

# CatoTrade

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## Should Free Traders Support the Trans-Pacific Partnership? An Assessment of the Largest-Ever U.S. Preferential Trade Agreement

by

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### **Assessing the TPP**

With terms and provisions spread over 30 sometimes overlapping chapters, the TPP agreement provides much to evaluate. Some chapters lend themselves to quantitative analysis, where the amount of trade liberalization can be calculated. Others require assessments of qualitative terms to even begin to understand whether they are liberalizing or protectionist.

Rendering judgment is by nature a subjective exercise. Assessments of the propriety or efficacy of particular policies are likely to reflect some a priori views or institutional bias. Accordingly, provisions in a trade agreement that might be considered good or bad by scholars at the pro-market Cato Institute might be viewed differently by lobbyists at the pro-business Chamber of Commerce or the pro-labor AFL-CIO or the pro-establishment Peterson Institute.

A trade agreement that opens the U.S. market to greater foreign competition may be welcomed by consumers and import-consuming industries, but it might be reviled by import-competing producers. A deal that accords special privileges on foreign investors may win kudos from multinational corporations, but it might not sit well with those worried about asymmetric access to judicial recourse. An agreement that conditions preferential tariff access for clothing on use of regionally-produced fabric may win the support of textile producers, but might not be in the best interest of U.S. designers, retailers, or consumers. An agreement ostensibly about removing trade barriers that locks in 25 percent duties on pick-up trucks for 30 years may elicit high fives in Detroit, but might cause dismay among truck consumers. Beauty is in the eye of the beholder.

It is with those considerations in mind that it is necessary to explain the criteria used in this assessment to evaluate the TPP. Whereas the AFL-CIO might grade the TPP according to how well it protects worker rights and the Sierra Club might focus on the number of enforceable environmental provisions and the Chamber of Commerce might grade the TPP by the amount of increased foreign market access obtained and the American Iron and Steel Institute might grade the TPP by how much contingent protection is provided, free traders have their own set of standards and criteria.

For free traders, the ideal is free trade: No border barriers; no domestic regulations or policies that have protectionist intent or effects or that otherwise bestow relative privileges on domestic companies or their products; no superfluous rules that are merely tangentially related to trade, but violations of which can be invoked to erect new impediments to trade.

Measured against those standards, the TPP – with its 5,500 pages of explicit rules and exemptions – would not pass the free trade test. The TPP is not free trade. Like all other U.S. trade agreements, the TPP is a managed trade agreement, with provisions that both liberalize and restrict trade and investment. Some free traders would reject the TPP out of hand for its failure to eliminate all restrictions.

While such comprehensive trade liberalization would be ideal, expecting the TPP to deliver real free trade is unrealistic. That outcome is simply politically unattainable. Holding out for the ideal would make the perfect the enemy of the good, when the good is very likely better than the status quo. If the TPP will deliver more trade liberalization than restriction, and realistic alternatives to more comprehensive liberalization are unavailable, why not support the TPP?

So, how to determine whether the TPP is net liberalizing?

### **Description of Methodology**

The scores for each graded chapter take a value ranging from 0 to 10, with 10 assigned to chapters that offer the most liberalizing terms possible (“free trade”); 0 assigned to chapters imposing the most restrictive terms possible (“protectionism”), and; 5 assigned to chapters for which the terms, in aggregate, have a neutral effect. As it so happens, no chapters were assigned scores of “0” or “10.”

Before assigning scores, each chapter was assigned to three scholars to review. After individual assessments were compiled and reviewed, discussion and debate followed, and scores were agreed by consensus. All of the scored chapters (22 of 30) were evaluated by each assigned individual through the prism of the following considerations:

1. Whether, to what extent, and how quickly they would reduce trade barriers or increase trade
2. Whether and to what extent they could have gone further to liberalize trade
3. Whether they are more liberalizing than the terms and provisions of other U.S. FTAs
4. Whether they disproportionately benefit specific producers or other interest groups
5. Whether they break new ground (positively or negatively) and establish markers for future liberalization
6. Whether they belong in trade agreements
7. Whether they are clear, simple, and enforceable
8. Other relevant factors.

Some of the chapters are about market access, some are about rules and governance, and others are technical, administrative, or “suggestive,” meaning that the provisions are not enforceable commitments, but rather suggestions of best practices.

The chapter assessments in the forthcoming paper include summaries, assessments, lists of pros and cons, discussions of the scoring rationale, and the assigned score. For purposes of this extract, that information has been condensed.

### **Scoring, Table, and Figure Descriptions**

*Table 1* presents the assigned scores in numerical order of chapter. The “Nature” of each chapter is also defined as “Market Access,” “Rules and Governance,” “Administrative,” or “Suggestive.” None of the “Suggestive” chapters was graded. Finally, since some chapters are more significant than others in terms of their contribution to the overall determination of whether the TPP is net liberalizing, a distinction for chapter “Tier” was created. “First” tier chapters are more significant determinants of the final verdict than are “Second” tier chapters, so any reasonable effort to assign a TPP-wide score should weight the chapters accordingly.

*Table 2* presents the same information, but in descending order of score.

*Figure 1* and *Figure 2* convey the information from *Table 2* visually, which reveal that the scores range from 3 to 8, with the mode and median score both at 6.

*Table 3* presents the same information as the previous tables, but sorted by Nature, Tier, and Chapter. At the bottom of the table are various averages calculated from the values in the table. The weighted average score of 6.03 is obtained by assigning Tier 1 chapters twice as much weight as Tier 2 chapters. The “Grading on a Special Curve” score of 6.7 adjusts the weighted average score from a scale of 0-10 to a scale of 0-9 to account for the fact that a score of 10 was simply unattainable.

It’s important to recognize that deriving a TPP-wide grade from a straight average of the chapter scores unrealistically assigns the same weight (significance) to each chapter. But it shouldn’t take much convincing that the terms of the “Temporary Entry for Business Persons” chapter is less significant than the “Market Access” chapter or that “Trade Remedies” is less significant than “Cross Border Trade in Services.” Some kind of weighting is necessary to generate a TPP-wide grade, but weighting is necessarily subjective.

The various averages presented at the bottom of *Table 3* indicate that this analysis finds the TPP to be net liberalizing from a variety of perspectives. Each of the averages is above 5. The median and mode scores are 6. The simple average of the Tier 1 scores is 6.63. And, while five chapters were found to be more protectionist than liberalizing (scores below 5), 15 chapters were found to be more liberalizing (scores above 5). Two had neutral scores of 5.

Accordingly, the scholars at the Cato Institute’s Herbert A. Stiefel Center for Trade Policy Studies endorse the overall package that is the TPP Agreement, and believe its ratification and implementation to be in the interest of the American public.

**Table 1: TPP Chapters and Scores**

Chapter	Title	Nature	Tier	Score
1	Initial Provisions and General Definitions	Administrative	None	None
2	National Treatment and Market Access	Market Access	First	8
3	Rules of Origin	Market Access	First	6
4	Textiles and Apparel	Market Access	First	3
5	Customs Administration and Trade Facilitation	Market Access	First	8
6	Trade Remedies	Market Access	Second	3
7	Sanitary and Phytosanitary Measures	Rules & Governance	Second	6
8	Technical Barriers to Trade	Rules & Governance	Second	6
9	Investment	Market Access	First	6
10	Cross Border Trade in Services	Market Access	First	8
11	Financial Services	Market Access	Second	6
12	Temporary Entry for Business Persons	Market Access	Second	6
13	Telecommunications	Rules & Governance	Second	5
14	Electronic Commerce	Rules & Governance	Second	7
15	Government Procurement	Market Access	First	6
16	Competition	Rules & Governance	Second	5
17	State-Owned Enterprises	Rules & Governance	Second	6
18	Intellectual Property	Rules & Governance	Second	4
19	Labor	Rules & Governance	Second	3
20	Environment	Rules & Governance	Second	4
21	Cooperation and Capacity Building	Suggestive	None	None
22	Competitiveness and Business Facilitation	Suggestive	None	None
23	Development	Suggestive	None	None
24	Small and Medium Enterprises	Suggestive	None	None
25	Regulatory Coherence	Rules & Governance	Second	6
26	Transparency and Anti-Corruption	Suggestive	None	None
27	Administrative and Institutional Provisions	Administrative	None	None
28	Dispute Settlement	Rules & Governance	Second	8
29	Exceptions	Administrative	None	None
30	Final Provisions	Market Access	First	8

**Table 2: TPP Chapter Scores in Descending Order**

Chapter	Title	Nature	Tier	Score
2	National Treatment and Market Access	Market Access	First	8
5	Customs Administration and Trade Facilitation	Market Access	First	8
10	Cross Border Trade in Services	Market Access	First	8
28	Dispute Settlement	Rules & Governance	Second	8
30	Final Provisions	Market Access	First	8
14	Electronic Commerce	Rules & Governance	Second	7
3	Rules of Origin	Market Access	First	6
7	Sanitary and Phytosanitary Measures	Rules & Governance	Second	6
8	Technical Barriers to Trade	Rules & Governance	Second	6
9	Investment	Market Access	First	6
11	Financial Services	Market Access	Second	6
12	Temporary Entry for Business Persons	Market Access	Second	6
15	Government Procurement	Market Access	First	6
17	State-Owned Enterprises	Rules & Governance	Second	6
25	Regulatory Coherence	Rules & Governance	Second	6
13	Telecommunications	Rules & Governance	Second	5
16	Competition	Rules & Governance	Second	5
18	Intellectual Property	Rules & Governance	Second	4
20	Environment	Rules & Governance	Second	4
4	Textiles and Apparel	Market Access	First	3
6	Trade Remedies	Market Access	Second	3
19	Labor	Rules & Governance	Second	3
1	Initial Provisions and General Definitions	Administrative	None	None
21	Cooperation and Capacity building	Suggestive	None	None
22	Competitiveness and Business Facilitation	Suggestive	None	None
23	Development	Suggestive	None	None
24	SMEs	Suggestive	None	None
26	Transparency and Anti-Corruption	Suggestive	None	None
27	Administrative and Institutional Provisions	Administrative	None	None
29	Exceptions	Administrative	None	None

Figure 1:

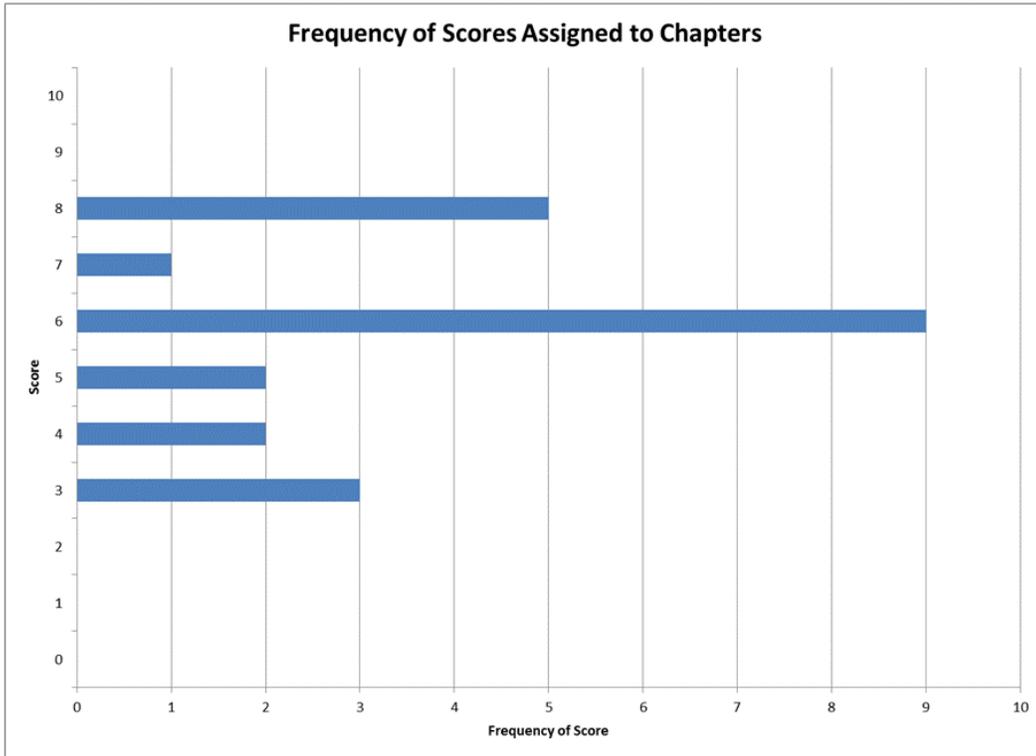
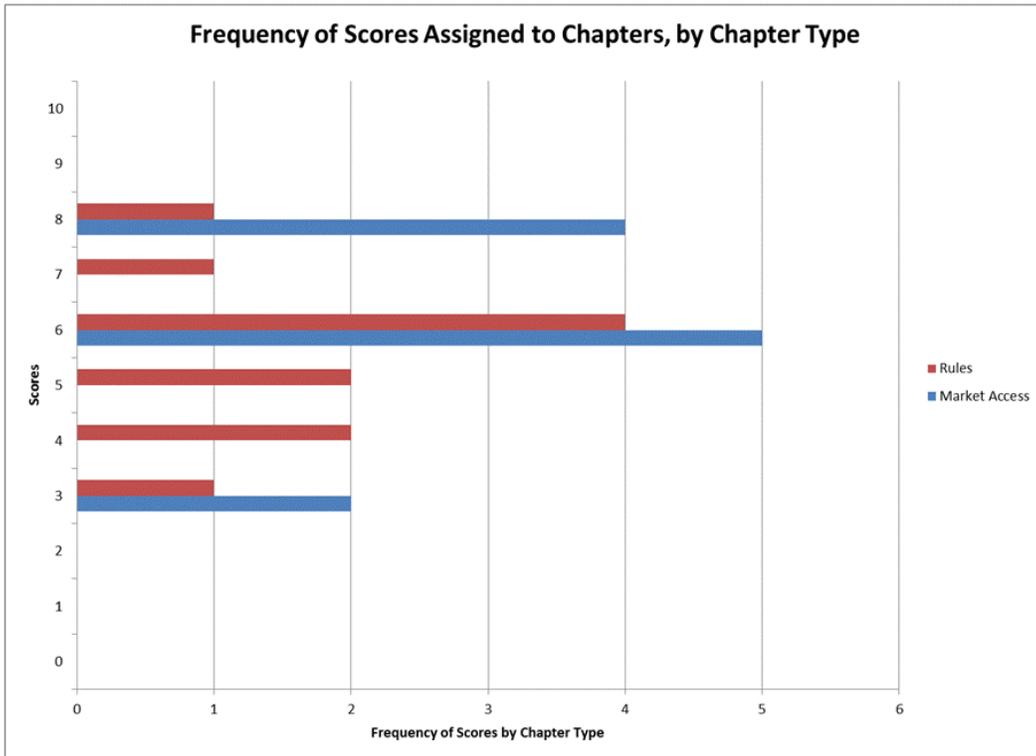


Figure 2:



**Table 3: TPP Chapter Scores by Nature and Tier**

Chapter	Title	Nature	Tier	Score
2	National Treatment and Market Access	Market Access	First	8
3	Rules of Origin	Market Access	First	6
4	Textiles and Apparel	Market Access	First	3
5	Customs Administration and Trade Facilitation	Market Access	First	8
9	Investment	Market Access	First	6
10	Cross Border Trade in Services	Market Access	First	8
15	Government Procurement	Market Access	First	6
30	Final Provisions	Market Access	First	8
6	Trade Remedies	Market Access	Second	3
11	Financial Services	Market Access	Second	6
12	Temporary Entry for Business Persons	Market Access	Second	6
7	Sanitary and Phytosanitary Measures	Rules & Governance	Second	6
8	Technical Barriers to Trade	Rules & Governance	Second	6
13	Telecommunications	Rules & Governance	Second	5
14	Electronic Commerce	Rules & Governance	Second	7
16	Competition	Rules & Governance	Second	5
17	State-Owned Enterprises	Rules & Governance	Second	6
18	Intellectual Property	Rules & Governance	Second	4
19	Labor	Rules & Governance	Second	3
20	Environment	Rules & Governance	Second	4
25	Regulatory Coherence	Rules & Governance	Second	6
28	Dispute Settlement	Rules & Governance	Second	8
A	Simple Average Score (22 Chapters)			5.82
B	Simple Average Score (Market Access Chapters)			6.18
C	Simple Average Score (Rules Chapters)			5.45
D	Simple Average Score (First Tier Chapters)			6.63
E	Simple Average Score (Second Tier Chapters)			5.36
F	Weighted Average Score (22 Chapters)			6.03
G	Grading on a Spedal Curve (22 Chapters)			6.70

1: Initial  
Provisions and  
General  
Definitions

Grade:  
**Not  
Graded**

## 2: National Treatment and Market Access for Goods

Scoring

Rationale:

Grade:

8

“The provisions in Chapter 2 will immediately and substantially open the U.S. market to regional imports by increasing the percentage of MFN duty-free tariff lines from 35.4 percent to 90.5 percent upon entry into force, and to 99 percent by full implementation in year 30. Likewise, foreign markets are opened just as wide and usually faster with the percentage MFN duty-free tariff lines rising from 51.3 percent to 87.8 percent, and nearly all remaining tariffs going to zero within 16 years. Seven of the 12 TPP countries eliminate all tariffs eventually and export subsidies are eliminated,

Despite wide-scale tariff elimination and reduction across the region, some parties – especially the United States and Japan – took exemptions or adopted very slow tariff phase outs for certain products to satisfy powerful domestic interests, such as beef, sugar, and auto producers in the United States and rice farmers in Japan. These carve-outs raise concerns that the agreement will cement protectionism in sensitive U.S. and foreign sectors and set precedents for similar protectionism in future trade agreements. The United States hold the unfortunate distinction of maintaining the longest tariff phase-outs – no liberalization of the 25 percent tariff on light trucks until the 30th year of implementation.

Moreover, the United States and Japan maintain separate tariff schedules for each country, which would seem to negate some of the market access benefits provided elsewhere in the agreement, stunt supply chain development, and lead to trade diversion. Nevertheless, the market access liberalization agreed by the TPP parties is considerable in absolute terms and relative to previous FTAs. The terms of this chapter are clearly net liberalizing.<sup>55</sup>

Scoring  
Rationale:

### 3: Rules of Origin

Grade:

6

“Rules of origin are features of preferential trade agreements that are, by definition, restrictive. ROOs that make allowances for more non-originating content permit greater flexibility and innovation in supply chain architecture, which means generally lower production and compliance costs, and other efficiencies, and are thus more liberalizing. The TPP’s ROOs are more flexible than those in other U.S. FTAs and are thus akin to a reduction in trade barriers, which is likely to lead to more trade. Of course, the ROOs could have been more liberalizing still, but efforts to make them so ran into opposition from auto and auto parts producers, especially from producers in the NAFTA countries. Although they could have been even less restrictive, the TPP’s ROOs are relatively permissive and will enable more trade. But were crafted with a lot of guidance from – and for the benefit of – incumbent auto and auto parts producers.”<sup>55</sup>

Scoring  
Rationale:

## 4: Textiles and Apparel

Grade:  
3

“The Textiles and Apparel chapter is explicitly restrictive and intended to manage supply chain relationships, while ensuring that the gains from trade are distributed in a political, rather than economic, manner. The TPP’s restrictive rules for textile and apparel trade continue a long tradition of managed trade and should raise questions about why an 18<sup>th</sup> century industry warrants such protection in a 21<sup>st</sup> century agreement.

Although the rules of origin vary by product, the overarching theme of the chapter is the “yarn forward” rule, which confers originating status on fabric and clothing made from regional inputs from the yarn forward. That rule impedes trade by limiting the supply of eligible inputs and detracts from the broader market access liberalization achieved in Chapter 2. Its provisions are intended to benefit primarily U.S. textile producers at the expense of TPP apparel producers, importers, retailers, and consumers.

The chapter conspires to ensure that the TPP’s largest clothing producer, Vietnam, has to establish new – likely much less efficient – supplier relationships and incur greater costs to obtain preferential access to the U.S. and other large TPP markets. That will deprive consumers of many of the benefits of trade and transfer rents to existing textile producers. The one bright spot is the absence of a mechanism for managing the short supply list, which introduces slightly greater certainty to the supply chain management process. The Textile and Apparel Chapter is protectionist.<sup>99</sup>

## 5: Customs Administration and Trade Facilitation

Scoring

Rationale:

Grade:  
8

“The provisions in the Customs Administration and Trade Facilitation chapter have good potential to reduce important – often overlooked – impediments to trade. As trade and development economists at the World Bank and elsewhere have demonstrated, delays at the border constitute significant barriers to trade, which act like tariffs, raising the costs of traded products. Meanwhile, opaqueness of customs processing and clearance procedures creates greater scope for corruption, which also raises the costs and reduces the benefits of trade. Measures to reduce these kinds of administrative barriers to trade by requiring adoption of best practices or common standards and procedures make good sense, and the requirements of this chapter are a good addition to the TPP.

The obligations and suggestions articulated in this chapter reflect the findings of a lot of research over the past decade about the adverse impact of transit, processing, and other administrative delays associated with customs procedures. Time is a trade barrier and efforts to reduce delays should be welcome additions to trade agreements. The obligations specified in this chapter will help reduce trade barriers and appear to be more liberalizing than the terms of the WTO’s Trade Facilitation Agreement, which sets a precedent for future liberalization in this realm.<sup>59</sup>

Scoring  
Rationale:

6: Trade  
Remedies

Grade:  
3

“The purpose of this chapter seems to be to ensure that TPP brings no liberalization to the U.S. antidumping, countervailing duty, or safeguard regimes. It accomplishes that objective by specifying that each country retains its rights under the WTO to invoke measures under those laws. In addition, the chapter avails the parties of new forms of protectionism by providing a “transitional safeguard measure,” which could be used to increase tariffs on imports included those not found to be “unfairly” traded.

Nothing in this chapter does anything to reduce trade barriers. In fact, the chapter is committed to expanding the access of domestic industries to protectionist outcomes. If there is anything remotely positive about this chapter, it is the requirement that domestic authorities make their trade remedies regimes more transparent – somewhat akin to a prisoner enjoying a final cigarette before facing the firing squad.<sup>59</sup>

## 7: Sanitary and Phytosanitary Measures

Scoring  
Rationale:

Grade:  
6

“The SPS chapter addresses health- and food safety-related rationales for restricting trade and builds upon the WTO SPS Agreement by adding more detailed obligations concerning transparency and cooperation. The recourse of governments to trade restrictions for the purpose of protecting public-health is not in question. But sometimes this allowance serves to mask protectionist or otherwise political objectives.

In recent years, numerous SPS-based restrictions have been imposed on U.S. exporters of GMO products, as well as beef, pork, and chicken, allegedly over concerns about diseases threatening public health. This chapter helps reduce the scope for mischief by defining more clearly when and how it may be appropriate to apply SPS measures.

These provisions go beyond current WTO obligations in ways that seem likely to facilitate, rather than restrict trade. In this chapter, the parties accept the science-based approach to SPS favored by Australia, Canada, New Zealand, and the United States, which puts a more rigorous burden on governments to justify their decisions to impose SPS-based trade restrictions on imports from another party. That could set a precedent for future agreements and might place pressure on the EU to reconsider its less robust evidentiary thresholds and weed out spurious SPS claims. And perhaps this reaffirmation of the need to use SPS measures thoughtfully will prompt the United States to reconsider the wisdom of some of its own SPS barriers.”<sup>59</sup>

## 8: Technical Barriers to Trade

Scoring  
Rationale:

Grade:  
6

“Technical barriers to trade take the form of product standards and regulations intended to protect public health, product and worker safety, and other desired social outcomes, which also have protectionist or discriminatory effects on imports. Technical barriers to trade have been a concern of the international trade regime dating back to before the GATT.

In recent years, the TBT Agreement has seen some high profile litigation at the WTO, often focusing on U.S. laws and regulations (the Clove Cigarettes, Country of Origin Labelling, and Tuna decisions). The TPP’s chapter on technical barriers to trade builds on existing international rules in other trade agreements. To a great extent, Chapter 8 duplicates the WTO’s TBT Agreement, but it also introduces some new additions that will help reduce the scope for protectionism masquerading as regulatory necessity.

International obligations on technical barriers to trade are a core part of the WTO already, so the benefits of extending these obligations to the TPP may be somewhat limited. However, the TPP chapter on technical barriers does have special provisions for several products, which go further than what is in the WTO. Overall, this chapter is not likely to have a broad impact on trade between TPP parties.<sup>59</sup>

Scoring

Rationale:

## 9: Investment

Grade:

6

“International trade and investment go hand-in-hand, as most trade is conducted between affiliates of the same multinational enterprises – often parent companies exporting components or finished products to affiliates abroad, who then process or package and sell to end users in foreign countries. Although the trade liberalizing features in other chapters of the agreement will also serve to encourage more FDI in the region, the TPP Investment chapter establishes certain rules governing the treatment of foreign investors and foreign investment that should amplify investment flows.

Among the more prominent features is that a “negative list” approach to investment liberalization was adopted, meaning that the parties listed the sectors of their economies excluded from the investment commitments agreed in the chapter. The negative list approach is considered more liberalizing because any industries not listed are open to new investment – including industries that don’t yet exist but are likely to emerge in the future. Moreover, the existence of a list of sectors that remain protected readily identifies industries that might be targeted for future reforms.

Another important feature of this chapter is that the parties agree to not use so-called performance requirements, such as minimum export-to-output ratios, use of local content, or the transfer of technology to domestic entities, as conditions of investment.

Like investment chapters in other U.S. FTAs, this one includes provisions for the controversial investor-state dispute settlement (ISDS) mechanism, as well as a carve-out that precludes tobacco companies from bringing ISDS claims. The investor state dispute settlement mechanism is more about litigation than liberalization. And the discrimination against tobacco through the "tobacco carve out" sets a bad precedent that could open the door to discrimination against other products and industries in the future.”

Scoring  
Rationale:

## 10: Cross Border Trade in Services

Grade:  
8

“Overall, this chapter offers some of the most extensive trade liberalization in the entire agreement. U.S. firms maintain significant comparative advantages in the tradable business services sectors, and stand to benefit from the considerable commitments made by most of the other TPP parties. Liberalization of services in multilateral fora has been difficult to achieve. In the 21 years since the GATS Agreement took effect, there has been very little enforceable services liberalization achieved globally. Attempts to secure stronger commitments in the Doha Round failed and efforts to push those commitments forward as part of the now plurilateral Trade in Services Agreement are still incomplete. Accordingly, the TPP is an achievement in services liberalization that goes further than any other agreement.

While the general obligations concerning national treatment, most favored nation treatment, and market access are similar to those found in the WTO GATS agreement, the TPP takes the important step of moving away from the positive list approach to a negative list approach. The TPP parties commit to full liberalization of every service sector that has not been carved out as a “nonconforming measure.” The TPP includes a new rule that precludes parties from requiring businesses of the other parties to establish a “local presence” as a condition of supplying cross-border services.

Nevertheless, the existence of extensive non-conforming measures – especially with respect to important U.S. maritime services (Jones Act) and commercial airline services industries, which have languished in inefficiency behind protectionist walls – shows that services liberalization could have gone further.<sup>59</sup>

Scoring  
Rationale:

## 11: Financial Services

Grade:

6

“Beyond the general chapter on cross-border trade in services, the TPP also establishes more specific rules for particular kinds of services. One of these is financial services, which covers two broad categories: insurance services, and banking and other financial services.

TPP parties make some commitments to liberalization of financial services by permitting greater competition and agreeing to extend national treatment and most-favored nation status to foreign firms. The deal reduces barriers to foreign firms wishing to compete in insurance, portfolio management, and payment services markets. But that relatively modest amount of liberalization is mitigated by the fact that financial firms participating in foreign markets will be exempt from the data localization prohibitions that apply to all other industries. That exemption could lead to governments requiring financial services firms to adopt sub-optimal data storage architecture, which would raise the cost of doing business.

Overall, the financial services chapter reflects the commitment to non-discrimination and liberalization reflected in other parts of the TPP. It strives to be liberalizing, but is constrained by traditionally protective national approaches to financial regulation, as well as the recollections of financial industry professionals of the Asian Financial Crisis and the more recent U.S. and European-centric crises. The desire to exercise prudence and the political necessity of avoiding the perception of governments caving to external pressure to weaken financial reforms adopted in many countries in response to those past crises contributed to the mitigation of liberalization in this chapter.<sup>59</sup>

Scoring  
Rationale:

## 12: Temporary Entry for Business Persons

Grade:

6

“In order to conduct business internationally, travel and formal entry into other countries are often necessary and that usually requires travel visas. The terms of this chapter are intended to facilitate that process with reliable, efficient procedures for entry of business persons who are nationals or permanent residents of a party and who are not persons seeking entry for purposes of employment or permanent residence. The chapter may provide a basis for improving business entry procedures.

By and large these are important considerations when providing goods and services across borders, and it is appropriate to consider systemic delays in these areas to be trade barriers. Although the 11 U.S. TPP partners made commitments in this area, the United States made none, owing to political sensitivities surrounding immigration issues (even though these provisions have nothing to do with immigration).

The chapter is moderately liberalizing in that 11 countries have committed to reducing barriers to temporary entry for business persons, but it could have been more so had the United States not refused to lift the ceiling on the number of visas.<sup>55</sup>

Scoring  
Rationale:

## 13: Telecommunications

Grade:

5

“The Telecommunications chapter sets out rules on how to regulate telecommunications services and service providers. It requires members to let foreign enterprises supply and use telecommunications services on a nondiscriminatory basis. It prohibits the imposition of unnecessary conditions on the use of telecom services. It includes provisions meant to facilitate interconnectivity of national phone systems and interoperability of mobile phones across markets. There is also a provision setting out a right for foreign suppliers to challenge the decision of a regulatory body.

These obligations are mostly carry-overs from previous trade agreements without much modification. However, the proliferation of mobile phones in recent years has led to one new provision, dealing with international mobile roaming services. The terms of this chapter have the potential to be liberalizing, but the downside is that the rules are awfully detailed and envision a very active role for telecom regulators in setting market conditions and managing competition in the market. It would be more clearly liberalizing if the chapter laid out what sorts of regulations are prohibited without mandating particular regulatory approaches. Regulation in the telecom services sector may prevent certain anticompetitive practices, but it also stifles innovation and privileges established firms.”<sup>59</sup>

Scoring  
Rationale:

## 14: Electronic Commerce

“The TPP chapter on electronic commerce contains a number of provisions that go beyond previous FTAs, and is perhaps one of the most innovative TPP chapters. It is a mix of negative obligations that prohibit TPP parties from imposing trade barriers, and positive obligations that require the parties to undertake specific measures. That’s a bit of a mixed bag from a free trader’s perspective.

The free flow of information is essential to free trade in electronic commerce, as well as to the industries for which data are crucial components of the product or service. The issue has been a sensitive topic in trade negotiations and in other venues in recent years.

Chapter 14 makes a positive contribution to the TPP by applying some basic free trade principles to electronic commerce. It succeeds by prohibiting the imposition of customs duties on electronic transmissions; establishing a general principle of nondiscriminatory treatment for digital products; prohibiting TPP Parties from requiring the use of local computing facilities as a condition for conducting business in their territory; requiring that Parties “allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of the covered person”; precluding Parties from requiring the “transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.”<sup>59</sup>

Scoring  
Rationale:

## 15: Government Procurement

Grade:  
6

“The TPP’s Government Procurement chapter, while slightly liberalizing, is a major disappointment for the opportunities foregone. It succeeded by opening previously closed foreign procurement markets in Vietnam and Malaysia to competition from U.S. and other TPP countries’ bidders, but it could have been much more liberalizing if project-value bidding thresholds were lower and a more categories of projects were made eligible. The existence of many country-specific and sector-specific restrictions on bidding reinforces the conclusion that this chapter is very much about managed trade.

The chapter could have been much more liberalizing if the United States had been willing to grant waivers to its highly inefficient, self-destructive Buy American provisions and opened its state and local procurement markets. As it stands, most of the estimated \$1.7 trillion U.S. market (federal, state, and local) remains off limits to foreign participation, ensuring that U.S. taxpayers continue to get the smallest bang for their bucks.”

Grade:

5

## 16: Competition

Scoring  
Rationale:

“The Competition chapter establishes rules related to competition policy and requires that each party have national competition laws “that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare.” The chapter lays out extensive due process rights and transparency requirements, including the right of parties to procedural fairness in competition law enforcement, including representation by counsel and protection of business confidential information, as well as the provision for a private right of action by which individuals could seek redress through a judicial process for harm experienced due to violation of competition laws.

The procedural rules might promote greater rule of law and justice if they are followed by the TPP’s more authoritarian members, which may be helpful to multinational companies that deal with anticompetitive situations in other countries and could encourage overseas investment. But, as the chapter will require no changes to U.S. law, one should assume there will be no direct benefits to U.S. consumers.

The competition chapter does very little to liberalize or restrict trade.<sup>55</sup>

## 17: State-Owned Enterprises

Scoring  
Rationale:

Grade:  
6

“Chapter 17 represents the first attempt in a trade agreement to target the abuses of state-owned enterprises. The chapter strives to reduce the scope for protectionist outcomes stemming from SOE activities by imposing obligations that they operate according to commercial considerations only; must not give or receive subsidies in a way that harms foreign trade; and must not discriminate against foreign suppliers. The rules are simple and well-tailored to address the problem of protectionism conducted through management of SOEs and the granting of special privileges to them.

Parties also are required to provide their courts with jurisdiction over civil claims arising from SOE activities the same as they do for non-SOE firms; publicly list all their SOEs and designated monopolies, even those not covered by the Chapter’s rules; commit to further negotiations within five years that could lead to more liberalization of SOEs.

By and large, the requirements of this chapter will reduce trade barriers and lead to more trade. And they lay down markers for countries with large SOE sectors that may want to accede to the TPP in the future. Indeed, future negotiations on these issues are mandated in the chapter text.

On the down side, the chapter provides for numerous exceptions to the basic rules and each country availed itself of numerous exemptions that effectively enable their SOEs to continue operating outside the rules of this chapter. While the chapter has good rules, its numerous exceptions and limited scope significantly diminish its ability to reduce the economic harm caused by the proliferation of privileged and insulated SOEs.<sup>99</sup>

Scoring  
Rationale:

## 18: Intellectual Property

Grade:  
4

“It is difficult to describe the intellectual property protections in trade agreements as “liberalizing.” While a case can be made for some level of intellectual property protection, it is not clear why such protection should be included in trade agreements, as opposed to international intellectual property agreements. Arguably, the protections that have been included go beyond what is necessary to promote innovation, one of the main justifications for these protections. Intellectual property protection is, after all, a form of protectionism. And we must be vigilant about ensuring that the monopoly privileges bestowed through IP protections don’t unnecessarily impede competition and hurt consumers.

The IP chapter is protectionist. The structure of the chapter, like IP chapters in other agreements, remains generally unbalanced in requiring protection of exclusive rights while merely permitting limitations and exceptions to those rights. Although the chapter’s provisions do not exceed the protection under U.S. law, they do lock in that level of protection and impose new obligations on foreign countries to change their laws.

Though it is not as bad as many critics claim, the chapter makes a positive contribution to the fight against excessive protection of geographical indications. It also imposes a positive, albeit weak, obligation to balance exclusive rights with limitations and exceptions, including fair use. The chapter won’t require any changes in U.S. law, and its provisions are on the whole less strict than the U.S.-Korea FTA.<sup>59</sup>

## 19: Labor

Grade:

3

Scoring  
Rationale:

“Labor chapters in trade agreements do not promote liberalization. They are designed to increase regulation of foreign labor practices. While there may be a political argument for including them in trade agreements, there is no economic rationale.

In the TPP, labor protections have been pushed even further. While much of the TPP labor chapter simply borrows from earlier agreements, with commitments to follow certain rights set out in the ILO Declaration and an obligation to “effectively enforce” domestic labor laws, the TPP goes beyond traditional labor chapters in a number of ways, including by requiring that parties “adopt and maintain statutes and regulations” with respect to minimum wages.<sup>55</sup>

## 20: Environment

Grade:

4

Scoring

Rationale:

“The TPP’s Environment chapter reduces the agreement’s value by making trade liberalization contingent on the adoption of certain environmental regulations. The TPP continues a decades-long trend of blurring the line between trade agreements and environmental treaties. However, the chapter imposes weaker obligations than past U.S. trade agreements and contains a genuinely liberalizing prohibition against subsidies that contribute to overfishing.”<sup>55</sup>

21: Cooperation  
and Capacity  
Building

Grade:

Not

Graded

22:  
Competitiveness  
and Business  
Facilitation

Grade:  
**Not  
Graded**

23:  
Development

Grade:

Not

Graded

24: Small and  
Medium  
Enterprises

Grade:

Not

Graded

Scoring  
Rationale:

25:  
Regulatory  
Coherence

Grade:

6

“The TPP Regulatory Coherence chapter focuses on improving domestic regulatory processes, including better interagency consultations and overall coordination, and good regulatory practices. The potential for liberalizing trade by reducing compliance costs through harmonization of regulatory standards or mutual recognition of the efficacy of different regimes is large. The TPP makes only very minor progress toward that potential.

Dispute settlement procedures are not available for “any matter arising under this chapter.” This exclusion makes the chapter much less significant than it otherwise might be. Relatedly, the provisions of this chapter are written in hortatory language, emphasizing its nonbinding nature. Perhaps the greatest achievement in the TPP with respect to regulatory coherence is the creation of a whole separate chapter called “Regulatory Coherence.” And there will be a formal Committee established to talk about these issues going forward. In that sense, the TPP pushes the U.S. FTA model forward in terms of regulatory issues.

Although its impact will be limited, the TPP provides an avenue for pursuing these important issues in international fora.<sup>59</sup>

26: Transparency and  
Anti-Corruption

Grade:

Not

Graded

27:  
Administrative  
and Institutional  
Provisions

Grade:  
**Not  
Graded**

## 28: Dispute Settlement

Grade:

8

Scoring  
Rationale:

“In order for trade obligations to have a liberalizing impact, they must be binding and enforceable. The TPP dispute settlement chapter devotes much effort to fixing the flaws in past agreements that deterred parties from pursuing this kind of recourse and prevented dispute panels from being established. The chapter language is intended to make dispute settlement faster than it is in the WTO, more transparent, and more comprehensive in that it will be accessible for resolution of more issue areas than is the case under any other dispute settlement systems.

If there are any drawbacks, dispute settlement under TPP lacks an appellate mechanism. While that feature will facilitate speedier resolution of issues, it could also produce incoherent jurisprudence that makes enforcement difficult.<sup>55</sup>

29:

Exceptions

Grade:

Not

Graded

## 30: Final Provisions

Grade:

8

Scoring  
Rationale:

“Chapter 30 sets out a variety of “final provisions” dealing with a number of future events. The two most prominent ones are entry into force and accession. The benefits of trade liberalization increase the more broadly it is applied, and therefore the prospect of accessions should make the TPP more valuable. The more countries that are parties to the agreement, the wider the liberalization net is cast.

There has long been talk of the TPP expanding to include other regional countries and eventually morphing into a broader Free Trade Area of the Asia Pacific. If that were to occur, the TPP would provide more liberalization, applied more broadly, and that would generate even greater benefits. Especially in the absence of viable alternative channels to broad-based, multilateral trade liberalization, the TPP could be the engine that ultimately produces those outcomes if accession – or some other form of multilateralization – proves popular.<sup>59</sup>

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the costs of protectionism.