

Trans-Pacific Partnership

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The Trans-Pacific Partnership, or TPP, is a recent trade agreement involving twelve countries: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, Vietnam, Canada, Mexico, and Japan. The text was released November 5, 2015.

The origins of the TPP began with the “P4” formed in the middle of the last decade by New Zealand, Chile, Singapore and Brunei. By 2008, Australia and Peru had joined, and Vietnam was in the process of joining. The Bush administration took the U.S. into the negotiation that year.

The Obama administration, after considerable debate, decided to make the TPP its main trade policy initiative in its first term. Trade is a divisive issue within the Democratic Party and some in the new administration had hoped to avoid trade issues during the first year in office in 2009 while focusing on the enormous challenges of the global financial crisis. However, the Democratic Party in Congress was not inclined to go along with this, starting off at the very beginning by adding “Buy America” provisions to the stimulus package that not only triggered (or legitimised) similar moves in China, but also slowed down the procurement processes that were meant to create jobs quickly. This was followed by a politically inspired tariff on low-priced Chinese tyres (more than offset by an increase in imports from existing sources elsewhere around the world, and leading directly to Chinese retaliation against much higher-value U.S. chicken and automobile exports).

Even before the election, the Obama administration had wanted to focus on Asia (at least in part to match increasing Chinese influence), while at the same time the TPP was “too small” to bother the unions. Whatever the reasons, in November 2009, President Barack Obama at the APEC summit in Japan announced that the U.S. would “engage” with the TPP. Although “engage” sounds

to some like a euphemism for a half-hearted commitment, it turned out to be a more legalistic choice of words – even without formal negotiating authority (trade promotion authority (TPA)) through legislation, the Obama administration had decided to follow the domestic formalities of the TPA legislation that had expired in 2008. One part of that legislation was that “negotiations” could not start until ninety days after the president had notified Congress of the intention to enter into negotiations.

There are two key aspects of the TPP agreement:

I SIZE

The original P4 was an extraordinarily successful “lobbying” exercise in which, by setting up a high-quality free trade agreement, the four countries created an attractive target to which others then signed up. The P4 itself comprised fewer than 30 million people, but the twelve countries now party to the agreement form a market of more than 500 million people, and create close to 40% of world GDP. The process is not unlike how the EU grew from the original Common Market of six. The UK joined because it had to, not because it wanted to, and that forced Denmark and Ireland to join immediately and the others snowballed until the EU reached twenty-eight. Similarly, with Vietnam in the TPP negotiation, Malaysia had to join because many of Malaysia’s key exports of consumer electronics and, to some extent, garments, would be placed at a decided disadvantage in the U.S. market. That is likely to mean that eventually the Philippines, Indonesia, Korea, and eventually Taiwan and Thailand and so on. Colombia has also indicated an interest in joining (which would keep its preferences in the recently completed FTA with the US), which logically

Notes

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would pressure Central American countries to join as well. By the time this snowball stops rolling, it will include at least 45% of world GDP. That by itself inevitably means a great deal of impact on international trade. Not least, it forces other World Trade Organization (WTO) members to think about what, if anything, they wish to multilateralise from the TPP. It has already led to US–EU FTA (TTIP) and EU–Japan FTA talks.

If the TPP reaches its ambitious goals, however, it seems unlikely in the shorter to medium term to include China, India, the EU, the Middle East or Africa. So, it will probably accelerate the pace of bilateral and plurilateral deals among the countries in those regions and around the world. It will be interesting to see whether this leads to greater trade liberalisation, or whether the added complexity of the resulting “spaghetti bowl” creates too much paperwork (at present, a huge percentage of the trade preferences negotiated on paper are never in fact used, as economic actors prefer to go with the simplicity of the alternative, WTO-negotiated most-favored nation rates to avoid the added cost of qualifying for lower FTA rates).

There was a raging debate about the TPP’s “transparency”, with a lot to be said on both sides. The original purpose of opacity in trade negotiations was to protect the civil servants negotiating tariff reductions that would aid consumers from being pressured by protectionists’ local interests out to sabotage those tariff cuts. However, even the original U.S. negotiating structure under the frequently renewed negotiating authority from 1934 onwards required a quite precise identification of the tariff lines (and sometimes principal suppliers) involved, allowing the protected local industries to guess pretty well what was going on and react accordingly. The “cleared advisor” or “advisory committee” structure put in place after 1974 in the U.S. (and subsequently in Canada, Australia, and other countries) gives local industries far greater access to information than consumers at large.

2 MARKET LIBERALISATION

The U.S. approach after NAFTA has been for full liberalisation on goods, meaning the removal of all tariffs, tariff-rate quotas, and so on, although often with very long phase-outs (as much as twenty years). The U.S. has achieved this in all post-NAFTA FTAs with two significant exceptions. In the US–Canada and the US–Australia FTAs, the U.S. refused to increase market access for sugar (and, not coincidentally, Australia refused to allow investor–state arbitration in the investment chapter). The tables were turned in the US–Korea FTA, where Korea refused to liberalise access to the rice market. There were other, less public exclusions, some achieved by

attaching conditions (thus, the U.S. insisted on Singapore opening its market to imports of chewing gum, but allowed Singapore to retain the right to require sales to be based solely on a doctor’s prescription). There has, of course, been one big exception – effectively excluding footwear and clothing from liberalisation even if tariffs were cut to zero, by imposing unreachable rules-of-origin limits. This posed an obstacle to TPP negotiations with Vietnam, whose current and likely future exports to the U.S. are almost exclusively footwear and clothing. The irony, of course, is that the amount of footwear produced in the U.S. may not even reach 1% of total demand, and clothing is estimated at 2% or less of demand, but one should never underestimate the power of entrenched U.S. lobbies. The problem, as one would expect, is that Vietnam made clear that if it gets only part of the full market access it would like for its exports of footwear and clothing to the U.S. (especially where there is no significant local production), then the U.S. will get the same degree of market access for what the U.S. wants out of Vietnam in TPP. The TPP deal with Vietnam, balances partial access for Vietnam to U.S. clothing and footwear markets in return for less than full access to Vietnam for U.S. exporters of other goods and services. Similar deals in TPP meant that there are some notable exceptions to the complete elimination of tariffs, in particular agricultural products in Japan (although reductions are substantial, e.g., from 38.5% to 9% on beef). What seems likely is that the pursuit of one of the original goals – simplifying existing U.S. FTAs with TPP countries into a single schedule – will instead lead to an even greater mass of complexity (at least in the first years).

3 SERVICES

Because progress in the WTO on services has been so slow, there was considerable pent-up demand within the TPP countries for further liberalisation, although complete liberalisation remains far away. The services area is buttressed by a more general (and not very binding) chapter on “regulatory coherence”.

4 AGRICULTURE

With Japan added, there was more than enough market access available to sort out most of the necessary deals. For example, the headlines included “US Dairy Industry Resistance to Imports from New Zealand”, but the U.S. dairy industry is now a major exporter and the opening of markets in Vietnam, Malaysia, Canada and Japan made the deal well worthwhile for it, even with greater access by New Zealand to U.S. (and other) markets. As noted there were large cuts in Japanese agricultural tariffs, down to

single digits (and possibly some exotic tariff-rate quotas) but not the zero tariffs demanded for all other products.

Just as important in the agricultural area is the “SPS” area (sanitary and phytosanitary measures taken by governments in the name of food and animal safety, but often disguised forms of protectionism). Progress was made in the SPS area beyond the WTO rules, which have proven to be quite weak in their enforceability, as countries take advantage of the slowness of WTO dispute resolution to impose barriers that are blatantly unjustified, such as the notable ban by eighty WTO members on imports of pork from Mexico, Canada and the U.S. during the “swine flu” episode, even though it is completely certain that no one can get “swine flu” from eating pork. Even larger in dollar terms – the largest single trade barrier to U.S. exports – are the various BSE restrictions that continue to apply to U.S. beef exports in various WTO member states and candidate members despite OIE classification of the U.S. as a “negligible” risk based on the measures that have been taken. Powerful agricultural exporting interests in the US, Australia, Canada and New Zealand have pressed successfully for at least improved and much faster dispute resolution or “rapid response” to go with the relatively limited but enforceable improvements and interpretations of WTO terminology, which is all that seems to be within the ambition of the negotiation (perhaps because of resistance by each country’s local regulators).

5 THE SUPPLY CHAIN

As with SPS, the business community’s ambition may have exceeded the willingness of governments to change in this area. Certainly major improvements in trade facilitation and other obstacles will be made, but, as one senior business executive pointed out, “If you don’t fix all the links in the chain, the [supply] chain won’t work.”

6 TRADE REMEDY LAW AND “STATE OWNED ENTERPRISES”

The U.S. has taken such a hard line in its FTAs since NAFTA that no discussion can occur of anti-dumping or countervailing duty rules (and decreasingly limited) changes to safeguard law. That barrier was symbolically broken by deputy U.S. trade representative Karan Bhatia in the US–Korea FTA, which required pre-initiation consultations in anti-dumping cases between the two countries – something not required by WTO rules. The US, Canada and Australia are all in very protectionist modes in the trade remedy area, both publicly aimed at China but in practice hitting imports from all sources, so

no change despite pressures from other TPP countries generally. The U.S. successfully pushed a complex mix of strict and lax rules on “state-owned enterprises” (with disciplines on companies majority-owned by central governments – but excluding some U.S. government-owned companies and all sub-central government state-owned enterprises).

7 INTERNET

The TPP is billed as a “21st Century Trade Agreement”, but surprisingly little thought was given to the internet at the outset of the negotiations, beyond the usual list of proposals by IP holders to further limit the internet in favor of protecting rights holders. The political debacle of proposed legislation with similar ideas in the U.S. (the Stop Online Piracy Act and the Protect IP Act (SOPA and PIPA)) and the similar popular revolt against the Anti-Counterfeiting Trade Agreement (ACTA) in Europe, Mexico and Australia, created the scary possibility that a similar rebellion could occur against TPP, with the claim that TPP in effect is SOPA or ACTA, and the whole agreement be dragged down. As a result, some progress was made on improving “free flow of data” and limitations and exceptions to copyrights.

8 INTELLECTUAL PROPERTY

The U.S. pushed hard for improved protection, in particular for pharmaceuticals. But this is political dynamite in most TPP countries and a huge cash cost for the many countries with government health-care systems. The US got some increased protection, notably a smaller than requested increase in protection for “biologics”.

9 DISPUTE SETTLEMENT

Perhaps the greatest challenge for the negotiators is creation of a dispute settlement system with enough credibility that private sector actors push governments to use it. Astoundingly, there have been zero disputes raised under any of the trade provisions of any U.S. FTA signed after NAFTA (and no such disputes within NAFTA since 2001, with the exception of a few ICSID cases and a few challenges to trade remedy cases under Chapter 19 of NAFTA, which will not be replicated in TPP at U.S. insistence). All disputes among parties to those agreements instead go to the WTO – even though the WTO can only enforce WTO obligations, and no other obligations under the relevant FTAs. A major effort was made by the very high quality government lawyers

working on TPP to fix the problems in prior FTAs. It will be a major test of TPP to see if the TPP governments make the efforts necessary to make the new dispute system work.

There are also disputes under the investor-state mechanisms in the investment chapters. One interesting aspect of this negotiation was the adoption of a proposal by several countries to preclude investor-state dispute settlement cases against regulation of the sale of tobacco products and smoking, in the wake of the U.S. loss of a WTO case (Clove Cigarettes); and the “rent-a-plaintiff” WTO case against Australia by Ukraine, and the “rent-a-forum” investor-state cases against tobacco regulation in Australia and Uruguay. No politician (or CEO, for that matter) is willing to admit to being in favor of teenage smoking, of course, but powerful economic

interests linked to tobacco were able to mobilise major business lobbies and their allies against such proposals.

10 CONCLUSION

The world is awash with trade deals and litigation already. TPP will provide new ideas in at least some areas, and will provide a trade agreement covering almost half of the world economy. Either of those facts would have an effect of increasing interests in other deals (notably TTIP), and, with luck, a multilateral agreement within the WTO that can replace some or all of the current patchwork of bilateral and regional deals. One way or another there is an enormous amount of work to be done by lawyers and governments, companies, law firms, universities, public interest groups, and any number of other bodies.