
Sticking Points in the TPP Negotiations

At their meeting in Honolulu in November 2011, TPP leaders issued a framework for the TPP accord and urged their negotiators to finish the deal in 2012.¹ While trade officials have made remarkable progress in crafting such a comprehensive accord, compiling draft text on the 29 chapters, much of the work on the TPP agreement remains to be done, with many contested issues still to be resolved.

In essence, the work to date has only set the stage for negotiation of the real guts of the TPP accord. Negotiators have put forward what they want to “get” but have been more reluctant to discuss what they will “give” in return. Much of the negotiating effort has focused on US demands for better market access in other TPP countries and vice versa, though the talks also confront important market access barriers that were not adequately covered in past trade accords among other TPP participants.

To date, this imbalance has not posed major problems for the work of the TPP negotiating groups, but it will increasingly do so as officials consider more politically sensitive reforms in areas such as agriculture, intellectual property, and services and investment, among others. Indeed, in recent rounds, TPP negotiators have been reluctant to accept new rulemaking obligations that would require changes to or new disciplines on their own policies in the absence of clear signals that the United States and others will change existing policies and liberalize longstanding trade barriers in key sectors. Such caution, nay timidity, crashed the Doha Round and could do the same for the TPP talks. If US officials want the TPP to be a “high-standard” agreement based closely on

1. Office of the United States Trade Representative, *Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders*, November 12, 2011, www.ustr.gov (accessed on June 2, 2012).

the US FTA template, then some existing US trade barriers will have to be put on the chopping block, recognizing that commitments to the most politically sensitive reforms will necessarily fall to the end-game negotiations.

The following sections examine a short list of “sticking points” in the current TPP talks. The fact that this short list is not so short, that many of the issues are not subject to obligations in intra-Asian pacts, and that current TPP participants have different priorities and approaches for dealing with them means that the negotiations are likely to be prolonged before an initial deal can be cut. The goal set in Honolulu of finishing negotiations in 2012 was unrealistic. Negotiations will most likely extend through 2013 and possibly into 2014.

Agriculture

TPP participants include important agricultural exporters and importers. In 2011, the TPP11 countries represented 30 percent of world exports and 20 percent of world imports of agricultural products; including Japan and Korea raises these totals to 32 and 29 percent, respectively (see table 4.1).

Market access for sensitive products like dairy, beef, sugar, and rice are contentious issues in the TPP negotiations. Currently, the United States is negotiating bilaterally with the countries with which it does not have an FTA (Brunei, Malaysia, New Zealand, and Vietnam) and seeking to maintain the liberalization schedules from existing FTAs. Other countries, however, want to revisit FTA commitments, especially where products were exempted from full liberalization in previous negotiations.²

Dairy

Liberalization of trade in dairy products is one of the key sticking points in the TPP negotiations. As seen in table 4.2, the TPP11 countries accounted for 47 percent of world exports of dairy products in 2011. The two prospective TPP members do not export very much but are sizeable importers of dairy products: The combined value of their dairy imports in 2011 exceeded \$2.6 billion, despite heavy protection for domestic producers.

New Zealand, whose dairy exports account for \$10 billion of the \$39 billion world total, is by far the largest exporter among the TPP countries, followed by the United States (\$4.2 billion) and Australia (\$2.1 billion). The biggest player in the New Zealand dairy industry is Fonterra, a cooperative that collects about 90 percent of the national milk production and is one of the world’s predominant exporters of dairy products, focusing on high-value-added products like milk powders and proteins. Fonterra is also an important player in the US market and—through its partnership with DairyAmerica—is among the largest

2. The Australian government is facing pressure from its largest sugar exporters, for example, to reopen sugar negotiations with the United States. Sugar Australia has issued a statement indicating the desire for greater access to the US market for refined sugar, whether through changes to the Australia-US FTA or via the TPP (DFAT 2010).

Table 4.1 Trade in agriculture, 2011 (billions of US dollars)

Country	Total trade		Agriculture		Agriculture as a percent of total trade	
	Exports	Imports	Exports	Imports	Exports	Imports
TPP11						
Australia	270	244	34	14	13	6
Brunei	12	3	n.a.	1	n.a.	n.a.
Canada	388	403	60	36	15	9
Chile	81	75	19	6	23	8
Malaysia	227	188	39	21	17	11
Mexico	298	310	23	29	8	9
New Zealand	38	37	24	4	64	11
Peru	46	38	8	5	17	12
Singapore	410	366	10	14	2	4
United States	1,480	2,266	168	137	11	6
Vietnam	97	107	22	13	23	12
Subtotal	3,348	4,035	407	280	12	7
Prospective countries						
Japan	770	694	11	96	1	14
Korea	466	425	13	35	3	8
Subtotal	1,236	1,119	24	131	4	22
Total (TPP11 + prospective countries)	4,584	5,155	431	410	9	8
<i>Memorandum</i>						
World trade	15,254	15,457	1,362	1,425	9	9
TPP11/world (percent)	22	26	30	20		
Total/world (percent)	30	33	32	29		

n.a. = not available

Note: Agricultural trade refers to Standard International Trade Classification (SITC) sections 0, 1, 2, 4, minus 27 and 28.

Source: WTO statistics database, 2012, <http://stat.wto.org>.

US exporters of dairy products.³ The United States is also the world's second largest importer of dairy products, surpassed only by China, whose imports have been growing at a rapid pace for the past decade.

3. United States Department of Agriculture, Farm Services Agency, "Paul Campbell bio," Fonterra communication, www.fsa.usda.gov/Internet/FSA_File/diac_fonterra_campbell_bio.pdf (accessed on September 3, 2012).

Table 4.2 Trade in dairy products, 2011 (millions of US dollars)

Country	Exports	Imports	Balance
TPP11			
Australia	2,071	674	1,397
Brunei	n.a.	n.a.	n.a.
Canada	286	601	-315
Chile	222	114	108
Malaysia	401	836	-435
Mexico	227	1,789	-1,562
New Zealand	10,112	103	10,009
Peru	118	160	-42
Singapore	455	1,384	-929
United States	4,157	2,701	1,456
Vietnam ^a	97	503	-406
Subtotal	18,145	8,865	9,280
Prospective countries			
Japan	21	1,806	-1,785
Korea	19	828	-809
Subtotal	40	2,634	-2,594
Total (TPP11 + prospective countries)	18,185	11,499	6,686
<i>Memorandum</i>			
World trade	38,819	30,833	7,986
EU27	11,399	1,594	9,805
China	522	2,764	-2,242
TPP11/world (percent)	47	29	
Total/world (percent)	47	37	
EU27/world (percent)	29	5	
China/world (percent)	1	9	

n.a. = not available

a. Data for Vietnam are from 2010.

Note: Dairy products refer to all goods in Harmonized Schedule 04 and 3501.

Source: UNComtrade Database, November 2012, <http://comtrade.un.org>.

The TPP talks have been cast as a struggle over market share in key TPP economies. As a practical matter, however, the major exporting countries (New Zealand, the United States, and Australia) have more at stake in expanding shipments to the rapidly growing markets in developing economies in Asia,

Latin America, and the Middle East and North Africa, where milk powders and proteins are driving demand growth. Between 2003 and 2009, Asian imports of dairy products increased from 2.4 million to 3.1 million tons, spurred by rising incomes that have increased the demand for higher-protein diets.⁴

Global demand growth, driven predominantly by developing economies, is expected to continue at a rapid pace (OECD-FAO 2011, Innovation Center for US Dairy 2009, FAO 2009). Traditional suppliers like New Zealand and Australia will not be able to meet the growing global demand (Innovation Center for US Dairy 2009). US producers already have been taking advantage and increasing shipments to lucrative overseas markets; the United States is now the world's third largest exporter of dairy products and could sell more abroad if US policies were reoriented to expand global market share instead of protecting existing domestic programs.

To be sure, the United States would have to revise its regulated pricing system to allow greater flexibility in responding to international market demands and possibly modify the federal milk marketing orders and the US Dairy Product Price Support Program. Congress does not seem interested in such a grand redesign in its labors over the terms of the 2012 Farm Bill. Even worse, proposals put forward by the National Milk Producers Federation under consideration by Congress would introduce a market stabilization program that would guarantee a certain margin between input costs and the price of milk. While not identical to the Canadian system of supply management, such a scheme would produce similar results, delinking domestic and world market prices.⁵ The Farm Bill provisions are at odds with the US negotiating position in the TPP and would likely draw sharp criticism from other TPP countries.

To date, TPP negotiations on dairy products have hardly progressed. New Zealand negotiators have sought broad liberalization of border restrictions to dairy trade and more open access to the US and Canadian markets in particular. US officials have deferred comment on such proposals not because New Zealand exporters would swamp the US market with products (the small country doesn't have the capacity to do so) but rather because of their concern that such reforms would depress prices in the US market and ultimately require wholesale changes in current US dairy programs.⁶ Ironically, US officials made

4. "The Impact of US Dairy Policy on International Trade," Paul Campbell's statement at USDA Dairy Industry Advisory Committee, October 12, 2010, www.fsa.usda.gov (accessed on October 15, 2010).

5. "US Dairy Reform Proposal Has Whiff of Much-Maligned Canadian System," *Inside US Trade*, April 9, 2012, www.insidetrade.com (accessed on August 8, 2012).

6. For that reason, some groups like the United States National Milk Producers Federation have called for the full exclusion of dairy from the TPP reforms (see National Milk Producers Federation, "US, New Zealand Dairy Trade Should be Excluded in Trans-Pacific Agreement, Urge NMPF and USDEC," press release, December 17, 2009, www.nmpf.org/latest-news/press-releases/dec-2009/us-new-zealand-dairy-trade-should-be-excluded-in-trans-pacific-a).

New Zealand-style demands on Canadian dairy policy as part of discussions on that country's entry into the negotiations.

At some point, trade officials will have to decide whether the TPP includes dairy as part of the 21st century reforms or allows members to maintain their 20th century restrictions, thus undercutting calls for comprehensive liberalization in other areas. As noted above, the lack of clarity on which way TPP members will go on dairy already has led countries to delay commitments to new trade liberalization and rulemaking reforms. The problem of market access is now further complicated due to the inclusion of Canada and Mexico in the TPP talks. Both countries apply high tariffs on specific dairy products as well as sanitary and phytosanitary measures, which limit imports—though Mexico imported \$1.8 billion of dairy products in 2011, or more than the combined total of the European Union.

Expanding the TPP agreement to include countries like Japan and Korea—which protect domestic dairy production through high tariffs, tight tariff rate quotas, and investment restrictions—would complicate matters even more. But the addition of those countries would also expand export opportunities to those significant markets: Japan and Korea imported about \$1.8 billion and \$800 million, respectively, in dairy products in 2011, primarily from New Zealand and the United States. If the TPP countries undertook significant liberalization of dairy protection, the United States and Canada could be major beneficiaries. Such reforms would enable those countries to refocus policy to better exploit increasing demand for North American exports of dairy products in major Asian markets. For that reason, the TPP should require substantial liberalization of existing barriers to trade in dairy products.

Sugar

The Australia-US FTA exempts sugar from the liberalization commitments, and US officials have resisted demands to reconsider existing market access schedules in the TPP talks. Australia, of course, would like its participation in the TPP to create new export opportunities and thus is pressing anew for US sugar trade reforms; at a minimum, it is likely that Australia will demand an increase in its tariff rate quota in the US market. In our view, it made no economic sense to exclude sugar from the Australia-US FTA and that action should be remedied in the TPP at least through the expansion of US sugar quotas.

Among the candidate countries, both Japan and Korea are net sugar importers, so protectionist instincts are not as sharp as in other product sectors. Thailand is one of the major suppliers to those markets and others in Asia, including TPP participants Malaysia and Vietnam. Thailand has preferential access to ASEAN countries through the ASEAN FTA, and other agreements like the ASEAN-Australia-New Zealand FTA did very little to improve market access. For example, Vietnam applies a 5 percent tariff on sugar originating from ASEAN countries but applies a 40 percent tariff on sugar from

non-ASEAN countries. This could be a major obstacle once TPP expands to include other ASEAN countries.

Rice

The United States' interest in opening rice markets and avoiding exceptions in TPP liberalization stands in sharp contrast to US efforts to maintain its dairy and sugar trade restrictions. Once major exporters like Thailand enter the talks, the negotiation of rice liberalization will become even more complicated. Divisions are likely to be regional with Asian markets—notably Malaysia, Japan, and Korea—pushing to maintain existing tariffs as they face competition from lower-cost producers like the United States, Australia, and Vietnam, one of the largest regional players. The TPP11 countries account for about 30 percent of world rice exports, the majority of which comes from the United States and Vietnam. The TPP11 imported roughly \$3 billion of rice, or 20 percent of world imports. Only the United States and Malaysia are major rice importers. Japan and Korea are not major exporters; they account for less than 1 percent of world rice exports. However, despite very high trade restrictions on rice imports, both countries imported over \$1 billion of rice in 2011, or 8 percent of world rice imports.⁷

Among the current TPP participants, Australia, Brunei, New Zealand, Peru, and Singapore have open rice markets. Chile applies a 6 percent import tariff on rice, while the United States applies a fixed tariff ranging from \$18 to \$21 per metric ton depending on the rice product. Vietnam and Malaysia apply fairly steep tariffs, ranging from 20 to 40 percent in Vietnam and 40 percent in Malaysia. Candidate countries, especially Japan and Korea, maintain much tighter controls on rice imports. For example, overquota tariffs under the Japanese tariff rate quota can exceed 700 percent (Durand-Morat and Wailes 2011).

Exemptions on rice have been included in past FTAs like the ASEAN+1s (Korea, Japan, and China). Rice was also excluded in the KORUS FTA, and both Korea and Japan expect that precedent to be followed when they negotiate the terms of their TPP association in the future.

Beef

Among the current group of TPP participants beef trade is not a contentious issue; the major “sticking point” would arise if the TPP talks were extended to major beef-producing and/or -consuming markets—Japan, Korea, and China—that currently restrict US beef imports. Both Korea and Japan banned US imports of beef after a case of bovine spongiform encephalopathy (BSE) was found in US cattle in late 2003. Although these market restrictions were justifiable because of legitimate health concerns, both countries kept market restric-

7. Data are from UN Commodity Trade Statistics (Comtrade) Database, 2012.

tions in place well after the World Organization for Animal Health designated the United States a “controlled risk” country. In a parallel agreement to the KORUS FTA, Korea committed to fully opening its market over time; however, sanitary restrictions still bar US exports of cattle over 30 months old. In addition, the KORUS FTA phases out the Korean 40 percent beef tariff, 95 percent of which will be eliminated within five years of the implementation of the agreement. Similar commitments will likely be expected from Japan.

Textiles, Apparel, and Footwear

Crafting rules of origin (ROO) for textiles and apparel is one of the most contentious market access issues in the TPP negotiations. The problem is that existing US FTAs have very strict “yarn forward” rules, requiring that the yarn used to produce apparel come from an FTA country, while other countries have relatively liberal origin rules in their trade pacts. Unlike tariffs, where different liberalization schedules in current FTAs can coexist within the broader TPP commitments, maintaining different ROO produces a patchwork of content requirements that discourages integration among TPP producers. That is why TPP negotiators already have agreed to cumulate the origin rules across the preference region, but that commitment in turn has made compromise on the actual rules to be applied even more fractious.

Cumulating ROO would be more beneficial in economic terms but nettlesome in political terms. The benefit of a cumulating ROO is it allows the use of material with originating status imported from another approved country, giving that product originating status rather than being subject to third-party tariffs. In previous trade accords, US commitments to slash tariffs in this sector have been tempered by strict yarn forward origin rules that provide significant continued protection for US apparel firms. Cumulating ROO will undercut such opaque protectionism. Agreeing to do so, given strong opposition from US producers, would be a major US concession in the market access negotiations.

ROO are also a key issue for Vietnam, whose apparel industry accounts for a large share of the country’s exports. The Vietnamese apparel industry is currently the second largest supplier to the US market and a cheaper alternative than China, which remains the largest supplier but faces rising wages and other labor challenges. Malaysia, Mexico, and Peru are also large apparel producers; Malaysia favors liberal ROO while Mexico and Peru (already obligated to yarn forward requirements in their FTAs with the United States) want restrictive rules to protect against Asian competition in their domestic marketplace and in the US market.

A US-style yarn forward rule could disadvantage the Vietnamese industry, which imports the majority of its textiles from China and South Korea. In contrast, Vietnam is pushing for a “cut and sew” rule that allows textiles imported from third countries to receive duty-free treatment. US apparel retailers are also advocating this position, as it will allow them to continue to

take advantage of Vietnam's low-cost shipments. Countering this position are the US domestic textile companies that are concerned about unfair competition from the heavily subsidized Vietnamese manufacturers, many of which are state owned. From an economic perspective, the preferred outcome would be less restrictive ROO that include exceptions through the "single transformation" rule, which would allow TPP members to use inputs from third countries and still receive duty-free treatment for specified goods, so long as the product is assembled in one of the TPP countries. More likely, US and Mexican officials will insist on a yarn forward rule, even though such a protectionist retrenchment could provoke Vietnam and others to limit their commitments to liberalization in other areas as well as new rulemaking obligations.

Footwear is another sticking point in negotiations. Footwear accounts for about 7 percent of Vietnam's exports. Currently, the United States is Vietnam's top export destination and accounts for nearly a third of all its footwear exports. Vietnamese firms supply the US footwear market with intermediary goods, materials, and finished products. In 2011 Vietnamese footwear exports to the United States totaled \$2 billion. Vietnamese negotiators are pushing for a phaseout of footwear tariffs, which in the United States range from 11 to nearly 70 percent,⁸ and more flexible ROO.⁹

US production has declined dramatically due to import competition. The high tariff wall and content requirements arguably allow the few remaining US plants to stay in business. So the sticking point really involves US politics: Will producer interests trump retail and distributor interests, or will TPP liberalization apply to US footwear like other products? US companies, like New Balance, that still manufacture some footwear in the United States, advocate maintaining current tariffs on footwear and introducing more stringent ROO; new entrant Mexico is likely to support this view.¹⁰ US companies, such as Nike, that manufacture their footwear overseas primarily in Asian countries are calling for "an immediate elimination of outdated tariffs, a competitive rule of origin..., fair and open distribution rights and efficient trade flows."¹¹ We suggest a pragmatic compromise: phasing out footwear tariffs over 5 to 10 years and maintaining existing ROO until the tariffs are eliminated, though we recognize that the United States and Mexico, among others, may need to provide support for displaced firms and workers in this sector.

8. Data are from Tariff Profile, Trade Analysis and Information System (TRAINS) Database, 2012.

9. Footwear Distributors and Retailers of America, "Trans-Pacific Partnership," www.fdra.org/TPP.html (accessed on September 11, 2012).

10. "US Industry Divided on Footwear in TPP; Talks Moving Slowly," *Inside US Trade*, March 5, 2012, www.insidetrade.com (accessed on September 11, 2012).

11. Footwear Distributors and Retailers of America, "CEOs Call for 21st Century Footwear Agreement," *Inside US Trade*, July 18, 2012, www.insidetrade.com (accessed on September 11, 2012).

Intellectual Property Rights

Intellectual property rights (IPRs) have emerged as one of the most contentious topics in the TPP negotiations. Countries differ on the appropriate level of obligation in several areas, including patent rights for pharmaceuticals, copyrights, and enforcement. Some prefer to maintain TRIPS provisions as the basic TPP IPR framework, arguing that overregulation of intellectual property deters innovation, pushes up the price of medicines, and puts technology-importing countries at a competitive disadvantage. Others, particularly the United States, want to augment TRIPS obligations in the TPP. The United States is aiming for expanded intellectual property provisions akin to those included in the KORUS FTA for patents, trademarks, copyrights, and trade secrets, as well as protection of online delivery of goods and services (ESA 2012).¹² One of the key US objectives in the TPP is “to promote trade and investment in innovative products and services, including related to the digital economy and green technologies, and to ensure a competitive business environment across the TPP region.”¹³

Patent Protection for Pharmaceuticals

Among the stickiest issues being negotiated in the TPP IPR chapter are those related to how countries’ public health authorities regulate pharmaceutical products.¹⁴ At the March 2012 negotiating round, the United States tabled an “access to medicines” proposal covering data exclusivity, patent term extensions, and patent linkage.¹⁵ US negotiators proposed an “access window”—a set time period during which a company can benefit from IPR protections while seeking marketing approval for its drugs in TPP member states (USTR 2011a). Those using the access window would receive protections such as longer data exclusivity, patent linkage, and patent term extensions akin to the level offered in the KORUS FTA. Supporters of this mechanism claim that such a window would support innovation and increase access to medicines, providing incentives for pharmaceutical manufacturers to market new drugs in countries

12. IPRs are an important priority for US negotiators: A May 2012 study estimates that intellectual property-intensive industries support about 18 percent of US jobs, and outputs from intellectual property-intensive industries make up about a third of US GDP.

13. Office of the United States Trade Representative, “TPP Fact Sheet,” www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement (accessed on October 19, 2012).

14. “IPR Remains Toughest TPP Area, Key Pieces of US Proposal Still Missing,” *Inside US Trade*, August 31, 2012, www.insidetrade.com (accessed on September 12, 2012).

15. Data exclusivity refers to the period during which the patent holder may withhold test data from generics manufacturers. Patent linkage means that regulators must certify that approving a generic drug would not infringe upon an existing patent.

Table 4.3 Intellectual property rights: Current provisions and policy positions

Agreement	Data exclusivity	Patent linkages
Agreement on Trade-Related Aspects of Intellectual Property Rights	Does not require countries to provide exclusive rights to the originator of the data for a given period.	No requirement to “link” drug regulatory agencies and patent issues (i.e., generic marketing approval is not “linked” to the expiration of the pioneer drug patent).
May 10, 2007 agreement	Provides five years of data exclusivity that prohibits a party from using another’s data to obtain marketing approval.	No requirement to “link” drug regulatory agencies and patent issues. Under a patent linkage system possible patent infringement is automatically checked when an application is filed to market a new drug. Under the May 10 agreement this check is voluntary.
Korea-US Free Trade Agreement	Incorporates May 10 agreement language.	Patent linkage is mandatory. Neither government may approve the marketing of a generic drug while the original patent is still in effect.

Sources: World Trade Organization, 1994, www.wto.org; Office of the United States Trade Representative, 2007, www.ustr.gov; Korea Ministry of Foreign Affairs and Trade, 2012, <http://mofat.go.kr>.

where they otherwise might not. Critics of the US approach, however, argue that it would bid up the price of medicines by preventing lower-cost generics from coming to market and could limit countries’ ability to define national standards for protection of clinical trial data.

Table 4.3 outlines the evolving US position and international obligations on data exclusivity and patent linkages in the TRIPS agreement, the May 10 accord,¹⁶ and the KORUS FTA. Neither data exclusivity nor patent linkage is required under the TRIPS agreement; both are included in several US FTAs, including recent FTAs with Colombia, Panama, and Peru.¹⁷ The North American Free Trade Agreement (NAFTA) includes provisions on data exclusivity but patent linkage is not specified; however, Canada and Mexico both have a patent linkage system in place. Other TPP partners such as Australia, Malaysia, and

16. The May 10, 2007, congressional–executive branch agreement, labeled “A New Trade Policy for America,” sets out new language on labor standards, environmental provisions, investment, and intellectual property rights to be included in new US trade agreements (see Destler 2007).

17. The TRIPS agreement requires that the data submitted to national health authorities be protected from “unfair commercial use” but does not specify how this is done.

Vietnam do not.¹⁸ The May 10 accord provides for five years of data exclusivity, while patent linkage is voluntary for developing countries. That agreement also specifies that periods of exclusivity for developing countries be concurrent where one country bases approval on approval in another country.¹⁹ To clarify that Korea will receive the same treatment as other industrialized countries, the KORUS FTA includes five years of data exclusivity and makes patent linkage mandatory. It also does not specify concurrency of exclusivity periods.

Another problem that may arise with regard to data exclusivity is the level of protection for biologic drugs. Unlike the United States, which has maintained an extended term of 12 years for biologics since passage of the Affordable Care Act of 2010, other TPP countries do not increase their data exclusivity terms for biologic drugs and may be reluctant to commit to do so through the TPP.²⁰ That said, the Obama administration seems to be reconsidering the desirability of codifying the 12-year term in the TPP agreement and to date has not put forward a proposal on this specific issue.²¹

TPP negotiators are also grappling with whether genetic resources and traditional knowledge should receive special patent protection. Peru has introduced a proposal that would require pharmaceutical companies to obtain consent from local communities prior to the use of traditional knowledge or genetic resources for commercial purposes and would require access and benefit sharing for the community from which the traditional knowledge or genetic resource is acquired. New Zealand has also put forth language providing protection against disclosure of traditional knowledge of genetic resources.²²

Copyright Protection

TPP negotiators are grappling with a number of very sticky issues related to the regulation of the “new digital economy”—including the expansion of copyright terms, the treatment of temporary reproductions, restrictions on “fair use,” and coverage of digital locks as well as the degree of enforcement and the allocation of responsibility for policing digital infringement. As in previous

18. “Canada, Mexico May Have Mixed Impact on US Efforts on IPR in TPP,” *Inside US Trade*, August 17, 2012, www.insidetrade.com (accessed on August 23, 2012).

19. Without the concurrency requirement a firm could delay generic marketing even further in the second country by waiting until the period of exclusivity has run out in the first country to register the drug in the second country.

20. “Peru Minister Rejects US IPR Proposal in TPP; Says Other Countries Agree,” *Inside US Trade*, December 22, 2011, www.insidetrade.com (accessed on September 6, 2012).

21. “Absence of US Proposal on Biologics in TPP Stokes Industry Worries,” *Inside US Trade*, September 7, 2012, pp. 15-16, www.insidetrade.com (accessed on September 12, 2012).

22. “Peru Minister Rejects US IPR Proposal in TPP; Says Other Countries Agree,” *Inside US Trade*, December 22, 2011, www.insidetrade.com (accessed on September 6, 2012).

trade pacts, US negotiators seek to lengthen the agreed term for copyright protection beyond the TRIPS baseline of no less than 50 years after publication or creation. The US proposal aims for terms of no less than 95 years after publication or 120 years after creation for corporate-owned works—longer than the timeframes in either the Australia-US FTA or the KORUS FTA, which both specify 70 years.

In deciding on the limit of copyright protection, TPP negotiators will need to seek a balance between the needs of creators, who benefit from protection, and consumers, who demand greater access. Increased copyright terms imply increased protection but also greater royalty fee payments, which could be significant for countries that are net importers of copyrighted material. In Australia, for example, a study of the impact of the increase in terms under the Australia-US FTA estimated that the increase would result in an additional cost for Australia of \$88 million per year, largely due to greater royalty fees (see Dee 2004). Currently, the United States and its FTA partners Australia, Chile, Peru, and Singapore all have copyright terms of life plus 70 years. Malaysia, New Zealand, and Canada follow the TRIPS standard. Mexico accords protection for life plus 100 years.

Differences remain over the scope of exceptions. Australia and the United States have proposed language confining exceptions to “certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.” New Zealand, backed by Brunei, Chile, Malaysia, and Vietnam, has countered the US proposal with a more limited requirement that each TPP country “carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws.”²³ In June 2012 the United States Trade Representative (USTR) put forward a proposal including a three-step test for the limitations and exceptions for the reproduction of works.²⁴ Also at issue are the limits on “fair use,” provisions that are often seen as necessary exceptions that balance more stringent copyright terms.

Another controversial element is a US proposal to prohibit parallel imports: the sale of goods produced legitimately under protection of a trademark, patent, or copyright, placed into circulation in one market, and then imported into a second market without the authorization of the local owner of the intellectual property right, bypassing the authorized distributor in the

23. This text comes from the leaked negotiating text that can be seen on websites such as <http://keionline.org/node/1516>. The language is similar to positive exceptions found in the US-Chile FTA, restating the affirmation in the World Intellectual Property Organization (WIPO) Copyright Treaty (footnote 17 to article 17.7 (3) of the US-Chile FTA, found at www.sice.oas.org/Trade/chiusa_e/Text_e.asp#17.17a).

24. Office of the United States Trade Representative, “USTR introduces new copyright exceptions and limitations provision at San Diego TPP talks,” Press Office blog, July 3, 2012, www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision (accessed on October 19, 2012).

foreign country.²⁵ In New Zealand, where parallel imports were legalized in 1998, the US proposal has spurred vocal opposition, including from librarians who fear the rise in the cost of books and limits on libraries' ability to digitize books.²⁶ Singapore also allows parallel imports, with a thriving business of parallel imported cars. Australia allows some parallel imports under certain conditions.

TPP negotiators also have been brought into the fray of the debate over computer use and internet freedom. The US proposal indicates a desire to depart from international standards on the treatment of temporary reproductions of copyrighted works and hold such use without authorization from copyright holders as copyright infringement. This latter provision could impact not only the ability of university professors to assign timely content but also computer use of resources: Technology advocates point out that computer software automatically copies "temporary files" into random access memory during routine operations. Cache copies of websites regularly found in browser searches can be classified as temporary copies and would likely be subject to such provisions.

The US proposal also would compel TPP partners to enact laws banning the circumvention of technological protection measures (TPMs), which act as "digital locks" on material in order to prevent copyright infringement, either by preventing unauthorized access to the work or imposing copy controls, and treat such circumvention as a separate offense, even if no copyright violation has taken place. This is being opposed by New Zealand, where the 2008 copyright law would have to be amended to accommodate this prohibition, and Australia, which in 2007 enacted a TPM regime that excludes region-coding on movies, videos, and other devices that employ such coding.²⁷

Another controversial aspect of the US TPP proposal is its enforcement provisions. The US TPP proposal draws heavily on the US Digital Millennium Copyright Act regarding enforcement provisions and includes a "notice and takedown" provision that effectively holds an internet service provider (ISP) liable in certain circumstances for infringement of content by that ISP's users.²⁸ Such an obligation would likely be opposed by Canada, which recently rewrote its copyright law after extensive deliberations. The new law only requires the ISP to provide notice to a user that is posting infringing content. Mexico also

25. For a more detailed discussion, see Maskus (2012).

26. See, for example, "Librarians speak up for parallel importing," *New Zealand Herald*, July 11, 2012, www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10818762 (accessed on October 26, 2012).

27. See, for example, Australian Government Attorney General's Office, "New Australian copyright laws: Technological protection measures liability scheme," Canberra, Australia, www.ag.gov.au/Documents/Copyright%20Fact%20Sheet%20-%20Technological%20Protection%20Measures%20liability%20scheme.pdf (accessed on October 19, 2012).

28. See Article 16.3 in Keep the Web Open, "The Trans Pacific Partnership Agreement Intellectual Property Rights Chapter," <http://keepthewebopen.com/tpp> (accessed on September 12, 2012).

does not have a “notice and takedown” system in place. New Zealand, backed by Brunei, Chile, Malaysia, and Vietnam, has countered the US proposal with a more limited requirement that TPP countries “carry forward and appropriately extend into the digital environment limitations and exceptions in its domestic laws.”²⁹

Leaked versions of the US proposal from February 2011 also indicate differences in approach with regard to disciplines on counterfeiting.³⁰ The US proposal would cover significant infringement for commercial and private financial gain as well as acts that would not result in financial gain and would criminally punish an individual who commits a significant act of infringement even if there is no financial gain. Australia, New Zealand, and Singapore have proposed substituting text from the Anti-Counterfeiting Trade Agreement (ACTA), which has a higher threshold for what is defined as commercial infringement, with punishment limited to infringement carried out for commercial gain.³¹ The new TPP participants are likely to side with this view: Canada’s new copyright law distinguishes between noncommercial and commercial acts, and Mexico also requires a profit motive for acts to be considered criminal infringement.

Services and Investment

All TPP participants are negotiating together on the nonconforming measures tabled in the areas of services and investment. Sticking points on services include provisions on financial services, telecommunications, insurance, and new issues such as e-commerce and regulatory coherence. On financial services, for example, the United States is pushing for GATS-plus market access, including the right to establish commercial presence, 100 percent ownership, and the provision of cross-border services without the requirement to establish commercial presence.

In new areas like e-commerce, US officials are seeking equal treatment for electronically delivered goods and services, and similar products delivered physically, and the elimination of tariffs and nontariff barriers on digital media

29. This text comes from the leaked negotiating text that can be seen on websites such as <http://keionline.org/node/1516>. The language is similar to positive exceptions found in the US-Chile FTA, restating the affirmation in the WIPO Copyright Treaty (footnote 17 to article 17.7 (3) of the US-Chile FTA, found at www.sice.oas.org/Trade/chiusa_e/Text_e.asp#17.17a).

30. Keep the Web Open, “The Trans Pacific Partnership Agreement (TPP) Intellectual Property Rights Chapter,” <http://keepthewebopen.com/tpp> (accessed on September 6, 2012).

31. Australia, Canada, the European Union and 22 of its member states, Japan, Korea, Morocco, New Zealand, Singapore, and the United States have all signed the Anti-Counterfeiting Trade Agreement. The ACTA will enter into force once six signatories have ratified it. The ACTA text is available at www.international.gc.ca. The United States is taking a strong line across the board on enforcement: US negotiators are also pushing for strong language on trade secrets that goes beyond that contained in previous FTAs, ensuring criminal penalties for government officials who willfully disseminate trade secrets.

such as software and videos. In addition, the United States has proposed new obligations to prevent countries from blocking cross-border data transfers or requiring companies to locate servers in a particular location. The proposal has been controversial, with Australia and New Zealand expressing concern about abuse of privacy rights. Australia has tabled alternative language consistent with its privacy laws that would give governments greater leeway in promulgating regulations that protect personal data.

Forging disciplines on financial services and investment, areas left for future negotiation in the P4 agreement, was a main motivation underlying the TPP negotiations. Initial talks in these areas were based on a draft text drawn up by the P4 members along with the United States in the early days of TPP negotiations.

Table 4.4 illustrates the coverage of BITs or investment chapters within FTAs for the TPP countries: The gaps are mainly between East and West. The ASEAN countries, Australia, and New Zealand adhere to the investment chapter in the ASEAN-Australia-New Zealand FTA, ratified by all member countries since November 11, 2011. Chile has FTAs or BITs with all of its Western Hemisphere partners as well as with Australia, New Zealand, and Malaysia. A BIT with Vietnam was signed but has not entered into force. In contrast, Peru lacks investment deals with Brunei, New Zealand, and Vietnam. The United States does not have a BIT with any TPP member; investment is covered through FTAs with Australia, Canada, Chile, Mexico, Peru, and Singapore.

The TPP investment chapter, a draft of which was leaked in June 2012, aims to create a BITs-plus accord among the TPP members, specifying core investor rights such as mandatory standards for nondiscriminatory treatment of foreign investments and investors by host countries, full protection and security, and transparency measures.³² The TPP draft text includes language prohibiting signatories from “directly or indirectly” expropriating or nationalizing a covered investment. However, the definition of what constitutes an “indirect expropriation” of an asset remains a point of contention. The US model BIT and most US FTAs define indirect expropriation by measuring the equivalency of its effects to direct expropriation but “without formal transfer of title or outright seizure.” An alternative approach is found in Peru’s and New Zealand’s FTAs with China, which give government officials broad flexibility to regulate. In the Peru-China agreement, for example, the signatories only proscribe actions that are: “(a) either severe or for an indefinite period and (b) disproportionate to the public interest,” and further note that “an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.”³³ Of course, the value of these

32. See Citizens United Trade Campaign, “New Leaked TPP Investment Chapter Contains Special Rights for Corporations,” www.citizenstrade.org/ctc/blog/2012/06/13/newly-leaked-tpi-investment-chapter-contains-special-rights-for-corporations (accessed on September 12, 2012).

33. People’s Republic of China, Ministry of Commerce, “China-Peru FTA,” <http://fta.mofcom.gov.cn/topic/enperu.shtml> (accessed on September 13, 2012).

Table 4.4 Investment commitments in FTAs among TPP11 countries

Country	Australia	Brunei	Canada	Chile	Malaysia	Mexico	New Zealand	Peru	Singapore	United States	Vietnam
Australia		FTA* (2010)		BIT (1999), FTA (2009)	FTA (2010)	BIT (2007)	BIT (SNI), FTA (2011)	BIT (1997)	FTA (2010)	FTA (2009)	BIT (1991), FTA* (2010)
Brunei	FTA* (2010)				FTA (2010)		FTA (2010)		FTA (2010)		FTA* (2010)
Canada				FTA (1997)		FTA (1994)		BIT (2007), FTA (2009)		FTA (1994)	
Chile	BIT (1999), FTA (2009)		FTA (1997)		BIT (1995)	FTA (1999)	BIT (SNI)	BIT (2001), FTA (2009)		FTA (2004)	BIT (SNI)
Malaysia	FTA (2010)	FTA (2010)		BIT (1995)			FTA (2010)	BIT (1995)	FTA (2010)		BIT (1992)
Mexico	BIT (2007)		FTA (1994)	FTA (1999)				FTA (2012)		FTA (1994)	
New Zealand	BIT (SNI), FTA (2011)	FTA (2010)		BIT (SNI)	FTA (2010)				FTA (2010)		FTA* (2010)
Peru	BIT (1997)		BIT (2007), FTA (2009)	BIT (2001), FTA (2009)	BIT (1995)	FTA (2012)			BIT (SNI)	FTA (2009)	
Singapore	FTA (2010)	FTA (2010)			FTA (2010)		FTA (2010)	BIT (SNI)		FTA (2004)	BIT (1991), FTA* (2010)
United States	FTA (2009)		FTA (1994)	FTA (2004)		FTA (1994)		FTA (2009)	FTA (2004)		
Vietnam	BIT (1991), FTA* (2010)	FTA* (2010)		BIT (SNI)	BIT (1992)		FTA* (2010)		BIT (1991), FTA* (2010)		

BIT = bilateral investment treaty; FTA = free trade agreement; SNI = signed but not in force; asterisk (*) = "ASEAN + 4" agreement

Note: Date in parentheses is date of entry into force.

Sources: Department of Foreign Affairs and Trade of Australia, 2012, <http://dfat.gov.au>; Brunei Darussalam Ministry of Foreign Affairs and Trade, 2012, www.mofat.gov.bn; Foreign Affairs and International Trade Canada, 2012, www.international.gc.ca; DIRECON, 2012, <http://direcon.gob.cl>; Ministry of Foreign Affairs of Japan, 2012, <http://mofa.go.jp>; Korea Ministry of Foreign Affairs and Trade, 2012, <http://mofat.go.kr>; Malaysia Ministry of International Trade and Industry, 2012, <http://miti.gov.my>; Secretaría de Economía de México, 2012, www.economia.gob.mx; New Zealand Ministry of Foreign Affairs and Trade, 2012, <http://mfat.govt.nz>; Ministerio de Comercio Exterior y Turismo de Perú, 2012, www.acuerdoscomerciales.gob.pe; Singapore Government, 2012, www.fta.gov.sg; Office of the US Trade Representative, 2012, [www.ustr.gov](http://ustr.gov); Vietnam Ministry of Industry and Trade, 2012, <http://webtr.vecita.gov.vn>.

obligations depends importantly on the efficacy of enforcement or dispute settlement procedures, another controversial area of the TPP negotiations.

Investor-State Dispute Procedures

One of the most contentious investment issues involves whether to include an investor-state dispute (ISD) settlement mechanism. While ISD procedures are expected to be part of the final TPP agreement, Australia has demanded to be excluded from this mechanism.

ISD procedures allow investors from one party to bring claims directly against the government of another. This issue first surfaced in relative obscurity in NAFTA but soon after became controversial. The United States first included the ISD mechanism in NAFTA because of investor concerns about the objectivity and timeliness of Mexican courts in adjudicating expropriation complaints and other claims by foreign investors. NAFTA's ISD procedures have subsequently been invoked against all three governments. Environmental and other groups within the United States have opposed the further use of ISD procedures, claiming that they give foreign investors greater rights in the US market than domestic firms and that the threat of such litigation causes a regulatory chill in which officials become overly cautious in promulgating new regulations for fear that they will be charged with indirect expropriation of existing investments.³⁴

Trade officials have learned from the numerous cases that have been adjudicated pursuant to NAFTA obligations. Since NAFTA, the United States has included ISD provisions in all its agreements except the Australia-US FTA. Over time, small but important changes have been made to clarify substantive obligations (e.g., the definition of indirect expropriation) and to incorporate procedural safeguards in the ISD process to minimize the risk of abusive litigation. US officials presumably are open to similar improvements in the ISD mechanism in the TPP negotiations. Such an outcome seems to be foreshadowed by the TPP framework issued in November 2011, which states that the investment chapter “will include provisions for expeditious, fair, and transparent investor-State dispute settlement...subject to appropriate safeguards.”³⁵

All TPP participants include ISD provisions in at least some of their trade agreements (see table 4.5). Australia and New Zealand have been vocal in rejecting the inclusion of an ISD settlement mechanism in the TPP, even though they have included ISD provisions that apply to the limited investment obligations in their agreements with developing countries. However, the Julia

34. As a result of this pressure, the May 10, 2007, accord between the executive branch and Congress requires that future trade agreements not grant foreign investors in the United States greater rights than domestic firms under ISD procedures.

35. Office of the United States Trade Representative, *Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders*, November 12, 2011, www.ustr.gov (accessed on September 12, 2012).

Table 4.5 Investor-state dispute settlement commitments in FTAs among TPP11 countries, as of September 2012

Country	Australia	Brunei	Canada	Chile	Malaysia	Mexico	New Zealand	Peru	Singapore	United States	Vietnam
Australia		A		A	A		C		A	C	A
Brunei	A			C	C		A		C		C
Canada				A		A		A		A	
Chile	A	C	A			A	C	A	C	A	C
Malaysia	A	C					A		C		C
Mexico			A	A				A		A	
New Zealand	C	A		C	A				A		A
Peru			A	A		A			A	A	
Singapore	A	C		C	C		A	A		A	C
United States	C		A	A		A		A	A		
Vietnam	A	C		C	C		A		C		

A = chapter or section of a chapter in FTA; C = no commitments (no explicit provisions/obligations)

Sources: Department of Foreign Affairs and Trade of Australia, 2012, <http://dfat.gov.au>; Brunei Darussalam Ministry of Foreign Affairs and Trade, 2012, www.mofat.gov.bn; Foreign Affairs and International Trade Canada, 2012, www.international.gc.ca; DIRECON, 2012, <http://direcon.gov.cl>; Ministry of Foreign Affairs of Japan, 2012, <http://mofa.go.jp>; Korea Ministry of Foreign Affairs and Trade, 2012, <http://mofat.go.kr>; Malaysia Ministry of International Trade and Industry, 2012, <http://miti.gov.my>; Secretaría de Economía de México, 2012, www.economia.gob.mx; New Zealand Ministry of Foreign Affairs and Trade, 2012, <http://mfat.govt.nz>; Ministerio de Comercio Exterior y Turismo de Peru, 2012, www.acuerdoscomerciales.gob.pe; Singapore Government, 2012, www.fta.gov.sg; Office of the US Trade Representative, 2012, www.ustr.gov; Vietnam Ministry of Industry and Trade, 2012, <http://webtr.vecita.gov.vn>.

Gillard government asserted in its Trade Policy Statement of April 2011 that Australia would discontinue this practice (DFAT 2011).

Capital Controls

While countries retain the right to impose capital controls for prudential reasons, US FTAs with Australia, Chile, Korea, Peru, and Singapore require “all transfers relating to a covered investment to be made freely and without delay into and out of its territory.”³⁶ Other TPP countries have used a different approach, including measures to safeguard the balance of payments. The Singapore-Australia FTA allows a party to adopt or maintain restrictions on payments or transfers related to investments in the event of “serious balance of payments and external financial difficulties,” recognizing “that particular pressures on the balance of payments of a Party in the process of economic development may necessitate the use of restrictions to ensure inter alia the maintenance of a level of financial reserves adequate for the implementation of its program of economic development.”³⁷ The New Zealand–Malaysia FTA contains similar language regarding the adoption of such restrictions and allows parties to “give priority to economic sectors which are more essential to their economic development.”³⁸ The latter approaches are in keeping with the new thinking on capital flows. Recent work by the International Monetary Fund (IMF) on the issue, endorsed in 2011 by the IMF Executive Board, recognizes that capital controls can be part of a country’s economic policy toolkit when implemented following certain principles (IMF 2011).

The TPP negotiations mark an opportunity to rectify the codification of doctrinaire attitudes toward unfettered financial flows in trade agreements. Our colleagues John Williamson and Arvind Subramanian point out that “surges in capital inflows can pose serious macroeconomic challenges that may require a different cyclical response. For emerging markets, the policy arsenal against future crises must cover measures to restrict credit growth and leverage counter cyclically, notably surging capital flows.”³⁹ Blanket proscription of short-term capital controls in FTAs should be recast to clarify that “prudential

36. Office of the United States Trade Representative, “Chapter Eleven Investment” in Free Trade Agreement between the United States and the Republic of Korea, www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (accessed on September 6, 2012).

37. Australian Department of Foreign Affairs and Trade, “Chapter 8, Article 12: Restrictions to Safeguard the Balance of Payments” in Singapore-Australia Free Trade Agreement, www.dfat.gov.au/trade/negotiations/australia_singapore_agreement.html (accessed on September 6, 2012).

38. New Zealand Ministry of Foreign Affairs and Trade, “Chapter Seventeen General Exceptions, Article 17.3: Measures to Safeguard the Balance of Payments” in New Zealand-Malaysia Free Trade Agreement, www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Malaysia/index.php (accessed on September 6, 2012).

39. Arvind Subramanian and John Williamson, “The Fund should help Brazil to tackle inflows,” *Financial Times*, October 25, 2009, www.ft.com (accessed on September 6, 2012).

and countercyclical capital controls...can be effective in smoothing booms and busts in capital flows to developing and emerging-market economies” (Jeanne, Subramanian, and Williamson 2012, 109). Considering the diversity in levels of development among the TPP countries, the United States should reexamine its policy on restricting the use of capital controls and consider the inclusion of targeted balance of payment safeguard measures rather than insisting on including its standard language in the investment chapter.

State-Owned Enterprises

State-owned enterprises (SOEs) play a significant role in the economies of several current and prospective TPP countries. Vietnam’s telecommunication services and other significant components of the Vietnamese economy are state run; so too is Chile’s largest copper company, Codelco. Singapore has two significant state-owned investment firms: Temasek and the Government Investment Corporation. In prospective member Japan, the largest financial institution and insurance provider is an SOE. These SOEs receive preferential treatment through government subsidies, exemptions from regulation, and favorable treatment in procurement contracts, among other practices.

Establishing TPP disciplines on SOEs in order to “level the playing field” between private companies and foreign state-owned firms has been one of the high-priority, 21st century issues under negotiation. TPP countries are crafting new obligations on SOEs covering both investment and competition policy issues. Australia and the United States have advocated a policy of “competitive neutrality” among public and private enterprises in order to mitigate market distortions caused by the structural advantages enjoyed by SOEs (e.g., preferential access to finance). OECD guidelines on Corporate Governance of State-Owned Enterprises could help inform that negotiation. However, the issues are complex; Singapore, for example, has objected to elements of the US proposal that would affect Temasek. Looming large is the consideration that rules developed in the initial TPP accord will set important precedents for SOEs of future members, especially China.

Environment

The United States has an extensive track record of promoting environmental issues in its FTAs and hopes that comparable provisions are included in the TPP (see Schott and Muir 2012b). All recent US FTAs include a separate chapter on environment in the main body of the agreement. Key environmental provisions in these pacts cover

- a fully enforceable and binding commitment prohibiting countries from lowering their environmental standards to attract investment;
- access to the same dispute settlement procedures as other obligations in the FTA;

- a “conflict of laws” provision prohibiting the use of the FTA to undermine obligations of specified multilateral environmental agreements; and
- commitments not to engage in illegal logging and trade, trade in endangered species, and harmful fishery subsidies.

In addition, a bilateral Environmental Cooperation Agreement (ECA) has been appended to most US FTAs. ECAs seek to promote cooperation on issues like air pollution, the management of waste disposal and water quality, environmental management of chemicals, and more broadly to foster education and public policy on environmental issues. However, these accords have a limited track record in part due to the absence of dedicated funding, which limits both the identification and remediation of environmental problems.

In December 2011, US officials tabled a new proposal on Conservation and the Trans-Pacific Partnership, which would require TPP countries to prohibit trade in “products harvested or exported in violation of national laws that seek to protect wildlife, forest or living marine resources” (USTR 2011b). US officials have also indicated that they will push for full market access for environmental goods and the elimination of nonconforming measures affecting environmental services.

To date, TPP participants have indicated general support for an environmental chapter that includes commitments to environmental protection and conservation and that reduces or eliminates tariffs on a specified list of environmental goods and services. The broad consensus breaks down, however, when the issue of enforcement is broached, and in particular whether obligations should be subject to the TPP’s dispute settlement procedures. Similarly, positions differ widely on a proposal by New Zealand to address trade and climate change, a subject that is not progressing very far in global talks and where the TPP could break new ground. Negotiators also have discussed including environmental cooperation commitments in the core treaty text or in an annex or side accord. Echoing the US experience, Australia proposed including an annex to the environment chapter that would establish an institutional framework for future work on environmental obligations. To be sure, addressing all these issues will likely require commitments by developed countries to provide substantial technical and financial assistance to facilitate the implementation of the TPP obligations by all the participating countries.

Labor

A surprisingly large number of trade pacts among TPP countries include provisions on labor, though most of those pacts set out hortatory goals with limited or no dispute settlement procedures rather than binding legal obligations.⁴⁰ US FTAs are at one end of the spectrum, with substantive chapters on

40. Australia’s agreements—with the exception of the US FTA—do not include labor provisions. None of Vietnam’s agreements with other TPP partners include labor provisions.

labor containing provisions subject to dispute settlement. In contrast, the P4 agreement contains a Memorandum of Understanding on Labor Cooperation that exhorts but does not obligate countries to uphold their labor standards and make them compatible with international standards; avoid using labor standards as protectionist tools; and refrain from lowering labor standards to attract investment. New Zealand's agreement with Malaysia contains similar provisions.

In the TPP discussions, the United States has proposed going beyond the P4 template on labor issues by incorporating obligations that were included in FTAs with Colombia, Korea, and Panama in response to demands by Congress in 2007 contained in the May 10 accord. In particular, US negotiators want TPP members to implement and enforce the 1998 Declaration on Fundamental Principles and Rights at Work of the International Labor Organization (ILO). The ILO Declaration covers five basic principles: freedom of association, right to collective bargaining, a ban on forced or compulsory labor, the effective abolition of child labor, and a ban on discrimination in employment or occupation. Codifying these commitments in the TPP would be a challenge for Vietnam, which traditionally has not allowed organized labor apart from the state-run unions, and possibly Brunei, which also bars independent trade unions. US negotiators also would like TPP countries to apply national labor laws in export processing zones.⁴¹ Most contentious is the US demand that the labor obligations be subject to the general dispute settlement procedures of the overall accord. Talks are currently deadlocked on that point.

Conclusion

In sum, TPP negotiators confront a wide array of vexing problems as they enter the final stages of the talks. Some involve longstanding differences over market access reforms in traditional areas like agriculture and light manufacturing; others cover new rulemaking obligations that expose different approaches to policymaking among the “like-minded” countries and pose challenges for some developing countries in terms of administration and enforcement. The more exceptions are taken from the market access talks, the less likely it will be that TPP officials accept broad new rulemaking obligations that require them to amend existing laws and practices.

Putting the final TPP deal together will require trade officials to liberalize, or at least partially open, deep-rooted protectionist practices and implement regulatory reforms and new disciplines on investment, competition policy, and SOEs, among others, that will provide greater policy predictability in TPP countries for trade and investment in goods and services. To resolve the major sticking points noted above, negotiators should recognize that even “half a loaf” can be nourishing and thus should craft compromises that may not be

41. “USTR Tables TPP Labor Proposal that Goes Beyond May 10 Template,” *Inside US Trade*, January 6, 2012, www.insidetrade.com (accessed on September 6, 2012).

ideal but still promote economic growth and development. In that regard, we offer some specific recommendations on the main sticking points, calling for

- substantial liberalization of barriers to trade in dairy products (tariffs, quotas, and subsidies);
- broad-based cuts in other agricultural tariffs and expansion of sugar quotas;
- exemption for rice and rice products, if Japan and Korea join the talks and commit to substantial market access reforms in goods, services, and other farm products;
- flexible and less restrictive rules of origin for textiles and apparel and the phaseout of footwear tariffs; and
- avoidance of blanket proscription of short-term capital controls in order to allow flexibility for developing countries to deploy temporary measures for prudential and countercyclical reasons.

We recognize that these specific recommendations would require US officials to modify their positions on politically sensitive issues. Nonetheless, we believe such compromises are both feasible and desirable, assuming that the other TPP partners are willing to follow suit by accepting obligations in other areas such as intellectual property protection covering the new digital economy; market access in insurance, distribution, and financial services; investor-state dispute settlement procedures; disciplines on SOEs; labor; and the environment. In this context, US agricultural reforms and textile and apparel liberalization seem like good investments.

Overall, the bigger the package of reforms, the more options officials have to craft political coalitions in support of the deal as well as more resources to facilitate the adjustment of those firms and workers who face new competitive pressures. That said, the final deal will have to address the substantial divide between rich and poor and big and small among the TPP participants. In that regard, we do not recommend special and differential treatment for developing countries; rather, we argue that TPP signatories should accept common obligations but with asymmetric implementation over a fixed period of time depending on a country's development circumstances.