

Cambridge University Press

978-1-107-02866-1 - The Trans-Pacific Partnership: A Quest for a Twenty-first Century
Trade Agreement

Edited by C. L. Lim, Deborah K. Elms and Patrick Low

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PART I

Introduction

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What is “high-quality, twenty-first century”
 anyway?

C.L. LIM, DEBORAH K. ELMS AND PATRICK LOW

1 Overview

This book is about one of the most significant regional integration initiatives in recent times. The Trans-Pacific Partnership Agreement (TPP) has the potential to become a new model for preferential trade agreements (PTAs). There are two main reasons for this. First, it is an open-ended agreement that clearly contemplates an expanded membership over time. Second, the TPP aspires to set high standards, both in terms of the degree of market openness to be achieved, and the quality and scope of the rules governing trade, investment and regulatory arrangements among its members.

This volume does four things. First, it traces the origins and motivations of the TPP initiative in order to provide the context for assessing the prospective Agreement. Second, it analyses critically the claims of the architects of the Agreement that it will be of “twenty-first century quality” as opposed to the lesser ambition of “twentieth century” PTAs. Third, it analyses options and likely outcomes in specific areas. Fourth, it projects the TPP into the future and considers its place relative to other trade regimes, including beyond the Asia-Pacific, to the World Trade Organization (WTO).

2 The quest for quality

The TPP negotiations have been characterized by the phrase “high-quality, twenty-first century” from the earliest stages of development. This phrase has become the principal motif of negotiations aimed at creating a PTA that will link together multiple countries in three continents at differing levels of economic development.

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The first major milestone of the TPP was the announcement of the broad outlines of the Agreement at the Asia-Pacific Economic Cooperation (APEC) Leaders' meeting in Honolulu, Hawaii. This November 2011 meeting represents an important benchmark for assessing this new type of agreement – then two years in the making.

While no one has ever argued that they are creating an “old-style, low-quality” agreement, the TPP is unique among PTAs in the high level of ambition from the outset. Each of the participant countries – Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Viet Nam – has committed to achieving a high benchmark across the widest range of trade topics that have ever been included in a preferential trade deal.

The scale and scope of this ambition is perhaps best appreciated relative to the quality and level of ambition generally contained in other agreements in the Asia-Pacific. Some, especially those negotiated with the United States or using templates closer to the US models, are viewed as higher-quality and more comparable with the TPP. Others, including those with some Asian trade partners, contain commitments in goods only or with general pledges to uphold WTO promises and not a great deal more. Viewed in this context, the TPP does indeed represent a higher benchmark for quality and ambition.

While officials have laboured mightily, the quest for a high standard quite quickly collided with the political and economic realities on the ground in the nine member countries. As the chapters in this book indicate, early efforts to reach for new solutions to old problems have generally resulted in a return to fairly standard PTA approaches. The result, at the end of two years of negotiations, is an interim agreement that is more comprehensive and far-reaching than many PTAs, but not nearly as grand as its rhetoric would suggest. Particularly because the nine member countries remain fairly small trading partners, the economic impact of the agreement is limited.

Moving forward, as new members accede to the Agreement, the economic importance of the TPP should grow accordingly. This makes it all the more critical that the final agreement should reach the highest aspirations for quality. A watered-down agreement will not provide the same economic stimulus for the Asia-Pacific region. It will not pull in new members and, without new members, it is doomed to remain a small, interesting exercise in trade relations.

3 Evolution of the TPP

Officials launched talks in early 2010, with the original goal of producing an agreement by the time of the APEC Leaders' Meeting in Honolulu,

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Hawaii, in November 2011. Although the Agreement was not, in fact, concluded on schedule, this date marks a key milestone for reflecting on the progress towards the lofty goals expressed so frequently by leaders. It was not until mid-2011 that officials admitted that the APEC deadline would not be met. Up until this point, officials had been holding intense negotiating sessions in anticipation of wrapping up talks on time. Even after the target was changed to a commitment for the “broad outlines” of an agreement, officials continued to meet for up to two weeks at a stretch in an attempt to have the widest possible set of commitments in place for leaders to discuss in Honolulu. This “deadline” therefore represents a good place for a reflection and stocktaking exercise – how close did officials manage to get to a high-quality agreement by the original timeline?

This book critically evaluates what an agreement with such noble claims might look like in a variety of key trading sectors, and the extent to which this objective accords with the reality of the negotiations. Where the agreement is likely to fall short of these goals, the chapter authors address the reasons why such an ambitious target has not been possible.

This book also discusses how the TPP Agreement may affect trade relations in the Asia-Pacific and more broadly. The TPP is intended to allow for new members to accede in the future, with a clause that specifically opens the door to new applicants, particularly from within APEC. We explore how the proliferation of preferential trade agreements worldwide – not least in the Asia-Pacific region – will be affected by the TPP.

We also consider how an ambitious PTA fits within a multilateral trading world. This is not just the multilateral trading regime represented by the nine current members of the TPP, but also how the TPP fits within regional trade initiatives underway within and across the Asia-Pacific. Finally, we consider how the TPP fits within the global framework of the WTO. The TPP negotiations moved ahead in early 2009. At that point in time, the WTO talks on the Doha Development Agenda (DDA) had been underway for eight years with forward progress looking less and less likely. One of the strongest arguments for the TPP has been that it could overcome some of the specific challenges and obstacles that have bedeviled the WTO and the multilateral trading process. A hand-selected group of countries should be able to go beyond global liberalization efforts and consider such intrusive “behind-the-border” measures as harmonizing standards, mutual recognition or opening up government procurement markets to greater competition. If it proves difficult or impossible for this set of countries to achieve these ambitious goals,

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what can we expect from a broader set of countries in the multilateral trade regime?

The TPP is a twenty-first century PTA in that it seeks to encompass all the issues currently found in greater or lesser measure in a range of existing PTAs. This includes not just market access in goods, but also agriculture, textiles, rules of origin, services, technical barriers to trade, sanitary and phytosanitary measures, investment, financial services, telecommunications, e-commerce, trade remedies, intellectual property rights, competition policy, customs cooperation, capacity building and development issues, labour standards and environmental rules.

The fact that these provisions exist reflects new realities of economic interdependency through trade and investment, and in particular the growing tendency towards international vertical integration. The essential innovation of the TPP is its quest for coherence at this high level of policy ambition. In other words, its true success lies in the embryonic establishment of a bottom-up blueprint for “multilateralizing regionalism.”

The definition of a “high-quality, twenty-first century” may be in the eye of the beholder. The negotiators involved have never defined the statement. We believe that such an agreement should have: (i) comprehensive scope of diverse topics, (ii) substantial geographical scope, (iii) considerable depth that includes cooperation and integration components among members, and (iv) contain a set of shared values or norms among participants.

The TPP’s potential for successfully achieving such goals is partly due to the nature of the partners, especially their diversity and geographical spread linking both sides of the Pacific, and partly due to the intended nature and treaty design of the deal in achieving an all-new type of PTA. The level of ambition, scope and scale of the TPP makes it unique.

This book allows readers to follow the negotiations to establish a new type of international treaty regime. If successful, the TPP could represent the first concrete effort to address some of the negative effects or stumbling blocks created by overlapping and sometimes incomplete PTAs. However, the evolution of the TPP could strengthen or fracture current trading regimes. The specific architecture of the Agreement, including the elements of various negotiating chapters, is critical to realizing high-quality outcomes.

This book contains substantial discussions of the kinds of problems a treaty initiative such as the TPP has faced in the first two years of negotiations. A major question to be explored is why we need a new kind of PTA that will serve to “multilateralize” the provisions found in multifarious,

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smaller bilateral deals. Related to this is the issue of what new trade and trade-related challenges among nations will require of the content of a twenty-first century PTA. The TPP emphasizes such matters as regulatory coherence, the difficulties faced by small and medium-sized enterprises, trade facilitation more broadly, and problems faced in the production of intermediate goods and the management of supply chains.

4 Defining a twentieth century agreement

Such issues were not on the table in “twentieth century” PTAs. Instead, a “twentieth century” preferential trade agreement could be reasonably defined as focusing on final goods transiting borders, where the key objective was to remove relatively high tariff barriers or high tariff peaks.¹ Nearly all PTAs exclude agriculture entirely from the agreement or exclude the sensitive sectors where nearly all agricultural trade between partners might actually take place.² Some PTAs extended the exclusion of goods trade into industrial goods, especially labour-intensive manufactures, with the result that potential trade in goods of between 5 and 20 percent were beyond the scope of the agreement.

Early PTAs experimented with different types of rules of origin (ROOs). These are the necessary rules to ensure that the only firms taking advantage of preferential trade access as a result of the PTA are firms originating in one of the PTA partners. If a firm from any country could benefit from the PTA provisions, there would be no need for PTA negotiations at all, since access could be provided unilaterally to all parties or multilaterally through the WTO, where it could be given to all member states. Since most PTAs are bilateral, the benefits are confined to the firms of only one country. Under twentieth century PTAs, ROOs were often extremely complex. Many had very high hurdles as well for qualifying firms. Partly as a result, utilization rates by business for many PTAs were quite low.

Tariffs are not the only way to keep out goods. Most PTAs did not address the myriad other mechanisms for protecting markets, including the use of quantitative restrictions or quotas, licences, legal frameworks,

¹ However, the WTO notes that 84% of merchandise trade in 2010 continued to take place on a non-discriminatory, most-favoured-nation (MFN) basis. See WTO (2010): *World Trade Report* p. 7. Under existing PTAs, 66% of tariff lines with MFN rates above 15% were not reduced in the PTA. See p. 11.

² As an example, two temperate states could completely liberalize trade in tropical products but seek to exclude wheat or place tight quantitative restrictions on the levels of soybean exports.

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trade remedies, sanitary and phytosanitary (SPS) regulations, and a host of technical barriers to trade (TBT). Addressing these issues requires countries to intrude in the domestic affairs and regulations of their partners. Under twentieth century agreements, most of these “behind-the-border” barriers to trade were only lightly addressed or ignored altogether.

Many existing PTAs cover only trade in goods. Since services were not conveyed easily across borders, older-style PTAs did not address trade in services or did so only superficially. Many PTAs pledge to uphold WTO commitments in services, without attempting to go further. Given that the WTO commitments in services are themselves quite weak, this has meant that limited rules govern trade in services.

In addition, the very mechanisms for addressing trade in services have been driven by the WTO baselines. These include dividing trade in services into four “modes” of supply. As an example, mode 1 service delivery covers the provision of a service across borders, without any movement of individuals. At the time these rules were developed, in the early 1990s, negotiators were uncertain how many services could realistically be provided in this way. As it turns out, with the rise of the internet and new forms of telecommunication, many services can be provided across borders, with no commensurate movement of people. The “modes” of service delivery rules now rarely match the actual provision of services for most firms engaged in global services trade. Yet, in spite of this problem, twentieth century PTAs continued to divide up the services trade into four modes of supply and to divide the services markets in the agreement in the same way.

In what were regarded as high-quality, twentieth century agreements, investment was generally handled by pledging to abide by WTO rules. Since the WTO focused very little on investment, PTAs also did little to alter trade patterns in investment.

Some higher-quality, twentieth century agreements addressed a range of additional issues, including intellectual property rights, government procurement, financial services or trade remedies. The general standard, again, was to either refer to existing WTO commitments or to pledge to go slightly beyond WTO commitments in the context of the PTA. Other regulatory issues were handled – if at all – in other venues.

5 What’s new in the twenty-first century?

A “twenty-first century” agreement must address a much broader range of linked trading issues. First, goods include intermediate products as

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well as final goods. Inputs into a final product might have crossed borders multiple times or have travelled between subsidiaries in different countries before final assembly and shipment of the product itself to consumer markets. The fragmentation of markets into complex supply chains makes it all the more imperative to remove obstacles to the smooth passage of goods across borders. Tariffs are no longer the primary impediment to trade in goods for most markets. Instead, business is interested in removing barriers, like inefficient or cumbersome customs procedures, streamlining procedures, facilitating the movement of cargo by improvements in infrastructure and the like. These improvements must be supplemented by an expansive rules of origin criteria to allow the maximum volume of goods to pass between PTA member states more efficiently.

Second, trade in services has exploded and includes a wide range of services delivered across borders. Trade increasingly means the transfer of personnel as well as the delivery of specific services. A twenty-first century agreement should reconsider the mechanisms for providing services across borders without necessarily being bound to existing WTO provisions. At a minimum, a new agreement ought to open services markets on the basis of a negative list (everything not explicitly listed as closed is open).

Third, cross-border investment has likewise grown tremendously, particularly across the Asia-Pacific, and is increasingly linked to trade in services and goods. It can no longer be addressed through separate bilateral investment treaties, but must be part of a larger package of rules.

Fourth, although some existing PTAs have addressed a range of topics, like intellectual property rights, telecommunications or trade remedies, the scope for additional rules beyond the WTO is quite wide. Many of these newer issues are addressed in PTAs in a limited way with modest new commitments.

Finally, there are a host of new issues that should be included in a twenty-first century agreement like the TPP. These include efforts to harmonize or streamline contradictory standards and regulations that impede trade. Most of the economic activity in many countries comes from small and medium enterprises (SMEs). Yet, SMEs rarely use the trade provisions in PTAs and are therefore not gaining potential benefits.

6 The example of regulatory coherence

Many of the “behind the border” issues have the potential to cut two ways. On the one hand, the proposed TPP rules could spur a

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convergence among larger and larger concentric circles of countries as rules are harmonized over larger groups of countries. For example, if the TPP is successful in implementing regulatory coherence over a set of sanitary and phytosanitary rules or intellectual property procedures among the current nine, these changes will be available to non-TPP members as well. It would be difficult to exclude other states from taking advantage of regulatory rule changes. If the new TPP rules are beneficial to firms, they may be copied by other states.

On the other hand, the proliferation of new regulatory regimes could also fragment the international trading system further. This is particularly true if the rules chosen by the TPP are out of sync with the kinds of regulatory rules selected by other important trading groups and countries. Without a larger entity like the WTO to help guide such rule changes, the TPP could spur competing trade groups to implement their own incompatible regulations. Bringing about convergence could be significantly harder in the future than it is today.

Only some regulatory reforms will have dividends for non-TPP members. In other cases, the regulations can be used in a discriminatory manner. There will be instances where some firms capture first-mover advantages. Particularly in situations where regulatory cooperation is about mutual recognition of standards, then outsiders will be excluded from benefiting from the agreement. So even regulatory coherence will be a two-edged sword that both unites and divides TPP members from non-TPP members, making further integration simultaneously more and less difficult in the future.

7 Caveats

This book represents the first sustained attempt to understand the TPP negotiations. As a result, a few points are worth noting up-front. First, the Agreement was not completed as originally envisioned by November 2011. The internal deadline was taken extremely seriously by the negotiating teams, with the scheduled official rounds of talks extending for over two weeks per session in an attempt to get the deal done in time. The goal of completing the Agreement by November was maintained all the way through mid-2011, before officials admitted that only the “broad outlines” of an agreement would be ready by the APEC Leaders’ Meeting in Hawaii. The analysis in this volume uses this date as a point of reference. Because the Agreement was assessed at this point in the negotiations, some elements in the final deal may be subject to changes from the compromises