

Should Free Traders Support the Trans-Pacific Partnership? An Assessment of America's Largest Preferential Trade Agreement

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Abstract

This paper presents a chapter-by-chapter analysis of the Trans-Pacific Partnership agreement from a free trader's perspective. Brief summaries, assessments, scores on a scale of 0 (protectionist) to 10 (free trade), and scoring rationales are provided for each evaluated chapter. Of the 22 chapters analyzed, we found 15 to be liberalizing (scores above 5), 5 to be protectionist (scores below 5), and 2 to be neutral (scores of 5). Considered as a whole, the terms of the TPP are net liberalizing – it would, on par, increase our economic freedoms. Accordingly, the authors hope it will be ratified and implemented as soon as possible.

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Introduction

After nearly six years of negotiations, a Trans-Pacific Partnership agreement was reached in October 2015. The deal was subsequently signed by the governments of the United States and 11 other parties in Wellington, New Zealand in February 2016. In terms of the value of trade and share of global output accounted for by the 12 member countries, the TPP is the largest U.S. trade agreement to date.

Legislation to implement the TPP could be introduced in Congress this year, but with caustic anti-trade rhetoric permeating the presidential election campaigns and the major-party candidates publicly opposing the deal, prospects for passing such legislation in 2016 look bleak. Election-year politics aside, skepticism and, in some cases, outright opposition to the TPP have been registering across the political and ideological spectra. The usual anti-trade arguments from labor, environmental, and other groups on the left have been supplemented by free-market oriented assertions that the TPP is too much about global governance and too little about market liberalization.

Although often referred to as a free trade agreement, the TPP is not really about free trade. Like all so-called free trade agreements, the TPP is about managed trade. The deal includes broad swaths of liberalization – “freer” trade – as well as rules and provisions that serve other, sometimes less liberal purposes.

The agreement’s 30 chapters deal with traditional trade issues, such as: market access for goods, services, and agricultural products; rules of origin; and, customs- and other border-related issues. But it also includes rules affecting e-commerce, the operations of state-owned enterprises, the formulation of regulations, intellectual property, investment policy, labor policy, environmental policy, and other policy areas that are less obviously associated with trade or trade barriers.

Whether free traders should support ratification of the TPP depends on whether, and to what extent, they wish to avoid making the perfect the enemy of the good. If free trade purity is the benchmark, then the TPP fails the test. But what if the deal includes more trade liberalization than protectionism and can be deemed net liberalizing? Should that be enough? Does it depend on specific provisions in specific chapters?

This paper presents a chapter-by-chapter analysis of the TPP from a free trader’s perspective.¹ Brief summaries, assessments, scores on a scale of 0 (protectionist) to 10 (free trade), and scoring rationales are provided for each evaluated chapter. Of the 22 chapters analyzed, we found 15 to be liberalizing (scores above 5), 5 to be protectionist (scores below 5), and 2 to be neutral (scores of 5). Considered as a whole, the terms of the TPP are net liberalizing.

¹ We were able to analyze and “score” 22 of the 30 TPP chapters. Eight chapters did not lend themselves to qualification or scoring.

The Trans-Pacific Partnership in a Nutshell

The TPP is the largest U.S. trade agreement to date – in terms of the volume of trade and share of global output represented by the 12 countries involved.² In 2014, the member countries accounted for \$5.3 trillion or 23 percent of the world's exports and \$28 trillion or 36 percent of global GDP.³

The Trans-Pacific Partnership has been a source of contention since President Obama formally announced U.S. participation in the negotiations in 2009. From the outset the debate surrounding the TPP generated more heat than light. Old, traditional battle lines were redrawn, with business lobbies touting the benefits to U.S. exporters and the jobs they would create, and labor, green, and other anti-corporate lobbies warning of TPP's imminent worker abuses, exacerbated income inequality, and adverse health and environmental consequences.

During six years of slow-moving negotiations, most of the TPP's details were kept in the vault, accessible only to cleared advisors and members of Congress. The dearth of information about the trade deal produced an environment ripe for speculation, misinformation, exaggeration, and dishonesty, which was exploited by those intent on stoking fears and opposition to the deal. The absence of any significant effort from President Obama to rebut mendacious claims about the TPP, challenge his party's anti-trade orthodoxy, or to reassure Americans that removing restrictions on their economic freedom is actually something to celebrate explains much about why the atmosphere surrounding trade and the TPP became so toxic.

Many TPP members, including the United States, already have bilateral free trade agreements between and among themselves, which means that some of the benefits of TPP's lower hanging fruit are already being realized. However, the liberalization in TPP goes farther and deeper than the liberalization in other trade agreements, and the deal includes important new countries with large consumer markets and pools of resources for imports and collaboration on the production and supply side.

The agreements 30 chapters deal with traditional trade issues, such as: market access for goods, services, and agricultural products; rules of origin; and, customs- and other border-related issues. But it also includes rules affecting e-commerce, the operations of state-owned enterprises, the formulation of regulations, intellectual property, investment policy, labor policy, environmental policy, and other policy areas that are less obviously associated with trade or trade barriers.

Arguably, this second cluster of rules and provisions belongs in trade agreements, as protectionism nowadays is more likely to lurk behind the border. But including such rules and provisions in trade

² The TPP signatories are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

³ Peter A. Petri and Michael G. Plummer, "The Economic Effects of the Trans-Pacific Partnership: New Estimates," Peterson Institute for International Economics, Working Paper 16-2, January 2016.

agreements invites legitimate concerns about the potential for overreaching global governance and whether that could lead to an erosion of national sovereignty and domestic accountability.

There has been a great deal of opposition expressed by certain civil society groups to various aspects of the TPP. Some of those concerns seem to have merit, but much is hyperventilation, stoked by interest groups whose opposition to trade agreements is hard-wired in their organizational purposes, and whose tactics rely heavily on the use of hyperbole and misinformation to scare people to their causes.

Nevertheless, there are legitimate concerns about potentially overreaching provisions on labor and the environment, as well as on intellectual property, investment, and in some other areas, which could threaten the exercise of domestic sovereignty in the United States and in the other member countries. And those should be considerations to weigh against the likely benefits of liberalization in the agreement.

Globalization Means 21st Century Trade Agreements are More Comprehensive

The proliferation of cross-border investment and transnational supply chains has changed the nature of production and conduct of international trade. Not too long ago, most products were produced in a single country and selling those products in foreign markets involved exporting from one location to an unaffiliated importer abroad. The kinds of trade barriers that concerned foreign producers, exporters, and importers were border barriers, such as tariffs and slow customs clearance procedures, which could increase the costs of their transactions. Ensuring non-discrimination against imports mostly required monitoring of protectionism at the border only.

Revolutions in computing, communications, and transportation, along with continuous reductions in tariffs throughout the second half of the 20th century spurred a proliferation of cross-border investment and the emergence of transnational production and value chains. These developments changed the complexion of international competition.

With products and services being created and delivered in multiple countries and with companies setting up operations in foreign countries and competing directly with incumbent domestic firms, the scope for discrimination expanded. Or – more accurately – discrimination in legal and regulatory environments became more noticeable. No longer was protectionism perceived as just a problem of border barriers. It now lurked in national regulations, performance requirements, buy local provisions, investment benchmarks, regulatory standards, intellectual property laws, and other domestic laws, regulations and rules. So, as the nature of global commerce evolved, so too did the scope for protectionism.

Accordingly, modern trade agreements have expanded coverage in efforts to prevent and weed out these more hidden forms of discrimination. But in so doing, trade negotiations sometimes have encroached into areas of domestic policymaking already occupied by interest groups, regulators, and congressional committees that have jurisdictional claims to the policy matters, but little familiarity with

or interest in trade agreements. Although the nature of international commerce has pushed trade agreements into these relatively new areas, that penetration into domestic regulatory space sometimes has generated significant push back amid concerns that bundling commitments in international trade agreements might serve to circumvent domestic regulatory and legal processes. And, as is so often the case, legitimate concerns are often exaggerated and exploited by interest groups with ulterior motives. All of these features have been on display throughout the negotiation of the Trans-Pacific Partnership.

Should Free Traders Support the Trans-Pacific Partnership?

Real free traders abhor domestic trade barriers and want them removed regardless of whether other governments remove their own barriers. The benefits of trade are the imports we obtain, not the exports we give up. Those benefits are measured by the value of imports that can be purchased for a given unit of exports – the more, the better. Trade barriers reduce those benefits, which include greater variety, lower prices, more competition, better quality, and the innovation spawned by those and other factors.

The process of U.S. trade policy formulation has never been particularly accommodating of free traders' perspectives. Free trade views have been marginalized by their being subsumed within a broader category of views labelled "pro-trade," which is dominated by business lobbies and other "pro-export" mercantilists. As the definition of free trade has been expanded to mean pro-trade, the definition of protectionism has been narrowed to exclude certain views, such as: "I'm not a protectionist; I just want a level playing field," or; "I'm for free trade, as long as it's fair trade." Those are the clichés used by protectionists, who are now popularly grouped under the pro-trade umbrella.

So, today's trade debate (framed as it is by media, lobbyists, and politicians) does not feature free-traders on one side and protectionists on the other. Instead, one is either pro-trade or anti-trade, supports corporations or their workers, and believes free trade agreements are either good or evil. In a world with these binary choices, nuance gets squeezed out. Where do you fit if you support the tariff reductions in a trade agreement, but are unhappy with the corporate welfare it bestows on particular industries? What if you know that trade liberalization is good for both corporations and their workers alike? What if you're pro-market, but not pro-business? Given these and other ambiguities, should free traders support free trade agreements?

Free markets are essential to our prosperity. Free trade is the extension of free markets across political borders. Making markets freer and expanding them to integrate more buyers, sellers, investors, and workers deepens and broadens that prosperity. When goods, services, capital, and labor flow freely across borders, Americans can take full advantage of the opportunities of the international marketplace. Free trade provides benefits to consumers and taxpayers in the form of lower prices, greater variety, and better quality. And, it enables businesses and workers to reap the benefits of innovation, specialization, and economies of scale that larger markets afford. Countless studies have shown that economies that are more open grow faster and achieve higher incomes than those that are relatively closed.

U.S. trade barriers hurt U.S. citizens, as consumers, taxpayers, workers, producers, and investors. Whether or not to remove U.S. barriers to trade is purely a domestic decision. The answer helps shed light on whether policymakers think U.S. citizens are worthy of the freedom to make their own economic choices. It is a reform to which all free people are entitled, and can be achieved without need of any foreign government's consent.

Americans would be better off if we simply undertook our own reforms – on tariffs, regulations, and other artificial impediments to commerce – without regard for what other governments do. Free trade is about the freedom of people to transact as they wish, when they wish, with whom they wish, and without politicians and bureaucrats as gatekeepers.

Despite what we call them, free trade agreements are not really about free trade at all. Rather, they are institutions of managed trade, premised on assumptions that are anathema to real free traders. At the most fundamental level, free trade agreement negotiators see imports as the price we pay for exports, while free traders consider exports the price we pay for imports. Negotiators treat production as an end in itself (“maximize exports over imports”), while free traders see consumption as the sole purpose of production (“maximize imports over exports”). Managed trade is about the proliferation of often labyrinthine rules intended to distribute particular benefits to specific interests, while free trade is about removing impediments that benefit some at the expense of others so that each of us individually has the fullest battery of choices to decide how best to use our own resources.

In many respects, free trade agreements give free trade a bad name. But does that mean free traders should oppose them? Despite their flaws, free trade agreements have helped reduce domestic impediments to trade, expand our economic freedoms, and lock in positive reforms, even if only as the residual byproduct of an ill-premised mercantilist process. Ultimately, free trade agreements have delivered freer trade. Is that not good enough?

The question of whether free traders should support free trade agreements, then, hinges upon whether they can see past these shortcomings and inconsistencies to the end result. If one's fealty is to the pure logic of free trade, then those characteristics of trade agreements are not shortcomings, but fatal flaws. But if one is more concerned with the end result – the expanded economic liberties and the bounty of its promise – then that free trader might be more inclined to forgive the indiscretions and support an imperfect trade agreement.

Over the years, the default position of Cato's trade scholars – generally speaking – has been the latter view. We have identified the flaws in the assumptions underlying mercantilist reciprocity, assailed the corporate welfare it bestows, and advocated for unilateral free trade, while ultimately finding our way to supporting free trade agreements because, warts and all, they have expanded our economic liberties. That said, not all free trade agreements are the same. Ideally, the texts would be short, sweet, and unequivocal: “There shall be free trade among the parties.” But, regrettably, it's more complex than that. So the devil is in the details.

Whether real free traders should recoil or rejoice over this broadening of the scope of trade agreements is an important question to answer. To free traders, the whole point of trade is to expand the size of the market to enable greater and more refined levels of specialization, and economies of scale. Reducing tariffs and other border barriers to enable goods and services to cross frontiers is one way – the traditional, textbook way – of expanding the size of the market. But integration and market expansion will remain hindered if the laws and regulations governing commerce differ between or among the countries that reduced their border barriers. Harmonization of product standards, equivalence of regulations, similarity of intellectual property regimes, and the coherence of other domestic frameworks that govern or affect commerce might also help expand the size of the market. It is this latter form of market expansion that makes modern trade agreements – 21st century agreements, such as the TPP – so controversial.

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, on net, 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 biases. 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 people associated with pro-business, pro-labor or pro-establishment organizations.

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 fist bumps 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 of the TPP. Whereas the AFL-CIO might score 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 prioritize the amount of increased foreign market access obtained and the American Iron and Steel Institute might home in on the contingent protection it provides, 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 import barriers.

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 as much 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 assessed 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 reviewed by three Cato trade analysts, whose individual assessments were compiled, compared and debated. Final scores were agreed by consensus. All of the scored chapters (22 of 30) were evaluated 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. Chapters falling into this last category (8 of 30) were not assessed or scored.

The chapter reviews in the next section include scores, summaries, assessments (including lists of pros and cons), and scoring rationales. Some of the chapters are about market access, some are about rules and governance, and others are technical or administrative. It was possible to assign scores to 22 of the TPP’s 30 chapters. The assessments are based on the final text of the Trans-Pacific Partnership Agreement, reached in October 2015.⁴

Chapter Assessments

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 scored. 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 is important to recognize that deriving a TPP-wide score 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 are less significant than the terms of the “Market Access” chapter or that the “Trade Remedies” chapter is less significant

⁴ <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

than the “Cross Border Trade in Services” chapter. Some kind of weighting is necessary to generate a TPP-wide score, 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.

Table 1: TPP Scoring by Chapter

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	Competiveness 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

	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: Frequency of Assigned Chapter Scores

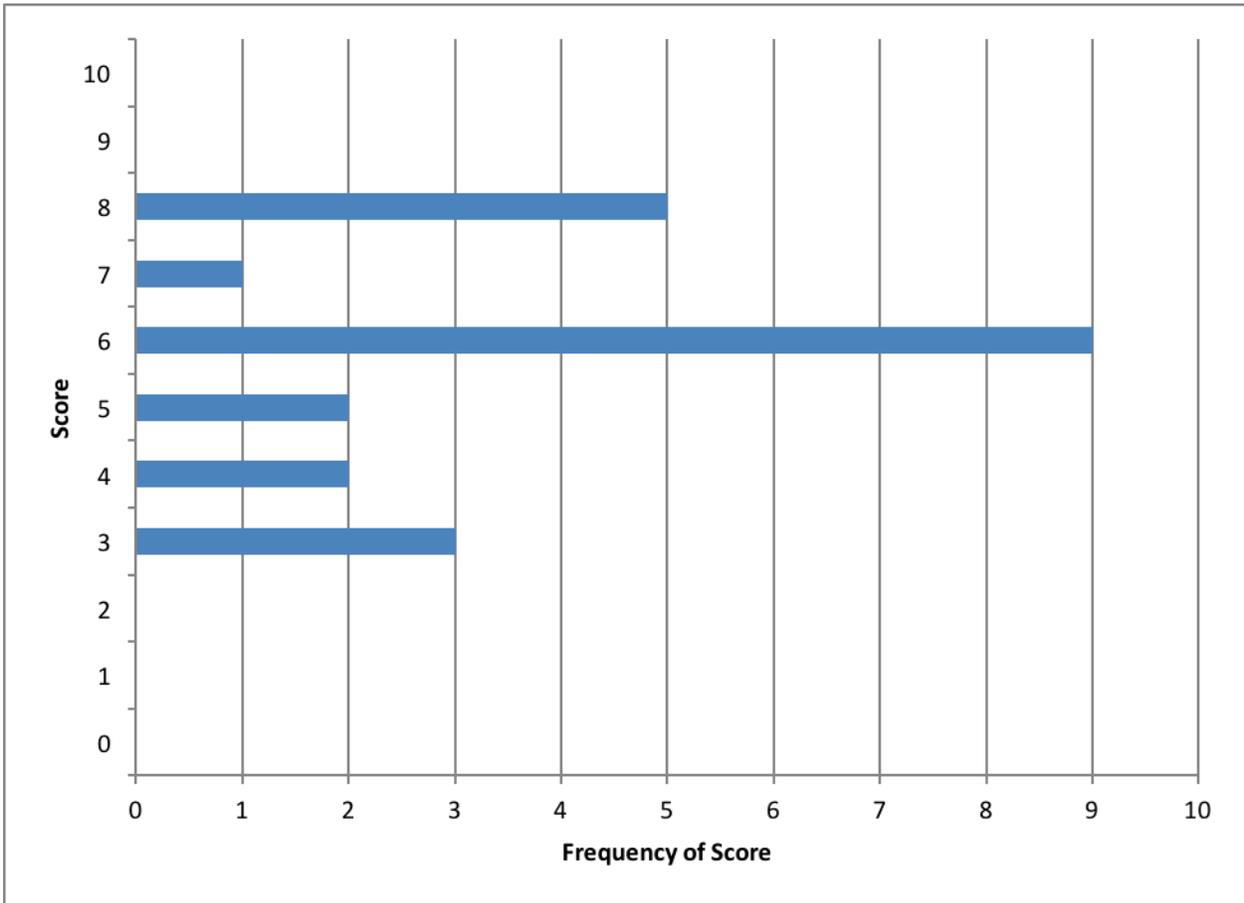


Figure 2: Frequency of Assigned Chapter Scores, By Chapter Type

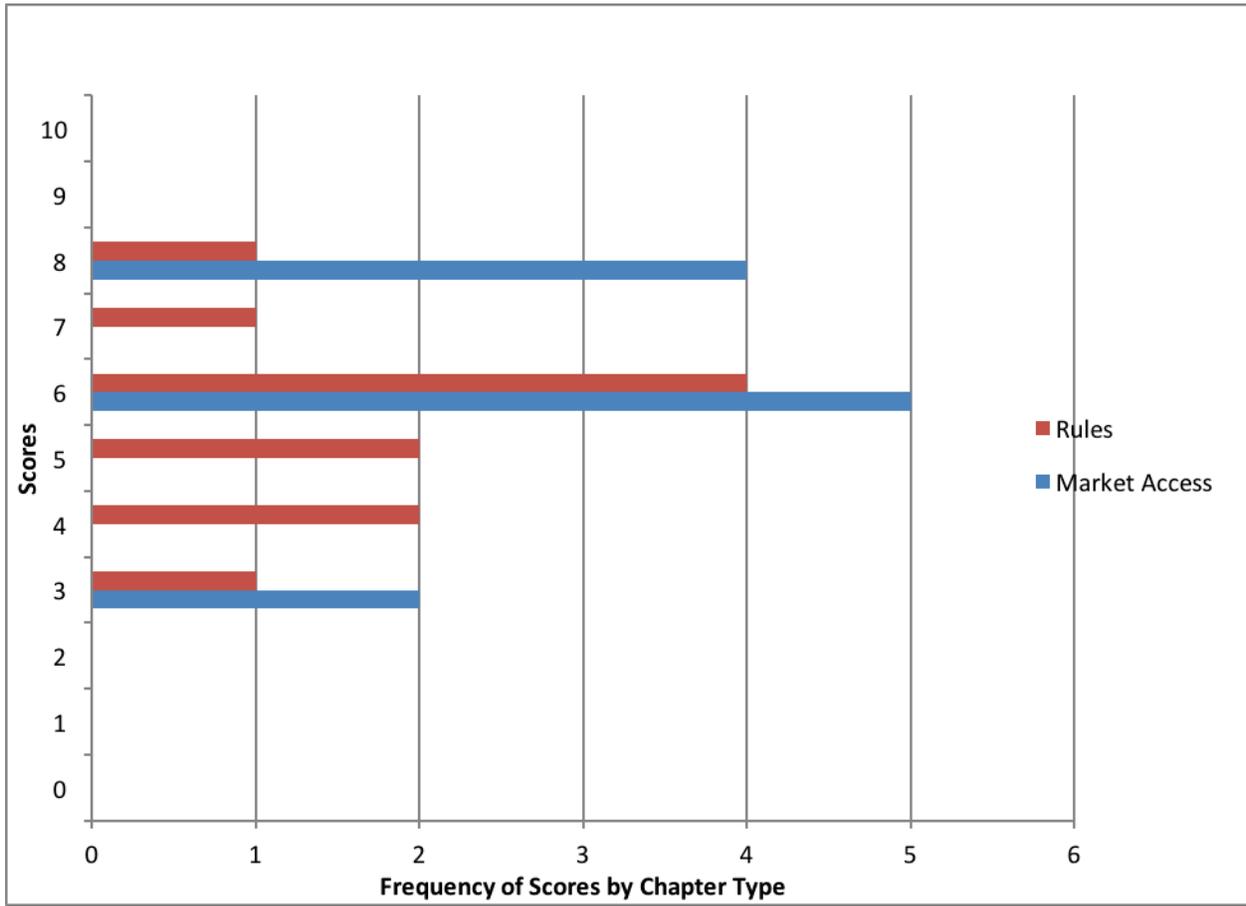


Table 3: TPP Chapter Scores by Nature and Tier, Including Averages

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 Special Curve (22 Chapters)			6.70

Chapter 1: Initial Provisions and General Definitions

Score: No Score

Summary

This chapter establishes the structure of the overall TPP Agreement and its relationship to other trade agreements between and among the TPP parties, and provides general and technical definitions. All of the TPP parties already have obligations to each other as members of the World Trade Organization, and some have obligations under various bilateral trade agreements. This chapter acknowledges that the TPP was crafted with sensitivity to those obligations and with the intention of avoiding the creation of new obligations that would be inconsistent with pre-existing agreements. Parties have recourse to consultations with other parties if they believe there are inconsistencies.

Article 1.1 stipulates that the TPP is a "free trade area" subject to the rules of the WTO. While the WTO enshrines the principles of "most-favored nation" (all trade liberalization by a member country should apply on a non-discriminatory basis to all other members) and "national treatment" (foreign entities and their products and services should be accorded the same treatment under law as domestic entities and their products and services are accorded), that institution long has recognized that some members might wish to pursue deeper and broader liberalization. As long as certain core conditions are met – in particular, that the liberalization between countries party to such agreements covers substantially all trade between them, and that the agreements do not raise barriers to external trade – bilateral or regional agreements are permitted.

Article 1.2 then discusses the relationship of the TPP to other international agreements more generally. With most of the TPP parties already having bilateral trade agreements with other TPP parties, there is the potential for overlapping obligations and conflicting rules. Article 1.2 stipulates that it is the intention of the TPP parties that these agreements "coexist," and sets out the possibility for parties to use the TPP's dispute settlement process to resolve possible conflicts between the TPP and other agreements. The practical effect of this "coexistence" approach – as opposed to specifying that the TPP supersedes the terms of intra-TPP member bilateral agreements – remains to be seen.

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

Chapter 2: National Treatment and Market Access for Goods

Score: 8

Summary

Chapter 2 establishes the basic rules for trade in goods among the TPP Parties. It includes commitments with respect to four core elements: (1) Market Access; (2) National Treatment; (3) Agriculture, and; (4) The Administration of Tariff Rate Quotas.

With respect to Market Access, the parties commit to eliminate tariffs and quantitative restrictions on goods trade by:

- Removing customs duties on imports of almost all products originating in other TPP parties, in accordance with detailed schedules found in each party's Annex 2-D;
- Prohibiting import and export restrictions, except with respect to the products listed in Annex 2-A and under various other conditions;
- Prohibiting "performance requirements" as conditions of reduced import tariffs;
- Adopting rules on import and export licensing to ensure that such systems are transparent, non-discriminatory and not disguised trade restrictions;
- Limiting administrative fees and formalities (e.g., customs fees) associated with importation or exportation to the approximate cost of services rendered;
- Prohibiting export duties, except for those on the goods listed in Annex 2-C;
- Committing to publish promptly any rules, regulations and procedures concerning the importation or exportation of goods.

With respect to National Treatment, the parties generally commit to treat the goods of other TPP parties the same as they would treat domestic goods. This is a fundamental principle of all trade agreements.

On Agriculture, the parties undertake various obligations, including commitments to:

- Eliminate export subsidies on agricultural goods destined to other TPP parties;
- Negotiate multilateral disciplines on export credits, export credit guarantees and insurance programs;
- Negotiate multilateral disciplines on agricultural state trading enterprises;
- Restrict to specific and limited conditions the imposition of export restrictions for food security reasons;
- Improve transparency, cooperation and information-exchange related to the trade of products of modern biotechnology, including GMOs.

Concerning the Administration of Tariff Rate Quotas (TRQs), parties commit to administer all TRQs, as set forth in Annex 2-D, in a transparent and impartial manner and subject to various disciplines.

Assessment

In its summary of Chapter 2, the Office of the U.S. Trade Representative emphasizes the benefits of foreign trade barrier reductions to American exporters, but downplays the benefits of eliminating U.S. trade barriers to American businesses, consumers, and taxpayers:

Through the TPP Agreement, the United States is seeking to create an economic architecture in the Asia-Pacific region that helps American businesses, workers, farmers and ranchers produce and sell their goods more easily. The National Treatment and Market Access for Goods Chapter (also known as the Goods chapter) helps us reach this goal by removing barriers to export of Made-in-America manufactures and farm products...

Reducing or eliminating these tariffs, and other barriers to American exports, in many fast-growing markets will help support economic growth and high-wage employment for Americans in the 21st century. In so doing, TPP will help secure America's emerging role as the world's most attractive site for manufacturing, support higher incomes and rural development, and help to ensure a future of sustained U.S. economic growth based on high-wage employment, research, investment, and production.⁵

These export benefits are legitimate, but real free traders would emphasize the substantial benefits from the TPP's import liberalization. Notwithstanding the mercantilist objectives of trade negotiations (and the political aversion to acknowledging the benefits of imports), the provisions in Chapter 2 will broadly improve Americans' access to imported products and components, undergirding economic growth to the benefit of U.S. businesses, consumers and workers. The chapter provides for the elimination – immediately or eventually – of nearly all U.S. tariffs on goods from the other TPP parties. That dynamic is more likely to “secure America's emerging role as the world's most attractive site for manufacturing...” than is the reduction of barriers to U.S. exports.⁶ It also promises that American consumers will enjoy greater variety of goods at lower prices, thus improving living standards and easing the strain on family budgets. For example, the U.S. footwear industry estimates that TPP's tariff liberalization will provide \$500 million in savings for American shoe consumers in its first year of implementation and \$6 billion over the first decade.⁷

The benefits to U.S. companies that export – especially those that rely on imported intermediate goods – will nevertheless be significant. Although existing FTAs between the United States and six of the TPP parties mean that U.S. exporters are already enjoying preferential access to those markets, the other participants – particularly Malaysia, Japan, Vietnam, and New Zealand – present substantial new opportunities for U.S. exporters. For example:

⁵ Office of the United States Trade Representative, “The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Businesses,” National Treatment and Market Access for Goods, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-National-Treatment-and-Market-Access-for-Goods.pdf>.

⁶ See Daniel Ikenson, “Reversing Worrying Trends: How to Attract and Retain Investment in a Competitive Global Economy,” Cato Policy Analysis no. 735, August 22, 2013, <http://www.cato.org/publications/policy-analysis/reversing-worrying-trends-how-attract-retain-investment-competitive>.

⁷ Footwear Retailers and Distributors of America, “Trans-Pacific Partnership: Issue Brief,” <http://fdra.org/key-issues-and-advocacy/trans-pacific-partnership-tpp/>.

- On beef products, Japan will eliminate duties on 74 percent of its tariff lines, while Vietnam will eliminate tariffs currently as high as 34 percent.⁸
- On machinery, which accounts for almost 6 percent of U.S. manufacturing output, Japan will immediately eliminate all tariffs, while Malaysia and New Zealand immediately eliminate about 94 percent of their tariffs.⁹
- About 15 percent of Vietnam’s tariffs of 20 percent ad valorem or higher will be eliminated immediately (60 percent will be eliminated within 5 years), which will open that large market much further to U.S. (and other TPP) exporters.

Relative to existing U.S. FTAs, Chapter 2 also breaks new ground with:

- provisions on biotech goods (GMOs), which for the first time establish transparency requirements for parties’ laws and regulations on trade in biotech products;
- commitments that trade in “remanufactured goods” (i.e., restored or refurbished products) is subject to the same general prohibitions on import and export restrictions;
- provisions requiring transparency in export licensing procedures;
- specific disciplines on agricultural state trading enterprises;
- a general commitment to eliminate (most) agricultural export subsidies.

Overall, however, only the biotech commitments are likely significant because the trade value of the products at issue, or affected by the measures at issue, is not large. The national treatment, non-discrimination and transparency rules are also laudable, as they will either (1) prohibit TPP Parties from discriminating against the goods of other Parties in favor of their domestic manufacturers and farmers or (2) shine needed light on measures with the potential for such abuse, such as import licensing or customs fees. Meanwhile, the commitments to eliminate harmful agricultural export subsidies are welcomed, although the actual impact will likely be muted by the recent agreement by WTO Members in Nairobi to do essentially the same thing.¹⁰

Although Chapter 2 liberalizes trade in goods among the TPP parties, it includes a variety of provisions that moderate – and occasionally impede – that liberalization. For example, both the United States and Japan maintain separate tariff liberalization schedules for each TPP party. That means the same imported product may be subject to different tariff rates, depending on the country of origin. For example, in the U.S. schedule, 88 percent of tariffs on imports from countries that are already U.S. trade agreement partners go to zero upon entry into force of the agreement. But for imports from Malaysia, Japan, and Vietnam (all new partners), the comparable figures are 83.7 percent, 74.6 percent, and 66.4

⁸ United States Department of Agriculture, Foreign Agricultural Service, <http://www.fas.usda.gov/sites/default/files/2016-05/tpp-beef-05-15-2016.jpg>.

⁹ U.S. Department of Commerce, International Trade Administration, “U.S. Machinery Exports: Discovering the Benefits of TPP,” Tradeology (The Official Blog of ITA), February 3, 2016, <https://blog.trade.gov/2016/02/03/u-s-machinery-exports-discovering-the-benefits-of-tpp/>.

¹⁰ In December 2015, WTO Members at the tenth ministerial conference in Nairobi agreed to adopt a Ministerial Decision on Export Competition (WT/MIN(15)/45) that includes a commitment to eliminate subsidies for farm exports (paras. 6-11).

percent respectively. These disparities reflect protectionist concessions made to certain U.S. industries, which add needless complexity, encourage trade diversion, and impede the TPP's goal of creating a seamless Asia-Pacific supply chain.

Furthermore, despite liberalizing many tariffs immediately or within a few years after entry into force, the TPP maintains – and in some cases even creates – new barriers to imports of “sensitive” imports. Many tariff lines are not immediately liberalized but are subject to phase-out periods of over 10 years. For example, the agreement maintains phase-outs for U.S. tariffs on beef (15 years), dairy products (20-30 years), processed fruit (15 years) and rice (15 years). It also includes a 30-year phase-out of the 25 percent tariff on pick-up trucks from Japan, with other Japanese cars and trucks facing slightly shorter phase-out periods. Other countries provide similarly slow access to their markets.

Meanwhile, the United States' Annex 2-D denies true market access to some of the most competitive TPP exporters by establishing restrictive TRQs on sugar, beef and dairy imports and “special safeguard mechanisms” – which restrict “surges” of fairly-traded imports from these countries – for sugar and dairy. Japan maintains similar measures for a wide range of agricultural products, while Malaysia, Mexico and Vietnam do so on a more limited basis.

Pros

- TPP parties will be required to follow general non-discrimination principles, and to avoid quantitative import and export restrictions, which will help rein in protectionism and prevent favoritism of one TPP party over another.
- Tariff liberalization commitments, overall, are significant and should provide tangible benefits for consumers and producers.
- Upon entry into force, the proportion of MFN duty-free tariff lines among the 12 TPP parties will increase from 51.3 percent to 87.8 percent and nearly all remaining tariffs will go to zero within 16 years.
- Upon entry into force, the proportion of MFN duty-free tariff lines on U.S. imports from TPP parties will increase from 36.4 percent to 90.5 percent, and to 99 percent upon full implementation.
- Seven of the 12 TPP countries eliminate all tariffs on TPP imports eventually.
- Eliminates export subsidies.
- Tariff reductions will occur in large and growing consumer markets, such as Japan and Vietnam, where barriers traditionally have impeded access of U.S. exporters.
- Novel rules for GMOs, export licensing, agricultural export subsidies and other issues should facilitate trade in areas not covered in previous U.S. FTAs.

Cons

- The TPP's ample liberalization potential is partially offset by myriad exceptions to the basic market access and national treatment provisions – exceptions that in many cases go beyond previous FTAs in terms of their restrictiveness.

- These carve-outs raise concerns that the agreement will cement protectionism in sensitive U.S. and foreign sectors and set a precedent for similar protectionism in future trade agreements.
- U.S. and Japan maintain separate tariff schedules for each country, which negates some of the benefits, may encourage trade diversion, sets the precedent of violating MFN by permitting discrimination within a preferential trade agreement.
- Long tariff phase outs for autos, beef, clothing, and much of U.S. agriculture.

Scoring Rationale

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 of 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 vast amounts of liberalization, the agreement could have been more liberalizing still. Although TPP accomplishes 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. The United States holds 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.

However, those concerns should be weighed against the fact that 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.

Chapter 3: Rules of Origin and Origin Procedures

Score: 6

Summary

Chapter 3 establishes the rules for customs authorities to determine whether an imported good “originates” within the region, thereby qualifying for the preferential treatment afforded under the agreement. Generally, a product is considered originating if it was wholly made within the region (in the countries party to the agreement), if it was significantly transformed within the region from imported materials and components, or if the relative value of originating materials and manufacturing performed in the region is sufficiently high.

The chapter consists of a series of general rules and an annex that provides a long list of the product-specific rules of origin, which clarify how much transformation must occur or how much of a final product’s value must be added within the region or come from originating materials. Some products have higher minimum regional value content requirements than others and some products (particularly automobiles) are assigned detailed explanations concerning the amount of transformation that must occur when using non-originating material inputs. For automobiles, there is an additional annex, which explains that certain production activities automatically confer originating status regardless of other product-specific rules.

The TPP’s rules of origin allow for unlimited “cumulation.” That is, materials and manufacturing activity from multiple TPP countries can be combined for purposes of determining how much of a product’s content originated within the TPP region.

The chapter also establishes rules for customs procedures, which explain how national customs authorities should interact with importers and exporters when determining whether goods are originating.

Assessment

Rules of origin are necessary components of preferential trade agreements. When products from different countries receive different tariff treatments, customs officials must have a way to determine which tariff rate to apply. Rules that permit greater use of non-originating inputs or broader definitions of what constitutes product transformation tend to be more trade liberalizing than more proscriptive rules, which impose greater restrictions on qualification for the agreement’s preferential tariff rates.

In today’s globalized economy, strict rules of origin impede the evolution and operation of more efficient supply chains and can be used to privilege existing producers by limiting competition. They increase the likelihood and cost of trade diversion, which occurs when less efficient producers are chosen simply for the tariff advantages they receive. Moreover, complicated rules of origin tend to generate higher compliance and verification costs, which erode the benefits of preferential duties causing importers to simply forego their claims to preferences.

The TPP's rules of origin are generally more liberal than past U.S. trade agreements. The lowest regional content threshold generally required in other U.S. trade agreements is 35 percent; in the TPP, the most common threshold is 30 percent. Products with higher regional content requirements, such as chemicals and metals, are also about 5 percentage points lower across the board in the TPP than in other U.S. FTAs.

The TPP's rules of origin content requirements for automobiles are between 35 and 45 percent, which is significantly more liberal than NAFTA's, which are about 60 percent. NAFTA's tariff eliminations helped create an integrated North American auto industry; the lower thresholds for origin status in the TPP likely will increase competition by allowing more diverse supply chains utilizing auto parts from outside the TPP.

However, the TPP does single out the auto industry for special treatment by including a separate annex on automobile rules of origin. Those rules allow certain non-originating materials to count as originating if certain specific production processes are performed. The rules reflect a decision to privilege some supply chain arrangements over others.

Past U.S. agreements have included special provisions for footwear with detailed rules governing the types of processes that had to be performed and what proportions of various materials could be used. The TPP's rules of origin for footwear are much less detailed, though they do impose a relatively high regional content requirement of about 45 percent. The chapter's procedural provisions mostly ensure that national customs authorities effectively implement and enforce the rules of origin, but they also improve the rule of law by insisting on certain procedural rights for importers.

Pros

- The rules of origin on the whole are more liberal than past U.S. trade agreements.
- The relatively low regional content requirements, combined with unlimited cumulation, will enable a broader array of supply chain arrangements than currently enjoyed in the region.
- Relatively less detailed rules in key areas will mean a lower a cost of compliance and wider use of tariff preferences.

Cons

- As with all preferential trade agreements, the rules of origin serve to limit the impact of tariff liberalization.
- Special rules for some products, especially autos, represent a form of managed trade where supply chains are shaped through negotiations rather than the market.
- As new supply chains develop to take advantage of the TPP, the strictest rules of origin will insulate some regional industries from global competition.

Scoring Rationale

Rules of origin (ROOs) are features of preferential trade agreements that are, by definition, restrictive. Rules 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.

Chapter 4: Textiles and Apparel

Score: 3

Summary

The Textiles and Apparel Chapter establishes special rules of origin for textile and apparel trade. Although the rules of origin vary by product, the predominant feature of the chapter is the “yarn forward” rule, which confers originating status on fabric and clothing only if it is made from regional inputs – from the yarn component forward in the production process.

The chapter does grant certain exceptions to the yarn forward rule, by allowing *de minimis* amounts of non-originating components; relaxing the requirement for materials used in handicrafts or folkloric goods; and providing a “short supply list,” which includes fabrics that may be sourced outside the region because they are not produced in sufficient commercial quantities within TPP countries, among other things. Unlike previous U.S. FTAs, there is no mechanism to add or remove fabric from the short supply list. Fabrics on that list are there either temporarily (5 years) or permanently.

The chapter also establishes a special safeguard provision for textiles and apparel, which allows tariffs to be raised if an increase in imports on account of tariff reductions made pursuant to TPP provisions is so great as to cause serious injury to a domestic industry. Any tariff increase under this provision cannot exceed the MFN rate applied when the TPP entered into force or the rate applied immediately before the tariff reduction that spurred the request for safeguard action.

Finally, the chapter includes special rules for customs officials seeking to verify the origin of textile products.

Assessment

The Textile and Apparel chapter is protectionist. In addition to very slow tariff liberalization for clothing, which is subject to some of the highest U.S. tariffs, the present chapter represents a continuation of the misguided policy of protecting U.S. textile producers by limiting preferential access to fabrics and clothing made from regionally-produced textiles. Essentially, preferential access to the U.S. market is reserved for customers of U.S. textile producers, making the rules little more than a subsidy to U.S. producers. Even the chapter’s exceptions are reserved for situations where freer trade would not harm established interest – producers of foreign handicrafts and folkloric goods, for example, don’t purchase U.S. textiles, and products on the short-supply list are not commercially meaningful to U.S. textile producers.

The TPP’s rules for textile and apparel trade are nothing new. They continue a long tradition of managed trade in one of history’s oldest industrial sectors. 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.

Pros

- The negative character of this chapter is mitigated by its narrow scope.
- The short supply list provides a relatively high number of exceptions to the yarn forward rule.
- There is no mechanism for adding or removing items from the short supply list, conferring a higher degree of predictability than would be the case if the list were subject to revision.

Cons

- Singling out one industry for special treatment is so inherently offensive to free trade that this chapter is irredeemably protectionist.
- The chapter exists simply to mitigate the trade liberalization stipulated in Chapter 2, even though that liberalization for textiles and apparel is grudging and back-loaded.
- The special safeguard mechanism gives incumbent interests one more tool to use in their efforts to impede the process of textile and apparel production being performed where it is performed most efficiently.

Scoring Rationale

Although it provides for some liberalization of tariffs over time, the Textiles and Apparel chapter is primarily 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 chapter could have been much more liberalizing had tariffs been eliminated more quickly and without so many conditions.

The terms of the chapter primarily serve to protect the U.S. textile industry's apparel customer base at the expense of U.S. apparel consumers and foreign apparel producers who source their textiles from other suppliers. The TPP's restrictive rules for textile and apparel trade continue a long tradition of managed trade and should raise questions about why an 18th century industry warrants such protection in a 21st century agreement.

Chapter 5: Customs Administration and Trade Facilitation

Score: 8

Summary

The goal of Chapter 5 is to ensure that “customs procedures are applied in a manner that is predictable, consistent and transparent.” The chapter includes provisions intended to improve efficiency and cooperation among the parties regarding customs issues. Among them are calls for expeditious responses to requests for advice or information; requirements (with some exceptions) that advance rulings regarding customs classifications be issued within 150 days of such requests; requirements that governments publish and make available to importers and exporters relevant customs laws and procedures; encouragement of the use of automation to facilitate classification, valuation, and customs clearance; and requirements that requests for confidential treatment of information be granted when warranted.

Other provisions of note are the objectives to release all express shipments within six hours of document submission, and to release all shipments within 48 hours of arrival. To help achieve that goal, parties are required to implement risk-management systems that focus inspection efforts on high-risk shipments. Both administrative and judicial appeals procedures are to be available.

Assessment

The provisions in this chapter have strong potential to reduce important – often overlooked – impediments to trade. Like tariff cuts, improvements in customs and trade facilitation procedures reduce the cost of trade and increase its flow. As multitudes of studies conducted by trade and development economists at the World Bank and elsewhere have demonstrated, delays at the border constitute significant barriers to trade. Economists David Hummels and Georg Schaur estimate that each day of delay in transit is equivalent to an ad valorem tariff of between 0.6 and 2.1 percent.¹¹ Moreover, opaqueness of customs processing and clearance procedures creates greater scope for corruption, which also raises the costs and reduces the benefits of trade. The chapter seeks to reduce these kinds of administrative barriers by identifying and adopting best practices or common standards and procedures.

Customs administration is an area that genuinely can benefit from advances in digital technology. Chapter 5 seeks to bring customs clearance procedures into the 21st century. Although most of the issues addressed in this chapter are also covered by the WTO Trade Facilitation Agreement (which is expected to be ratified and adopted as early as next year), in some cases the requirements of TPP’s Chapter 5 are more rigorous. For example, recognizing that time in transit is a trade barrier, this chapter mandates maximum time limits for shipment processing at borders. Modern electronics make it possible to expedite the process of moving goods across borders, while also making it easier to detect customs evasion and corruption.

¹¹ David L. Hummels and Georg Schaur, “Time as a Trade Barrier,” *American Economic Review*, Vol. 103, No. 7, December 2013, <https://www.aeaweb.org/articles?id=10.1257/aer.103.7.2935>.

These changes should reduce the costs of importing and exporting, with disproportionate benefits flowing to small and medium-sized enterprises. SMEs with limited resources should find it much easier to navigate customs requirements once the TPP is implemented.

Pro

- Implementation of these measures should help smooth the process of customs clearance and reduce the costs of international trade, especially with respect to TPP members that do not currently employ modern customs procedures.
- Express shippers (and the customers they serve) are likely to have more confidence in their ability to deliver goods on a “just in time” basis.
- The development of highly functional and easy-to-use digital technology to expedite customs clearance within the TPP may provide a helpful template that could be adopted by other trading nations.

Con

- Given the importance of efficient customs clearance procedures to reducing transit time, which is a trade barrier, the chapter could have gone further with more rigid requirements backed up by capacity building and other resources to implement the reforms.

Scoring Rationale

The provisions in the Customs Administration and Trade Facilitation chapter are genuinely designed to reduce the costs of trade associated with delays, uncertainty, administrative inefficiency, and corruption. They should help increase trade flows immediately. The chapter could have gone further to mandate even faster customs processing (and other measures to improve efficiency and reduce corruption), but achieving even higher standards might have been too difficult for some of the parties. On the other hand, the provisions do go further than previous efforts, including the agreed – but not yet implemented – WTO Trade Facilitation Agreement.

If the terms favor some enterprises more than others, it’s not because of any prejudicial rules that carve out benefits for particular, vocal, politically-active industries. The reduction of trade costs will provide relatively greater benefits to small and medium-sized firms because those costs constitute a larger barrier to trade for those firms than they do for big businesses.

The obligations and suggestions articulated in this chapter reflect the findings of a lot of research over the past 15 years. Time is a trade barrier and efforts to reduce delays should be welcome additions to trade agreements.

Chapter 6: Trade Remedies

Score: 3

Summary

The main purpose of the Trade Remedies chapter is to reaffirm the rights of the parties, established under various WTO agreements, to have and to use their domestic safeguards, antidumping, and countervailing duty laws in manners that are consistent with the obligations spelled out in those agreements. Ostensibly, these laws are intended for the purpose of remedying economic injury resulting from the sale of products in export markets at “unfairly” low prices (antidumping), the provision of subsidies to producers of exported products (countervailing duty), or a sudden surge in the volume of imports (safeguards). The chapter includes language to ensure that exporters facing foreign trade remedy measures receive procedural due process and transparency.

The chapter also includes provisions allowing the parties to apply transitional safeguard measures to one, some, or all parties during the tariff phase-out period, if imports have increased and are found to be a cause or threat of injury to the domestic industry. The safeguard could last for two years, with a one-year extension permitted, but would have to be “progressively liberalized” if left in place for more than one year. Compensation in the form of improved access for imports from the other party would be required. Failure to agree on compensation would allow the other country to retaliate.

Assessment

Chapter 6 is protectionist. It is committed to affirming the circumstances and procedures under which TPP parties can *raise* trade barriers. The chapter ensures 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 their respective domestic laws. Moreover, 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 not even found to be “unfairly” traded. When imports have increased sufficiently and are found to cause “serious injury” to the domestic industry, the provision could result in the reversion of tariffs to the higher rates that prevailed before the increase in injurious imports.

Since the government imposing a safeguard may not be able to come up with offsetting concessions, it seems likely that innocent industries would get hurt when the other party imposes retaliation. In the United States, a domestic industry would file a petition for relief and the U.S. International Trade Commission would determine whether the industry has been seriously injured. If such a decision is reached, it would be up to the Office of the United States Trade Representative and the White House to find countervailing concessions that could be offered to the other country. The politics of reducing protection for one industry in order to increase it for another can be quite tricky, so most likely no concessions would be offered and retaliation would ensue.

Safeguards have the potential to be applied against all goods for which tariffs are reduced and for which imports increase to the point that they irritate the domestic industry. This measure could be used to restrict imports of “fairly traded” goods, which means there would be no need to demonstrate that imports are entering the country at unfairly low prices. However, “serious injury” appears to be a higher standard than “material injury,” which is the statutory standard used by the U.S. International Trade Commission to determine harm in antidumping and countervailing duty cases. In other words, it may be more challenging for the domestic industry to prevail in a safeguard case than in an “unfair trade” case.

The chapter breaks a bit of new ground by promoting the transparency of trade remedy procedures, as well as encouraging members to provide due process to firms caught up in these disputes. The U.S. trade remedy system already is relatively transparent, but this provision may be helpful to companies involved in antidumping or countervailing duty actions initiated by other TPP countries.

Pros

- The chapter encourages greater transparency in trade remedy procedures.
- Access to the transitional safeguard is limited and would end when the tariff commitments for a specific product are fully implemented.
- Even though the safeguard provides a new alternative for instituting protection, it seems not likely to be used often, largely because other trade remedy measures may be easier to obtain.

Cons

- The chapter is unabashedly protectionist.
- The chapter does nothing to rein in protectionist abuses of the trade remedy laws or to limit the collateral damage these laws inflict on other U.S. entities.
- The safeguard language does nothing to increase the degree of liberalization that might be achieved under TPP; it works to slow the process of making markets more open and competitive.

Scoring Rationale

Nothing in this chapter does anything to reduce trade barriers. In fact, the chapter is committed to preserving and expanding the access of domestic industries to tools that lead to protectionist outcomes. One of many glaring shortcomings in the trade remedy laws is that U.S. industries that rely on the imported products and components subject to “remedial” tariffs have no recourse to affect the outcome. Under U.S. law, only the effect of the measures on the industry seeking “relief” is considered, and the impact of increased costs imposed on downstream, import-using companies is completely disregarded. Chapter 6 is a blown opportunity to fix that problem.

The trade remedies chapter is mostly a continuation of the status quo, which is to say it is a giveaway to upstream, litigious U.S. industries that prefer political to economic solutions. If there is anything positive about Chapter 6, it is the requirement that domestic authorities make their trade remedies regimes more transparent.

Chapter 7: Sanitary and Phytosanitary Measures

Score: 6

Summary

Chapter 7 addresses health- and food safety-related restrictions on trade and builds upon the WTO Sanitary and Phytosanitary Agreement by requiring greater transparency and cooperation with respect to the rationale and propriety of specific SPS-based restrictions. The chapter includes provisions that establish an SPS committee, require identification of contact points in each country, and provide guidelines for transparency and notification. It recognizes that there can be more than one approach to addressing SPS issues, which may provide equivalent protection. It encourages the practice of “compartmentalization” so that, instead of banning imports from an entire country, the ban would apply only to the commodities from regions known to present risks to public health.

On those occasions when trade-restricting emergency measures are imposed, parties are obligated to conduct a scientific review within six months of imposition. Technical consultations among parties are required prior to resorting to dispute settlement, but issues that cannot otherwise be resolved may be adjudicated under the provisions of Chapter 28. On the whole, the chapter reaffirms a commitment to science-based risk assessment in dealing with SPS matters.

Assessment

In recent years, U.S. exporters of beef, pork, chicken, and genetically modified grains have faced trade restrictions due to health concerns, including bovine spongiform encephalopathy (BSE), avian influenza, and porcine epidemic diarrhea virus (PEDv). The recourse of governments to trade restrictions for the purpose of protecting public-health has never been in question. But sometimes this allowance serves to mask protectionist or otherwise political objectives.

This chapter reduces the scope for mischief by defining more clearly the conditions that would warrant SPS restrictions, as well as the procedures and benchmarks for evaluating their propriety. These provisions go beyond obligations taken under the WTO SPS Agreement 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 of proof on governments to justify their decisions to impose SPS-based trade restrictions on imports from another party. The rules build upon WTO obligations by adding more details concerning transparency and cooperation, and by defining more clearly when and how it may be appropriate to apply SPS measures. 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.

Moreover, the liberalizing requirement that SPS measures be based on sound science is complemented by the allowance for “compartmentalization,” which will likely have the effect of mitigating the adverse impact of broad SPS restrictions on trade.

Pros

- Provisions are designed to mitigate the problem of disguised protectionism in SPS measures.
- Requires SPS measures be science-based and conform to appropriate international standards or comport with objective, documented, scientific evidence.
- Requires that any SPS measure imposed is no more trade restrictive than is necessary to achieve the right level of safety protection.
- GMOs are not discussed in this chapter, which means that there are no formal health-related dimensions to these products in the TPP.
- SPS disputes that cannot be resolved through consultations could be adjudicated through the dispute settlement procedures of Chapter 28.

Cons

- Emergency measures in response to SPS concerns could restrict trade for six months before undergoing scientific review to determine risk.

Scoring Rationale

The SPS chapter contributes to trade liberalization by making it more difficult for parties to impose health- or food safety-related trade restrictions without sufficient merit. The use of SPS measures (either to protect public health or to serve protectionist purposes) is increasing, so the inclusion of tighter rules is likely to be trade liberalizing. However, governments still reserve much discretion in this realm, and future abuses remain likely to occur.

The provisions could have been more liberalizing had they included more specific benchmarks and evidentiary thresholds to surpass before imposing SPS restrictions. However, such language might have presented unnecessary restrictions on the exercise of legitimate domestic policy responses to health and food safety crises.

For now, the provisions in this chapter represent progress in tackling these kinds of trade barriers. Certainly, SPS rules belong in trade agreements and those rules will have to evolve over time, balancing public health and domestic sovereignty on one hand with the imperative of maintaining an environment for non-discriminatory trade on the other.

Chapter 8: Technical Barriers to Trade

Score: 6

Summary

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 may also have protectionist or discriminatory effects on imports. The objective of Chapter 8 is to facilitate trade, including “by eliminating unnecessary technical barriers to trade, enhancing transparency, and promoting greater regulatory cooperation and good regulatory practice.”

The TPP's chapter on technical barriers to trade builds on existing international rules in other trade agreements. Chapter 8 is effectively a reassertion of the WTO TBT Agreement with some small refinements here and there. Article 8.4 explicitly incorporates many of the TBT Agreement obligations that have been litigated recently. Among the provisions of the chapter are new rules concerning information and communication technology products, which go much further than existing WTO rules in how they apply to products that use cryptography. At least on its face, this requirement imposes a significant new obligation on the TPP parties, potentially acting as an impediment to governments demanding that private companies turn over encryption keys.

The WTO's TBT Committee is also active in evaluating TBT measures that raise "specific trade concerns" for particular WTO Members. The Committee offers an alternative to litigation, and provides a forum for reviewing and discussing these measures. This chapter establishes a similar committee.

Additionally, there are provisions on transparency requiring that "[e]ach Party shall allow persons of another Party to participate in the development of technical regulations, standards and conformity assessment procedures by its central government bodies on terms no less favorable than those that it accords to its own persons."

Assessment

On most TBT matters, this chapter's impact is likely to be muted because of the large role that has been played by the WTO in this area. TPP efforts may be duplicative and having access to multiple fora for the same sets of issues could generate confusion, if not conflict. While having a TPP chapter on these issues does offer opportunities for innovation where the WTO has failed, the WTO has been fairly successful.

One area in which the WTO may be coming up short is in mutual recognition and good regulatory practices. These issues have been discussed at the WTO, but with limited success. However, it is not clear exactly what role a TPP TBT chapter should play in this area, given the separate Regulatory Coherence chapter in the TPP.

Chapter 8 does include several annexes on specific products, some of which are enforceable and go beyond the requirements of the WTO TBT Agreement. These annexes cover wine and distilled spirits; information and communications technology products; pharmaceuticals; cosmetics; medical devices; proprietary formulas for prepackaged foods and food additives; and organic products. They tend to focus on transparency and consumer protection goals, along with the promotion of international standards, good governance, and regulatory cooperation.

The rules prohibiting governments from demanding encryption keys may prove to be important in protecting privacy – although its main function may be to offer commercial benefits by protecting companies' assets. On the other hand, in Chapter 29 (Exceptions), there is an exception for "security" concerns, which is stated very broadly and looks to be "self-judging." As a result, it may be that, in practice, governments can still take these actions by invoking the security exception.

Ultimately, the impact of the encryption rules will depend in large part on whether governments attempt to enforce them. Often, the precise scope of the rules is not clear until litigation prompts an interpretation.

Pros

- Regulatory barriers are a growing menace to trade, so efforts to develop and implement new rules to rein them in are laudable.
- To a great extent, Chapter 8 duplicates the WTO's TBT Agreement, but it also introduces some new features that will help reduce the scope for protectionism masquerading as regulatory necessity.
- Some of the special and additional rules in the Annexes to this chapter break new ground.

Cons

- 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.
- The new rules on encryption in Annex 8-B are confusing in scope, and their impact is unclear.

Scoring Rationale

Technical barriers to trade are, by definition, trade barriers, so efforts to curb their abuse, such as those articulated in Chapter 8, must be considered trade liberalizing. The chapter breaks ground establishing new rules to ensure that trade in a wider variety of products and services is protected from discriminatory, technical barriers. By and large, much of the language in Chapter 8 reasserts principles and reestablishes rules that exist under the WTO TBT Agreement, but there are also novel provisions that likely will serve to rein in technical trade barriers in other areas.

The provisions in this chapter are fairly straightforward and enforceable, and they certainly belong in trade agreements. However, some of the language might be subject to different interpretations, which means the full impact of the provisions might not be ascertained until they are litigated and adjudicated.

in dispute settlement. Overall, because the WTO TBT Agreement already covers much of what is covered in this chapter, the TPP TBT rules are unlikely to have a broad impact on trade between TPP parties.

Chapter 9: Investment

Score: 6

Summary

International trade and investment go hand-in-hand, as most trade is conducted between affiliates of the same multinational enterprises. Trade often involves parent companies exporting components or finished products to affiliates abroad, which then process or package and sell to end users in foreign countries. Like investment chapters in other trade agreements and bilateral investment treaties, the TPP's Investment chapter provides basic guarantees and protections for investors and investments, including "national treatment," "most-favored-nation treatment," "minimum standard of treatment," and rights to compensation for government expropriation of an investment.

The chapter obligate parties not to interfere with capital flows related to a covered investment, including transfers of profits, dividends, interest payments, and royalties, subject to exceptions that ensure governments have the flexibility to engage in prudential measures to manage potentially volatile capital flows. It prohibits the use of "performance requirements," including local content requirements, minimum export requirements, technology transfer, and localization requirements as conditions of investment. Moreover, Chapter 9 guarantees that investors have the ability to appoint senior managers without regard to nationality, and ensures that any restrictions of the appointment of board members based on nationality do not adversely affect an investor's control of its investment.

With respect to sectors and activities open to investment from TPP parties, the chapter uses a negative-list approach, which means that the specified commitments apply to all sectors and activities that are not explicitly identified as exemptions.

Under this chapter, TPP parties are also entitled to pursue neutral arbitration of disputes through international tribunals under the terms of provisions commonly referred to as "investor state dispute settlement." Access of TPP investors to ISDS, however, will exclude tobacco companies, some financial services companies, and so-called "shell companies," which are defined as companies established in order to take advantage of treaty rights but that lack substantial business activities in that country.

Assessment

Among the important liberalizing features of the investment chapter is the "negative list" approach employed by the parties to single out sectors and activities excluded from the new investment rules. Under a negative list approach, the parties identify which sectors are NOT being liberalized, rather than those which are. This is considered a more liberalizing approach because any new industries that emerge won't be on that list and are automatically opened to foreign investment. Moreover, the existence of a list of sectors that remain protected readily identifies industries that might be targeted for future reforms.

Chapter 9 also specifies that there will be no so-called performance requirements as conditions of investment. Parties cannot require a minimum threshold of output to be exported or minimum local content requirements or that proprietary technology be transferred to domestic entities. The chapter's non-discrimination requirements, under which parties agree to treat foreign investors and investments as they would domestic investors and investments, are also important commitments to liberalization. The TPP chapter also encourages investment by raising the screening thresholds for when foreign investment needs approval by the government.

While liberalizing foreign investment is clearly a good economic policy, there are rules in the TPP investment chapter that go beyond liberalization, and function more as a litigation mechanism for foreign investors. In particular, the TPP includes the controversial investor state dispute settlement (ISDS) mechanism. Despite broad and growing concerns over the use and potential abuse of ISDS, the TPP essentially adopts the existing U.S. approach with a few minor tweaks. The core obligations of non-discrimination, the minimum standard of treatment, and compensation for expropriation remain. New provisions related to the burden of proof for minimum standard of treatment claims, or the early dismissal of claims that are "manifestly without legal merit," are unlikely to make a meaningful difference in how the agreement operates.

Meanwhile, some of the carve-outs seem to confirm the characterization of ISDS as a privilege bestowed upon foreign investors, rather than a necessity undergirding the rule of law, as proponents claim. An exemption denying access to ISDS procedures for tobacco companies so that governments can implement tobacco control measures more broadly would seem to endorse the view that ISDS is a special privilege – and one that can be denied to particular industries. This clause sets a bad precedent that could open the door to discrimination against other products and industries in the future.

Finally, the ISDS provisions in the TPP Investment chapter differ in significant ways from the provisions in investment chapters in existing bilateral trade agreements between some TPP parties, inviting potential conflict. For example, NAFTA's ISDS chapter already includes provisions that affect Canada, Mexico, and the United States. Now, investment disputes featuring North American investors and governments will be subject to both NAFTA ISDS and TPP ISDS rules simultaneously. How will this be resolved? A simpler and clearer approach might have been to have TPP ISDS supersede NAFTA ISDS.

As a special rule that applies only to foreign investors – typically multinational enterprises – ISDS reinforces false perceptions that big corporations are the primary beneficiaries of trade agreements, which perpetuate economic inequality and hurt the poor. In reality, the TPP's trade and investment liberalization do just the opposite.

Pros

- Commitments made under TPP to liberalize investment restrictions, such as a higher threshold for screening foreign investment, will have great economic benefits.
- The use of a negative list to identify sectors and activities that are off-limits increases the scope for liberalization.

- Some of the ISDS provisions have been improved to make them slightly less problematic.

Cons

- ISDS provisions will create more litigation and controversy, without any proven liberalizing impact.
- Exclusion of tobacco products and companies from use of ISDS provisions sets a bad precedent for discrimination against other industries in future trade agreements.
- There was no attempt to address the serious problem of subsidies to encourage foreign investment.

Scoring Rationale

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 and trade flows. Certainly, the chapter contributes to trade liberalization and its provisions – with the exception of those operationalizing ISDS – belong in trade agreements.

The rejection of 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 is a positive development. And the use of a “negative list” approach, which identifies the sectors and activities excluded from the investment commitments agreed in the chapter, means that foreign investment is welcome as a general rule.

But the agreement could have been more liberalizing if fewer industries and investments were on the negative list. Although investment opportunities abound under these rules, the exceptions lists are also quite long. Trimming those lists would have made for more liberalization. Furthermore, the so-called carve-out of tobacco products and companies from the ISDS mechanism sets a bad precedent for discrimination against other industries prospectively.

Chapter 10: Cross Border Trade in Services

Score: 8

Summary

Chapter 10 includes substantive obligations to liberalize “cross-border trade in services.” While the general obligations are similar to those found in the WTO’s General Agreement on Trade in Services (GATS) – national treatment, most favored nation treatment, and market access – this agreement takes the important step of moving away from the positive list approach taken in the GATS, instead using a negative list approach: TPP parties commit to full liberalization of every service sector that has not been carved out as a “nonconforming measure.”

With regard to nonconforming measures, there are two kinds. Annex I contains current measures that would otherwise violate one or more of the “core obligations” described above, but which a party has determined it needs to maintain in force. For such measures, the party commits to a “standstill,” promising the measures will not become more restrictive later, as well as a “ratchet,” so that if the measures are amended in the future to become less restrictive, the new, more favorable treatment will become the benchmark for the standstill requirement. In addition, Annex II contains a list of reservations that offer full discretion to maintain existing non-conforming measures or adopt new restrictions.

The TPP includes a new rule concerning “local presence.” Article 10.6 states: “no party shall require a service supplier of another party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.”

Beyond these core obligations, Article 10.8 also deals more generally with “domestic regulation” of trade in services. Paragraph 1 reads: “Each party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.” For this obligation, there is no non-conforming measures exception, and thus this provision applies broadly to all services regulation. So, in theory at least, this provision could be used to offer a fairly extensive means of judicial review of domestic services rules by a trade dispute panel.

In an annex, the chapter also offers instructions to develop new commitments for certain professional services. A separate Annex sets out stronger obligations relating to “express delivery services,” with a goal of preserving competition in the area of delivery services to the greatest extent possible. In this regard, paragraph 5 of Annex 10-B reads: “No party shall allow a supplier of services covered by post-monopoly to cross subsidize its own or any other competitive suppliers’ express delivery services with revenues derived from monopoly postal services.” It also requires parties to ensure that postal monopolies do not abuse their monopoly position.

Assessment

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 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 proven difficult to achieve. In the 21 years since the GATS 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 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.

The TPP parties commit to full liberalization of every service sector that has not been carved out as a "nonconforming measure." Importantly, the scope of a TPP Party's liberalization of trade in services can only be ascertained by reviewing all of its non-conforming measures. That said, there appears to be a good amount of services liberalization in the TPP. Nevertheless, the existence of a long list of non-conforming measures suggests that services liberalization could have gone further.

Pros

- Achieves important services liberalization across many sectors.
- Prohibits limits on the number of suppliers, the number of persons employed, or the value of services traded.
- Spells out non-conforming measures (listed in Annexes I and II).
- Provides guidelines for recognition of licensing and certification by other parties.
- Requires transparency with regard to regulations governing services.
- Prohibits restrictions on cross-border payments and transfers, with exceptions for bankruptcy, criminal offences, judicial orders, etc.

Cons

- No liberalization of maritime services (Jones Act).
- No liberalization of commercial airline services.
- No liberalization of professional licensing requirements.

Scoring Rationale

Overall, this chapter offers some of the most extensive trade liberalization in the entire agreement. Relative to other trade agreements, the TPP's commitments on cross-border service trade seem to go further than anything since the WTO GATS agreement in 1995. Even so, 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.

Chapter 11: Financial Services

Score: 6

Summary

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.

Generally speaking, U.S. financial services businesses enjoy a strong position in international trade. As a result, the United States often takes an "offensive" position in international trade negotiations on these issues, pushing to open up foreign services markets to more international trade (although more recently there has been some sensitivity regarding how U.S. financial regulations would be treated under trade obligations, which has made the U.S. position slightly more "defensive.>").

As with services liberalization in general, the financial services chapter includes general principles of national treatment, most favored nation treatment, and market access, combined with a set of exceptions and carve outs that limit its scope.

As noted, financial services has been a sensitive area for U.S. trade negotiators, in part because of fears that the trade rules in this area would interfere with "prudential" regulation, to deal with financial crises and related issues. In the TPP, Article 11.22 addresses this concern in the context of investor-state disputes by establishing a special mechanism through which governments can obtain exceptions to the normal procedures under qualifying circumstances. Though it is unlikely that a dispute would reach this stage, the provision adds some reassurances to governments that their ability to regulate to achieve sufficient levels of macroeconomic security is protected.

So far, there is little actual experience with financial services obligations in trade agreements, although a dispute at the WTO over certain Argentine measures related to tax havens, currently at the appeal stage, could help clarify how trade rules apply to certain of these provisions.

Assessment

Overall, the financial services chapter requires the same kinds of commitments to non-discrimination and liberalization that are required in other parts of the TPP. Its liberalizing thrust is somewhat constrained by highly conservative national approaches to financial regulation, reinforced by recollections of the Asian Financial Crisis and the more recent crises in the United States and Europe. An exception to the prohibition of data localization requirements agreed by TPP parties in the E-Commerce chapter is granted in this chapter for financial services firms. That provision likely will lead to increases in the costs of providing cross-border financial services.

The desire to exercise prudence and the political necessity of avoiding the perception that governments may be caving to external pressure to weaken financial reforms adopted in response to past crises may have contributed to the mitigation of liberalization in this chapter.

Pros

- Promotes market access by forbidding limits on the number of financial institutions or the value of services traded.
- Allows suppliers to provide financial services (including new services) across borders, and users to buy them – though registration or authorization of suppliers may be required.
- Requires protection of individual account information, and information that ought not to be disclosed due to law enforcement or legitimate commercial interests.
- Ensures that financial institutions have access to publicly operated payment and clearing systems.
- Allows back-office functions to be carried out in the territory of another party.
- Establishes a committee on financial services to oversee the chapter.

Cons

- Excludes financial services firms from the benefits associated with rules against data localization requirements agreed in the E-Commerce chapter.
- The many exceptions to the rules suggest that a great deal of potential liberalization was foregone.

Scoring Rationale

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 recollections 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.

Much more liberalization in this sector has been left to future reforms and agreements.

Chapter 12: Temporary Entry for Business Persons

Score: 6

Summary

In order to conduct business internationally, travel and formal entry into other countries is 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 extracts commitments from the parties that will improve business entry procedures. The provisions in the chapter include commitments to ensure that information on visa requirements, including explanatory materials and information concerning where inquiries should be directed, is readily available to the public. The chapter encourages TPP parties to provide information promptly concerning the status of applications, ensure that application fees are reasonable, and to render decisions and inform applicants of those decisions in a timely manner.

Assessment

By and large, temporary entry for business persons is of considerable importance to firms providing goods and services across borders, and it is appropriate to consider systemic delays in these areas to be trade barriers. Efforts to streamline and expedite the process are clearly important components of trade liberalization.

Although the 11 U.S. TPP partners made positive commitments in this area, the United States made none, owing – apparently – to the political sensitivities surrounding immigration issues (even though these provisions have nothing to do with immigration). In its summary of the chapter’s provisions, the Office of the United States Trade Representative reports: “In addition, while the other 11 TPP Parties have agreed upon country-specific reciprocal commitments on access for each other’s business persons, the United States is not undertaking any commitments in this area.”¹²

Pros

- Encourages development of “trusted traveler” programs, such as the “APEC Business Travel Card.”
- Requires parties to make available pertinent information about their temporary entry requirements and procedures.
- Encourages cooperation on issues, such as electronic processing systems for visas.

¹² Office of the United States Trade Representative, “The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Businesses,” Temporary Entry for Business Persons, <https://medium.com/the-trans-pacific-partnership/temporary-entry-for-business-persons-3559e41ae388#.7x7zebccb>.

- Establishes a “Committee on Temporary Entry of Business Persons,” which will meet once every three years.

Cons

- The United States makes no commitments in this area, which could impede the provision of business services by foreign firms in the United States.

Scoring Rationale

Business visas often are essential requirements in the provision of business and other services to foreign customers. Unnecessary delays, excessive paperwork, limited durations of visits, and other red tape impede the provision of those services, just as cargo inspection delays and tariffs do. Commitments to greater efficiency in this realm are certainly appropriate provisions to include in trade agreements.

The chapter is moderately liberalizing in that 11 countries committed to reduce barriers to temporary entry for business persons. It could have been more liberalizing if the United States made it 12 countries.

Chapter 13: Telecommunications

Score: 5

Summary

In most countries, the telecommunications sector is monopolistic or oligopolistic. In order to discourage anti-competitive behavior, the industries tend to be highly regulated. The Telecommunications Chapter establishes rules concerning the regulation of telecommunication services and service providers. Members are obligated to permit foreign enterprises to supply and use domestic telecommunications infrastructure and services on a nondiscriminatory basis. The chapter prohibits the imposition of unnecessary conditions on the use of those services. It includes provisions intended 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 domestic regulatory body.

The obligations are subject to dispute settlement.

Assessment

In the TPP, the telecommunications chapter mostly carries over previous obligations without much modification. However, the proliferation of mobile phones led to one new provision, dealing with international mobile roaming services.

By and large, the rules in this area have the potential to be liberalizing, although the extent of liberalization depends on – among other factors – whether the parties have actually made commitments that go beyond their obligations at the WTO or in other FTAs. That seems to be unclear and will remain so unless and until parties bring claims to enforce these obligations. There has only been one previous trade dispute concerning telecommunications obligations, so the dearth of legal interpretation of the commitments made casts some uncertainty over whether this chapter provides much liberalization.

Moreover, the chapter's obligations are tempered by Article 13.3, which gives the parties wide berth in how they implement their obligations, including by relying on market forces and by acknowledging that consumer interests are sufficiently served without direct regulation in a particular area.

It would likely lead to more liberalizing outcomes if the chapter specified the sorts of regulations that 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.

Pros

- The chapter recognizes the importance of telecommunications infrastructure to the provision of goods and services and acknowledges that impediments to accessing that infrastructure are trade barriers.

- Some of the chapter's rules target protectionism.
- Some of the chapter's rules focus on promoting competition and consumer interests.

Cons

- The rules envision a very active role for telecom regulators to manage competition in the market.
- The chapter promotes harmonization of approaches to regulating telecommunications services that ultimately could discourage competition.

Scoring Rationale

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.

Most of the provisions in the chapter are 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. Lower mobile roaming rates should reduce the cost of conducting business across the region.

Chapter 14: Electronic Commerce

Score: 7

Summary

The E-Commerce Chapter applies to measures “that affect trade by electronic means.” Its provisions are intended to ensure the free flow of data, prevent forced localization of data servers and technologies, promote the security of the internet, and protect the privacy of individuals and businesses, as they use and create content.

Chapter 14 includes a mix of negative obligations that prohibit TPP parties from imposing trade barriers, and positive obligations that require the parties to undertake specific measures. The chapter includes prohibitions of customs duties on electronic transmissions; prohibitions against requiring foreign companies to provide software source codes as a condition of doing business; prohibitions of restrictions on “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”; prohibitions of requirements that local computing facilities be used as a condition of doing business in the territory, and; prohibitions against 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.”

With respect to the positive obligations imposed on governments, this chapter covers a number of regulatory issues. Article 14.7 requires parties to have “consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.” Article 14.8 requires that parties have a “legal framework that provides for the protection of the personal information of users of electronic commerce.” And, Article 14.14 addresses the issue of spam e-mails, requiring measures that limit the ability of companies to use spam.

Other provisions in the chapter are best described as global governance provisions that harmonize domestic regulations without really liberalizing trade.

Assessment

Chapter 14 includes a number of provisions that will help liberalize trade by applying some basic free trade principles to electronic commerce. Most importantly, it prohibits the imposition of customs duties on electronic transmissions; applies the general principle of nondiscriminatory treatment for digital products; prohibits TPP parties from requiring the use of local computing facilities as a condition for conducting business in their territory; requires the parties to “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”; precludes the 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.”

The chapter includes a number of provisions that go beyond previous FTAs, and is perhaps one of the most innovative TPP chapters. But as with many TPP chapters, the liberalization is tempered somewhat by the exceptions and carve outs found in other chapters of the agreement, as well as the general exceptions in Chapter 29. Thus, the obligations to liberalize may not be as broad as they appear at first glance. For some sensitive issues, the interaction of the obligation and the exceptions are unclear. Moreover, an additional layer of complexity arises with this agreement because trade in goods and services are already covered in separate chapters. The relationship between the liberalizing obligations of this chapter and those of other chapters is not always clear.

Pros

- Parties are prohibited from imposing customs duties on electronic transmissions.
- Parties are prohibited from requiring the use of local computing facilities as a condition of doing business in the territory.
- Parties are required to "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."
- Parties are prohibited 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."

Cons

- There are a significant number of provisions that set "global governance" rules on things like e-signature regulations and consumer protection laws, which don't necessarily liberalize trade, carry some risk of rent-seeking, and really don't belong in trade agreements.

Scoring Rationale

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. In establishing rules to promote free information flow, the E-Commerce chapter is clearly trade liberalizing. It includes a number of provisions that go beyond previous FTAs, and is one of the most innovative TPP chapters.

The chapter is a mix of negative obligations that prohibit TPP parties from imposing trade barriers, which is an unambiguously positive development, and affirmative obligations that require the parties to undertake specific measures, which is a mixed bag from a free trader's perspective.

Chapter 15: Government Procurement

Score: 6

Summary

The Government Procurement chapter commits the parties to national treatment (foreign companies and bids are extended the same treatment in the process as are domestic companies and bids) and most-favored-nation treatment (all foreign companies and their bids are entitled to same treatment as any other foreign company or bid) in consideration of all covered projects.

In general, parties agree to accept bids for public procurement projects from producers and service providers of other parties, and to consider those bids on a non-discriminatory basis. The chapter harmonizes the procedures associated with announcing public procurement projects and considering bids, including the publication of procurement information, notices of intended procurement, requirements for participation, a registration system, selective tendering, limited tendering, and associated time periods. In addition, the chapter provides rules on information disclosure to ensure the transparency of the procedure and decision-making. It also establishes an obligation for each party to maintain at least one impartial administrative or judicial authority to review any challenges or complaints filed by a supplier. Specific commitments made by the parties with respect to project value threshold and coverage vary.

Every country, including the United States, has particular programs that TPP government procurement commitments will not cover. The United States continues to exclude from coverage the same programs excluded in past agreements, such as projects funded by loans, grants and other forms of assistance from the federal government to state and local entities that are subject to “Buy America” requirements. The chapter also provides for some general exceptions to the commitments for the purpose of protecting public morals, human/animal life or health, IP rights, and philanthropic work, if such measures are not arbitrary or unjustifiably discriminatory among TPP members, or a disguised restriction on international trade.

The chapter creates a committee on government procurement, which will meet to address any matters related to the implementation and operation of the chapter, upon the request of a party.

Assessment

The 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 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 America 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.

Whereas the failure to loosen the grip of Buy America provisions over government procurement spending is a major shortcoming of this chapter, the following paragraph seems to suggest that the Office of the U.S. Trade Representative considers it a virtue:

“TPP’s Government Procurement chapter will help create export opportunities for American producers of manufactured goods and services which support high-wage employment in the United States, ranging from information technology to transport machinery, medical technologies, professional services, and many other products. *At the same time, it will support U.S. businesses and workers, including by maintaining current Buy America requirements and small business and other set asides.*”¹³

Any free-trade oriented analysis would consider that last sentence politically motivated and economically uninformed.

Pros

- Includes first government procurement commitments made in an international agreement by Vietnam and Malaysia.
- Establishes government procurement benchmarks for prospective new TPP members to meet or exceed.
- Establishes due process to guarantee all tenders will be treated fairly and impartially, and have the access to a review authority.
- Includes a provision to recommence negotiations in this area within three years.

Cons

- The chapter only applies to sectors that each government has agreed to open (positive list), so the effect is limited.
- The United States did not open up its vast state and local level government procurement markets.
- The chapter does not cover any federal loans or grants provided by procuring entities.
- The technical specification clause (Art. 15.12) preserves wide latitude for American procuring entities to establish requirements for labor and environmental protection.
- There are no concessions on the threshold for the covered procurement. For instance, the threshold for the central government entity procurement is equivalent to the threshold under

¹³ Office of the United States Trade Representative, “The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Businesses,” Government Procurement, <https://medium.com/the-trans-pacific-partnership/government-procurement-ac9def5bba92#qxp4bfes>, (Emphasis added).

the Government Procurement Agreement and higher than that established in the U.S.-Korea Free Trade Agreement.

Scoring Rationale

The provisions of this chapter will serve to open some currently closed foreign procurement markets, as well as open further the markets in other countries. But the promise of that liberalization is tempered by the existence of voluminous country-specific and sector-specific exemptions. Most disappointing for free traders is the failure of this chapter to rid the \$1.7 trillion U.S. procurement market of highly restrictive Buy America provisions.

Government procurement projects remain highly protected from foreign competition, so rules to liberalize market access to the public sector are crucial components of good trade agreements. This TPP Government Procurement chapter makes some progress, but could have been much better.

Chapter 16: Competition

Score: 5

Summary

Chapter 16 establishes rules related to competition policy. It begins with the requirement that each party must have national competition laws “that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare.” The chapter encourages effective and transparent competition policies that protect consumers against monopoly practices and encourage market-based competition. These principles are meant to ensure that regulatory actions rest on objective and transparent criteria and are taken in a manner that does not discriminate against foreign businesses.

The chapter lays out extensive due process rights and transparency requirements, including the right of parties to procedural fairness in competition law enforcement, representation by counsel, protection of business confidential information, and provision for a private right of action by which individuals can seek redress through a judicial process for harm experienced due to violation of competition laws.

The chapter also encourages cooperation among national competition authorities; mandates that parties have consumer protection statutes that outlaw fraudulent and deceptive commercial activities; encourages transparency in the operation of competition policies; and, calls for consultations among parties to address matters arising under this chapter.

As in previous agreements, none of the Competition chapter’s provisions is subject to dispute settlement.

Assessment

None of the provisions in the competition chapter liberalizes trade per se. Rather, the chapter promotes the conditions of competition that are hospitable to market competition, including competition from foreign companies. 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.

Pros

- The procedural rules might promote greater rule of law and justice if they are followed by the TPP’s more authoritarian members.
- The commitment to rules that support competition should help encourage overseas investment and, at the margin, may serve to facilitate greater economic integration among the TPP parties.

Cons

- The competition chapter does very little to liberalize trade.

Scoring Rationale

This chapter is basically neutral with regard to trade liberalization. Since TPP members are offering hortatory support for open competition among firms, it may lead to some increase in foreign investment. However, foreign firms that believe they are not being treated fairly under this chapter would likely have to absorb large legal costs over a considerable period of time to achieve any redress.

Chapter 17: State-Owned Enterprises

Score: 6

Summary

The purpose of this chapter is to curtail the market distorting effects of state-owned enterprises, which are defined as any commercial enterprises in which the state has majority ownership, controlling ownership, or the ability to appoint a majority of the board of directors. SOEs have become more prominent actors in the global economy in recent years. According to the Office of the U.S. Trade Representative, “Whereas in 2000, there was only one SOE in the Fortune Global 50 list of the largest companies in the world, now there are close to a dozen. Their international activity has raised new concerns about government influence, potential trade distortions, and unfair competition. In addition, some TPP countries that maintain many SOEs are already considering reforms to enhance the efficiency and productivity of their economies.”¹⁴

Concerns about the role of SOEs have grown in recent years because SOEs that had previously operated almost exclusively within their own territories are increasingly engaged in international trade of goods and services or acting as investors in foreign markets. The chapter represents the first ever attempt to discipline SOEs as a distinct category through trade rules.

The provisions include three broad obligations meant to reduce the discretion of governments to use state-ownership as a tool for trade protectionism. These obligations are that SOEs and designated monopolies must 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. Beyond the three broad obligations specified in the chapter, the parties must also provide their courts with jurisdiction over civil claims arising from SOE activities just like they do for non-SOE firms; publicly list all their SOEs and designated monopolies, even those not covered by the chapter’s rules; and, commit to further negotiations within five years that could lead to more liberalization of SOEs.

The scope of the chapter is explicitly limited to ensure that its rules don’t interfere with the operation of central banks, stock exchanges, bank deposit insurance, sovereign wealth funds, or pension funds.

The substantive rules in the chapter aren’t entirely new. The requirement to operate according to commercial considerations can be found in the General Agreement on Tariffs and Trade, but is applicable only to state trading companies; the nondiscrimination obligation is mirrored after a provision in the General Agreement on Trade and Services regarding monopoly service providers; and the chapter’s subsidy disciplines are simple expansions of the rules of the WTO Agreement on Subsidies

¹⁴ Office of the United States Trade Representative, “The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Businesses,” State-Owned Enterprises and Designated Monopolies, <https://medium.com/the-trans-pacific-partnership/state-owned-enterprises-and-designated-monopolies-bfddb20cb3b3#.gpub66qjm>

and Countervailing Measures. Where the TPP breaks new ground is by applying these disciplines to SOEs generally.

Assessment

While the privatization of public assets is an important part of economic liberalization, the State-Owned Enterprises chapter does not attempt to eliminate or prevent government ownership. Instead, it is intended to reduce the economic distortions caused by direct government ownership of prominent firms. The chapter's three main obligations make an excellent contribution to international economic law. 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. The chapter's commitments build on principles in various WTO agreements and in previous U.S. free trade agreements, but go beyond them in important ways, including by applying subsidies rules to services exports of SOEs and to the operations of SOE manufacturers outside their home territory.

On the down side, the chapter provides for numerous exceptions to the basic rules, which will have the effect of diminishing the impact of these otherwise market-oriented disciplines. Each party maintains detailed lists of exemptions, allowing the bulk of existing SOEs to continue operating without paying much heed to the SOE disciplines. Most members have carved out specific SOEs from the chapter's disciplines, particularly in the energy and finance sectors. The extent of these exemptions significantly limits the chapter's practical impact. Moreover, by requiring a controlling interest, the definition of an SOE leaves out a great number of enterprises that receive special treatment by the state due to inappropriate government involvement through ownership.

Among the entities exempted are export credit agencies, such as the U.S. Export-Import Bank and the Overseas Private Investment Corporation; entities that don't meet a minimum revenue threshold; and, SOEs and designated monopolies of sub-central governments.

Pros

- The SOE Chapter's core rules—commercial consideration, nondiscrimination, and subsidy disciplines—represent important and positive contributions to the TPP and to international trade rules in general.
- The chapter establishes precedents for reining in some of the market distorting practices of SOEs and lays down markers for TPP accessions by other countries, including, importantly, China.
- The provisions require ongoing negotiations on these issues with the objective of continuing to curtail abuses and neutralize unfair advantages bestowed upon these kinds of entities.

Cons

- While the chapter includes 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.
- The provisions fail to address many of the problems private firms currently face in the region, as they compete with SOEs.
- The chapter does not attempt to eliminate or prevent government ownership, which is a shortcoming that ensures a continuation of unfair competition.

Scoring Rationale

By and large, the provisions in Chapter 17 will help reduce trade barriers and create more trade. And they lay down markers for countries with large SOE sectors that may want to accede to the TPP in the future. The chapter breaks new ground in a positive way, as the first trade agreement that specifically targets the abuses of state-owned enterprises, and future negotiations on these issues are mandated in the chapter text. Though the rules disciplining SOEs are clear, so are the vast exemptions which largely defang those rules.

The provisions could have been made more robust to apply to more activities, and to limit the number and type of government-assisted, -directed, or -owned firms that were ultimately exempted.

Chapter 18: Intellectual Property

Score: 4

Summary

The TPP continues the long-standing practice of including protections for intellectual property in trade agreements. Chapter 18 contains comprehensive and detailed rules that will affect the substance and administration of domestic intellectual property laws. The chapter predominantly serves to set minimum levels of protection for rights holders and partially harmonizes the IP laws of the 12 TPP parties. A number of key provisions are worth noting.

With respect to trademarks, the chapter clarifies that nonvisual signs are eligible for protection; establishes extra protection for famous marks; and, sets rules governing disputes over web domain names.

Regarding “Geographical Indications,” the chapter gives precedence to trademarks over “later-in-time” GIs and requires the parties to adopt procedures for canceling existing GI protections as generic – with exceptions granted for GIs already agreed by treaty.

Concerning pharmaceutical patents and related test data, the chapter requires patent linkages and patent extensions for unreasonable delays by a party’s patent office or its drug safety regulators. It does not require that biologic drugs be granted more than the standard 5 years of data exclusivity enjoyed by other drugs.

Copyright protection for the duration of the life of the author plus 70 years is enshrined in this chapter, as are the requirements that parties have some criminal penalties for trade secret misappropriation, and criminal and civil penalties for decoding encrypted signals from satellite and cable transmissions.

With respect to the question of whether and to what extent internet service providers should be liable for the IP-infringing activities enabled by their provision of internet services, the chapter requires parties to have a notice and takedown system (similar to the U.S. Digital Millennium Copyright Act) for websites that host allegedly infringing content.

The chapter also includes provisions requiring civil and criminal liability for circumventing technological protection measures (e.g., unlocking your phone) and for tampering with digital rights management data.

Assessment

The chapter’s breadth and depth (it is the longest chapter in the TPP) render comprehensive analysis of its impact difficult. Generally, however, one is hard-pressed to describe the intellectual property protections extended in this chapter as trade “liberalizing.” In fact, the IP chapter is protectionist – though not as bad as many critics claim. 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.

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. Moreover, the protections that have been included arguably go beyond what is necessary to promote innovation – one of the main justifications for these protections. And we must be vigilant about ensuring that the monopoly privileges bestowed through IP protections do not impede competition and hurt consumers any more than necessary.

At the same time, intellectual property protections are fixtures in U.S. trade agreements, and it would be difficult to ratify a TPP without IP protections. The TPP's IP provisions were a major source of controversy during the negotiations, and disagreements over the final provisions are an important reason that U.S. ratification is in doubt.

On one hand, the TPP's intellectual property chapter simply builds on previous U.S. free trade agreements by extending the number of trade partners to which these principles and provisions apply, without adding much in the way of new obligations. For example, while the WTO's TRIPS agreement requires a copyright term of life of the author plus 50 years, prior U.S. FTAs already extended the term to life plus 70 years. In adopting this longer term, the TPP does not change the substance, but merely applies the same principle to more countries.

On the other hand, the TPP does go further in protecting intellectual property in at least a few ways. One of the most controversial aspects of the TPP negotiations was the term of exclusivity of test data for biologic drugs. Under U.S. law, the current term is 12 years, which is far more than any other TPP party. U.S. negotiators pushed – to some extent – for the longest possible term it could get. Ultimately, a compromise was reached that all of the governments could live with: 5 years of protection, with vague provisions suggesting as much as 8 years was possible.

Pros

- The chapter won't require changes to U.S. intellectual property laws, and its provisions are, on the whole, more flexible than those in the U.S.-Korea FTA.
- The TPP will add very little to existing U.S. international obligations in the area.
- The text is generally more flexible and permissive than previous U.S. trade agreements and even includes a novel provision calling on members to “endeavor to achieve an appropriate balance” in their IP regimes through “limitations or exceptions” to exclusive rights.
- Since IP rules are going to be a part of trade agreement for the foreseeable future, this call for balance represents an important step toward improving the IP policy that trade agreements impose.

- The chapter makes a positive contribution to the fight against excessive protection of geographical indications.

Cons

- Intellectual property protection is, by definition, protectionism.
- The structure of the chapter, like IP chapters in other agreements, remains generally unbalanced in its 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.
- The most objectionable provision is the extension of copyright duration of existing works to life of the author plus 70 years—a 20 years extension for many TPP members.

Scoring Rationale

While intellectual property policy has become a prominent component of economic governance in the 21st Century, strengthening the protection of patents and copyrights does not further the goal of trade liberalization. Of course, if the parties adopt more rigorous rules to curtail pirating of music, videos, and theft of other intellectual property, there may be an increase in legal trade of those products.

Moreover, protecting biologic test data for five or eight years may help pharmaceutical companies recoup some of their research and development costs, through higher revenues, and reduce the costs of new medicines in the United States. However, these protections are just as likely to stymie competition. And American consumers will continue to absorb most of the costs for developing novel medicines.

The IP Chapter intrudes into regulatory matters that would be best negotiated in a different forum or dealt with in a purely domestic context. Compared to past U.S. trade agreements, however, the TPP's IP Chapter is not especially onerous. Its provisions are generally weaker and more flexible, and the chapter includes a helpful provision calling on members to seek balance in their IP regimes. The TPP will not require any changes in U.S. IP law, though it may make reform of those laws more difficult in the future.

Chapter 19: Labor

Score: 3

Summary

Labor issues have been associated with trade agreements since the exception for goods produced with prison labor was articulated in the original GATT in 1947. But it is only more recently that positive commitments to protect labor rights have become fixtures in trade agreements. What began as a “labor commission” established through a side-letter to the North American Free Trade Agreement in 1993, labor protections in trade agreements expanded in subsequent trade deals and have now become enforceable commitments. The so-called May 10th Agreement between Congress and President Bush (reached on May 10, 2007) raised the benchmarks for labor protection and enforceability even higher.

TPP’s Labor chapter provisions go further than all previous free trade agreements have gone to regulate domestic labor laws in a manner ostensibly intended to protect workers’ rights. As in previous agreements, parties are required to adopt and maintain laws and regulations that abide the fundamental labor rights articulated by the International Labor Organization (ILO), including freedom of association and the right to collective bargaining; elimination of forced labor; abolition of child labor; and the elimination of employment discrimination. But for the first time in a trade agreement, the TPP parties are required to have laws governing minimum wages, hours of work, and occupational safety and health. All of these obligations are enforceable and subject to dispute settlement, which can result in the imposition of trade sanctions.

The chapter requires that TPP parties not fail to effectively enforce their labor laws in a manner that would affect trade or investment between the parties and not to weaken labor protections in export processing zones to attract investment. Moreover, the United States took the unusual step of negotiating bilateral implementation plans with Vietnam, Malaysia, and Brunei to expedite compliance and ensure that the laws, regulations, and practices in those countries are up to international standards.

Under the terms of those implementation agreements, Vietnam is required – among other things – to allow workers the autonomy to establish and operate labor unions that need not have government affiliation, as is currently required. Malaysia’s implementation plan requires significant legal and institutional reforms to reduce the incidence of human trafficking and eliminate the use of forced labor. Brunei’s plan commits its government to a path of continuing reform of laws governing the formation, operation, and activities of labor unions, including establishment of a government-to-government review mechanism to oversee implementation of the plan.

Assessment

While labor chapters in trade agreements have become generally accepted as part of U.S. trade policy, the rationale for their inclusion remains unconvincing. There is an international institution, the ILO, already devoted to these issues. Giving trade agreements jurisdiction to regulate and adjudicate these issues and to authorize sanctions for non-compliance with rules and standards appropriate and

affordable in rich countries might deprive developing countries of their advantages and raise the costs of production. Being a party to a trade agreement with the United States carries big benefits, including the capacity to attract greater amounts of investment in domestic value added activity. But the uncertainty that comes with the existence of rules that can be conduits for protectionist motives and trade sanctions tends to deter investment and retard growth. Why is it appropriate, in the context of trade liberalization, to mandate that developing countries adopt rich-country standards that may be suitable and affordable to rich countries because they are rich countries, but are costly for developing countries to adopt and uphold and which may impede the priority of economic growth?

The TPP Labor chapter includes the most rigorous, enforceable protections of labor rights and, by extension, the widest berth for protectionist mischief masquerading as labor concerns ever to be included in a trade agreement. While much of the TPP labor chapter borrows language 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 substantive ways, including by requiring that parties "adopt and maintain statutes and regulations" with respect to minimum wages. Questions about the efficacy of minimum wage requirements are the subject of considerable debate in the United States, so mandating that other countries adopt such requirements seems reckless and reeks of cultural imperialism. Mitigating that concern is the fact that no guidance is offered with respect to establishing specific minimum wages, so, theoretically, parties could set them at a low enough level as to have no impact.

There is an asymmetry to the costs of implementing the requirements of the labor chapter, which will burden the poorest countries disproportionately.

Pro

- Enunciation of the ILO principles as legitimate objectives of public policy.

Con

- The provision for trade sanctions in response to non-compliance or inadequate compliance will impede investment and reduce trade.
- Requirement that all TPP parties adopt minimum wage laws could have a profoundly adverse impact on employment.
- Enforceable labor provisions do not belong in trade agreements.
- The provisions impose an asymmetry of compliance burdens with the poorest TPP parties bearing the greatest costs.

Scoring rationale

Labor chapters in trade agreements do not promote liberalization. They are intended as conduits for rich country influence over foreign labor practices. While there may be a political argument for including them in trade agreements (though that argument does not hold for TPP, as organized labor remains firmly opposed despite getting nearly everything it wanted), there is no economic rationale.

Chapter 20: Environment

Score: 4

Summary

The Environment chapter commits the parties to enforce their own environmental laws and to refrain from relaxing those laws for the purpose of attracting investment. Parties are required to fulfill the obligations they have made as signatories to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a multilateral agreement committed to protecting endangered species, and to combat trade in wildlife, plants and fish that may not be covered under CITES, but have been taken illegally. The provisions also require parties to protect wildlife and plants through conservation of wetlands and the promotion of sustainable forest management practices. Parties are required to adopt and maintain measures to insure current levels of control over ozone-depleting substances, control pollution from ships in the ocean, and ensure due process and transparency in the enforcement of environmental laws.

The chapter also covers a number of other issues without imposing any real substantive obligations on the parties. These include compliance with other Multilateral Environmental Agreements, promotion of corporate social responsibility, appreciation for biodiversity, and transition to a “low emissions economy.” Similarly, the chapter does not impose substantive obligations on members in provisions condemning invasive alien species, shark finning, marine bycatch, and whaling.

One very substantive provision in the chapter combines environmental protection and traditional trade rules to prohibit fishery subsidies that contribute to overfishing.

All provisions of the chapter are subject to the TPP’s standard dispute settlement procedures, although some provisions are not binding.

Assessment

The TPP continues a decades-long trend of conflating obligations that belong in trade agreements and those that belong in environmental treaties. Free traders should be opposed to including enforceable environmental provisions in trade agreements. Such rules have nothing to do with liberalizing trade, and only provide leverage (the use or threat of sanctions) to environmental crusaders to impose costly mandates on poor countries. They also reinforce the myth that trade harms the environment and that no cost is too high – even for developing countries – to mitigate threats and potential threats to environmental quality, even if the measure would provide only a marginal benefit.

In this particular agreement, however, the Environment chapter imposes weaker obligations than past U.S. trade agreements and contains a genuinely liberalizing prohibition against subsidies that contribute to overfishing. In that regard, the chapter represents an improvement over the four most recent U.S. FTAs to be ratified, which included more rigorous commitments to environmental regulation and nothing that could be considered trade liberalizing. Moreover, aside from the wildlife trade provision,

none of the obligations may actually alter state practice. The negative impact is mostly symbolic and there is a real positive impact from the addition of disciplines on fishery subsidies.

Although the chapter's provisions are subject to dispute settlement that could lead to trade sanctions, the obligations appear easy to fulfill.

Pros

- The ban on fisheries subsidies, although limited to those that risk overfishing, is a genuinely liberalizing obligation that could be the most disciplining anti-subsidy provision in the entire agreement.
- The chapter is less restrictive than previous U.S. trade agreements, as the only MEA it requires adherence to is CITES.

Cons

- Brings new environmental concerns, such as shark finning and carbon emissions, into the ambit of trade agreements.
- Takes a shotgun approach to restricting trade in illegal wildlife in a manner similar to the U.S. Lacey Act, which has been used by the U.S. lumber industry to criminalize importers.

Scoring Rationale

Environmental provisions are put in trade agreements not to liberalize trade, but to restrict it. Generally, the TPP's Environment chapter continues that tradition. However, the provision restricting government subsidies to entities that overfish is an exception to the general rule. That provision, especially, renders Chapter 20 less onerous than environment chapters in prior trade agreements.

The agreement would have been better if it banned all fishery subsidies and better still without an environment chapter altogether. But as far as environmental chapters in trade agreements go, the TPP's is an improvement from a free trade perspective.

Chapter 21: Cooperation and Capacity Building

Score: No Score

Summary

While negotiating trade agreements is a crucial part of the process, implementing the commitments undertaken is at least as important if trade liberalization is to ensue. In trade agreements, such as the TPP, where some of the parties have less administrative experience and face resource and other shortcomings that may impede implementation, allowances for training, sharing of best practices, and technical support between and among the parties can help mitigate the capacity constraints.

Chapter 21 establishes a Committee on Cooperation and Capacity Building to identify areas of need and to facilitate information exchange and other forms of cooperation.

TPP is the first U.S. agreement to create a formal and permanent framework of cooperation to build the capacity to fully implement the agreement, which includes an economically diverse group of countries and is the largest ever to be negotiated by the United States.

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

Chapter 22: Competitiveness and Business Facilitation

Score: No Score

Summary

The purpose of the Competitiveness and Business Facilitation chapter is to create the architecture that will allow TPP parties to evaluate the impact of the agreement on various aspects of their economies. It provides for establishment of a committee – with input from TPP stakeholders – that will meet regularly to review the agreement’s impact on regional competitiveness and economic integration and consider input from stakeholders about how the agreement might further enhance competitiveness and integration, and further strengthen regional supply chains.

In light of the high-degree of disaggregated production sharing in the Asia-Pacific region, the TPP is the first U.S. trade agreement to include provisions designed to monitor the success and evolution of these supply networks and value chains.

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

Chapter 23: Development

Score: No Score

Summary

The main purpose of the chapter is to establish a TPP Development Committee to promote greater awareness among the parties of the opportunities for growth and poverty eradication created by the TPP's provisions. The Office of the U.S. Trade Representative anticipates that "the Committee will work with governmental bodies as well as civil society groups, private companies, academic institutions, and non-governmental organizations, and promote joint activities to promote and align development activity, expand joint engagements in science, technology, and research; and facilitate public-private partnerships to enable private enterprises, small and medium-sized enterprises to bring their expertise to bear to support development goals."¹⁵

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

¹⁵ Office of the United States Trade Representative, "The Trans-Pacific Partnership: Leveling the Playing Field for American Workers & American Businesses," Development, <https://medium.com/the-trans-pacific-partnership/development-a9869aa451c4#.9tnei6gth>.

Chapter 24: Small and Medium-Sized Enterprises (SMEs)

Score: No Score

Summary

The TPP is the first U.S. FTA to include a chapter devoted to promoting the interests of small and medium-sized enterprises. The chapter requires each party to create a publicly accessible website to provide SMEs with a description of TPP's provisions; a list of government agency websites and national laws that SMEs would need in order to better understand how to trade, invest, and conduct business in that territory; and, additional relevant information.

The parties also have agreed to establish a committee to oversee the SME provisions and to facilitate the goals of the chapter. The committee would be composed of government representatives.

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

Chapter 25: Regulatory Coherence

Score: 6

Summary

Reflecting growing recognition that the divergence of regulations and regulatory practices between countries, while expected and understandable, can also serve to frustrate market integration or even be overtly protectionist, the TPP is the first U.S. free trade agreement to include a chapter on regulatory coherence. Chapter 25 specifies two broad objectives: first, to improve the domestic regulatory process; and, second, to foster cooperation between and among regulatory agencies in different countries.

Most of the chapter's provisions are intended to promote better interagency consultations, coordination, transparency, and good regulatory practices, including provisions to discourage adoption of regulations developed unfairly, without adequate public input, without a sound rationale, or for the benefit of a particular industry, company, or stakeholder. Among the good regulatory practices encouraged are publication of impact assessments of proposed regulations, explanations for selection of particular regulatory approaches over others, commitment to crafting regulations clearly and concisely, commitment to performing cost/benefit or other analyses to determine whether the regulation performed as expected and whether it remains the most effective approach, and commitment to notify the public of expected regulatory changes in the year ahead.

The Regulatory Coherence chapter does not address specific regulatory issues related to trade and investment, but rather the overall process or system through which TPP members develop regulations. It will also help leverage regulatory best practices, while reaffirming the right of each TPP Party to identify its regulatory priorities and establish and implement measures to address these priorities as it considers appropriate.

It is important to note that the provisions of this chapter are written in hortatory language, emphasizing their nonbinding nature. Indeed, the chapter's final provision, Article 25.11, makes clear that dispute settlement procedures are not available for "any matter arising under this chapter."

Assessment

The TPP breaks new ground as the first U.S. trade agreement to include a separate chapter on regulation. In that sense, the TPP establishes that protectionist aspects of regulation are legitimate topics to discipline in trade agreements, though it extracts relatively few commitments from the parties. By contrast, rules dealing with regulatory coherence are likely to constitute a more significant part of any prospective agreement that emerges from the ongoing trade negotiations between the United States and the European Union.

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. But the TPP makes only very minor progress toward that potential.

Of course, several aspects of regulation are subject to the disciplines in other substantive TPP chapters. The rules on intellectual property, labor, the environment, technical barriers to trade, SPS measures, and a number of other chapters all address regulation in a variety of ways. Thus, the Regulatory Coherence chapter is not the only place where the TPP addresses domestic regulation.

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

Pro

- First time a U.S. trade agreement has a chapter on regulatory issues, creating a marker for future progress in other agreements.
- Establishes a formal Committee to talk about these issues going forward.

Con

- The provisions are not enforceable through dispute settlement, so the chapter is not likely to have much of an immediate impact.
- Creates an overlap with other trade agreements, such as the WTO's TBT Agreement, which could lead to conflict and confusion.

Scoring rationale

Divergent regulations and regulatory processes can mask protectionism, so the commitment of this chapter to reining in that potential is distinctly trade liberalizing. Regulatory coherence issues should be included in trade agreements. The fact that most of the language in the chapter is suggestive ("should" instead of "shall") and that the real obligations spelled out are not subject to dispute settlement indicates that the provisions could have been more liberalizing.

Chapter 26: Transparency and Anti-Corruption

Score: No Score

Summary

The purpose of Chapter 26 is to establish and reinforce effective measures to combat corruption and promote government transparency standards so that delivery of the trade liberalizing benefits of the TPP faces fewer impediments. The chapter includes provisions intended to prevent corruption by public officials, promote integrity among public officials, and require adoption and enforcement of anticorruption laws.

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

Chapter 27: Administrative and Institutional Provisions

Score: No Score

Summary

The chapter establishes the Trans-Pacific Partnership Commission, to be comprised of senior officials from each TPP party. The functions of the commission, among others, include: “any matter relating to the implementation or operation of this Agreement;” the review of economic relationships among parties; the consideration of any proposals for amendments or modifications; and the supervision of all committees and working groups. The Commission also may accelerate tariff elimination schedules, adjust rules of origin, and modify goods and services covered under the government procurement provisions.

The establishment of the commission provides a mechanism for dealing with the many issues likely to arise as TPP is implemented, and with the possible accession of additional members.

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

Chapter 28: Dispute Settlement

Score: 8

Summary

The enforceability of the TPP obligations is of great importance because if governments cannot be held accountable to their commitments, the value of those commitments is significantly diminished. Accordingly, if TPP is going to have a significant impact on trade liberalization, its dispute settlement procedures will have to apply broadly, function properly, and be enforceable. Most, but not all of the provisions of the TPP are subject to dispute settlement.

At the WTO, dispute settlement has a long, and highly regarded, track record. Over 500 complaints have been lodged in the WTO's nearly 22 year history and, generally speaking, governments have been pretty good at complying with adverse dispute settlement rulings. In contrast, resort to dispute settlement in preferential trade agreements has been rare. 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 accessible as a venue for resolving disputes in a greater number of issue areas than is the case under any other dispute settlement systems. Unlike the WTO system, TPP dispute settlement lacks an appellate mechanism.

Assessment

Reasonable dispute settlement backed up by the possibility of sanctions will help ensure the enforceability of the TPP's provisions. The applicability of dispute settlement to most of the TPP is commendable. While speedier resolution may be essential to the process, attempting to achieve that outcome in this case came at the cost of forgoing an appellate process. That might not be the worst trade off in the world, but the absence of an appellate mechanism could produce inconsistent jurisprudence, which could ultimately make enforcement more difficult.

At the WTO, the Appellate Body has proved very valuable in developing a coherent jurisprudence. With only a panel level judiciary at the TPP, there could be a problem with divergent interpretations, which create uncertainty as to exactly what the obligations of a trade agreement mean. One difficulty that could complicate TPP dispute settlement is Article 28.11, which states that TPP panels must consider interpretations by WTO panels and the Appellate Body. The growing body of WTO jurisprudence is complex and evolving, and its guidance may not always be easy to follow.

The Dispute Settlement Chapter contains detailed procedures for determining compliance with TPP rules and imposing remedies when one party believes another party is violating the agreement. Although WTO dispute settlement has become quite common, such recourse has been rarely pursued in preferential trade agreements. One reason for that is that trade agreement partners are almost always

WTO members, as well, so for obligations covered under WTO agreements, the WTO dispute settlement system is almost always used. However, TPP commits the parties to terms on issues that are not expressly covered – or not covered in the same detail – by the WTO, so there is certainly scope for issues to be adjudicated under TPP dispute settlement procedures.

Good intentions aside, the effectiveness of TPP dispute settlement cannot be judged until the mechanism is tested through actual disputes. There are some new areas of trade law in the TPP, such as rules on state-owned enterprises, the full scope of which will not be understood until they are interpreted and applied in actual litigation. So the process of handling disputes must be credible and respected.

Pro

- A great deal of effort has been taken to make dispute provisions enforceable, to overcome the problems experienced with the NAFTA and general disuse in other FTAs.
- Speedier resolution of issues should help ensure greater compliance, enforcement, and benefits from the TPP.

Con

- Lack of appellate process could lead to inconsistent or incoherent jurisprudence.
- There have been few disputes under existing FTAs, leading to questions about whether TPP will be enforced.

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. On the other hand, the TPP involves commitments that do not exist under the WTO, so TPP-specific dispute resolution may prove an important complement to the trade liberalizing commitments made throughout the agreement.

Chapter 29: Exceptions

Score: No Score

Summary

The Exceptions chapter addresses a grab bag of issues, including provisions clarifying that governments do not cede their rights to regulate in the public interest or to protect national security. The chapter incorporates general exceptions provided under Article XX of the General Agreement on Tariffs and Trade and Article XIV of the General Agreement on Trade in Services, which specify that nothing in the agreement “shall be construed to prevent the adoption or enforcement” of policies to, among other things, protect public morals, protect human, plant, or animal life and health, enforce intellectual property rules against counterfeiting, enforce laws relating to imports of products of prison labor, and conserve exhaustible resources. It provides that parties may take any measure they consider necessary for the protection of its essential security interests.

The chapter also specifies parties’ rights to take temporary “Safeguard Measures,” related to controlling volatile capital flows under certain circumstances; it identifies tobacco as a product posing unique public health challenges, which has the illiberal impact of exposing tobacco products and companies to some of the discriminatory treatment applied in other parts of the agreement, and opens the door the other forms of discrimination against other products and industries. The chapter also provides for other general exceptions regarding taxation, information disclosure, and policies associated with some governments’ recognition of indigenous rights in their countries.

Assessment

None.

Pros

None.

Cons

None.

Scoring Rationale

None.

Chapter 30: Final Provisions

Score: 8

Summary

TPP 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 provisions on entry into force are set out in Article 30.5. If all of the original negotiating parties ratify the TPP through their domestic political processes, entry into force is fairly simple. However, if one or more parties is unable to ratify, paragraph 2 establishes certain thresholds that need to be met for TPP to enter into force with fewer than all governments on board. If all of the original negotiating parties cannot ratify within two years of the date the agreement is signed, the TPP can still enter into force if at least six of the original parties, accounting for at least 85% of the combined GDP of these parties, have ratified it. Parties who could not be part of the original entry into force can enter later once they complete their domestic process.

Another important aspect of this chapter is the accession procedure. There has already been a good deal of talk about other countries in the region acceding to the TPP, most prominently, of course, China. Article 30.4 sets out detailed rules on accession.

Paragraph 1 specifies that members of APEC might join, but also notes that any other state or customs territory may also join if the parties agree.

In general, FTAs are designed to be exclusively for the parties to the agreement, and accession is not anticipated. As a result, there is not a lot of experience with accession procedures in these types of agreements.

By contrast, the GATT/WTO has a long history of administering an accession process for new members. Thus, for practical experience with the accession process, the TPP will likely look to the WTO for guidance.

Unlike the WTO, the TPP will not have a Secretariat to manage this process. Instead, TPP will require establishment of ad hoc working groups to manage individual accessions.

In general, the accession process is designed to extract concessions from the applicant government that are equivalent to what the existing parties have agreed. The terms of accession would include tariff concessions, services commitments, procurement liberalization commitments, as well as discussions of the scope of the substantive rules in other chapters that will apply to the acceding member.

Assessment

When trade agreements are found to be net liberalizing, the benefits increase when their terms are more broadly applied. The fact that TPP is a “living agreement,” open to accession by new members, magnifies the trade liberalizing nature of the agreement and significantly increases its value. This may be one of the least appreciated aspects of the TPP.

Currently, many countries are engaged in reforms to qualify for TPP membership. As more countries join TPP, the wider the liberalization net will be cast. Moreover, the costs of remaining outside the agreement will rise. There has long been talk of the TPP evolving into a Free Trade Area of the Asia Pacific. If that were to occur – with countries such as China and India as members – the TPP would generate far more substantial economic benefits than it is likely to do in its current form.

Although multilateral trade liberalization remains the gold standard, prospects for achieving that outcome pursuant to the old, consensus-driven, negotiating round approach are remote. It has been 22 years since the last successful GATT multilateral trade negotiating round – the Uruguay Round, which produced the WTO – was completed. Repetitive failures to advance the Doha Round point to systemic weaknesses in that approach.

The TPP offers a different approach to that end. By achieving critical mass (40% of the global economy) and offering membership to those who qualify, the TPP ultimately could attract many more countries beyond China and India, including Latin American, African, and even European countries.

The TPP might be the vehicle that takes the world to a new period of multilateral liberalization.

Pros

- Living agreement
- Provides for new liberalization and new members

Cons

Scoring Rationale

Unlike other U.S. FTAs, according to the terms of this chapter the TPP is a living agreement. That means its scope for revision and expansion makes it potentially much more liberalizing than it is as a 12-country regional pact. This feature needs to be better appreciated by free traders and policymakers because it equips the TPP with the tools to make it a vehicle for much broader, even multilateral, trade liberalization. The terms of this chapter help to articulate the opportunity costs of a failure to ratify and implement the TPP.

Conclusion

Our analysis includes assessment of 22 of 30 chapters. Chapters earning scores above 5 are considered “net liberalizing,” and those graded below 5 are considered “net restrictive.” Following is a summary of findings:

- 15 of 22 chapters received scores above 5.
- 5 of 22 chapters received scores below 5.
- 2 of 22 chapters received neutral scores of 5.
- The highest score assigned was 8 and it was assigned to 5 chapters.
- The lowest score assigned was 3 and it was assigned to 3 chapters.
- The median and mode scores were both 6.
- The straight average score was 5.82 (which assigns equal weight to each chapter, which seems difficult to justify given that some chapters are much more impactful than others).
- The average for “market access” oriented chapters was 6.18.
- The average for “rules and governance” oriented chapter was 5.45.
- The average for “First Tier” chapters (those that have to most bearing on the quality of the agreement) was 6.63.
- The average for “Second Tier” chapters was 5.36.
- The weighted average (where twice as much weight is assigned to First Tier chapters) was 6.03.

Obviously, not everything in a free trade agreement is going to be to the liking of free traders. Some issues simply don't belong in trade agreements. But in our view, every little bit of liberalization helps. If that liberalization doesn't come at a cost that exceeds the benefits, it is worthy of support.

The bottom line is that, in our assessment, the TPP would be net liberalizing – it would, on par, increase our economic freedoms. Accordingly, we hope it will be ratified and implemented as soon as possible.