with the United States or other *TPP* country. But for the opposition of New Zealand under the former Labour government of Prime Minister Helen Clark to the Iraq War resolution in early 2003 in the United Nations Security Council, it might well have signed an FTA with New Zealand, too. The United States-Australia FTA was drafted to allow for the possibility of New Zealand 'docking on' to it. The United States and Vietnam have a bilateral accession agreement as part of Vietnam's entry into the WTO in 2007. As for Brunei, it has no significant agricultural sector. All these points indicate a *TPP* may be reasonably easy to negotiate successfully, with a suitable docking on provision.

United States has (*inter alia*) with Australia, Canada, Chile, Korea, Mexico, Peru, and Singapore. For instance, the *Australia FTA* contains no ISDS mechanism, as both agreed to leave matters to local law and courts. Australia objected to inclusion of such a mechanism in a *TPP*.²⁶⁸ But, if it were added, then how might it relate to the *FTA*?

Consider the problem of a market access schedule, or schedules. Ideally, the *TPP* would yield a single market access schedule. That is, the different existing FTA market access schedules, which contain different tariff rates and exemptions depending on the FTA and product, would be replaced by, or subsumed into, a single schedule.²⁶⁹

Still another matter is that of upgrading. Might *TPP* lead to positive amendments of existing FTAs? In respect of the *NAFTA*, in May 2013, Mexico made clear it would review all 29 *TPP* Chapters, if and when the *TPP* is concluded, to determine how *NAFTA* might be upgraded. For instance (as discussed earlier), an RRM that might address SPS and TBT disputes under the *TPP* could be added to *NAFTA*.²⁷⁰ Under an RRM, importers and exporters would receive immediate, detailed notifications about risk detections assessments, and management measures, and neutral experts would provide an expedited review of their merchandise to prevent spoilage. The RRM would include a dispute settlement mechanism. Interestingly, an RRM in the *TPP* or *NAFTA* would be a WTO Plus discipline.

With respect to IP protection on issues not covered by *NAFTA*, or where *NAFTA* provisions were insufficient, such as online copyright piracy and data exclusivity in respect of research for patented pharmaceuticals, *TPP* was an opportunity to upgrade *NAFTA*.²⁷¹ Thus, again in January 2014, Mexico welcomed the opportunity *TPP* presented to modernize *NAFTA*.²⁷²

Of course, *NAFTA* was not the only candidate for updating. In contrast with *KORUS*, *TPP* contained more ambitious disciplines on SOEs and the environment, and new rules on SMEs, and supply chains, in *TPP*.²⁷³ Hence, certain provisions in *KORUS* may need revisiting.

8. PRELIMINARY THEMES

TPP could be the most economically and politically significant FTA in the Asia-Pacific region. Conceived in 2006 by just four small countries, it now embraces 12 that account for 40 percent of global GDP. It looks to be a 21st century accord in terms of the breadth and depth of trade barriers it identifies and disciplines.

²⁶⁸ See Lucien Chauvin, 'Stakeholders Focus on IPR, Investment at Trans-Pacific Partnership Talks in Peru', 30 *International Trade Reporter* (BNA) 739 (23 May 2013).

²⁶⁹ See Amy Tsui, 'Single Market Access Schedule to Result from Multiple Separate Negotiations in TPP', 29 *International Trade Reporter* (BNA) 1342 (16 August 2012).

²⁷⁰ See Len Bracken, 'Mexican Official Foresees Review of TPP As Element in Process of Upgrading NAFTA', 30 *International Trade Reporter* (BNA) 848 (6 June 2013).

²⁷¹ See Brian Flood, 'Chamber of Commerce Tells Congress NAFTA IP Protections Are Too Lenient', 31 *International Trade Reporter* (BNA) 178 (23 January 2014).

²⁷² See Maja Wallengren, 'TPP Will Help Modernize NAFTA, Mexico's Economy Minister Says', 31 *International Trade Reporter* (BNA) 179 (23 January 2014).

²⁷³ See Len Bracken, 'U.S. Consultations With Korea on TPP To Be on Two Tracks, USTR Official Says', 30 *International Trade Reporter* (BNA) 1984 (19 December 2013).

But, with plenty of likely exceptions, *TPP* appears to fall short of a ‘free’ trade accord in the Neo-Classical Economic sense. It seems to manage trade in sensitive sectors. Worse yet, negotiated in an almost shamefully non-transparent manner, *TPP* may well advance an American corporate agenda, with insufficient regard to the most pressing matter in the Asia-Pacific region: poverty alleviation.