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The Trans-Pacific Partnership and the Management of Globalization

On October 5, 2015, the trade ministers of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam agreed to the "Trans-Pacific Partnership" agreement (TPP) (see **Exhibit 1**). All 12 of these countries were members of a talking shop for leaders called APEC, which stood for Asia-Pacific Economic Cooperation. APEC counted 21 members in 2015, including China and Russia. The TPP negotiations themselves were, to some extent, an offshoot of a conversation at the 2002 APEC meeting among three of the participants, namely the President of Chile and the Prime Ministers of New Zealand and Singapore. These conversations led these countries to sign a comprehensive trade agreement that also included Brunei in 2005. Australia, Peru and the United States started negotiating the actual TPP with this group in 2008. The other TPP signatories joined the negotiations later.[1]

The TPP would enter into force after it was ratified by at least 6 countries with a combined 2013 GDP equal to at least 85% of the signatories total 2013 GDP (see **Exhibit 4**). One of the biggest questions looming over the TPP was whether the US Congress would ratify the arrangement. Because Congress had given "fast-track authority" to President Barack Obama in June 2015, Congress could not vote on amendments; it had to vote either for or against the agreement as it stood. Fast-track authority had been hard fought, however, passing only 218-208 in the House (with 28 of 188 Democrats in support).[2]

TPP was an ambitious deal, it covered a number of policy areas including trade, international investment, intellectual property, and even labor standards. In defending such a comprehensive agreement, Obama emphasized that "we should not let China write the rules of the global economy. We should write those rules." The creation of formal international rules in these domains was a recent phenomenon; historically, policy in these areas had been determined unilaterally by nation states. In deciding whether the TPP was a good idea, some historical background seemed essential.[3]

Trade and International Investment before World War II

Edward III (1312-1377), was one of the first rulers to use trade policy to encourage economic development. England had long been a purveyor of raw wool to Flanders, where it was manufactured into cloth. To foster a textile industry in England, Edward III encouraged Flanders weavers to come to England, imposed a very large tax on the export of raw wool and discouraged the import of woolen cloth. Similarly, the UK's response to rising cotton imports from India and China in the late 17th century

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was to raise tariffs and ultimately prohibit these imports. This protected cotton manufacturing in England and may have helped foster the Industrial Revolution.[4]

In 1817, however, David Ricardo penned the most famous argument suggesting that free trade is beneficial to all nations - even those whose productivity is lower in every sector. In his mathematical model, countries with lower productivity in every sector would have lower wages to assure full employment. As a result, they would be able to export the good in which their productivity was *relatively* higher. This would benefit them because it would allow them to purchase those goods in which their productivity was relatively lower at prices below those that would prevail in the absence of free trade.

Britain did lower tariffs in the 19th century, particularly after 1840. The U.S, by contrast, raised tariffs significantly in this period with the dual aim of collecting government revenue and fostering domestic manufacturing.

The 19th century also saw the spread of the "gold standard," where governments promised to exchange their own currency for a fixed quantity of gold. Before World War I, 36 countries spent time on the gold standard. These included TPP members Canada, Chile, Japan, Mexico, and the United States. Under this free convertibility, countries using the gold standard had somewhat lower interest rates. At the same time, there were massive flows of foreign investment, including English investments in US railroads.[5]

Reactions to the slowdown in economic activity after 1929 were not favorable to the free flow of goods and capital. Several countries, including the US, raised tariffs substantially in the hopes of either strengthening their own economy or maintain their international reserves. Some countries devalued; several imposed limits on capital outflows. In part to remedy these problems, the US and the UK took the lead in creating new international institutions after World War II. The IMF, for example, was created to extend credit to countries that found themselves losing reserves. One of the IMF's goals was to prevent competitive devaluations and its members bound themselves not to "manipulate exchange rates … to gain an unfair advantage over other members."[6]

The GATT process

In 1947, a group of 23 countries that included both developed and developing countries such as China, India, and Syria negotiated reductions in trade barriers through the GATT (General Agreement on Tariffs and Trade) process. At base, GATT negotiation involved bilateral negotiations among member countries: countries agreed to lower their own tariffs in exchange for tariff reductions in the country they were they were negotiating with. Once these bilateral negotiations were over, countries were free to set tariffs for GATT members at any rate lower than the lowest bilateral rate to which they had agreed. A key ingredient in GATT, the "Most Favored Nation" (MFN) principle, ensured that all members exporting a particular good to a particular country would face the same tariff. GATT largely forbade "quantitative restrictions" such as quotas, in which countries set a limit to the quantity of a particular good they were willing to import. In addition, the original GATT frowned upon other trade distorting measures such as export subsidies.

Over time, the number of members increased: there were 162 members as of the end of 2015. Also, new "rounds" of GATT talks led to revised agreements, and often a lowering of tariffs. MFN, on the other hand, became subject to an important exception: countries joining in a "free trade area" (FTA) did not have to extend the privilege of zero tariffs to other GATT members.

As of 2015, the last completed round of GATT negotiations was the Uruguay round, which extended from 1986 to 1994. The Uruguay round was remarkably comprehensive, covering such difficult topics as agriculture, intellectual property, textiles, phytosanitary measures, and dispute resolution. Phytosanitary measures were included to prevent a country from arbitrarily declaring that certain imports posed health risks. Indeed, countries were only allowed to exclude imports on health grounds on the basis of scientific evidence.

The intellectual property component of the Uruguay round was embodied in TRIPS (Trade Related aspects of Intellectual Property Rights). In this agreement, all members agreed to grant patents for inventions that would stay in force for 20 years after the patent application was filed. This was meant to curb the rampant copying of drugs in countries that issued no patents for them. According to economics Nobel Laureate's Joseph Stiglitz, TRIPS "signed a death warrant for millions of people by making access to generic drugs more difficult."[7]

Patent protection in TRIPS had limitations, however. First, members were "allowed to exclude [inventions] from patentability" to protect "ordre public …, including to protect human, animal or plant life or health." This right of members seems to have been mostly unused. Second, members were allowed to issue "compulsory licenses." without the approval of the patent-holder in cases of "national emergencies." Compulsory licenses were not in fact common. Still, the right to issue them was used by South Africa in 2003, Thailand in 2006, and Brazil in 2007 to ensure the supply of inexpensive locally-manufactured AIDS drugs.[8]

At the time, these moves were extremely controversial, and the US government criticized them heavily. After a 2001 anthrax scare, however, the US itself used the threat of issuing a compulsory license to get a lower price for Cipro from Bayer. Still, the US 2015 report on problematic trade practices singled out Indonesia for the lack transparency in its compulsory license policies (it had issue such licenses both for a hepatitis drug and for second line HIV drugs). It also expressed concern about statements made by Indian officials regarding compulsory licenses of green technologies. India had broken new ground by granting a compulsory license for Sorafenib, a drug used in the treatment of kidney and liver cancer.[9]

The most significant accomplishment of the Uruguay round may have been the creation of an organizational structure, the WTO. Aside from convening meetings of trade ministers whose purpose was to develop further international agreements, the WTO had a judicial role. Countries could bring complaints against other countries in response to perceived violations of the Uruguay round agreement. From the beginning of WTO operations until the end of 2015, 501 complaints had been brought. In response to a complaint, WTO officials chose the members of a dispute resolution panel. This panel was supposed to issue a report within a year of the complaint's initiation. Parties could appeal this ruling, and the WTO would then appoint an appellate panel, who was supposed to issue a judgment within three months.

Judgments either allowed or disallowed the practice that led to the complaint. In case the judgment favored the complainant but the responding party refused to change its practice, the WTO could allow the complainant to respond proportionately by departing from the Uruguay rules. For example, the complainant could impose additional tariffs on the goods coming from the country that had lost its case.

This system was sometimes fast. China complained in February 2011 that the US used a flawed method for determining whether dumping (selling below cost) had taken place in shrimp and diamond

sawblades. A year later, the WTO ruled against the US, and the U.S promised to change its method of calculation.[10]

Other disputes dragged on much longer. In 2002, Brazil complained that the US's complicated system of cotton subsidies was not consistent with the Agreement on Agriculture (AoA) that was part of the Uruguay round. A WTO panel sided with Brazil in 2004. This was followed by a long dispute regarding whether the US law had changed to be in compliance with this judgment. Meanwhile, Brazil argued it should be allowed to impose countermeasures that included non-payment for certain pieces of intellectual property. Brazil and the US finally settled in 2010, with the US agreeing to pay Brazil $173 million a year to discontinue its dispute. After the 2014 farm bill passed, Brazil accepted a final installment of $154 million. Left out of the deal were four African countries, Benin, Burkina Faso, Chad, and Mali, for whom cotton exports played a key role in the economy.

The AoA had three main components. First, most agricultural quotas needed to be converted into tariffs. This still allowed the European Union to have essentially prohibitive tariffs on beef. Second, developed countries agreed to cut their average tariffs on agricultural good by 36% over three years. Third, some forms of subsidies that were seen as particularly distorting were outlawed, while non-distorting subsidies (such as payments per acre independent of the amount planted) were welcome. Finally, total expenditure on subsidies that were somewhat distorting was capped in nominal terms at a level 20% below the historical one.

Many commentators said that countries had largely modified their policies to be consistent with the AoA. A report of the US Congress expressed concern, however, that an important reason the US had complied with the AoA was that agricultural prices had been relatively high. This made expenditures low because many US agricultural support programs took the form of subsidized insurance against low prices. If prices of agricultural goods were to drop sharply, US payments to farmers would balloon beyond the AoA limit.[11]

Nonetheless, agriculture featured prominently in the next set of negotiations, begun in Doha in 2001. Trade ministers declared at the time that they aimed for the "the [trade] system [to] play its full part in promoting recovery, growth, and development." To accomplish this, many issues would be tackled at once. Developed countries wished to use this round to reduce the barriers to their manufactured goods in developing countries, and also to liberalize trade in services. At the same time, several developing countries refused to budge from their requirement that developed countries scrap most of their agricultural protection.[12]

In an unprecedented move by a President of a country, the President of Burkina Faso Blaise Campoare appeared in front of the WTO committee on trade and asked both for the elimination of cotton subsidies and for payments to poor cotton-producing countries while the subsidies remained in place. He said, "African countries share the opinion that a satisfactory settlement for the cotton subsidy issue is both a must for the current negotiation round and a test that will allow member States to prove their sincerity behind the commitments taken at Doha."[13]

The Doha round was still ongoing at the end of 2015, and had accomplished little in spite of repeated gatherings of the members' trade ministers. The 2013 gathering in Bali was seen as relatively successful because members agreed to simplify customs processes. In order to sign on to this deal, the Indian government insisted that it be allowed to violate the AoA so that it could subsidize its poor farmers for producing. A temporary "peace clause" that allowed developing countries to do this was included in the deal, though the Indian representatives would have preferred a more permanent solution with fewer reporting requirements.[14]

As of the end of 2015, the agreement signed in Bali had not yet entered into force because only 63 of the required 108 members had signed it. Meanwhile, the ministerial meeting of December at the end of 2015 in Nairobi produced only a commitment to eliminate export subsidies on agricultural goods. Ministers seemed deeply divided on other issues.[15]

Global integration outside the GATT process

Trade

The relative paucity of results from the meetings organized by the WTO after 1994 did not stop trade liberalization from taking place. In particular, many countries lowered their tariffs unilaterally, with the result that their actual tariff rates ended up below the maximum rates they had agreed to in GATT negotiations. India, for example, lowered tariffs as part of its program of reform (see **Exhibits 2, 5**).

Another source of tariff reduction was the proliferation of bilateral and multilateral trade agreements. The latter often involved geographically proximate countries and thus were sometimes called regional trade agreements. According to the WTO, there were 265 groupings of countries that had signed such agreements by the end of 2015. Of these, 137 covered only trade in goods while the rest were more ambitious.[16]

Countries that joined free trade areas often saw their exports to their new partners soar. Peru's FTA with the US, for example, entered into force in 2009. "Non-traditional" agricultural exports from Peru to the US, which included grapes, asparagus, and quinoa, rose from US$55 million during January 2010 to US$ 119 million during January 2015.[17]

Some groups of countries had become more integrated over time. ASEAN (the Association of South East Asian Nations) was created in 1967 (during the Vietnam War) in a meeting of the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore, and Thailand with the declared aim "accelerating" economic growth and promoting "regional peace." In 1992, after the addition of Brunei Derussalam, ASEAN members agreed to become a free trade area in goods, though this process would not be complete until 2018 at the earliest. Vietnam, Laos, Burma (Myanmar) and Cambodia joined after this deal was signed.

All 10 members adopted the "ASEAN charter" in 2007. This gave ASEAN a flag, an anthem and a variety of official purposes. These included peace and security, the creation of a "single market," the strengthening of democracy, and the protection of human rights. ASEAN thus came under severe criticism for favoring its principle of "non-interference" when Myanmar stood accused of severe human rights violations.

ASEAN members entered into a number of subsequent agreements. A particularly notable one was the ASEAN Comprehensive Investment Agreement, which came into force in 2012. This agreement shared a number of features, including its recourse to private arbitration, with the Bilateral Investment Treaties (BIT) discussed more fully below. However, various ASEAN countries set aside a number of sectors in which foreign investment, even by companies located in ASEAN, was severely restricted. Thailand, for example, did not allow foreigners to hold more than 50% of the equity in a substantial number of sectors, while foreigners were simply excluded from the manufacture of sugar.

ASEAN also signed FTAs with Australia, China, India, Korea and New Zealand. China, for its own part, had signed 13 FTAs by the end of 2015, including deals with New Zealand, Peru, and Singapore,

who all belonged to the TPP. In addition, China was close to finalizing an FTA with Australia.[18] At the same time, Chinese officials deplored the fragmentation induced by the proliferation of agreements each of which had limited coverage. At the 2014 APEC summit, Chinese leader Xi Jinping favored making "free trade arrangements open and inclusive to the extent possible" and championed the creation of a broad "Free Trade Area of the Asia Pacific," The APEC meeting ended with a declaration that a "collective strategic study" of such a free trade area would be made public in 2016. China was also involved in negotiating a smaller free trade area that included all ASEAN countries as well as those that had signed FTA's with ASEAN (see **Exhibit 3**).[19]

The US, meanwhile, had signed 14 free trade deals involving 20 countries. These countries included TPP members Australia, Chile, Mexico, Peru, and Singapore. The most consequential of these was the North American Free Trade Agreement (NAFTA) with Canada and Mexico, which came into force in 1994. Both the US House and Senate had Democratic majorities at the time, but the majority of pro-NAFTA votes came from Republicans. The US debate regarding NAFTA placed a great deal of weight on "jobs." A leading NAFTA opponent, presidential candidate Ross Perot, complained that "we have to stop sending jobs overseas." Bill Clinton (D) won the election and, on signing NAFTA defended it by saying, "First of all … NAFTA means more jobs. American jobs, and good paying American jobs."

No consensus emerged on the issue of jobs after NAFTA came into force. Economists generally regarded the effects of the deal on US employment and GDP as modest. A paper in the *Journal of Economic Perspectives,* for example, showed that the number of workers that asked for assistance from a specially-designed program for workers displaced by NAFTA was quite modest. On the other hand, the AFL-CIO union continued to assert at the end of 2015 that NAFTA had cost the US nearly 700,000 jobs, and blamed this on US investments in Mexican plants where these firms were able to pay lower wages than they had previously paid in the US. The AFL-CIO based its estimate on a study that emphasized the increase in the US's trade deficit with Mexico. It converted this deficit into jobs by using the typical ratio of employment to output in the industries in which the US increased its exports and imports. It noted in particular that the trade deficit had increased in the electronics and automobile industries. By contrast, the paper in the *Journal of Economic Perspectives* argued that total employment in the US automobile industry had actually increased after NAFTA was adopted.[20]

NAFTA also covered agriculture, though liberalization in this sector was meant to be complete only by 2008. In the meantime, a system of "tariff quotas" for agricultural goods, where amounts under a limit ("quota") could come in duty free and amounts over the quota had to pay tariffs, was instituted. The quota was supposed to increase over time until trade would be free.

US sugar producers, however, strongly disliked the reductions in sugar prices they saw after Mexican sugar could enter freely in 2008. They then complained to the US Department of Commerce that Mexico's interventions (including nationalizations) in its financially struggling sugar mills constituted an illegal subsidy and led these mills to sell sugar below their true cost. The Department of Commerce agreed and slapped high "countervailing duties" on Mexican sugar. These duties were never collected because Mexican and US officials quickly negotiated a new agreement concerning sugar. This agreement re-instituted quotas for Mexican sugar, where these were now based on a complex supply and demand calculation. To bring sugar into the US, Mexican exporters needed to obtain export licenses from their own government and could not charge less than a pre-specified minimum price.[21]

NAFTA also had its own dispute resolution systems. In one of them, the two disputing governments were each supposed to appoint two members to a panel with the fifth, the chair, chosen by mutual agreement. Such panels were rarely convened, perhaps because it was possible for the

responding government to block the creation of a panel. One of the few panels that reached a determination ruled in 2001 that the US policy of blocking Mexican trucks from delivering goods in the US violated NAFTA. The US failed to change its policy for some time, and there was a period during which Mexico imposed tariffs in response. In 2015, the US finally relented, and let Mexican truckers that passed US inspections operate freely in its territory. A different panel was even less successful in resolving the long standing dispute between Canada and the US concerning US imports of lumber from Canada (which the US regarded as being subsidized by Canadian logging rules). This was settled temporarily in 2006 through an explicit agreement between the two countries. Under this agreement, the Canadian government agreed to limit lumber exports to the US and charge a tax on lumber exports exceeding a pre-specified quota.[22]

Foreign Investments

The negotiators in the Uruguay round reached only a weak agreement concerning the protection of international investments. Instead, such protections were provided by Bilateral Investment Treaties (BITs) and by some FTAs, including NAFTA. By 2015, there were over 2900 BITs, with the bulk of these having been signed in the 1990's. The United States was party to 42 of them, none of which were developed countries. Being treaties, they required the approval of 2/3 of the US Senate. They often passed by unanimous consent.

While they differed in sometimes critical details, BITs tended to require that foreign investments be treated no worse than domestic ones (national treatment) nor worse than foreign investments from another country (most favored nation). They also provided protection against both "direct" and "indirect" expropriations, where the latter involved changes in the rules of the game that constituted a violation of "fair and equitable treatment." BITs typically also included clauses requiring that signatories allow investors to transfer funds freely. Lastly, they allowed investors to bring complaints to an investor-state dispute settlement (ISDS) arbitration panel.

By and large, ISDS panels were constituted using the rules of either the United Nations Commission on International Trade Law (UNCITRAL) or the World Bank's International Centre for Settlement of Investment Disputes (ICSID). In either case, it was common for an arbitration panel to consist of three members. One was appointed by the complaining firm while the second was appointed by the defending country. The President of the panel was either appointed by mutual agreement between the parties or, if agreement proved impossible, by a UN or World Bank official. Arbitration panel members charged the disputing parties for their services and were often either distinguished professors specializing in international law or lawyers who had occupied high ranking positions in government.

Decisions by arbitration panels could not be appealed even when, as in the case of the various tribunals that foreign investors demanded in response to Argentina's 2001 policies, the judgments of different tribunals appeared to be inconsistent. Both ICSD and UNCITRAL rules allowed the losing party to ask for an "annulment," but annulments could only be obtained on narrow grounds and were rarely granted in practice. Before 2007, compliance with the decisions of ISDS panels appeared to be good. However, more recently, both Argentina and Russia failed to pay awards at the time they were due. A last recourse for plaintiffs was to try to have the awards enforced by courts in various developed (third-party) countries. However, third-party courts often felt unable to attach a country's local assets on the ground that countries had sovereign immunity.[23]

The United States Trade Representative strongly supported ISDS arbitration, and noted that the US had never lost an ISDS case. Other countries were less enthusiastic. After ISDS tribunals ruled against

them, Bolivia and Ecuador cancelled their ISDS agreements, though these agreements would continue in force for existing investments.

NAFTA incorporated all the key ingredients of BITs. Under NAFTA, Canada lost several ISDS cases. In the Clayton case filed in 2008, for example, a US firm seeking to develop a quarry in Nova Scotia won on the ground that it had not been given "fair and equitable treatment." The Canadian government claimed that it had prevented the quarry from operating because the quarry had not obtained the necessary environmental permits mandated by law. Clayton claimed instead that it was subject to an unusual procedure that had not been used in a comparable project owned by a Canadian company. According to Clayton, this process favored environmentalists who rejected the project on the grounds of its inconsistency with "core community values," a criterion that Clayton was not expecting and on which it was not allowed to present sufficient evidence.[24]

Quoting many precedents, the majority of the arbitration tribunal ruled for Clayton in 2015. Canada's appointee to the tribunal dissented, however. He regarded local community sentiment as ever more important in environmental management, and predicted that the majority opinion "will be seen as a remarkable step backwards in environmental protection."[25]

A widely discussed set of ISDS cases concerned Australia's and Uruguay's anti-smoking laws, both of which required that the vast majority of a cigarette's package be devoted to health warnings. Arguing that its investments in branding had been eroded, Philip Morris brought an ISDS suit against Uruguay based on the Switzerland-Uruguay BIT (Philip Morris was headquartered in Lausanne) and one against Australia based on the Hong Kong-Uruguay BIT. A tribunal dismissed the second of these suits on the ground that the Philip Morris' Hong Kong subsidiary had received its Australian assets from the parent company only after Australia had announced its anti-smoking legislation. Thus, this subsidiary "expectations" were not violated by this legislation. The ISDS suit against Uruguay remained pending at the beginning of 2016.[26]

Meanwhile, several countries including Indonesia and Honduras had complained to the WTO that Australia's tobacco legislation violated TRIPS by reducing the value of trademarks. In addition, they argued that the tobacco legislation violated the WTO agreement on technical barriers to trade (TBT) by creating trade obstacles that "are more restrictive than necessary to fulfill a legitimate objective." This WTO case remained pending in early 2016. However, in response to complaints by Mexico and Canada, a WTO dispute resolution panel had recently ruled that the "not more restrictive than necessary" requirement of the TBT had been violated by a US rule obliging retail meat packages to show the country where the animal was born, raised, and slaughtered.[27]

Intellectual Property

In setting the objectives of the US Trade Representative (USTR) in pursuing bilateral and multilateral trade agreements, the US Congress stated that the provisions regarding intellectual property rights should "reflect a standard of protection similar to that found in United States law." In the case of pharmaceuticals, the objectives of industry and the USTR often overlapped. Consistent with this, USTR officials frequently worked at pharmaceutical companies before and/or after working at the USTR.[28]

While broadly consistent with TRIPS, intellectual property protection in some bilateral agreements was more generous to rights holders. The Australia-US FTA, for example, required its signatories to enforce contractual restrictions on the ability of importing patented goods from countries were these

were sold at lower prices. TRIPS, by contrast, had no rules concerning such "parallel imports" of patented goods.

Several FTA's signed by the US also added a new protection for pharmaceuticals. In particular, they forbade the data used to obtain approval for a drug from being used to approve a copycat generic for 5 years. According to some observers, fewer generic drugs were approved in Guatemala after this rule was adopted to comply with a US FTA. The reason, according to the authors of the study, was that pharmaceutical companies rarely patented drugs in Guatemala.[29]

The NGO *Doctors Without Borders* objected to the inclusions of "new uses" of existing products as objects that could be patented in the Australia-US FTA. They noted that provision could allow for the "ever-greening" of pharmaceutical patents. While "new use" patents were not discussed in TRIPS, Australia already allowed them. Nonetheless, *Doctors Without Borders* worried that their inclusion in the Australia-US FTA would act as a "model" that would ultimately hurt developing countries.[30]

The TPP

Even leaving aside the 3852 pages of tables specifying each country's tariff reductions, the TPP was 2673 pages long. There were 30 chapters, and in many cases, the chapters had annexes where individual countries laid down their own commitments. In the chapter on "Temporary Entry of Business Persons," for example, the overall chapter did little more than specify that such entries were desirable and that countries ought to have transparent rules governing them. The Annexes, on the other hand, laid out each country's rules for temporary business visitors. In its final chapter, the TPP stipulated that other countries could join in the future as long as there was a consensus among the executive authorities of existing members.

A recurrent complaint against the TPP was that it was negotiated "in secret." US law required that the USTR consult with a number "advisory committees" each of whom had members from a particular business sector. There was also an advisory committee consisting of union members. The business advisory committees wrote reports in support of the TPP while the one with union members urged the TPP's rejection. Unios claimed to have had very limited input into the agreement. By contrast, several observers viewed the deal as excessively friendly to certain business interests.[31]

Two individuals who had previously worked at the USTR argued for more transparency, including for public discussion of individual proposals made during negotiations. TPP drafts revealed by Wikileaks did in fact include such proposals, and some of these were vigorously debated. There was an uproar, for example, against a US proposal in the August 2013 draft that gave authors the right to prevent their books from being imported. This clause was seen as contrary to a US Supreme Court decision, and was dropped from the final deal. [32]

Trade in goods

When it came to tariffs on goods, each TPP signatory specified at what speed it intended to reduce its tariffs to other TPP members. The intent was to bring tariffs to zero, even in the case of "peak" tariffs, whose magnitude vastly exceeded the ratio of a country's tariff revenue to its volume of imports. Mexico's tariff of 254% on animal oils, for example, was expected to be removed in stages over the course of 10 years. Similarly, the US promised to eliminate its 32% tariff on t-shirts made of synthetic fabrics over the course of 6 years. The reduction in the substantial US tariffs on apparel was particularly important to Vietnam, whose apparel exports to the US were so significant that it was the second largest source of tariff revenue for the US (after China).[33]

President Obama stressed that the TPP deal would remove "more than 18,000 taxes" on US products. California vintners were particularly satisfied that Japan would drop its tariffs on US wine. That would put California wines on the same footing as wines from Australia and Chile, two countries that already had FTA's with Japan.[34]

The tariff reduction schedules of individual countries did not always treat all TPP exporters equally. Trucks, for example, could immediately enter the US duty free from countries such as Mexico, Canada, Australia and Chile right. For other countries, like New Zealand and Malaysia, the US 25% base truck tariff was eliminated over 10 years. Japanese trucks, finally, would pay the 25% duty for the next 30 years. Only afterwards would they be subject to zero tariffs.

To qualify for the reduced tariffs agreed upon in the TPP, goods needed to have a minimum of "regional content requirement." The agreement stipulated several different methods for computing this regional content. In response to firms' use of complex supply chains, these methods also specified when intermediate goods made with foreign materials had been sufficiently transformed to qualify as "local content" in the computation of a final good's regional content. Depending on the good, the regional content needed to qualify for the TPP tariff was different. For several goods, including automobiles, it was 45%. A number of critics decried this as too low and pointed out that it would allow Chinese input producers to benefit from the agreement.[35]

The TPP also included a number of quota arrangements for agricultural goods. Japan would increase its imports of rice from Australia and the US by about 70,000 tons annually from its current level of 770,000 tons. (Its production had long exceeded 10 million tons annually.) Canada agreed to increase the share of milk imported from Australia, New Zealand, and the US by 3.2% over 5 years. As a final example, the US agreed to allow Australia to increase its shipments of sugar to the US by 65,000 tons. Given the way that the Mexico-US sugar agreement was written, this meant that Mexico would be required to reduce its sugar exports to the US from the current value of 1.3 million tons.[36]

Recent bilateral agreements entered into by the EU, including the one the EU had signed with Peru, protected the use of "geographical indications." This meant that feta cheese could only come from Greece and gorgonzola from Italy. By contrast, the TPP, required signatories to have a procedure to deny protection for geographical indications that had become the common name in the local language. This was consistent with US trademark law, according to which terms could no longer be trademarked when they came to designate generic goods.

At the same time, the TPP singled out ice wine. Canadian producers of ice wine had long complained about the sale of "fakes." In response, the agreement specified that only wines made of grapes that had frozen on the vine could be sold as ice wine (or icewine) in TPP countries.[37]

Investment

The TPP incorporated the typical elements of BITs, including its national treatment and MFN requirements. While "tobacco control measures" were specifically excluded, firms could sue governments using ISDS tribunals for policies that constituted direct or indirect expropriations. Massachusetts Senator Elizabeth Warren (D) called this the "TPP clause everyone should oppose." She went on to say "Conservatives who believe in US sovereignty should be outraged that ISDS would shift power from American courts, whose authority is derived from our Constitution, to unaccountable international tribunals. Libertarians should be offended that ISDS effectively would offer a free taxpayer subsidy to countries with weak legal systems. And progressives should oppose ISDS because it would allow big multinationals to weaken labor and environmental rules."[38]

To address this last criticism, the ISDS segment of the TPP added a clause to older BITs. It said "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."

Consistent with US BITs such as the US-Jordan BIT, a draft of the TPP leaked in 2012 protected the right to transfer freely funds invested in securities; so that the imposition of capital controls could trigger ISDS suits. After receiving letters from hundreds of economists arguing that capital controls were a useful policy tool, US Treasury Secretary Timothy Geithner responded that other tools should be used instead and that he would stick to his approach. The Australia-Singapore and the Malaysia-New Zealand BIT did allow capital controls in response to balance of payments crises, and the final version of the TPP did so as well.[39]

The investment chapter of the TPP did include prohibitions against a set of practices that the US had long opposed. It forbade, in particular, making investment approvals (or subsidies) conditional on either having the investor purchase a certain fraction of his inputs or technology domestically or on having the investor export a certain fraction of his output.[40]

Intellectual Property

Consistent with US law, the TPP's intellectual property chapter required that copyrights be valid for 70 years after an author's death. This would require several TPP countries to change their laws. In one of the more contentious disputes during the TPP negotiations, the US was unable to get others to agree with its own law concerning "data protection" for biologic drugs. In US law, data submitted for marketing approval of one "biologic" drug could not be used for the approval of another for a period of 12 years. Instead, TPP members committed themselves only to prevent the re-use of these data for 5 years.

Utah Senator Orrin Hatch (R), who was the chair of the Senate Committee in charge of trade and who had long advocated the interests of drug companies, objected strenuously to this outcome. Hatch had been a champion of giving the President fast-track authority, but now said, "This agreement may be very difficult to pass as-is," and added "At the end of the day, USTR may need to go back to the negotiating table and try again."[41]

The TPP was also criticized for aspects that mimicked US law more closely. Some critics objected, in particular, to the requirement that internet service providers make content unavailable as soon as a private party sent a notice claiming the content infringed its copyright. With somewhat ambiguous wording, the TPP suggested that Canada and Chile's more permissive systems would be grandfathered, but most members had to abide by this rule.[42]

An important feature of the TPP is that it required countries to impose criminal penalties on violators of certain intellectual property rights. In particular, members were supposed to criminalize at least one of the following: accessing a trade secret through a computer, misappropriating a trade secret, or disclosing a trade secret. However, members were allowed to limit these criminal penalties to situations where one party gained a commercial advantage or a party was injured.

Apart from the TPP negotiations, USTR had worried that "Trade secret theft, including industrial and economic espionage conducted by cyber means, appears to be escalating." The US government's complaints regarding trade secrets often singled out China. A 2011 US counterintelligence report, for example, said that "Chinese actors are the world's most active and persistent perpetrators of economic espionage." It noted that a disproportionate fraction of the international trade theft cases prosecuted

by the US were linked to China. In 2015, an official US statement after a meeting of US and Chinese officials, recognized that the Chinese government had proposed legislation that would make it easier for foreign companies to defend their trade secrets in Chinese courts.[43]

Dispute Resolution

The TPP included a chapter specifying how member countries could formally complain about other members' lack of TPP compliance. Three member panels, whose decisions could not be appealed, would rule on such complaints. In principle, the complainant would appoint one panelist, the respondent another, and the chair would then be appointed by mutual agreement. The procedures to be used if this normal process failed were somewhat murky. For example, if the first two panelists could not agree on a chair, the chair could be appointed by an unspecified "third party."[44]

If the panel ruled that a member was violating the TPP, the member was supposed to change its laws. If the member did not, the complaining country could retaliate by withdrawing TPP benefits from the member found to be at fault. If the member at fault complained, the original panel could also rule on whether this level of retaliation was commensurate with the TPP violation.

Labor

In his announcement of the TPP agreement, President Obama said, "It includes the strongest commitments on labor and the environment of any trade agreement in history, and those commitments are enforceable, unlike in past agreements." In the TPP's labor chapter members committed themselves to allow workers to form unions, to eradicate compulsory labor, to abolish child labor, and to eliminate employment discrimination.[45]

Labor activists had long complained about the lack of labor rights in Vietnam, where the only permitted union was state controlled and where labor activists were detained and beaten. An NGO also accused Vietnam of forcing about 30,000 alleged drug addicts to work in detention centers under penalty of getting beaten if they did not fulfill their quota. Probably in response, the TPP included a detailed side agreement with Vietnam. In this agreement, Vietnam promised to allow workers to form "grassroots" labor unions and to prevent the forced labor of individuals reporting to drug rehabilitation centers.[46]

US labor unions objected that, unlike the direct access given to firms in ISDS, formal complaints against violators of labor standards could only be brought by governments using the dispute settlements procedure just described. Further, Elizabeth Warren noted that several existing US free trade agreements contained labor provisions that had been touted by the US leaders that had signed them. At the same time, she complained that the US had been reluctant to bring formal complaints against partners that had violated these provisions. To sign the Colombia-US FTA, for example, President Obama required Colombia to adopt a "Labor Action Plan." One objective of this plan was to address violence against union organizers. According to Warren "neither the FTA nor the Labor Action Plan have resulted in significant advances in labor rights." In 2014, the US State Department issued a report on human rights in Colombia where it listed many violations. On worker rights, this report mentioned some instances of progress but recognized that "While there were some emblematic convictions in cases of unionist killings from previous years, the pace of investigations and convictions remained slow, and high rates of impunity continued."[47]

Environment

The TPP "recognized" the importance of environmental protection. It also contained some specific environmental commitments. Signatories promised to take steps to protect sharks and marine turtles and to refrain from subsidies that led to overfishing. They also vowed to make their laws consistent with the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). Signatories of the TPP could use the dispute settlements process to complain against countries that failed to apply their own environmental laws in a manner that affected trade or investment.

With some exceptions such as the World Wildlife Fund, numerous environmental groups declared themselves opposed to the TPP. Many objected to the absence of the word "climate change" in the text. The Sierra Club's main complaints were that the TPP would facilitate gas exports from the US, and that it would allow fossil fuel corporations to sue governments for imposing environmental requirements. The Sierra Club also called the environmental chapter "weak." It lamented, for example, that signatories only expressed a desire to conserve sharks and marine mammals rather than banning whaling and the trade in shark fins outright. It also expressed doubts that any environmental commitments in TPP would actually be enforced. Along with several other critics, it noted that the US had never brought charges against Peru for illegal logging even though there was strong evidence that this loggings continued even though it was banned by the 2009 Peru-US FTA.[48]

Services

In principle, the TPP obligated its signatories to accord most favored nation and national treatment to service providers, including financial service providers, based in the country of another signatory. However, countries were allowed to list service sectors in which foreigners had more limited rights (such as atomic energy and oil pipelines in the US) as well as exceptions to national treatment in financial services (such as the US requirement that national bank directors be US citizens). Even though most services were ultimately provided by individuals, TPP members did not have to allow citizens of other members to stay for extended periods. The TPP did, however, encourage members to offer temporary or project-specific licenses to professionals who had been licensed by other members.

One source of controversy involved the international provision of computer services. Signatories committed themselves to allow firms to transfer business-related information electronically. They also promised not to require firms to locate their computer facilities domestically as a condition of doing business. These requirements would have an important effect on Australia, which required health information to be stored locally.[49]

Conclusions

The first country to ratify the TPP was Malaysia, which did so at the end of January 2016. Although thousands had marched in protest, complaining among other things that the deal would hurt small Malay companies serving the domestic market, the ruling party had sufficient votes to get the TPP through the Malaysian Parliament and Senate.[50]

The eagerness of Malaysia was perhaps not surprising. Both a World Bank and the Peterson Institute study had concluded that the positive GDP effects of the TPP were largest for Malaysia and Vietnam, because they would benefit most from lower tariffs on their exports. These studies were based on a large set of interconnected equations which could be used to predict the production, employment, and trade of many sectors in many countries. The World Bank study also contemplated

the effect of the TPP on non-member countries and concluded that Thailand and Korea would suffer the largest declines in GDP.[51]

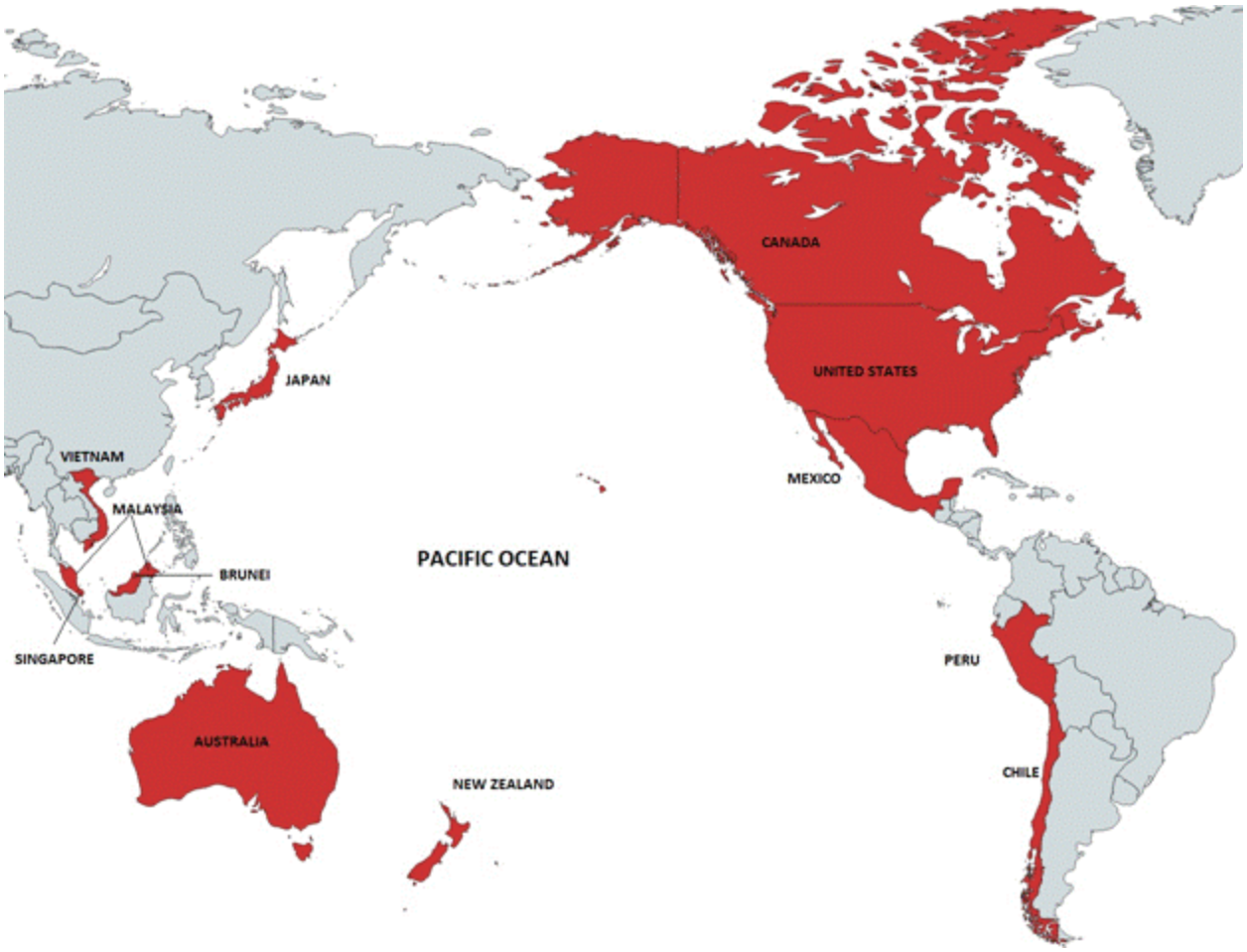
The biggest obstacle to ratification seemed to be the US. And, while the studies just discussed predicted that Malaysia and Vietnam would have about 10% more GDP in 2030 as a result of the TPP, US GDP would only be higher by about 0.5%. These studies assumed that, while TPP would eliminate some import-competing jobs, workers would change sectors and full employment would be restored. Under the assumptions of an alternate study, some workers would lose their jobs permanently, and US GDP would fall. Even if one expected US workers displaced by TPP-induced imports to find new jobs, the question remained whether these jobs would pay high or low wages. US union leaders were willing to make clear predictions in this regard. According to AFL-CIO President Richard Trumka, the TPP would "drive down wages" and "kill jobs." Several union leaders essentially saw the TPP as a continuation of a set of past policies that had not been good for their members. As Electrical Workers president Lonnie Stephenson put it, the TPP "looks awfully similar to past trade deals that have paved the way for outsourcing, lifting up multinational corporations at the expense of working families and consumers."[52]

Union leaders also had a specific complaint that was echoed by some business leaders, including Ford Motor Company officials. They objected to the absence of a ban on "currency manipulation." Instead, the "macroeconomic authorities" of the TPP countries signed a declaration saying they would abide by the IMF articles concerning exchange rate manipulation and competitive devaluations. When the TPP came into force, they would release a great deal of information about their exchange rate interventions and senior officials of TPP countries would meet annually to discuss macroeconomic and exchange rate policies. Supporters argued that these initiatives were a great step forward in stopping countries from using their exchange rates to benefit their current account, while opponents complained about the absence of any penalties for countries that deliberately kept their currency cheap.[53]

In the end, it was clear that the TPP had not managed to assuage the concerns of most labor and environmental groups in the US It was opposed by both candidates seeking the Democratic presidential nomination Hillary Clinton and Bernie Sanders, with Sanders saying "The Trans-Pacific Partnership is a disastrous trade agreement designed to protect the interests of the largest multi-national corporations at the expense of workers, consumers, the environment and the foundations of American democracy." At the same time, it was possible that some of Republicans who had supported fast track would reject the agreement as a result of the tobacco carve out from ISDS and the relatively short period of data protection for biological medicines.[54]

Meanwhile Donald Trump was campaigning for the Republican presidential nomination by saying "We're going to beat China, Japan. We're going to beat Mexico at trade. We're going to beat all of these countries that are taking so much of our money away from us on a daily basis…We have political hacks negotiating our deals for billions and billions and billions of dollars. Not going to happen anymore. We're going to use the finest businesspeople in the world. We are going to do something so good and so fast and so strong. And the world is going to respect us again. Believe me."[55]

Exhibit 1 TPP original signatories



Source: Created using mapchart.net, accessed January 22, 2016.

Exhibit 2 Weighted average tariff rates (weighted by import shares)

	1991	2001	2011
Australia	18.6	7.7	1.8
Brunei Darussalam	4.4 (1992)	9.5	2.4 (2010)
Canada	7.2 (1989)	1.8	0.9 (2010)
Chile	11.0 (1992)	8	4.0 (2010)
China	32.2 (1992)	14.1	3.6
India	54 (1990)	26.5	6.8 (2009)
Japan	3.8	4.4	1.3
Malaysia	9.4	4.3	2.8 (2009)
Mexico	11.9	15.3	5.4 (2010)
New Zealand	11.1 (1992)	2.5 (2000)	1.6 (2010)
Peru	16.4 (1993)	12.8 (2000)	1.5
Singapore	1.1 (1989)	0	0 (2010)
United States	4	1.8	1.6
Vietnam	21.1 (1994)	17.4	5.7 (2010)

Source: Adapted from World Bank, http://data.worldbank.org/indicator/TM.TAX.MRCH.WM.AR.ZS, accessed February 13, 2016.

Exhibit 3 Trade among TPP countries in 2014

	Fraction of exports to		Fraction of imports from	
Country	TPP countries	China	TPP countries	China
Australia	33.5%	35.8%	35.5%	21.7%
Brunei	58.4%	1.9%	54.1%	27.2%
Canada	81.2%	4.6%	65.8%	11.6%
Chile	30.4%	24.8%	33.0%	21.8%
Japan	31.3%	23.9%	25.4%	22.5%
Malaysia	41.8%	16.9%	35.0%	18.6%
Mexico	85.4%	1.8%	59.2%	16.8%
New Zealand	40.8%	21.9%	42.3%	17.3%
Peru	33.8%	18.8%	35.0%	21.1%
Singapore	30.6%	23.8%	23.8%	13.0%
US	44.9%	10.2%	37.6%	20.1%
Vietnam	40.8%	14.1%	23.5%	31.1%
China	35.5%		32.6%	

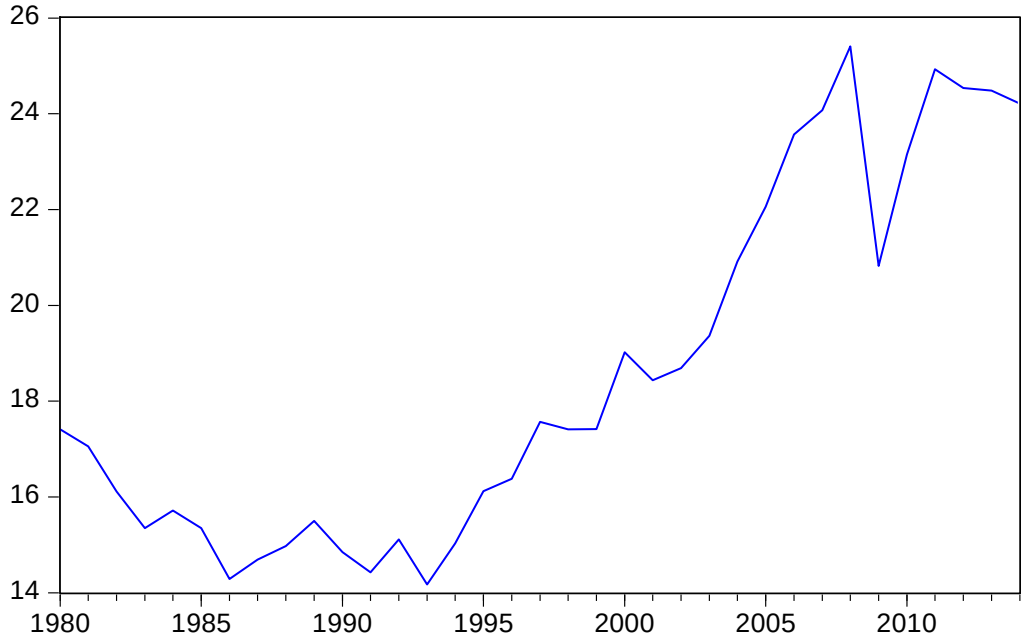
Source: IMF Directions of Trade, https://www.imf.org/external/pubs/cat/longres.aspx?sk=19305.0, accessed February 13, 2016.

Exhibit 4 Economic indicators for 2013

	Exports (billions US $)	GDP (billions US $)	GNI Per capita PPP in US $
Australia	253.0	1497.2	42220
Brunei Darussalam		18.1	72,190 (2012)
Canada	458.4	1839.0	42410
Chile	77.9	276.7	21110
Japan	714.6	4919.6	37550
Malaysia	228.3	323.3	23390
Mexico	380.1	1261.9	15620
New Zealand	41.1	184.8	33760
Peru	41.5	201.9	11080
Singapore	410.2	302.2	77840
United States	1579.0	16663.2	54000
Vietnam	132.5	170.6	5070
TPP countries	4316.6	27658.3	
China	2210.2	9490.8	12100
World	18476.7	75467.1	

Source: GDP and exports from IMF, http://www.imf.org/en/Data, accessed 2/13/16; GNI and Population from World Bank, http://data.worldbank.org/indicator, accessed 2/13/16

Exhibit 5 World exports as a percent of world GDP (both in US$)



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