

# THE TRANS-PACIFIC PARTNERSHIP TRADE NEGOTIATIONS: SOME OUTSTANDING ISSUES FOR THE FINAL STRETCH

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## ABSTRACT

*Negotiations in the Trans-Pacific Partnership (“TPP”) are reaching the end-Game. After more than three years of hard bargaining, the twelve members are down to the most sensitive issues: some agricultural products, textiles, intellectual property, state-owned enterprises, and a dispute resolution system. In addition, officials have to begin thinking about the longer term. How will the agreement be ratified and implemented? How will new members join? How can a living agreement be created? How can the TPP be expanded into the Free Trade area of the Asia-Pacific in APEC? Finally, how will the TPP affect the global trading system?*

**KEYWORDS:** *Trans-Pacific Partnership (TPP), Free Trade Agreement, Trade Negotiations, Trade Promotion authority (TPA), Living Agreement, Free Trade Agreement of the Asia-Pacific (FTAAP)*

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## I. INTRODUCTION

The 17th round of negotiations in the Trans-Pacific Partnership (“TPP”) negotiations got underway in Lima, Peru, on May 15, 2013. Officials of the twelve member countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam) were feverishly working towards an officially announced target for conclusion at the end of the year.

After more than three years of complex negotiations, it seems this is an opportune time to pause and reflect on some of the issues that will quickly become apparent as countries shift from the day-to-day technical work in resolving differences among member states to the higher level politically and economically sensitive issues that come to the fore as bargaining reaches a crescendo. This paper begins to lay out some of the broader challenges for the TPP in the years ahead.

## II. JAPAN’S ENTRY

Japan was not sitting at the negotiating table in Peru in May with the other TPP members, because it did not join until very late in the negotiating game. However, Japan flirted multiple times with entry into the talks. On October 1, 2010, Prime Minister Naota Kan gave a speech in Japan’s Diet announcing his intentions to have Japan join the TPP, and thus began sending out delegations to consult with member countries. A year later, under another prime minister, Yoshihiko Noda, Japan was on the brink of membership. But, ultimately, it was not until April 21, 2013 that a new man, Prime Minister Shinzo Abe, was finally able to complete the procedures and get approval from the other TPP members for Japanese participation.

## III. A SIDE TRIP THROUGH THE US TRADE PROMOTION AUTHORITY (TPA)

Getting approval to participate did not mean, however, that Japan automatically became eligible to see all the negotiating texts or to sit in on bargaining at the next round of discussions. Instead, Japan was forced to wait for the domestic procedures in each TPP member country to be completed before it was allowed to commence discussions with any of them. The delay in participation can be traced to American practice.

In the United States, the Office of the Trade Representative (“USTR”) negotiates trade agreements. USTR is an executive branch agency, and it should be noted that Congress has ultimate authority over all treaties as well as control of the purse. In the past, Congress essentially delegated its authority to USTR to negotiate over trade on its behalf, through what used

to be called fast-track and is now called the Trade Promotion Authority (“TPA”).<sup>1</sup> Under TPA, USTR is required to notify Congress of its intent to negotiate with any new countries and provide a 90 day period to collect comments. At the end of the window, USTR must use the comments to help formulate a strategy for negotiating and keep Congress actively informed of progress. Once negotiations are completed on the agreement, Congress promises to either accept or reject the entire package without making amendments. This portion of TPA is essential, otherwise, Congress is likely to start amending the first line of any agreement and probably would not stop making changes until the very last sentence.

The TPA actually expired in the United States in 2007. Nevertheless, USTR has chosen to operate under the TPP “as if” it were active. This is because the agency planned to have the TPA in place before the final ratification vote on the agreement, and they did not want Congress to fail to vote on either the TPA or the TPP itself because proper procedures were not followed along the way.

A section below returns to the prospects for TPA passage. For now, the important point to note is that USTR notified Congress of Japan’s impending membership on April 24, 2013. This triggered the 90 day comment window. Under the “as if” TPA rules, USTR could not talk to Japan until July 24 at the earliest.<sup>2</sup>

It might be imagined that other TPP members could begin discussions with Japan ahead of this date. However, the informal rules of the TPP also prohibit this behavior. The conditions for entry for new members were never officially inscribed. The working rules have nonetheless demanded that the internal domestic procedures of each member must be fully completed before any country can be granted entry into the group with the full rights and responsibilities of membership.

In Peru, officials discussed the timing of Japan’s entry. The next scheduled round of the TPP was set for mid-July in Kuala Lumpur. However, because of the 90 day window, officials noted that Japan would likely miss this round or be able to participate only in the final days of the negotiations, after the window closed. This meant that — barring a shift in the scheduled July dates (which officials insisted could not be easily done as calendars were already set and rooms and flights booked) or some sort of special clearance from Congress (and it is not obvious who, exactly, would be able to grant this) — Japan would not be able to sit in on the full negotiations until the September round of discussions. Instead, the solution was to offer a “Japan day” at the end of the Malaysia round on July 24,

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<sup>1</sup> For more details on the evolution of TPA, *see generally* I.M. DESTLER, AMERICAN TRADE POLITICS (4th ed., 2005).

<sup>2</sup> In the end, Japan was granted special permission to commence discussions in the afternoon of July 23rd in Kuala Lumpur, Malaysia, at the 18th round of TPP negotiations.

devoted specifically to all things related to getting Japanese officials up to speed on the talks as soon as possible.

It is certainly true that Japan could have avoided this situation by getting its own domestic situation sorted out much earlier and joining the TPP at any point in the prior years. In fact, Japan was widely expected to join with Canada and Mexico in November 2012 but did not end up doing so.

#### IV. WHY WAS JAPAN SO LATE TO ARRIVE AT THE PARTY?

Books will be written about the myriad of reasons as to why it took Japan more than two years of fraught internal negotiations to arrive at the decision to join the TPP. The payoffs from Japanese membership in the TPP are potentially very large. Although many of the current TPP members already have existing PTAs between them, many are not well connected to Japan. Bringing the world's third-largest economy into the agreement will have substantial economic benefits for participants. Japanese gains from TPP entry are also likely to be significant, as Petri, Plummer and Zhai suggest.<sup>3</sup>

However, the single biggest obstacle to Japanese participation has been agricultural concerns. The most obvious impediment to joining has been the historically high levels of protection offered to Japanese farmers. The political structure is tilted to provide heavier representation of rural areas. Although farming does not contribute much to Japan's overall GDP, the 2.5 million Japanese who farm full or part-time are a formidable force, operating through the Japan Agriculture ("JA") Group.<sup>4</sup> The most potent symbol of Japan's protectionist farm policies is rice, which is sheltered behind rice tariffs that are higher than 700%.

The JA has estimated that removal of tariff barriers to farm products would decimate Japan's agricultural sector. Given that most farmers manage very small plots that are economically uncompetitive with the large agribusinesses in Australia, New Zealand, and the United States in particular, JA predicted that up to 90% of Japanese rice production would be wiped out, as well as 99% of wheat, nearly all sugar, and most beef.<sup>5</sup>

Many have argued that these figures are overblown. In addition, structural changes within Japanese agriculture have been taking place regardless of whether Japan joins the TPP. The average age of Japan's farmers is 65 with few youngsters opting for farming as a career. Many of

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<sup>3</sup> See generally PETER A. PETRI ET AL., *THE TRANS-PACIFIC PARTNERSHIP AND ASIA-PACIFIC INTEGRATION: A QUANTITATIVE ASSESSMENT* (2012).

<sup>4</sup> Aya Takada & Yuriy Humber, *Japan Wants Free Trade, Its Farmers Don't*, BLOOMBERG BUSINESSWEEK (Aug. 2, 2012), <http://www.businessweek.com/articles/2012-08-02/japan-wants-free-trade-dot-its-farmers-dont>.

<sup>5</sup> *Id.*

the current farmers lose money and work only part-time on their plots. According to government estimates, Japan's consumers pay heavily for food protection and domestic farm support, including four times the average global price for rice; three times the global average for sugar, butter and beef; and twice the global average for wheat.<sup>6</sup>

Japan levies a 252% tariff on imported wheat, 360% on butter, 328% on sugar and 38.5% for beef. These tariffs, as well as the politically charged rice tariff, will likely have to go in the TPP. If not withdrawn completely, at least they are going to be subject to significant modifications for the first time in a PTA.<sup>7</sup>

## V. HOW JAPAN CHANGES THE TPP NEGOTIATING DYNAMICS

Japan spent more than two years getting its own internal house in order to be able to join the TPP. In the meantime, the (now) eleven other TPP members spent this time engaged in complex, deeply challenging negotiations. The TPP represents the most comprehensive regional PTA signed to date.<sup>8</sup> It contains nearly 30 chapters covering not just traditional areas like goods, services, investment, and intellectual property, but new issues like e-commerce, environment, and labor. Even in existing areas, officials are busy crafting new rules to try to go further or push boundaries in areas not previously committed. The whole thing is supposed to be subject to a robust dispute settlement mechanism designed to be used by members on a regular basis.

Officials themselves have been strongly divided about Japanese membership. Nearly all have recognized the economic importance of adding Japan to the TPP. This is particularly true as the current 11 partners are well connected through existing PTAs. But Japan is not as linked to the rest on a bilateral or regional basis outside of the TPP.<sup>9</sup> Nor are the existing agreements with Japan as comprehensive or deep as the TPP. For example, most Japanese PTAs carve out or exclude significant portions of agricultural trade. Also, one important objective of the TPP is to facilitate trade in value chains. Including Japanese firms in an Asia-Pacific regional agreement provides a significant boost to achieving this objective.

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<sup>6</sup> Hiroko Tabuchi, *Japan's Farmers Oppose Pacific Free Trade Talks*, N. Y. TIMES (Nov. 10, 2010), [http://www.nytimes.com/2010/11/12/business/global/12yen.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/11/12/business/global/12yen.html?pagewanted=all&_r=0).

<sup>7</sup> However, Japan is also moving forward with PTA negotiations with the European Union where the some of the same product tariffs are likely to be up for discussion as well. The rice tariff might be less problematic in the EU agreement, as the EU does not currently produce rice, unlike the TPP parties.

<sup>8</sup> Excluding the EU, of course.

<sup>9</sup> Japan is connected to the ASEAN member states of Brunei, Malaysia, Singapore and Vietnam through the Japan-ASEAN agreement, but it covers trade goods only. Services and investment negotiations have been proceeding at a snail's pace. Brunei, Malaysia and Singapore also have bilateral agreements with Japan, as does Mexico and Peru.

However, offsetting the benefits of getting Japan in have been the challenges of Japan's inclusion — especially at such a late date in the negotiations. There has been a real concern across many countries that Japan will stall, unpick or destroy the deal on the table at such a late date in the talks. Some of these actions could be deliberate, but some could be inadvertent. The mere fact of Japan's entry, as noted below, could upset the balance on various outstanding issues.

Knowing that Japan will be present has both sped up and slowed down the bargains on the table for most of the first half of 2013. Part of the agreement for entry included the provision (also applicable for Canada and Mexico) that existing “closed” chapters cannot be reopened.<sup>10</sup> This provided a strong incentive for the TPP 11 to close out as many chapters as possible prior to Japan's entry.

However, this came with a catch — for any country with a specific position remaining that believed that Japan might be helpful to their concerns and position, they had the opposite incentive — to prolong negotiations until Japanese officials could lend their weight to one side of an argument.

## VI. RESOLVING SENSITIVE ISSUES

On the 3rd anniversary of the TPP negotiations, which very nearly coincided with the negotiations in Singapore in March 2013, few chapters could be considered “closed.”<sup>11</sup> Most were getting quite close, however. What increasingly were left were the highly sensitive issues that could not be resolved at the level of officials but will need to be made through domestic political decisions. Most of the problem areas that were left to be ironed out are the same issues that could have been predicted from the outset of negotiations. These included sugar, dairy, textiles, and intellectual property rights. Negotiations have also thrown up some new and somewhat unexpected challenges including problems with the competition and dispute resolution chapters.

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<sup>10</sup> It appears that Japan was also granted additional time to complete its own commitments and schedules, if necessary. Canada and Mexico were given up to six months beyond the completion of the TPP to conclude (especially) their market access commitments for goods and services. Japan was apparently given up to 12 months.

<sup>11</sup> Only the SME chapter was officially closed. Even those that were substantially concluded, like telecommunications, may have still had a few minor details left to be resolved, even if all the technical work was concluded and the negotiating teams for the chapter no longer needed to travel to future rounds for further work. At the end of the proceedings, lawyers will need to carefully review the entire document to ensure consistency and so forth once the negotiations conclude.

## VII. SUGAR AND DAIRY

In general the most contentious sectors for TPP members in agricultural trade have been sugar and dairy. Sugar has been a problem for the TPP in multiple ways. For one, the sector is highly sensitive. In the United States, protection of the industry began in earnest back in the Depression and has never been relaxed. As a result, for decades U.S. consumers have paid 2-3 times the world price for sugar.<sup>12</sup> Yet efforts to roll back the various types of support for the sugar industry over the years have been defeated.

In the P4 agreement between Brunei, Chile, New Zealand and Singapore that formed the original basis for the TPP, sugar received the only sector-specific provision in the goods agreement. Chile got a special agricultural safeguard mechanism, “the sugar treatment,” to prevent disruptive surges in sugar imports.<sup>13</sup> In the NAFTA agreement, after a 14-year wait, one of the last items to be liberalized between the parties was sugar. Sugar is not just sensitive in the United States, but also in Mexico.<sup>14</sup>

There is also a specific problem for sugar rooted in the complex TPP negotiating environment. This is because sugar was completely carved out of the existing 2005 U.S.–Australia FTA (“AUSFTA”). It was carved out of the agreement at the time as part of a grand bargain that allowed the United States to continue to protect domestic sugar producers and Australia to opt out of the investor-state dispute mechanism.<sup>15</sup> The latter was an important objective for Australia while the former was a key issue for the Americans. In the end, both sides compromised by excluding these two items from the final agreement.<sup>16</sup>

Now, however, the sugar exclusion presented a new challenge to negotiators in the TPP. If sugar was included in the TPP, it would negate the terms of the AUSFTA. In what was largely perceived as a response to

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<sup>12</sup> See *Employment Changes in U.S. Food Manufacturing: The Impact of Sugar Prices 2* (U.S. Dep’t Com. Int’l Trade Admin., Paper No. PB2006-108488, 2006). The report goes on to note that 10,000 manufacturing jobs had been lost from sugar manufacturing jobs as well during the period 1997-2002, largely as a result of the high price of sugar.

<sup>13</sup> New Zealand, however, noted that it only agreed to liberalization of sugar products (in solid form, HS 1701) because it did not export such products to Chile. See generally N. Z. MIN. OF FOREIGN AFF. AND TRADE, *TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP AGREEMENT: NATIONAL INTEREST ANALYSIS* (2005).

<sup>14</sup> The Mexican government, for example, provided over a USD\$1 billion in loans to the domestic sugar industry in the early 2000s through the development bank, *Financiera Nacional Azucarera SA*. See GARY CLYDE HUFBAUER & JEFFREY SCHOTT, *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 295 (2005).

<sup>15</sup> See ANN CAPLING, *ALL THE WAY WITH THE USA: AUSTRALIA, THE US AND FREE TRADE* (2004).

<sup>16</sup> For more detail on the history of the AUSFTA, ANN CAPLING, *ALL THE WAY WITH THE USA: AUSTRALIA, THE US AND FREE TRADE* (2005).

this problem, the United States developed its strategy of refusing to negotiate for new market access with any country with an existing FTA.<sup>17</sup>

But excluding sugar from the TPP has been problematic. It has been difficult not just for trade in agriculture. The exclusion allowed other countries to argue for excluding their own most sensitive agricultural items. Given the relatively limited economic trade involved between many TPP members, carving out sectors could seriously erode the potential economic gains from the final agreement. It also flew in the face of a “no exclusions” mantra present from the earliest days of negotiations.

Finally, carving out a sector like sugar could lead to similar behavior elsewhere in the agreement. Like the AUSFTA example, the exclusion of sugar might result in the carving out of automobiles or investor protections or intellectual property protections for pharmaceutical products. If each of the 12 TPP members were allowed to exclude their “favorite” sensitive product, sector, or issue from the final agreement, the result could be a significant step back from the liberalizing goals sought.

The other particularly problematic sector for agriculture negotiators has been dairy. Again, this is a historically sensitive industry for many countries with a poor track record of liberalization across the board. New Zealand and the United States do not have an existing PTA. One of the biggest obstacles to completing a bilateral agreement in the past has been over dairy issues.<sup>18</sup> The United States has had a variety of measures in place to protect dairy farmers, including subsidies for milk production and price supports for dairy and dairy products. Historically, these programs have been backed up by high tariffs and by tariff rate quotas (“TRQs”), in order to limit imports of dairy products.

After three years of negotiations, the United States and New Zealand had only made the most limited steps towards resolving the issues over dairy in their market access talks.<sup>19</sup> Both sides acknowledged that dairy was likely to fall into the final end-game package for the TPP as a whole.<sup>20</sup> However, the calculus on dairy changed somewhat with the addition of Canada and Mexico to the negotiating table during the 15th round of talk in late 2012. In particular, U.S. dairy producers had the potential for greater

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<sup>17</sup> This policy was slightly modified with the addition of Canada and Mexico at the negotiating table. The United States announced that it would refuse to negotiate with countries with market access commitments that were “not yet fully implemented.” Since the AUSFTA has some tariffs on sugar and out-of-quota dairy commitments that remain until 2022, Australia was deemed to be ineligible for reopening market access commitments. Canadian concessions, however, could still be sought, since the final NAFTA commitments were phased in by 2008.

<sup>18</sup> An earlier problem related to issues with New Zealand’s refusal to allow American nuclear vessels into New Zealand waters for refueling.

<sup>19</sup> *USTR Tables Initial TPP Dairy Proposal, Offers Little New to New Zealand*, 30(12) INSIDE U.S. TRADE (Mar. 23, 2012).

<sup>20</sup> *U.S. Negotiator Sees New Zealand Dairy Talks As Part of TPP End Game*, 30(37) INSIDE U.S. TRADE (Sept. 14, 2012).

market access into Canada that might offset any losses inflicted by New Zealand farmers.

It was issues with dairy that largely derailed Canada's entry into the TPP for more than two years. Canadian officials originally approached the TPP members in October 2009 to request the bilateral consultations that precede any entry decision. Although officials have been coy about the results of these meetings, Canada was not granted entry at that time. The primary reason for rejection centered on the obstacles posed by Canadian unwillingness to discuss its supply management systems for dairy and poultry in the context of the TPP.

Canada has a long-standing set of practices in place to encourage the growth and development of domestic dairy, poultry and egg farmers.<sup>21</sup> This system was deemed necessary to protect Canadian farmers against competitive pressures from south of the border. The supply management system included setting a floor price and tariff peaks on dairy as high as 300%.

In Canada's existing PTAs, the supply management system for dairy (and poultry) had remained intact.<sup>22</sup> In fact, even under a fully implemented NAFTA agreement, Canada continued to have less than free trade in dairy from American and Mexican producers. This has given rise to the potential for substantial changes in Canadian policy going forward that may have an impact on trade levels in dairy with other TPP partners.

Also left unaddressed at the three-year mark in TPP negotiations was the role of tariff rate quotas ("TRQs") for agricultural products. As TRQs have been used in the WTO as well as in PTAs, eliminating them all together in the TPP could alter market conditions quite substantially for the products currently subject to these quantitative constraints. But duplicating TRQs in the TPP undermines the high quality aspirations of the agreement.

Other agricultural products have not been as difficult, although the addition of Japan at the table may complicate things. Japan has extremely high tariff barriers on a number of sensitive agricultural products. As part of its entry statement with the United States, Japan's Prime Minister Abe pledged to take special care of six sectors including rice, dairy, sugar, wheat, beef and pork.<sup>23</sup>

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<sup>21</sup> Approximately 13,000 dairy farmers participate in supply management, with the bulk of them located in Quebec and Ontario.

<sup>22</sup> Although a somewhat similar system for wheat was dismantled. TPP members were closely following the ongoing talks between Canada and the European Union, under the assumption that supply management was likely on the table in this PTA, which was expected to conclude before the TPP.

<sup>23</sup> Reiji Yoshida, *Japan-U.S TPP deal Sets Stage for Congress Verdict*, THE JAPAN TIMES (Apr. 12, 2013), <http://www.japantimes.co.jp/news/2013/04/12/business/japan-u-s-tpp-deal-sets-stage-for-congress-verdict/#.UeeugNiyb6c>.

### VIII. TEXTILES

Textiles have complicated the speedy conclusion of the TPP agreement. The problem stems from the extraordinarily intricate system of textile protections by the United States. Vietnam, and to a lesser extent, Malaysia, have highly competitive textile industries. Three things have made TPP textile negotiations difficult: the method of negotiating, tariff cuts, and rules of origin.

Because neither Vietnam nor Malaysia have an existing PTA with the United States, both countries have been negotiating market access commitments for goods on a bilateral basis with the Americans. The remaining members have limited interest in the issue of textiles, since it is not considered a sensitive sector. This means that there has been no additional, outside pressure on the United States or Vietnam to move more quickly in resolving their textile differences from other members.

Textiles (and footwear) are subject to relatively high tariffs into the American market. These two items also incur frequent complex duty calculation methods. Negotiators have been at loggerheads over how to reduce the tariff levels.

But far more vexing have been problems related to the rules of origin for textiles. This is because the United States maintains an elaborate system of rules to ensure that firms do not circumvent the rules and obtain preferences from a PTA. Under most US PTAs, the United States requires that (nearly) every step of garment manufacture for textiles to be exported to the United States, be made with fabric created from American yarn. Any attempt to change this system in the TPP will mean undermining the yarn-forward rules in previous PTAs.

The creative solution to this conundrum has been to create a short supply list of fabrics that cannot be properly supplied by US fabric producers — either at all (for items that are not domestically produced) or in sufficient quantities to meet planned demand (nearly all other possible products from cotton to wool to nylon or synthetics). The short supply lists have two variations. One is permanent for former items, such as silk. The latter includes a temporary list, and is where the negotiation action has been heated. The temporary list is intended to allow countries like Vietnam to use non-US made fabric for up to three years while being subject to cut and sew rules of origin. However, many US fabric producers are concerned that these temporary lists might be rolled over on a more permanent basis.<sup>24</sup>

The addition of Mexico to the negotiating table in November 2012 complicated the textile talks further. Mexico also produces garments and,

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<sup>24</sup> This would make it a bit like the granting of Generalized System Preferences (GSP), which have to be reauthorized.

under NAFTA, has substantial benefits into the US market that it appears reluctant to share.

The US timetable for resolving the short supply lists slipped more than once. USTR originally thought it would arrive in Singapore with a completed list for the March 2013 round. It did not. The May round in Peru also did not feature a complete list of products. As a result, Vietnam (in particular) has been reluctant to engage further on a range of market access issues of interest to the Americans in their bilateral negotiations. Until the market access gets sorted out, completing the entire TPP package will be impossible.

## **IX. INTELLECTUAL PROPERTY**

Three years into negotiations, a range of issues remained outstanding in intellectual property (“IP”). The IP chapter has had two problems from the very beginning. First, it is attempting to go well beyond WTO commitments across all areas of IP. Second, the TPP itself bridges a range of members at different developmental stages. Although the TPP does not want to address development or design a “two-speed” agreement, the IP chapter throws into sharp relief the differences between the more advanced member state capacities and interests from the less developed members.

The most challenging issues left in IP have included appropriate protections for pharmaceutical products, especially patent protection length and terms. The rules governing electronic commerce have proven difficult to write. Especially tough are provisions on cross border data flows, as each member has different ideas about how data and privacy ought to be handled. Enforcement also remains a problem.

A looming challenge comes at the intersection between IP and goods. Australia has a new law on plain packaging for cigarettes, and cigarette manufacturers have already filed suit. Interest groups have become galvanized on this topic in the TPP talks with multiple presentations and interventions on all sides of the issue. Thus far, three years into talks, TPP officials have not decided how to handle cigarettes, health, and IP.

## **X. COMPETITION**

One of the more unexpected problems in the TPP has come up in the competition chapter. About halfway through the negotiations, the United States abruptly announced that it wanted to include explicit provisions to cover the behavior of state owned enterprises (“SOEs”). While this should not have been entirely surprising, as a similar problem arose in the US–

Singapore FTA,<sup>25</sup> the extent of US efforts to discipline SOEs caught many TPP members off guard. After placing the issue on the table, it laid dormant for many rounds with only limited discussion. It was not until mid 2013 that officials returned to a discussion of a draft text.

## XI. DISPUTE RESOLUTION

With nearly 30 chapters and provisions that go well beyond WTO commitments, the TPP needs a robust dispute settlement mechanism to handle future arguments about the implementation and enforcement of commitments made by the 12 members. A few unexpected challenges to the creation of such a system have cropped up in the negotiations.

As mentioned above, the US–Australia FTA carved out sugar in exchange for investor-state dispute settlement (“ISDS”). This allows an investor to sue a government over failure to properly uphold its commitments in the investment chapter. Since the bilateral agreement was signed, the Australian government has become more adamant that it will not participate in ISDS in any future agreements. This has proven tricky. If Australia carves out ISDS from the TPP, it may set a precedent for other members to carve out sensitive issues in the final end game as well.

Also problematic for dispute settlement is how far-reaching this chapter will ultimately become. Four other chapters are closely tied into this issue — sanitary and phytosanitary rules (“SPS”) for food and agricultural products, e-commerce, environment, and labor. Officials are currently working on new SPS provisions that go beyond WTO commitments. Many have argued that if these new rules are not enforceable (because WTO dispute settlements cannot be used to adjudicate rules beyond WTO commitments), the new provisions will not amount to much. Therefore, given the absence of full enforceability in the TPP, new SPS provisions will be meaningless. On e-commerce, the environment and labor, some have made similar arguments, and all three are chapters in the TPP. The extent to which commitments made in each will be fully enforceable has remained an open question.

## XII. HOW COMPREHENSIVE DOES IT NEED TO BE?

From the earliest days of the TPP negotiations, it has been touted as a “high quality, 21st century” agreement.<sup>26</sup> Part of this commitment has

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<sup>25</sup> Officially, Singapore does not have SOEs, but instead government-linked companies (GLCs). Nevertheless, the negotiations over the chapter in the bilateral agreement on competition for GLCs were quite contentious. *See*, THE UNITED STATES–SINGAPORE FTA HIGHLIGHTS AND INSIGHTS (Tommy Koh & Chang Li Lin eds., 2004).

<sup>26</sup> THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A 21ST CENTURY TRADE AGREEMENT 3(C. L. Lim et al. eds., 2012).

included the baseline statement of “no exclusions.” This is especially true for market access in goods, which is supposed to be at complete, 100% coverage.

The tariff negotiations have been structurally complex.<sup>27</sup> Basically, all TPP members will drop tariffs for each other’s goods on 90% of tariff lines to zero when the agreement enters into force. Of the remaining 10%, most will also go to zero within 7-10 years. At the end of negotiations, it is possible that between 1 or 2% of tariff lines (at the domestic heading level) will not go all the way to zero at the end of the phase-in period.<sup>28</sup>

In services, liberalization will also be relatively broad. Officials will not be opening every subsector in every possible configuration (or mode) for complete market opening to one another. But their commitments will go well beyond what they have promised at the WTO or in most other bilateral and regional PTAs. Because services have been negotiated on the basis of a negative list (everything not explicitly listed is automatically opened), services should be more liberal in the TPP than in most other agreements members have negotiated in the past.<sup>29</sup>

The agreement also has new commitments in many areas, including IP, government procurement, competition and so forth. How much additional coverage these provisions provide depends in part on the benchmark. Compared to many of the US PTAs, many of the TPP chapters may not provide a significant improvement. But compared to many ASEAN commitments, the TPP represents a drastic difference in the level of commitment required by participants.

From the beginning, the TPP has also touted its cutting edge new issues. These issues (called “horizontal” or cross-cutting issues) were bundled together in one overarching chapter for negotiation. They included discussions on engaging small and medium enterprises (“SME”), enhancing development prospects, and facilitating regulatory coherence.

At the end of the day, it turns out that these types of issues have not been addressed in previous PTAs because they are devilishly difficult to handle. The TPP will likely prove not much different. For example, the SME provisions have basically become a website to help smaller firms take advantage of TPP rules.

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<sup>27</sup> For further details, see generally Deborah K. Elms, *The Trans-Pacific Partnership: The Challenges of Unraveling the Noodle Bowl*, 18(1) INT’L NEGOT. 25 (2013).

<sup>28</sup> The use of domestic level tariff headings in the TPP increases the liberalization in the agreement, because a decision to keep a product at, say 5% in the end will apply to a small category of goods, rather than a larger, aggregated category of goods (as would be the case if tariff liberalization were conducted at the 6 digit level of tariffs like many other PTAs).

<sup>29</sup> Although it is true that a positive list (only the listed sectors are open to foreign competition) can be quite liberal, in practice a negative list is likely to deliver more market opening. This is true at the very least because any new services will be automatically opened for competition in a negative list, unless scheduled for reservation in subsequent agreement review periods.

The regulatory coherence idea was not a big hit with TPP member regulators who have so far proved reluctant to cede control in any important way over their regulations on other countries. However, some elements of what was in this chapter have been shifted to other parts of the agreement. For instance, some regulations around food and agricultural products have been incorporated into the sanitary and phytosanitary (“SPS”) chapter. Others will appear in the technical barriers to trade (“TBT”) sections. What remains in the regulatory coherence chapter itself is largely about forming the institutional mechanisms for coordination between TPP members in the future.

### **XIII. WHEN WILL IT END?**

TPP leaders gave officials instructions to conclude the negotiations by the end of 2013. Since most major announcements on the TPP have been timed to coincide with APEC events, this was interpreted to mean that talks should be wrapped by the APEC Leader’s Meeting. This year, Indonesia is the host of APEC. Since Indonesia is also hosting the WTO Ministerial meeting in Bali in December, the APEC meeting has been pushed forward to October 1-3, 2013.

This deadline was always going to be difficult to meet, even before Japan joined the talks. Logistically, it was a challenge. Negotiating rounds were set for March, May and September. The July round was added later. Given the amount of work to be finished, getting it all done in four rounds ahead of the October deadline is unlikely. Although interim meetings were added, especially for smaller groups of officials, it simply takes a certain amount of time to reach domestic positions before it is possible to sit down and negotiate anything new with other partners. Plus, given the sprawling nature of TPP membership, just getting from the home country to the negotiating venue can take a major effort.

Given the difficulties of reaching a conclusion by the end of the year, when can we expect the agreement to be concluded? A more likely conclusion date is mid-2014. The agreement is not far from being completed. However, it needs slightly more time than officials will likely have available in 2013 (with the major caveat that it depends on how cooperative Japan will be once it substantively joins the negotiations).

### **XIV. RATIFICATION AND TRADE PROMOTION AUTHORITY**

As mentioned above, at the three-year mark, the United States was operating without TPA for the TPP. USTR officials were confident that the absence of TPA would not be a problem for the final ratification of the TPP agreement. They have, after all, scrupulously followed the rules of TPA all

along. The lead US negotiator said she had been holding meetings on Capitol Hill as often as a dozen times per week.<sup>30</sup> The need to convince Congress of the benefits of the agreement has resulted in many specific, non-negotiable positions taken by American officials.<sup>31</sup>

But getting trade agreements past an increasingly skeptical Congress can never be taken for granted. Securing approval of the bilateral deals with Columbia, Panama and South Korea took years and just barely cleared the legislature.<sup>32</sup> The TPP agreement is much more consequential, and comes with the potential for more significant interest group losses than any of these bilateral agreements. Lobby groups in Washington have been actively working the ground since 2010 and can be expected to ramp up their pressure even further once the agreement is placed before Congress.

In the past, Congress granted USTR broad TPA, often for an unspecified set of future trade negotiations. This is not going to happen any longer. Now, the expectation has been that USTR will ask for TPA just before it brings the TPP agreement before Congress for approval. Congress will first bind its own hands with TPA and then vote up or down on the entire TPP package without amendment.

One factor that dramatically changed the prospects for passage of TPA was the June 2013 launch of negotiations between the United States and the European Union. The Trans-Atlantic Trade and Investment Partnership “TTIP” talks also need TPA to proceed to the final approval stage. By bundling the TPP and TTIP together, the Obama administration has made it harder for members of Congress to refuse to grant TPA.<sup>33</sup>

## **XV. FUTURE MEMBERSHIP? ESPECIALLY THE CHINESE ELEPHANT IN THE ROOM...**

The TPP has a unique accession clause (already a rarity) that has been repeatedly used.<sup>34</sup> Membership has expanded over time, from the original four members of the P4 (Brunei, Chile, New Zealand and Singapore) to eight in 2009 (Australia, Peru, United States and Vietnam) to nine in 2010 (Malaysia) to eleven in 2012 (Canada and Mexico). With the addition of Japan in 2013, the economic weight of the TPP has become considerably more substantial. If membership stops with the current TPP 12, the

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<sup>30</sup> Private interviews with author.

<sup>31</sup> This has certainly complicated the TPP negotiations, but ought to smooth the passage of the final agreement through Congress in the end.

<sup>32</sup> See generally JEFF SCHOTT ET AL., UNDERSTANDING THE TRANS-PACIFIC PARTNERSHIP (2013).

<sup>33</sup> If the Bali Ministerial for the WTO in December 2013 yields any agreement, TPA may also be used for this agreement (or at least brought into the arguments for why Congressional approval of TPA is necessary at this time), further strengthening the grounds for TPA passage.

<sup>34</sup> “The Agreement is open to any APEC economy or any other State (Article 20.6), subject to terms to be agreed among the Parties.”

agreement will have important benefits for participants over and above the existing overlapping bilateral and regional agreements between the parties.

However, there are already signs of prospective new members wanting to join the TPP in the future. For the most part, these new members will not be able to renegotiate the agreement, but will be acceding to the terms already on the table (much like new entrants to the WTO). They will, of course, have to negotiate the specific conditions and schedules for their own market access in goods, services and investment, but they will otherwise be subject to the same rules that govern trade in areas like IP or competition, similar to the rest of the TPP membership.

One big question on membership is what happens with China. Although officials there have been following the TPP negotiations with a great deal of attention, they have never expressed an interest in joining the talks at this stage.<sup>35</sup> The TPP is widely viewed as too ambitious an undertaking for China, especially so soon after the wrenching economic changes required for WTO membership. In addition, many commentators have repeatedly noted the challenging political and security ramifications of having China join an agreement at the midway point, and led by the Americans.

For the moment, China seems content to focus on trade liberalization in RCEP and, perhaps, in the trilateral China–Japan–Korea negotiations (“CJK”). This approach may change and the Chinese may become more interested in joining the TPP if RCEP or CJK fail to make significant progress. A decision to reconsider joining the TPP could also be triggered if the TTIP talks between the US and EU pick up momentum.

## **XVI. A LIVING AGREEMENT AND INSTITUTION BUILDING**

The TPP is designed to be a “living” agreement. This means it is supposed to be open to revision on an ongoing and regular basis. Such provisions are important for “21st century” agreements, and especially those designed to facilitate trade in value chains where technology and changes in communication and infrastructure render old methods of doing business rapidly obsolete.

Most PTAs do contain clauses to hold annual (or regular) review sessions. However, these reviews are not always held. Even if they are conducted, the changes made are generally modest and involve tinkering with the legal language of specific provisions. They rarely involve wholesale revisions to an existing chapter. As a result, many agreements

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<sup>35</sup> In late May, China’s Ministry of Commerce spokesman Shen Danyang said that the country was analyzing the advantages and disadvantages of joining the agreement. *See* Don Lee, *China, in Dramatic Shift, Signals Interest in US-Led Trade Talks*, L.A. TIMES (May 31, 2013), <http://articles.latimes.com/2013/may/31/business/la-fi-mo-china-trade-20130531>.

can quickly become “out of date” either because technology has changed or because the PTA does not sufficiently capture the range of activities included in newer agreements.<sup>36</sup>

So the TPP includes a different idea. It is meant to be a “living” agreement subject to ongoing and regular revisions, presumably beyond what is normally found in annual reviews.

But managing a living agreement is going to be tricky. It suggests that officials will have to monitor trends and commitments on a regular and ongoing basis across all members. Once the agreement is finished, the teams of people who have been assembled, often from across government, to negotiate each chapter will move on to new tasks. Yet a living agreement will require that someone stay behind to keep an eye on the TPP itself.

Current thinking in most TPP members seems to suggest that the TPP can be handled like every other agreement — desk officers in the trade ministry will pay attention to the TPP, especially around periods of scheduled reviews. These officers will likely also be in charge of other PTAs, perhaps those in Asia or the overlapping bilateral deals as well.

Handling the TPP in such a manner belies the claims of a living agreement. If the TPP is, indeed, to be the kind of far-reaching, broad and deep integration effort that has been promoted from the beginning, a half-hearted implementation by overcommitted desk officers in the trade ministry alone will not get the job done. The logic of a living agreement seems to require more sustained attention and the building of institutional memory and resources.

No one wants to discuss such a thing now. The focus is on getting the agreement over the finish line. Yet getting it done is really only the first part of the battle. The agreement must be implemented by governments and legislatures, and then used by business firms, if it is to make a real difference in member economies.

## **XVII. THE TPP AS A PATHWAY TO THE FREE TRADE AREA OF THE ASIA PACIFIC “FTAAP”?**

In 2006, the Asia Pacific Economic Cooperation (“APEC”) endorsed an investigation of a future Free Trade Area of the Asia Pacific (“FTAAP”). By the 2010 Leader’s Meeting, the 21 member economies had agreed to move towards the FTAAP.<sup>37</sup> APEC itself has no negotiating function, nor

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<sup>36</sup> Officials often try to avoid this problem by including “ratchet” mechanisms whereby countries pledge to grant each other whatever are the best practices in the newest agreements on a most-favored-nation (MFN) basis. These, however, may need to be treated with caution, as it may be committing a country to provisions that would never have been agreed in a negotiation.

<sup>37</sup> The 21 members of APEC are: Australia, Brunei, Canada, Chile, China, Hong Kong China, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, South Korea, Chinese Taipei, Thailand, United States, and Vietnam.

any apparent enthusiasm among members for creating one. Therefore, the path to an FTAAP must be traveled by a parallel process, with APEC serving as “an incubator of ideas.” APEC officials charted four possible routes to getting there: ASEAN+3, ASEAN+6 (now called the Regional Comprehensive Economic Partnership or RCEP), the TPP, and others.<sup>38</sup> With the RCEP negotiations launching at the end of May 2013, two of the possible routes to the FTAAP are now in play. Many commentators have therefore followed the TPP developments with one eye on its evolution into the FTAAP. This idea, however, comes with many challenges.

First of all, while the current 12 members of the TPP are all APEC members, many of the countries lining up for entry are not. For example, Costa Rica and Columbia have long expressed interest in joining the TPP and neither is an APEC member. This objection ought not be fatal. After all, while two of the endorsed paths to FTAAP center on ASEAN, not all ASEAN members are themselves APEC members (Cambodia, Laos and Myanmar are not APEC members, nor is India in the ASEAN+6 configuration).

Second, and more problematic, not all APEC members are likely to be ready or willing to sign on to the range and depth of TPP provisions. It is difficult to imagine a scenario, for example, under which Papua New Guinea would agree to commit to the liberalization measures in investment, competition, government procurement, or IP in any short or medium time frame.

Third, Papua New Guinea “PNG” presents another type of problem for FTAAP. It is not included in any of the stated paths—not a TPP member, not an ASEAN member, and not a +3 or +6 Dialogue Partner. Countries like PNG, Russia, and Chinese Taipei will need to be accommodated somehow. It is probably not fair to expect them to just dock on to whatever agreement is used, and was negotiated elsewhere with no opportunity to contribute terms.

Fourth, with the launch of RCEP, some people envision some sort of eventual merger between RCEP and the TPP to create an FTAAP. The two agreements have seven common members right now.<sup>39</sup> Of course, a lot will ultimately depend on what happens with RCEP and the level of ambition shown. From the beginning however, a merger is already looking tricky. For instance, RCEP explicitly allows special and differential treatment for developing economies, while the TPP does not. The TPP mandates are much broader and deeper than the agenda drawn up by the 16 RCEP parties.

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<sup>38</sup> ASEAN+3 is the 10 members of the Association of Southeast Asian Nations (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Thailand, Singapore, and Vietnam) with the three countries of Northeast Asia (China, Japan and South Korea). ASEAN+6 adds Australia, India and New Zealand to the 13.

<sup>39</sup> Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam.

It is highly likely that, at the end of the day, the TPP members will be reluctant to drop down the level of ambition in the TPP to meet the RCEP or that RCEP members will come up much farther to meet the TPP.

Finally, even if a merger of some sort were possible between RCEP and the TPP, creating a 21 member PTA in such a fashion would likely be a poor way to draft an agreement. Docking on and massaging existing commitments to fit a new environment is less likely to deliver maximum benefits to all parties than a new agreement negotiated from the beginning.

### **XVIII. THE TPP AND THE GLOBAL TRADING SYSTEM**

Not all PTAs can lay claim to altering the global trading system, but the TPP may be an exception. By itself, it will not start a revolution. Yet the rules contained in the agreement are likely to be transferred to other settings — used in new bilateral agreements, incorporated into different regional deals, and pulled into the WTO itself. The member country participants have bargained long and hard to create the rules and systems in the TPP across a wide and fairly diverse range of countries. These officials will try to transfer this hard-won knowledge into new agreements.

It is not just the “usual suspects” that will argue for using TPP-created standards in other environments. The Americans, of course, can be expected to lobby hard in the WTO and elsewhere to incorporate issues like the latest IP or SPS rules created by the TPP 12. What may be unusual is the extent to which some of the developing country members in the TPP will use their experience to push for changes going forward. Vietnam and Malaysia, for example, may argue much more stridently for real change in ASEAN. After all, some of the commitments in the upcoming ASEAN Economic Community (“AEC”) appear much less intimidating once you have leapfrogged far ahead in the TPP. The upcoming RCEP negotiations could be pulled much more in the direction of the TPP than might otherwise have been expected.

On the one hand, such a spread of liberalizing enthusiasm ought to be applauded. After all, it represents the continuation of a path set in motion with the creation of the GATT back in the 1940s. On the other hand, to the extent that the TPP continues to gain momentum and attract new members going forward, it will dilute enthusiasm from renewed global trade efforts. There is another risk involved in structuring trade along ambitious regional trading regimes like the TPP — not all countries are able or willing to participate.

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