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The Trans-Pacific Partnership*

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ABSTRACT

This article provides an overview of the recently concluded Trans-Pacific Partnership Agreement (TPP), a treaty the parties have described as comprehensive and ambitious, yet also representing a balance of competing interests. The article focuses on the TPP's chapters relating to investment, services, intellectual property and regulatory coherence, each of which provides insight into the motivations that drove the conclusion of the TPP and the negotiating dynamics that determined its final content. In areas such as investment, the TPP takes a more balanced approach than many earlier agreements, providing greater safeguards for the regulatory autonomy of states while still embodying core protections for foreign investors. In relation to intellectual property and services, the TPP goes beyond earlier agreements in several key respects, such as preventing the imposition of local presence requirements for service providers or requiring longer copyright terms than those demanded by other international treaties. The TPP chapter on regulatory coherence is one of the most novel features of the treaty, as regulatory coherence is not frequently included in earlier trade agreements, demonstrating the increased focus of states on addressing regulatory barriers to trade and investment. While all of these elements of the TPP are interesting in their own right, given the number and size of the parties involved in the agreement, they also provide valuable guidance about the direction of other ongoing and future preferential trade agreement negotiations, such as the proposed Transatlantic Trade and Investment Partnership (TTIP) and Trade in Services Agreement (TiSA).

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I. INTRODUCTION

The Trans-Pacific Partnership (TPP) is touted as the "biggest global trade deal in twenty years",[1] following on from the creation of the World Trade Organization (WTO) in 1995. Its 12 Pacific Rim countries are unusually diverse as regards geographic location, culture, interests, and level of development: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States (U.S.) and Vietnam. Together, they represent approximately 50% of global gross domestic product and 37% of global trade.[2] However, the number of and variation among TPP countries are not the only unusual aspects of this "new generation"[3] of trade and investment agreement. The agreement is also potentially revolutionary in the depth and breadth of its provisions. TPP countries have proclaimed its significant impact in eliminating "more than 98 per cent of tariffs in the TPP region."[4] But the TPP also focuses on a wide range of governance issues including domestic regulation. Novel aspects of the agreement include innovative disciplines relating to environmental protection and fisheries management, extensive disciplines on state-owned enterprises, and a separate chapter on transparency and anti-corruption.

The size (approximately 6,000 pages),[5] depth and breadth of the agreement, as well as its more intrusive "behind the border" aspects, have led to widespread controversy and concern among the TPP citizenry. This concern has been exacerbated by both the secrecy of TPP negotiations,[6] since their commencement in March 2010,[7] and the occasional leaking of texts during the negotiating process. In the United States, a system of "cleared trade advisors" operating in "trade advisory committees" allowed some individuals (including "representatives from industry, agriculture, services, labor, state and local governments, and public interest groups")[8] access to draft texts and the ability to provide

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1 Andrew Robb, Minister for Trade and Invt., Austl., *Trans-Pacific Partnership (TPP) Pact to Drive Jobs, Growth and Innovation for Australia*, Media Release (Oct. 6, 2015).

2 World Bank Group, GLOBAL ECONOMIC PROSPECTS: SPILLOVERS AMID WEAK GROWTH 221 (Jan. 2016).

3 *See e.g.*, Edward Alden, *The TPP Agreement: Big Things Are Still Possible*, Council on Foreign Relations Blog (Oct. 5, 2015), *available at* http://blogs.cfr.org/renewing-america/2015/10/05/the-tpp-agreement-big-things-are-still-possible.

4 Austl. Gov't., Dep't Foreign Affairs & Trade, *Trans-Pacific Partnership Agreement: Outcomes at a Glance,* 1 (last updated Oct. 6, 2015). *See also* U.S. Trade Representative, *The Trans-Pacific Partnership: Overall US Benefits Fact Sheet*: *TPP eliminates over 18,000 taxes that various countries impose on Made-in-America exports* (last updated Oct. 6, 2015).

5 *See e.g.*, *Free exchange: A Serviceable Deal*, THE ECONOMIST (Nov. 14, 2015), *available at* http://www.economist.com/news/finance-and-economics/21678253-tpp-intended-spark-boom-trade-services-it-will-be-decades.

6 *See* Austl. Gov 't., Dep't. Foreign Affairs & Trade, *Release of Confidentiality Letter* (Feb. 25, 2014).

7 Austl. Gov 't., Dep't Foreign Affairs & Trade, *Update on the first round of Trans-Pacific Partnership (TPP) Negotiations - A Strong Start* (Oct. 19, 2014).

8 USTR, *FACT SHEET: Transparency and the Trans-Pacific Partnership* (June 2012).

feedback.[9] Also, according to the Office of the United States Trade Representative (USTR), "[a]s a matter of longstanding policy and practice, USTR has provided any Member of Congress access to classified negotiating documents and texts on request."[10] In contrast, in Australia, parliamentarians received access to the draft text but only at a very late stage in the negotiations[11] and only on an ad hoc basis rather than pursuant to any consistent policy established systematically for treaty-making.[12] (The treaty was not tabled in the Australian Parliament until 9 February 2016:[13] four months after negotiations concluded in early October 2015).[14] These kinds of mechanisms, along with regular stakeholder meetings,[15] were intended to enhance transparency and participation, but their limited nature highlights the difficulties of balancing the principles of tough, frank negotiation with the need for community input.

The official release of the agreed treaty text on 6 November 2015 (before the "legal scrub" and before the signing of the treaty on 4 February 2016) has not alleviated concerns about the agreement. Instead, debate has continued on matters including the economic impact of the agreement, assuming it is ratified and enters into force for the 12 parties. The World Bank has concluded that, by 2030, the TPP "could … lift member countries' trade by 11 percent" and "will raise member country GDP by 0.4-10 percent", with the "largest gains in GDP … expected in smaller, open member economies, such as Vietnam and Malaysia (10 percent and 8 percent, respectively)."[16] The Peterson Institute has suggested that "the United States will be the largest beneficiary of the TPP in absolute terms",[17] whereas another study has found "negative effects on growth in the United States and in Japan", as well as "the loss of 770,000 jobs, with the largest losses occurring in the United States."[18] While Australia's then Trade Minister Andrew Robb rejected the

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9 *Id*.

10 *Id*.

11 Lenore Taylor, *Australian MPs Allowed to See Top-Secret Trade Deal Text but Can't Reveal Contents for Four Years,* The Guardian (June 2, 2015), *available at* http://www.theguardian.com/business/2015/jun/02/australian-mps-allowed-to-see-top-secret-trade-deal-text-on-condition-of-confidentiality. *See* Acknowledgement of Confidentiality Requirements to Facilitate Viewing of the Draft TPP Negotiating Text by Members of the Australian Parliament (2015), *available at* http://static.guim.co.uk/ni/1433217576506/Trans-Pacific-Partnership-a.pdf (as *noted in* Taylor, *supra* note 11).

12 *See* Hansard, Foreign Affairs, Defence and Trade References Committee, *Government Response to Report "Blind Agreement: Reforming Australia's Treaty-Making process"* (Feb. 2, 2016) 67.

13 Andrew Robb, Minister for Trade and Investment, *Trans Pacific Partnership Agreement Tabling*, Ministerial Statement (Feb. 9, 2016).

14 John Kerry, Secretary of State, *Successful Conclusion of Trans-Pacific Partnership (TPP) Negotiations*, Press Statement (Oct. 5, 2015).

15 *See e.g.*, USTR, *Direct Stakeholder Engagement* (Mar. 6, 2013).

16 World Bank, *supra* note 2 at 226, 227, 229.

17 Peter Petri & Michael Plummer, *The Economic Effects of the Trans-Pacific Partnership: New Estimates* 2 (Peterson Institute for International Economics, Working Paper Series WP16-2, Jan. 2016).

18 Jeronim Capaldo & Alex Izurieta with Jomo Kwame Sundaram, *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement* 1 (Global Development and Environment Institute, Tufts University, Working Paper No. 16-01, Jan. 2016).

"modest benefits" suggested by the World Bank study,[19] Australia's Department of Foreign Affairs and Trade apparently refrained from conducting any modeling of its own of the impact of the TPP, relying instead on the studies by the World Bank and the Peterson Institute.[20] New Zealand conducted its own modelling to determine that "entering TPP would be in New Zealand's national interest"[21] on the basis that its total benefits after three years would be "ten times larger than costs" and it would increase New Zealand's GDP by 1% by 2030.[22]

Given word constraints, it is not possible to cover in a comprehensive manner the many details of the TPP, particularly in view of the many side letters and annexes that make up the agreement as a whole. Documents associated with the TPP also include, for example, a separate declaration by the TPP countries regarding currency manipulation, including a commitment to "avoid manipulating exchange rates … to gain an unfair competitive advantage" and "refrain from competitive devaluation."[23] In this article, instead, we provide an overview of four key areas of the TPP - investment, services, intellectual property, and regulatory coherence - based on the agreed text released following the legal scrub on 26 January 2016.[24] These areas are selected given their importance to TPP countries and their potential to set a precedent for new approaches in international economic law. In examining each area we take note of the difficulties involved in reaching an agreement of this size among so many parties, while also reflecting on the implications of the TPP for other existing agreements and ongoing negotiations. Throughout all of these provisions the TPP parties attempt to strike a balance between competing interests, driven by the desire to reach an ambitious and innovative agreement, but also constrained by the range of parties involved and public concern regarding the extent of obligations in areas such as investment and intellectual property.

II. Investment

As one leading commentator has noted, the TPP's investment chapter is "relatively balanced", with respect to "the needs of capital exporters desiring to protect the rights of their investors abroad" and "the needs of capital importers which, as

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19 Greg Earl, *Andrew Robb Rejects World Bank Study on TPP Benefits* Australian Financial Rev. (Feb. 3, 2016), *available at* http://www.afr.com/news/economy/trade/andrew-robb-rejects-world-bank-study-on-tpp-benefits-20160202-gmjitb.

20 Office of Trade Negotiations, Dep't Foreign Affairs & Trade, *Trans-Pacific Partnership Agreement: National Interest Analysis [2016] ATNIA 4*, par.10.

21 Min. Foreign Affairs & Trade, N.Z., *Trans-Pacific Partnership: National Interest Analysis* 27 (Jan. 25, 2016). *See also* Murray Griffin, New Zealand Analysis Shows More Limited TPP Benefits, Int'l Trade Daily, (Jan. 28, 2016).

22 Min. Foreign Affairs & Trade, *supra* note 21, at 21-22.

23 *Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries* (released Nov. 6, 2015).

24 Trans-Pacific Partnership text released Jan. 26, 2016 following legal scrub, *available at* https://tpp.mfat.govt.nz/text (last visited 20 July 2016).

host states, still need to be able to regulate to protect the public interest."[25] Thus, the chapter contains the core protections for foreign investors typically found in international investment agreements (IIAs), as well as several clarifications and exceptions appearing more regularly in modern IIAs to ensure sufficient policy space for governments. Similarly, the chapter includes a traditional mechanism for investor-state dispute settlement (ISDS), which is inherently designed to protect foreign investors, while containing some procedural and substantive reforms to address some of the legitimacy problems arising from this form of dispute settlement. For some, these clarifications, exceptions and reforms do not go far enough in protecting sovereign regulatory autonomy of host states.[26] For others, the more novel aspects go too far in carving out particular areas of regulation.[27]

A. Definition of Investment

As is usual in IIAs, the definition of investment in the TPP is broad, encompassing assets taking forms such as enterprises, shares and intellectual property.[28] However, the definition is limited to those assets that have "the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[29] These named characteristics bring within the treaty text two of the elements of an investment identified by the investment treaty tribunal in *Salini v. Morocco*, referring to the meaning of investment in the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention):[30] "contributions … and a participation in the risks of the transaction."[31] The tribunal also included two other criteria, which do not appear in the TPP definition: "a certain duration of performance of the contract" and (more controversially) a "contribution to the economic development of the host State."[32] As an example of the potential significance of this fourth criterion, in recent years Uruguay unsuccessfully argued that the tobacco company Philip Morris had not made an investment in Uruguay because its activities impose "huge costs" on Uruguay.[33]

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25 José Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?* 1, 32 (Inst. Int'l. L. & Justice, N.Y. U. L. Sch., Working Paper 2016/3 (*MegaReg Series*), Mar. 27, 2016).

26 *See e.g.*, Lise Johnson & Lisa Sachs, *The TPP's Investment Chapter: Entrenching, Rather Than Reforming, a Flawed System* (Colum. Center on Sustainable Inv., Policy Paper, Nov. 2015); Lise Johnson, Lisa Sachs & Jeffrey Sachs, *The Real Danger in TPP*, CNN.com (Feb. 19, 2016), *available at* http://edition.cnn.com/2016/02/19/opinions/tpp-threatens-sustainable-development-sachs.

27 *See e.g.*, *TPP Deal Includes Tobacco Carveout, Teeing up Fight with Congress*, Inside US Trade (Oct. 9, 2015), *available at* https://insidetrade.com.

28 TPP, *supra* note 24, art. 9.1(a), (b), (f) (definition of investment).

29 *Id.* art. 9.1.

30 Conv. on the Settlement of Investment Disputes between States and Nationals of other States, concluded Mar. 18, 1965, entered into force Oct. 14, 1966, 575 U.N.T.S. 159.

31 Salini Costruttori SPA & Italstrade SPA v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

32 *Id*.

33 Philip Morris Brands Sàrl, Philip Morris Products SA & Abal Hermanos SA v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, paras. 177, 209 (July 2, 2013).

B. CORE OBLIGATIONS AND EXCEPTIONS

In addition to the country-specific exceptions and inclusions contained in side letters and annexes,[34] the investment chapter contains many general clarifications and exceptions to its core obligations, in order to enhance policy space. For example, the non-discrimination obligations of national treatment and most-favored-nation (MFN) treatment are subject to footnote 14, which specifies that whether treatment is accorded in "like circumstances" for the purpose of those provisions "depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." A "Drafters' Note" adds that these provisions "seek to ensure that foreign investors or their investments are not treated less favorably on the basis of their nationality" and "do not prohibit all measures that result in differential treatment."[35] The MFN provision is also explicitly restricted to prevent a state or investor from using it to invoke more favorable dispute settlement provisions from other treaties, such as more favorable ISDS provisions.[36] Specific provisions prevent a successful claim of unlawful expropriation[37] or breach of fair and equitable treatment[38] on the sole basis of a host state's decision to modify or reduce a subsidy or grant.

Nevertheless, some of these provisions designed to preserve TPP countries' policy space have only limited impact. For example, the clarifications applicable to the key obligations concerning fair and equitable treatment (FET) and expropriation, while welcome, do not provide as much protection as some other recent treaties. Significantly, under the TPP a FET breach does not arise merely from a breach of another TPP provision, a breach of another international agreement, or a failure to fulfil an investor's expectations.[39] In addition, the FET standard is restricted to the "customary international law minimum standard of treatment."[40] However, this restriction still allows arbitrators to interpret the customary standard as having evolved to preclude, for example, violations of due process or of domestic law, rather than only egregious or outrageous conduct.[41] In contrast, the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)[42] specifies that a breach of domestic law does not establish a breach of the FET standard.[43] CETA also contains an apparently *exhaustive* list of the kinds of conduct

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34 *See e.g.*, TPP, art. 9.12 (non-conforming measures).

35 *Drafters' Note on Interpretation of "In Like Circumstances" Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)* (Jan. 26, 2016) [2].

36 TPP, *supra* note 24, art. 9.5.3.

37 *Id*. art. 9.8.6.

38 *Id*. art. 9.6.5.

39 *Id*. arts. 9.6.3, 9.6.4.

40 *Id.* art. 9.6.2. *See also* annex 9-A.

41 *See e.g.*, Clayton & Bilcon of Delaware, Inc. v. Canada, Award on Jurisdiction and Liability, ¶¶ 438-44 (Perm. Ct. Arb. Case No. 2009-04, Mar. 17, 2015). *Cf*. Clayton & Bilcon of Delaware, Inc. v. Canada, (dissenting opinion of Professor Donald McRae) (Perm. Ct. Arb. Case No. 2009-04, Mar. 10, 2015).

42 Consolidated Comprehensive Economic and Trade Agreement between Canada and the European Union Text (released Feb. 2016, not yet signed or entered into force), *available at* http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

43 Comprehensive Economic and Trade Agreement between Canada and the European Union, art. 8.10.7.

that will breach the FET standard (e.g. denial of justice, targeted discrimination, or abusive treatment),[44] whereas the TPP contains an *inclusive* list of such conduct,[45] leaving more scope for other conduct to amount to a breach as well.

The narrowing of the expropriation obligation in the TPP is also significant but limited. The issuance of a compulsory license pursuant to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) and consistent with the intellectual property chapter of the TPP does not constitute expropriation.[46] An action "cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."[47] In addition:

> Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.[48]

Yet, again, the words "except in rare circumstances" detract from the force of this provision, leaving scope for argument that a particular non-discriminatory regulatory action to promote legitimate public welfare objectives *does* constitute expropriation.

Similarly, Article 9.16 provides:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[49]

Article 9.16 may be important in interpreting other provisions in the investment chapter, on the basis that it reflects the object and purpose of the treaty or at least the context for interpreting treaty terms, within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties. However, the words "otherwise consistent with this Chapter" in Article 9.16 mean that this provision cannot operate as a fully-fledged "exception" to the obligations in the investment chapter. Moreover, while limited exceptions to the prohibition on performance requirements in Article 9.10 include references to measures "necessary to protect human, animal or plant life or health" and measures "related to the conservation of living or non-living exhaustible natural resources",[50] no general set of exceptions analogous to that in Article XX of the WTO's General Agreement on Tariffs and Trade (GATT) 1994[51] applies to the TPP investment chapter as a whole.

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44 *Id.* art. 8.10.2.
45 TPP, *supra* note 24, art. 9.6.2(a).
46 *Id.* art. 9.8.5.
47 *Id*. annex 9-B, [1].
48 *Id*. annex 9-B, [3(b)] (footnote omitted).
49 Emphasis added.
50 TPP, *supra* note 24, art. 9.10.3(d)(ii), (iii).
51 GATT, Doc LT/UR/A-1/A/1/GATT/2, signed Oct. 30, 1947, as incorporated in the Marrakesh Agreement Establishing the World Trade Organization, annex 1A, opened for signature Apr. 15, 1994, entered into force Jan. 1, 1995, 1867 U.N.T.S, 3.

These provisions in the TPP investment chapter appear to reflect an attempt by the drafters to clarify and narrow the scope of investment obligations, in view of the incursion on policy space witnessed in some investment treaty awards.[52] The limits to these clarifications may reflect difficulties in agreeing on the requisite language, both among a relatively large number of negotiating parties, and within each country given the varied interests of industry, inward and outward investors, and other stakeholders. Although the results may be seen as an advancement in comparison to the older-style bilateral investment treaties, which tend to lack nuance and have no explicit exceptions, they also leave much to the discretion of arbitrators, which is itself a cause for some concern. That fact lends greater significance to the inclusion of ISDS in the TPP.

C. INVESTOR-STATE DISPUTE SETTLEMENT

ISDS in the TPP was of central concern to many community groups in different TPP countries. For Australia, in particular, a government policy of April 2011 moved away from pursuing ISDS where such a mechanism would provide greater protections to foreign than domestic investors.[53] A footnote in a leaked version of the TPP investment chapter in June 2012 confirmed (in square brackets) that the ISDS mechanism would not apply to Australia or Australian investors.[54] A subsequent leak in 2015 added to that footnote: "*deletion of footnote is subject to certain conditions*."[55] The textual change in those years corresponds with the change of Australian government, leading to a return to an ad hoc approach to ISDS since 2013.[56] Reflecting that case by case approach, in 2014-2015, ISDS was included in Australia's preferential trade agreements (PTAs) with Korea[57] and China[58] but not Japan.[59] The ISDS mechanism in the final TPP text applies to all TPP countries,[60] although Australia and New Zealand have excluded ISDS as

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52 *See e.g.*, *supra* note 41.

53 AUSTL. GOV'T., DEP'T FOREIGN AFFAIRS & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY, 14 (Apr. 2011).

54 Investment, § B (Investor-State Dispute Settlement), n. 20, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf (last visited Apr. 20, 2016) as noted in Citizens Trade Campaign, *Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations* (June 13, 2012).

55 WikiLeaks, *Trans-Pacific Partnership Treaty: Advanced Investment Chapter Working Document for All 12 nations (Jan. 20, 2015 draft)*, Investment (Jan. 20, 2015), § B (Investor-State Dispute Settlement), n. 29 (emphasis in original) (Mar. 25, 2015).

56 *See e.g.*, Julie Bishop, *Free Trade Focus*, ON LINE OPINION (Mar. 28, 2013); *Australia May be More Open to ISDS in TPP with Government Change*, 31 INSIDE US TRADE (Mar. 15, 2013), *available at* https://insidetrade.com (last visited Apr. 20, 2016).

57 Korea-Australia Free Trade Agreement, signed Apr. 8, 2014, entered into force Dec. 12, 2014.

58 Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, ch. 9, § B, signed June 17, 2015, entered into force Dec. 20, 2015.

59 Agreement between Australia and Japan for an Economic Partnership, signed July 8, 2014, entered into force Jan. 15, 2015.

60 TPP, *supra* note 24, ch. 9, § B.

between themselves pursuant to a side letter.[61] That exclusion is consistent with the approach of the two countries under the investment protocol to their PTA with each other,[62] their PTA with the Association of Southeast Asian Nations in 2009,[63] and their treaty recognizing each other's court proceedings.[64] However, in contrast, ISDS applies between all other TPP countries, including between Australia and the United States, despite the exclusion of ISDS from the PTA between those two countries.[65]

A number of procedural reforms apply to the ISDS mechanism in the TPP. For example, a specific provision provides for the acceptance of submissions from *amicus curiae* (friends of the court),[66] and hearings are to be open to the public, with non-confidential documentation also to be made public.[67] These provisions are relatively unusual in IIAs and should help enhance the transparency and thus legitimacy of the ISDS process under the TPP.

More unusually, the TPP also includes a tobacco-specific "carve-out", allowing TPP countries to elect to deny the benefits of the ISDS mechanism in respect of claims against tobacco control measures.[68] Australia and New Zealand have already indicated their intention to make such an election on an across the board basis.[69] The provision is written in such a way that a TPP country could also elect to deny the benefits of ISDS in respect of a specific claim, even after the proceedings have commenced. In the United States, the carve-out has raised concerns for TPP ratification, for example among members of Congress "from tobacco-producing states."[70] In contrast, the carve-out has also been heralded as an important public health precedent for other treaties.[71] Other commentators have made the point that

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61 Exchange of letters between Andrew Robb, Minister for Trade and Investment, Australia, and Todd McClay, Minister of Trade, N.Z. (Feb. 4, 2016).

62 Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement, signed Feb. 16, 2011, entered into force Mar. 1, 2013 (no ISDS mechanism).

63 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ch. 11, § B, signed Feb. 27, 2009, entered into force Jan. 1, 2010, [2010] ATS 1; letter from Tim Groser, Minister of Trade, New Zealand, to Simon Crean, Minister for Trade, New Zealand (Feb. 27, 2009).

64 Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed July 24, 2008, entered into force Nov. 10, 2013, [2013] ATS 32.

65 Australia-United States Free Trade Agreement, signed May 18, 2004, entered into force Jan. 1, 2005, [2005] ATS 1.

66 TPP, *supra* note 24, art. 9.23.3.

67 *Id*. art. 9.24.

68 *Id.* art. 29.5.

69 *Notification by Australia Pursuant to Article 29.5 of the Trans-Pacific Partnership Agreement (15 Feb.2016); National Interest Analysis (Australia) [2016] ATNIA 4*, ¶ 5 (Feb. 4, 2016); Trans-Pacific Partnership National Interest Analysis (New Zealand) 252 (Jan. 25, 2016); *Australia, NZ Intend to Deny Tobacco ISDS Challenges under TPP*, 34.8 Inside US Trade (Feb. 26, 2016), *available at* https://insidetrade.com.

70 *Business, Ag Groups Press TPP Countries to Oppose Tobacco Carveout*, 33 Inside US Trade (Oct. 2, 2015), *available at* https://insidetrade.com.

71 *See e.g.*, Campaign for Tobacco-Free Kids, *In Historic Step for Public Health, Trans-Pacific Partnership Protects Health Measures from Tobacco Industry Attack*, Press Release (Oct. 5, 2015).

the carve-out may help tobacco control but that reforms to ISDS are needed beyond tobacco control.[72]

This brings us to the limits of ISDS reform in the TPP. Beyond the procedural reforms and the tobacco carve-out, the TPP could have included more fundamental reforms to the ISDS system. For example, the European Commission has proposed a new international investment court, including an appellate court, in connection with its negotiation of the Transatlantic Trade and Investment Partnership (TTIP) with the United States.[73] The Commission is also pushing this kind of approach in its agreements with other countries such as Vietnam and Canada.[74] The TPP merely acknowledges that an appellate court might arise in future and should then be considered by TPP parties.[75] The Commission's proposal may not be accepted by the United States, and might not in any case ultimately develop into the multilateral system that the Commission envisages. However, this kind of ambitious reform proposal may be needed to address the underlying legitimacy problems with ISDS,[76] such as conflicts of interest with arbitrators acting as counsel, unpredictability, and excessive awards.

III. SERVICES

A. SCOPE, CORE OBLIGATIONS AND EXCEPTIONS

The TPP contains important disciplines on services, which account for an increasing portion of global GDP (13.2 percent in 2014).[77] As with the WTO's General Agreement on Trade in Services (GATS),[78] the TPP chapter on Cross-Border Trade in Services (Chapter 10) applies to services supplied in GATS terms via modes 1 (cross-border supply), 2 (consumption abroad), or 4 (presence of natural persons):[79]

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72 *See e.g.*, Simon Lester, *The TPP Tobacco Carveout: A Triumph of Politics Over Good Policy*, HUFFINGTON POST (Dec. 1, 2015), *available at* http://www.huffingtonpost.com/simon-lester/the-tpp-tobacco-carveout_b_8683498.html; James Surowiecki, *The Corporate-Friendly World of the TPP*, THE NEW YORKER (Oct. 6, 2015), *available at* http://www.newyorker.com/news/daily-comment/the-corporate-friendly-world-of-the-t-p-p.

73 European Union, *Proposal for Investment Protection and Resolution of Investment Disputes* (Nov. 12, 2015), art. 12.

74 Michael Scaturro, *EU-Canada Investment Court Plan Close to TTIP Version* INT'L TRADE DAILY (Feb. 29, 2016), *available at* http://www.bna.com/international-trade-daily-p6099; *see e.g.* Comprehensive Economic and Trade Agreement between Canada and the European Union, art. 8.29.

75 TPP, art. 9.23.11.

76 *See also e.g.,* UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015).

77 World Bank, *Data: Trade in Services (% of GDP)*, *available at* http://data.worldbank.org/indicator/BG.GSR.NFSV.GD.ZS/countries/AU-US?display=graph (last visited Apr. 4, 2016).

78 Marrakesh Agreement Establishing the World Trade Organization, annex 1B , opened for signature Apr. 15, 1994, entered into force Jan. 1, 1995, 1867 U.N.T.S. 3.

79 GATS, art. I:2(a), (b), (d).

> (a) from the territory of a Party into the territory of another Party;
> (b) in the territory of a Party to a person of another Party; or
> (c) by a national of a Party in the territory of another Party …[80]

However, TPP Chapter 10 does not cover GATS mode 3 (commercial presence), because "the supply of a service in the territory of a Party by a covered investment"[81] is instead covered primarily[82] by Chapter 9 (Investment). Chapter 10 is not subject to the ISDS mechanism in Chapter 9.[83]

Like the GATS, Chapter 10 does not apply to "government procurement"[84] or "services supplied in the exercise of governmental authority."[85] Chapter 10 also explicitly excludes "subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance"[86] and (largely) financial services,[87] which are covered by a separate chapter (Chapter 11).

The U.S. Trade Representative explains that Chapter 10 "includes four core obligations … subject to country-specific exceptions that must be negotiated and agreed."[88] Three of these core obligations are familiar from the GATS: market access (precluding restrictions such as numerical limits on the number of service suppliers)[89] and the twin non-discrimination obligations of national treatment[90] and MFN treatment[91] (both subject to a clarification regarding the meaning of "like circumstances" similar to that in footnote 14 of the investment chapter).[92] (Another important obligation common to GATS and Chapter 10 of the TPP relates to domestic regulation: "Each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.")[93] The TPP services chapter is also subject to general exceptions contained in Article XIV(a)-(c) of GATS.[94]

The fourth core obligation is of perhaps greater significance, prohibiting requirements of "local presence" in the following terms (not found in GATS):

> 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.[95]

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80 TPP, *supra* note 24, art. 10.1 (definition of cross-border trade in services or cross-border supply of services).
81 *Id*.
82 *But see* TPP, *supra* note 24, arts. 10.2.2, 10.2.3(a).
83 *Id.* ch. 10, n. 1.
84 *Id*. art. 10.2.3(b); *cf*. GATS, art. XIII.
85 TPP, *supra* note 24, art. 10.2.3(c); GATS, art. I:3(b).
86 TPP, *supra* note 24, art. 10.2.3(d); *cf*. GATS, art. XV.
87 TPP, *supra* note 24, art. 10.2.3(a).
88 USTR, *TPP Chapter Summary: Cross Border Trade in Services* 2 (Oct. 6, 2015).
89 TPP, *supra* note 24, art. 10.5; GATS, art. XVI.
90 TPP, *supra* note 24, art. 10.3; GATS, art. XVII.
91 TPP, *supra* note 24, art. 10.4; GATS, art. II.
92 TPP, *supra* note 24, ch. 10, n. 2.
93 *Id*. art. 10.8.1; *cf*. GATS, art. VI:1.
94 TPP, *supra* note 24, art. 29.1.3.
95 *Id*. art. 10.6.

The TPP services chapter has the potential for significant liberalization of trade in services because of its overarching framework. Specifically, the TPP follows a "negative list" approach, whereby different service sectors are subject to the core obligations except to the extent that a TPP country has negotiated for the exclusion of a particular sector or measure. In contrast, the GATS follows a largely "positive list" approach, whereby market access and national treatment commitments apply only to sectors that a WTO member has inscribed in its services schedule. Although, in principle, either approach could lead to the same result, in practice, a negative list approach may have a liberalizing effect and may also enhance transparency and the ability for future negotiations to be successfully directed at remaining barriers.[96] These kinds of benefits are enhanced by the inclusion in the services chapter of a "ratchet" mechanism, whereby amendments to non-conforming measures listed in that country's schedule to Annex I cannot "decrease the conformity of the measure."[97] Nevertheless, each TPP country maintains more or less extensive lists of non-conforming measures in relation to services (as with investment).[98]

In the following sections we examine as examples three areas governed by the TPP services chapter: professional services, telecommunications and electronic commerce.

B. Professional Services

A dedicated annex to Chapter 10 (Annex 10-A) covers "Professional Services." The annex includes general provisions regarding recognition of professional qualifications,[99] licensing or registration, as well as specific provisions on (i) engineering and architectural services,[100] (ii) temporary licensing or registration of engineers,[101] and (iii) legal services.[102] The annex also establishes a Professional Services Working Group[103] "to support the Parties"[104] relevant professional and regulatory bodies" in relation to professional recognition activities. The annex recognizes external developments such as the Asia-Pacific Economic Cooperation (APEC) Engineer and APEC Architect frameworks.[105] The provisions on legal services are relatively limited, while "recogniz[ing] that transnational legal services that cover the laws of multiple jurisdictions play an essential role in facilitating trade and investment and in promoting economic growth and business confidence."[106] If regulating foreign lawyers and transnational legal practice, each TPP country

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96 *See* Tomer Broude & Shai Moses, *The Behavioral Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations*, (International Law Forum, Faculty of Law, Hebrew U. of Jerusalem, Research Paper No. 01-15, Apr. 2015) (draft chapter for RESEARCH HANDBOOK ON TRADE IN SERVICES (Martin Roy & Pierre Sauvé eds., Edward Elgar, forthcoming 2016).

97 TPP, *supra* note 24, art. 10.7.1(c).

98 *Id*. art. 10.7; on services *see supra* note 34 and corresponding text.

99 TPP, *supra* note 24, annex 10-A [1]-[4].

100 *Id*. annex 10-A [5]-[7].

101 *Id*. annex 10-A [8].

102 *Id*. annex 10-A [9]-[10].

103 *Id*. annex 10-A [11].

104 *Id*. annex 10-A [12].

105 *Id*. annex 10-A [5]-[7].

106 *Id*. annex 10-A [9].

is merely to "*encourage its relevant bodies to consider*, subject to its laws and regulations," a number of matters such as "whether or in what manner: (a) foreign lawyers may practice foreign law on the basis of their right to practice that law in their home jurisdiction"; and (e) different modes of providing transnational legal services are accommodated, such as "on a temporary fly-in, fly-out basis" and "through the use of web-based or telecommunications technology."[107]

Against these rather limited provisions applicable to all TPP countries, the specific commitments of each country must be examined. In the case of legal services, for example, the commitments made and restrictions maintained do not appear to depart significantly from the degree of liberalization under GATS and existing PTAs.[108] Singapore, for instance, in Annex II (not subject to the ratchet mechanism) "reserves the right to maintain or adopt any measure affecting the supply of legal services in the practice of Singapore law."[109] Malaysia - also in Annex II - "reserves the right to adopt or maintain any measures relating to mediation and Shari'a law",[110] and - under Annex I (subject to the ratchet mechanism) - specifies that foreign law firms and foreign lawyers may practice Malaysian law only to the extent provided under existing Malaysian laws and regulations.[111] Similarly, under the GATS, Malaysia makes market access and national treatment commitments regarding legal services "relating only to home country laws, international law and offshore corporation laws of Malaysia."[112] In other words, Malaysia does not commit to allow foreign lawyers to practice general local law in Malaysia.

A separate TPP chapter also applies to "Temporary entry for business persons", highlighting the importance placed by TPP parties on the ability of suppliers to provide services on a "fly-in, fly-out" basis. That short chapter (Chapter 12) also applies to business people engaged in trade in goods or the conduct of investment activities.[113] Like the GATS, TPP Chapter 12 does not "apply to measures regarding citizenship, nationality, residence or employment on a permanent basis."[114] Chapter 12 contains provisions regarding the procedures for application for a visa[115] and transparency[116] and establishes a Committee on Temporary Entry for Business Persons.[117] The chapter also requires TPP countries to set out in Annex 12-A (on a positive list basis) the commitments made with respect to temporary entry of business persons.[118] A refusal to grant temporary entry can provide the basis for state-state dispute settlement under the TPP in particular circumstances.[119]

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107 *Id*. annex 10-A [10] (emphasis added).

108 Andrew Godwin, *Legal Services and the TPP*, 90 L. Inst. J. (Mar. 2016) at 30 (focusing on Australia and Asia).

109 TPP, *supra* note 24, annex II: Singapore's Reservations to ch. 9 (Investment) & ch. 10 (Cross-Border Trade in Services), II-SG-14 (released Nov. 5, 2015).

110 *Id*. annex II: Schedule of Malaysia 15 (released Nov. 5, 2015).

111 *Id*. annex I: Schedule of Malaysia 8 (released Nov. 5, 2015).

112 World Trade Organization, Malaysia: Schedule of Specific Commitments, 5, WTO Doc GATS/SC/52 (Apr. 15, 1994).

113 TPP, *supra* note 24, art. 12.1 (definition of business person).

114 *Id.* art. 12.2.2 *(see also* arts. 12.2.3, 12.2.4); *cf.* GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, para. 2.

115 TPP, *supra* note 24, art. 12.3.

116 *Id.* art. 12.6.

117 *Id.* art. 12.7.

118 *Id.* art. 12.4.1.

119 *Id.* art. 12.10.

C. TELECOMMUNICATIONS AND ELECTRONIC COMMERCE

Dedicated TPP chapters apply to telecommunications (Chapter 13) and Electronic Commerce (Chapter 14). The telecommunications-specific provisions go beyond the general obligations regarding telecommunications services under GATS[120] and also contain some improvements on the more detailed commitments regarding telecommunications services that some WTO members included in their GATS schedules pursuant to the "Reference Paper."[121] Many of the provisions are familiar from more modern PTAs, but their inclusion will also harmonize and enhance the patchwork obligations applicable under TPP countries' various PTAs. The obligations include, for example: ensuring the availability of interconnection[122] and number portability;[123] maintaining measures to prevent major suppliers from engaging in anti-competitive practices;[124] not prohibiting resale of any public telecommunications service;[125] separating the telecommunications regulatory body from suppliers of public telecommunications services;[126] and not according more favorable treatment to telecommunications suppliers owned by the national government.[127]

The TPP telecommunications chapter also includes some rather unusual provisions reflecting the United States' approach to regulation (or non-regulation) of telecommunications services. Article 13.3 recognizes the "value of competitive markets"[128] and the "role of market forces"[129] in telecommunications, allowing parties to "forbear" from applying particular regulations where not necessary "to prevent unreasonable or discriminatory practices" or "for the protection of consumers" and where "consistent with the public interest."[130] Footnote 2 to the telecommunications chapter is also explicitly directed to the mobile telecommunications market in the United States:

> [T]he United States, based on its evaluation of the state of competition in the U.S. commercial mobile market, has not applied major supplier-related measures … to the commercial mobile market.

Another part of the telecommunications chapter that seems directed specifically at the concerns of particular TPP countries (including Australia and New Zealand,[131] as well as other ASEAN countries such as Malaysia, Singapore and

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120 GATS, Annex on Telecommunications.

121 WTO Negotiating Group on Basic Telecommunications*, Reference Paper* (Apr. 24, 1996).

122 TPP, *supra* note 24, art. 13.5.1.

123 *Id.* art. 13.5.4.

124 *Id.* art. 13.8.1.

125 *Id.* art. 13.9.1.

126 *Id.* art. 13.16.1.

127 *Id.* art. 13.16.3.

128 *Id.* art. 13.3.1.

129 *Id.* art. 13.3.2.

130 *Id.* art. 13.3.3.

131 *See* generally Tania Voon, *Discrimination in International Mobile Roaming Regulation: Implications of WTO Law*, 16 J. INT'L ECON. L. 91 (2013).

Brunei Darussalam)[132] addresses international mobile roaming rates. Proclaimed in Australia in particular as a major success of the negotiations,[133] the TPP contains provisions regarding transparency of such rates[134] and the potential for TPP governments to agree on reciprocal regulation to lower such rates.[135] Reciprocity of this kind could not provide the basis for a claim of MFN violation under the TPP,[136] but the implications of MFN rules under GATS and other PTAs remain uncertain.

As might be expected, TPP countries tend to list significant non-conforming measures in relation to the sensitive sector of telecommunications. In Malaysia, foreign companies are not eligible for individual or class licenses to supply telecommunications services in the absence of ministerial permission.[137] For Vietnam, while no foreign equity limitation or joint venture requirement can be maintained after the TPP has been in force for five years in connection with non-facilities-based telecommunications services (i.e. services supplied without network infrastructure, e.g. on the basis of resale), after that period foreign equity will be permitted for basic facilities-based services only up to 49 percent and through a joint venture or the purchase of shares in a Vietnamese enterprise.[138] For Australia, foreign investments in Australian businesses with assets exceeding AUD252 million in the telecommunications sector will be subject to notification and approval from the Australian government.[139] Australia also reserves the right to adopt or maintain any measure with respect to local content quotas for television and radio broadcasting and preferential co-production arrangements for film and television productions.[140]

The dedicated electronic commerce chapter (Chapter 14) contains important disciplines such as: prohibitions on customs duties on electronic transmissions[141] and on requirements to use or locate computing facilities in the territory as a condition for conducting business[142] or to transfer software source code as a condition for import, distribution or sale of that software in the territory;[143] and obligations of non-discriminatory treatment of digital products[144] and the allowance of cross-

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132 *See* 11th ASEAN Telecommunications and IT Ministers Meeting and its Related Meeting with External Parties, *Joint Media Statement* (Dec. 9, 2011) [9]; 14th ASEAN Telecommunications and Information Technology Ministers Meeting and Related Meetings, *Joint Media Statement* (Jan. 23, 2015) [3]; Infocomm Development Authority of Singapore, *Singapore and Malaysia to Reduce Mobile Roaming Rates*, Media Release (Apr. 20, 2011); Infocomm Development Authority of Singapore and Authority for Info-Communications Technology Industry of Brunei Darussalam, *Brunei Darussalam and Singapore Agree to Reduce Mobile Roaming Rates for Voice Calls, SMS, Video Calls and Data*, Media Release (Sept. 10, 2014).

133 Hansard (Senate), Senator Mitch Fifield, Minister for Communications 29 (Oct. 13, 2015).

134 TPP, *supra* note 24, arts. 13.6.1, 13.6.2, 13.6.6.

135 *Id.* arts. 13.6.3-13.6.4.

136 *Id*. art. 13.6.5.

137 *Id.* annex I: Schedule of Malaysia, 11 (released Nov. 5, 2015).

138 *Id.* annex I: Schedule of Viet Nam, 7-8 (released Nov. 6, 2015).

139 *Id.* annex I: Schedule of Australia, 3 (released Nov. 6, 2015).

140 *Id.* annex II: Schedule of Australia, 8, 10 (released Nov. 6, 2015).

141 *Id.* art. 14.3.

142 *Id.* art. 14.13.2.

143 *Id.* art. 14.17.1.

144 *Id.* art. 14.4.

border transfer of information by electronic means for business purposes.[145] Some exceptions apply to some of these requirements, for example to achieve a legitimate public policy objective.[146] Their interpretation and application, for example in a state-state TPP dispute, may be significant in determining the practical force of some of these provisions.

As with the investment chapter, the services-related chapters of the TPP demonstrate the limited advances that may be made in an agreement of this kind, bringing together like-minded countries in a less expansive setting than the WTO, yet still subject to a whole range of country-specific interests and imperatives that lead inevitably to different non-conforming measures and textual compromises. The outcomes and techniques used in the TPP may have significant implications for a more ambitious ongoing project: the negotiations towards a Trade in Services Agreement (TiSA) among (at the time of writing) 23 WTO members, including the European Union (representing its 28 member states), being jointly led by Australia, the European Union, and the United States.[147] Those negotiations are already demonstrating innovation in the architecture of commitments (with market access commitments subject to a positive list approach as under GATS and national treatment commitments subject to a negative list approach as under the TPP).[148] Making up 71 per cent of world services trade,[149] these parties face a challenge in achieving greater levels of services liberalization than have already been achieved in the WTO, TPP and existing PTAs.

IV. Intellectual Property

One of the most controversial aspects of the TPP is the chapter on intellectual property. During the negotiation of the agreement, the scope and impact of provisions in this chapter were a major source of concern for civil society in many TPP parties.[150] The extent of novel provisions relating to "biologics" - a type of highly complex

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145 *Id.* art. 14.11.

146 *Id.* arts. 14.11.3, 14.13.3.

147 Austl. Gov't., Dep't Foreign Affairs & Trade, *Trade in Services Agreement*, *available at* http://dfat.gov.au/trade/agreements/trade-in-services-agreement/pages/trade-in-services-agreement.aspx (last visited Apr. 4, 2016).

148 Austl. Gov't., Dep't Foreign Affairs & Trade, *TiSA Scheduling Approach: How to Read a Trade in Services Agreement Schedule*, *available at* http://dfat.gov.au/trade/agreements/trade-in-services-agreement/Pages/tisa-scheduling-approach.aspx (last visited Apr. 4, 2016).

149 Austl. Gov't., Dep't Foreign Affairs & Trade, *Trade in Services Agreement*, *available at* http://dfat.gov.au/trade/agreements/trade-in-services-agreement/pages/trade-in-services-agreement.aspx (last visited Apr. 4, 2016).

150 *See e.g.*, Letter from Australian Fair Trade and Investment Network Ltd to the Hon Andrew Robb (Minister for Trade and Investment), May 19, 2014; Electronic Frontier Foundation, *Trans-Pacific Partnership Agreement*, *available at* https://www.eff.org/issues/tpp (last visited Apr. 20, 2016); Public Citizen, *Trans-Pacific Partnership (TPP): More Job Offshoring, Lower Wages, Unsafe Food Imports*, *available at* http://www.citizen.org/TPP (last visited Apr. 20, 2016).

medicine created by biotechnology processes - was one of the last issues to be resolved in the negotiation of the agreement.[151] Even now that the agreement has been signed and countries have begun their domestic ratification processes, debate continues about these provisions.[152] The challenges faced in reaching agreement on intellectual property obligations reflect U.S. ambitions for a high standard of protection, the complexity of negotiating among such a diverse range of actors, and the aspiration for the TPP to become the basis of a future regional trading bloc.

The TPP's intellectual property chapter builds on the obligations contained in the WTO's TRIPS Agreement,[153] as well as other major agreements overseen by the World Intellectual Property Organization (WIPO) and other relevant bodies.[154] But the TPP also goes beyond TRIPS and other intellectual property treaties in several key respects (often referred to as "TRIPS-Plus" provisions), as has become common in PTAs negotiated by the United States or the European Union.[155] For example, the TPP requires a copyright term of life of the author plus seventy years:[156] a twenty year extension over the comparable requirement in TRIPS.[157] In relation to patents, the TPP does not generally require a longer term of protection than that mandated by the TRIPS Agreement (twenty years from the filing date of the patent application).[158] However, the TPP obliges the parties to provide an extension to the term of a patent in circumstances of unreasonable delay in processing the patent application.[159]

Due to the breadth of the obligations in the intellectual property chapter - which cover copyright, trademarks, geographical indications, patents, industrial designs, and trade secrets - a comprehensive review of its content is beyond the scope of this article. Instead, the following sections examine the interests and negotiating positions of different parties to the TPP, beginning with a general overview of how the ambitions of the United States drove the negotiation of the chapter but were tempered by the interests of other parties. We then examine two of the most controversial aspects of the TPP: first, the issue of access to medicines and protection for biologics; and, second, provisions relating to the enforcement of intellectual property rights, particularly in the context of copyright and digital media.

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151 John Garnaut, *The Arm Wrestle Over Drugs: Inside the TPP Deal*, Sydney Morning Herald (Oct. 7, 2015), *available at* http://www.smh.com.au/national/the-arm-wrestle-over-drugs-inside-the-tpp-deal-20151006-gk2dnt.html; Ruth Lopert, *Why Biologics Were Such a Big Deal in the Trans-Pacific Partnership*, The Conversation (Oct. 6, 2015), *available at* https://theconversation.com/why-biologics-were-such-a-big-deal-in-the-trans-pacific-partnership-48595.

152 *See* Len Bracken, *Australia May Deal on TPP Drug Concern, Hatch Says,* Int'l Trade Daily (Feb. 24, 2016), *available at* http://www.bna.com/international-trade-daily-p6099.

153 *See e.g.*, TPP, *supra* note 24, arts. 18.41, 18.64, 18.72.

154 *See e.g.*, TPP, *supra* note 24, art. 18.7.2 (referring, *inter alia*, to the WIPO Performances and Phonograms Treaty, the WIPO Copyright Treaty, and the International Convention for the Protection of New Varieties of Plants).

155 For a general overview *see* Michael Handler & Bryan Mercurio, *Intellectual Property*, *in* Bilateral and Regional Trade Agreements: Commentary and Analysis 324 (Simon Lester, Bryan Mercurio & Lorand Bartels eds., 2016).

156 TPP, *supra* note 24, art. 18.63.

157 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 12.

158 *Id*. art. 33.

159 TPP, *supra* note 24, art. 18.46.

A. UNITED STATES' AMBITION AND THE DIVERSE INTERESTS OF THE TPP PARTIES

The United States has long been a strong proponent of TRIPS-Plus standards in PTAs.[160] This negotiating stance is mandated by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Trade Promotion Authority)[161] - the law that provided the executive branch of government with the authority to negotiate the TPP and then present it for Congressional approval using a special "fast-track" procedure.[162] The Trade Promotion Authority sets out the objectives that must guide U.S. negotiators, which include, *inter alia*,

- ensuring that the provisions of any trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law;[163]
- providing strong protection for new and emerging technologies;[164]
- ensuring that standards of protection and enforcement keep pace with technological developments and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media;[165] and
- providing strong enforcement of intellectual property rights.[166]

In addition to these objectives that favor strong intellectual property protections, the Trade Promotion Authority mandates that trade agreements "foster innovation and promote access to medicines" and respect the WTO Declaration on TRIPS and Public Health.[167] Based on these negotiating objectives, the United States approached the intellectual property chapter with a draft text "based closely on [United States] law and developed through past bilateral negotiations."[168]

The United States' strongly pro-intellectual property stance left it relatively isolated among the TPP parties.[169] Although some other TPP parties already had

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160 Kimberlee Weatherall, *The TPP as a Case Study of Changing Dynamics for International Intellectual Property Negotiations*, *in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP 50, 53-54 (Tania Voon ed., 2013).

161 Pub L No. 114-26, § 101, 129 Stat 319 (2015) (Bipartisan Congressional Trade Priorities and Accountability Act of 2015).

162 For a detailed explanation of the role and scope of Trade Promotion Authority *see* Ian F. Fergusson & Richard S. Beth, *Trade Promotion Authority (TPA): Frequently Asked Questions* (Congressional Research Service Report No. R43491, July 2, 2015).

163 Bipartisan Congressional Trade Priorities and Accountability Act of 2015 § 102(b)(5)(A)(i)(II), 19 U.S.C. § 4201 (2015).

164 *Id*. § 102(b)(5)(A)(ii).

165 *Id*. § 102(b)(5)(A)(iv).

166 *Id*. § 102(b)(5)(A)(v).

167 *Id*. § 102(b)(5)(C).

168 Weatherall, *supra* note 160, at 54; *See also* Susy Frankel, *The Intellectual Property Chapter in the TPP*, *in* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT 157, 158-69 (Chin L. Lim, Deborah K. Elms & Patrick Low eds., 2012).

169 Inu Barbee & Simon Lester, *The TPP and the Future of Trade Agreements*, 2 LATIN AMERICAN J. INT'L TRADE L. 207, 216-17 (2014); Henry Farrell, *The United States Is Isolated in the Trans-Pacific Partnership Negotiations*, THE WASHINGTON POST (Nov. 18, 2013),

domestic systems reflecting the most protective international standards,[170] these countries were generally not supportive of enshrining even higher standards in the TPP, with the exception of Japan.[171] Other TPP parties came to the negotiating table with comparatively weak domestic intellectual property regimes. In fact, five of the eleven other TPP parties featured on the United States' intellectual property "Watch List" or "Priority Watch List" in 2015.[172] In Australia - whose intellectual property regime had already been heavily influenced by its bilateral PTA with the United States[173] - the government expressed strong resistance to any provisions that would require a change in domestic laws.[174] Based on leaked negotiating documents, New Zealand and Chile both proposed versions of an intellectual property chapter simply affirming the TRIPS Agreement standards with few additions.[175] Interestingly, several parties who otherwise opposed high intellectual property standards in the TPP wanted to see stronger levels of protection in relation to traditional knowledge and genetic resources.[176] The provisions on traditional knowledge and genetic resources included in the final TPP text are only aspirational, stating that the parties will "endeavor" to foster cooperation to "enhance the understanding of the issues"[177] and that "quality patent examination" may include the inclusion of relevant traditional knowledge in the prior art.[178]

This snapshot of the parties' different starting points for the negotiations demonstrates the extent of compromise that was necessary in order to conclude the intellectual property chapter. Although the final agreement contains a range of significant TRIPS-Plus provisions, the United States was unable to obtain several items on its wish-list.[179] For example, the United States had initially sought the inclusion in the TPP of limits on parallel importation, and an extension of the copyright term for films and sound recordings to 95 years.[180] In addition to compromise on these substantive points, the TPP provides transitional periods to facilitate some parties' compliance with new obligations.[181] Such periods are commonly included in intellectual property agreements for the benefit of developing

available at https://www.washingtonpost.com/news/monkey-cage/wp/2013/11/18/the-united-states-is-isolated-in-the-trans-pacific-partnership-negotiations.

170 Weatherall, *supra* note 160, at 51.

171 For an indication of the countries" negotiating positions on intellectual property, *see* Wikileaks, *Secret TPP Treaty: Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions* (Aug. 30, 2013 draft) (released Nov. 13, 2015).

172 Ambassador Michael G. Froman, U.S. Trade Representative, *2015 Special 301 Report* (Office of the United States Trade Representative, Apr. 2015).

173 Australia-United States Free Trade Agreement, ch. 17, signed May 18, 2004, entered into force Jan. 1, 2005 [2005] ATS 1.

174 Andrew Robb, Min. Trade & Investment, Austl., *Trans-Pacific Partnership (TPP) Pact to Drive Jobs, Growth and Innovation for Australia*, Media Release (Oct. 6, 2015).

175 Chile TPP Submission, *Preliminary Considerations for TPP IP Chapter* (Feb. 2011); *TPP Text Submitted by New Zealand - Intellectual Property* (Feb. 2011).

176 Frankel, *supra* note 168, at 158.

177 TPP, *supra* note 24, art. 18.16.2.

178 *Id*. art. 18.16.3(a).

179 For a more detailed overview of early U.S. proposals for the TPP intellectual property chapter, *see* Weatherall, *supra* note 160, at 54-55.

180 United States Proposal, *Trans-Pacific Partnership - Intellectual Property Rights Chapter*, arts. 4.2, 4.5(b)(i) (Feb. 10, 2011).

181 *See* TPP, *supra* note 24, art. 18.83.

nations, but the TPP also provides grace periods for some of its developed country parties. For instance, New Zealand has eight years to increase its term of copyright protection.[182]

B. ACCESS TO MEDICINES AND PROTECTION FOR BIOLOGICS

As noted above, the United States' negotiating objectives for the TPP included ensuring both strong protection for intellectual property (including for new and emerging technologies)[183] and that trade agreements provide access to medicines.[184] These competing goals reflect pressure from two different advocacy groups: on the one hand, the pharmaceutical companies that produce innovative drugs, and on the other hand, public health advocates seeking quick and affordable access to new medicines for all countries.[185] The final outcomes reached in the TPP reflect a compromise between these two positions, but arguably "satisfied neither side."[186] One of the most controversial aspects of the negotiation of the TPP in relation to access to medicines was the protection of biologics.[187] The term "biologics" is not exhaustively defined in the TPP, but countries must extend the protection to any:

> product that is, or, alternatively, contains, a protein produced using biotechnology processes, for use in human beings for the prevention, treatment or cure of a disease or condition.[188]

Examples of biologics include many cancer treatments and some medicines for the management of chronic conditions, such as rheumatoid arthritis.[189] If a biologic is new and inventive it may be eligible for a patent in accordance with the general provisions of the TPP,[190] like any other product.[191] Many PTAs recently negotiated by the United States include a separate and additional form of monopoly right for the developer's branded pharmaceuticals, known as data protection or data exclusivity.[192] For a certain period of time, data protection precludes the regulator from using data submitted by the developer of an innovative pharmaceutical in order to receive marketing approval, such as clinical trial results, to grant approval

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182 *Id*. art. 18.83.4(d).

183 Bipartisan Congressional Trade Priorities and Accountability Act of 2015 § 102(b)(5)(A), 19 U.S.C. § 4201 (2015).

184 *Id*. § 102(b)(5)(C).

185 Lee Branstetter, *TPP and the Conflict Over Drugs: Incentives for Innovation Versus Access to Medicines*, *in* ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOL. 2: INNOVATIONS IN TRADING RULES 20 (Jeffrey J. Schott & Cathleen Cimino-Isaacs eds., 2016).

186 *Id*.

187 *See* sources cited *supra* note 150.

188 TPP, *supra* note 24, art. 18.51.2.

189 Austl. Gov't., Dep't Foreign Affairs & Trade, *Outcomes: Biologics* (Oct. 6, 2015), *available at* http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-biologics.aspx.

190 TPP, *supra* note 24, art. 18.37.

191 Austl. Gov't. Dep't Foreign Affairs & Trade, *Outcomes: Biologics* (Oct. 6, 2015), *available at* http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-biologics.aspx.

192 On the distinction between these two concepts *see* Branstetter, *supra* note 185, at 22 n. 7.

to a generic form of the same medicine.[193] Once the data protection period expires, the regulator may use the information provided by the innovator to allow for faster approval of generic or biosimilar versions, avoiding the unnecessary duplication of some human or animal drug testing.[194] Under the TPP, as in previous United States' PTAs, parties are required to provide five years of data protection for pharmaceutical products.[195]

In comparison to traditional pharmaceuticals, which are typically small molecule medicines produced through chemical synthesis, biologics are expensive to develop.[196] For this reason, producers of biologics successfully sought a longer period of data protection for their products in the United States, and a twelve year data protection period was introduced in 2010 as part of the legislative package negotiated to pass the "Obamacare" reform of the domestic health system.[197] Industry lobbied the United States to push for a similarly long data protection period for biologics to be included in the TPP,[198] but other negotiating parties - particularly Australia - refused to agree.[199] During the last days of the negotiation, a compromise was reached,[200] which requires TPP parties to provide either: (a) eight years of data protection;[201] or (b) five years of formal data protection, as long "other measures" provide "effective market protection" that delivers a "comparable outcome in the market."[202]

The language of this provision appears deliberately vague, with no further definition of these "other measures" or what they might include, aside from a recognition that "market circumstances also contribute to effective market protection."[203] In Australia's view, its current system of protection for biologics fulfils these requirements because, even though it offers only five years of data protection, other features of its patent system and regulatory environment for pharmaceuticals effectively extend the monopoly period granted to the originators of biologics.[204] The ambiguous drafting of the provision on biologics, and ongoing debate regarding its interpretation,[205] demonstrate the difficulties that can arise as a result of having to compromise between staunchly divided countries.

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193 *See e.g.*, TPP, *supra* note 24, art. 18.50.

194 Lawrence A. Kogan, *The U.S. Biologics Price Competition and Innovation Act of 2009 Triggers Public Debates, Regulatory/Policy Risks, and International Trade Concerns*, 6 Global Trade & Customs J. 513, 515 (2011).

195 TPP, *supra* note 24, art. 18.50.1.

196 Austl. Gov't., Dep't Foreign Affairs & Trade, *Outcomes: Biologics* (Oct. 6, 2015), *available at* http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-biologics.aspx (last visited Apr. 20, 2016).

197 *See* Biologics Price Competition and Innovation Act (2009), Title VII Patient Protection and Affordable Care Act (2010), 42 U.S.C. § 18001 (2010). *See also* Kogan, *supra* note 194.

198 Branstetter, *supra* note 185, at 25.

199 *See* sources cited *supra* note 150.

200 *Id.*

201 TPP, *supra* note 24, art. 18.51.1(a).

202 *Id*. art. 18.51.1(b).

203 *Id*. art. 18.51.1(b)(iii).

204 Australian Parliament, Evidence to the Joint Standing Committee on Treaties, Canberra, Feb. 22, 2016, 7-8 (Elizabeth Ward, First Assistant Secretary; TPP Chief Negotiator, Office of Trade Negotiations, Dep't Foreign Affairs & Trade).

205 *Id.*; *cf*. Len Bracken, *Australia May Deal on TPP Drug Concern, Hatch Says,* Int'l Trade Daily, (Feb. 24, 2016), *available at* http://www.bna.com/international-trade-daily-p6099.

The longer period of data protection offered for biologics was a novel inclusion in the TPP, but it is not the only provision that may impact on access to medicines.[206] Other relevant provisions include obligations to allow for extension of patents in the face of unreasonable regulatory delay,[207] and requirements to link marketing approval for generic drugs with notification to the holder of the patent for the relevant originator drug, to allow them an opportunity to seek remedies for patent infringement (known as "patent linkage").[208] Beyond the intellectual property chapter, other elements of the TPP may also impact upon access to medicines, including an annex to the transparency chapter relating to the marketing and regulatory review of pharmaceutical products and medical devices.[209] Although the combined impact of these provisions has given rise to considerable concern among public health advocates,[210] the TPP also provides some limited flexibilities that allow parties to derogate from their obligations to promote access to medicines.[211] In particular, nothing in the intellectual property chapter should prevent a party from taking measures consistent with the WTO's Declaration on TRIPS and Public Health.[212] That Declaration affirms the right of WTO Members to grant compulsory licenses of patents for the production of generic medicines,[213] and to determine what constitutes a national emergency for the purposes of exceptions provisions in the TRIPS Agreement.[214]

C. Copyright Enforcement

Another aspect of the TPP intellectual property chapter that has been highly controversial is its provisions relating to the enforcement of intellectual property rights, particularly copyright. Two major efforts made prior to the TPP to strengthen mechanisms of enforcement for intellectual property rights faced significant public resistance, beyond anything seen in previous controversies related to intellectual property.[215] The first of these was the Stop Online Piracy Act (SOPA),[216] a bill introduced in the United States Congress to target websites that engage in, enable or facilitate copyright infringement.[217] It would also have imposed obligations

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206 *See* generally Branstetter, *supra* note 185; Brook K. Baker, *Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere*, 13 PLoS Medicine 1 (2016).

207 TPP, *supra* note 24, arts. 18.46, 18.48.

208 *Id*. art. 18.53.

209 *Id*. annex 26-A: Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices.

210 *See e.g.*, Medecins Sans Frontieres Access Campaign, *Spotlight on Trans-Pacific Partnership Agreement* (Jan. 2016), *available at* http://www.msfaccess.org/spotlight-on/trans-pacific-partnership-agreement.

211 TPP, *supra* note 24, arts. 18.6, 18.50.3.

212 *Id*. art. 18.6.

213 World Trade Organization, Declaration on the TRIPS Agreement and Public Health, (Ministerial Declaration), ¶ 5(b), WTO Doc WT/MIN (01)/DEC/2 (Nov. 14, 2001).

214 *Id*. ¶ 5(c).

215 Weatherall, *supra* note 160, at 65.

216 Stop Online Piracy Act, H.R. 3261, 112th Congress (2011).

217 *Id.* § 103(a) (1)(B). *See also* Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 Nw J. Technology & Intell. Property 21, 21-22 (2013).

on internet intermediaries, including internet service providers (ISPs), payment networks and search engines, to block access to foreign websites that facilitate online piracy.[218] This bill was met with massive protests from technology companies, including Google and Wikipedia, which included thousands of websites participating in a shut down on 18 January 2012.[219]

Shortly after the SOPA controversy, another flashpoint for opposition to increased copyright enforcement emerged: the Anti-Counterfeiting Trade Agreement (ACTA).[220] ACTA is an international treaty requiring parties to provide criminal penalties for a range of activities related to copyright infringement, including aiding and abetting (terms that are undefined in the treaty).[221] ACTA was negotiated in 2010 and opened for signature in 2011, but consideration of its ratification in Europe in early 2012 led to significant public opposition and protest.[222] Five of the eight original signatories of ACTA are TPP parties: Australia, Canada, Japan, Singapore, and the United States.[223] In spite of these countries demonstrating an appetite for higher international standards for copyright enforcement, the public reaction to SOPA and ACTA influenced and shaped debate regarding the TPP's intellectual property provisions.[224]

The TPP intellectual property chapter includes several important obligations relating to the enforcement of intellectual property rights. One provision found in some previous United States PTAs[225] is a requirement to provide both civil and administrative penalties for circumventing technological protection measures (TPMs) employed by copyright holders to control access to their work.[226] Criminal penalties must be provided for any person "found to have engaged willfully and for the purposes of commercial advantage or financial gain" in the circumvention of TPMs.[227] To address online piracy and copyright violations, each TPP party must establish a "framework of legal remedies and safe harbors" that includes "legal incentives" for ISPs to cooperate with copyright owners to deter the unauthorized storage and transmission of copyrighted works.[228] Upon obtaining knowledge of the copyright infringement, ISPs must "expeditiously remove or disable access" to the material.[229] To counterbalance this obligation, ISPs are provided with a safe harbor from monetary damages for copyright infringement on their network that they do not "control, initiate or direct."[230]

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218 Stop Online Piracy Act, H.R. 3261, 112th Congress (2011), § 102(c)(2).
219 Carrier, *supra* note 217, at 23; Weatherall, *supra* note 160, at 65-66.
220 Anti-Counterfeiting Trade Agreement, [2011] ATNIF 22, opened for signature Oct. 1, 2011, not yet entered into force.
221 *Id.* art. 23.4.
222 Weatherall, *supra* note 160, at 66.
223 Ministry of Foreign Affairs, Government of Japan, *Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties* (Oct. 1, 2011).
224 Weatherall, *supra* note 160, at 66-67.
225 *See e.g.*, Australia-United States Free Trade Agreement, signed May 18, 2004, entered into force Jan. 1, 2005, art. 17.4.7. [2005] ATS 1.
226 TPP, *supra* note 24, arts. 18.68.1 and 18.74.
227 *Id.* art. 18.68.1.
228 *Id.* art. 18.82.1.
229 *Id.* art. 18.82.3(a).
230 *Id.* art. 18.82.1(b).

While these provisions are certainly significant, the United States had proposed more extensive enforcement obligations that did not make it into the final agreement. These included criminal penalties for "significant willful" copyright violation, even with "no direct or indirect motivation of financial gain."[231] Further demonstrating the effort to balance increased enforcement with the public interest in accessing copyright material, the TPP includes an article requiring each party to "endeavor to achieve an appropriate balance in its copyright and related rights system", including by allowing the use of copyrighted material for legitimate purposes such as criticism or teaching.[232] Many previous international treaties, such as the TRIPS Agreement, allow the parties to grant exceptions to intellectual property rights.[233] However, the TPP is novel in actively suggesting that parties employ such exceptions.

The issues of access to medicines and the protection of biologics, as well as enforcement of copyright, demonstrate the negotiating dynamic that drove the intellectual property chapter of the TPP. Although the United States pushed for some of the highest standards ever seen in a PTA, in a number of important areas other TPP parties resisted, forcing compromise. Overall, however, the TPP provides for a relatively high standard of intellectual property protection. This may be an important factor in the future of the agreement, and whether or not it becomes the basis for a more comprehensive Asia-Pacific regional trade agreement.[234] In particular, it remains to be seen how the presence of these stringent disciplines on intellectual property will impact the likelihood of major players in the region that are not yet in the TPP - particularly China - seeking to join the agreement in the future.[235] The extent of intellectual property protection required by the TPP is likely to be one of the points that clearly distinguishes it from the other major plurilateral trade agreement currently being negotiated in the region: the Regional Comprehensive Economic Partnership (RCEP).[236] RCEP is likely to cover intellectual property,[237] but its provisions are unlikely to go far beyond the requirements of the TRIPS Agreement.[238]

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231 United States Proposal, *Trans-Pacific Partnership - Intellectual Property Rights Chapter*, art. 15.1(a) (Feb. 10, 2011).

232 TPP, *supra* note 24, art. 18.66.

233 *See e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13.

234 *See generally*, Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 Asian J. WTO & Int'l Health L. & Pol'y 359 (2013).

235 Weatherall, *supra* note 160, at 62-63; Larry Backer, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of a New World Trade Regulatory Order*, 13 Wash. U. Global Stud. L. Rev. 49 (2014); Barbee & Lester, *supra* note 169, at 216.

236 *See* Austl. Gov't. Dep't Foreign Affairs & Trade, *Regional Comprehensive Economic Partnership*, *available at* http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx.

237 Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership, *available at* http://www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf (last visited Apr. 20, 2016).

238 Kolsky Lewis, *supra* note 234, at 368.

V. Regulatory Coherence

In stark contrast to its intellectual property disciplines, the regulatory coherence chapter of the TPP is one of the shortest in the agreement, at just seven pages. Yet its textual simplicity should not undermine the importance of this chapter, which is one of the first on this topic to be included in any PTA.[239] Regulatory coherence in the context of the TPP is defined as:

> the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment.[240]

The inclusion of regulatory coherence in the TPP reflects a shift in international trade policy toward focus on regulatory barriers to trade.[241] It builds on work done on "regulatory reform" in the context of the Organization for Economic Co-operation and Development (OECD) and the APEC forum.[242] In addition to its chapters targeting specific categories of regulatory barrier to trade - such as sanitary and phytosanitary measures, and technical barriers to trade - the TPP sets standards for regulatory processes across the whole range of government activity through the regulatory coherence chapter. While its breadth has led some to be wary of the concept of regulatory coherence,[243] it is important to note from the outset that this chapter of the TPP is not subject to dispute settlement,[244] and that many of its provisions are about institutional frameworks and international cooperation.[245] Furthermore, each party to the TPP is able to decide the scope of its measures that are covered by the regulatory coherence obligations, subject to the aspiration that "each Party should aim to achieve significant coverage."[246] In this section we examine the "good regulatory practices" required by the TPP, particularly regulatory impact assessment (RIA), as well as the institutional

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239 The only other PTA with a chapter on regulatory coherence or cooperation is CETA, which is currently being finalised.

240 TPP, *supra* note 24, art. 25.2.1.

241 *See* Gary Winslett, *How Regulations Became the Crux of Trade Politics*, 50 J. World Trade 47 (2016); Andrew Lang, World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order 169-70 (2013); Robert Howse, *From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime*, 96 Am. J. Int'l L. 94, 101 (2002).

242 *See e.g.*, OECD, *APEC-OECD Integrated Checklist on Regulatory Reform* (2008), *available at* http://www.oecd-ilibrary.org/governance/apec-oecd-integrated-checklist-on-regulatory-reform_9789264051652-en; APEC, *Information Notes on Good Practice for Technical Regulation* (APEC, Sept. 2000).

243 *See e.g.*, Jane Kelsey, *Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence* 2 (Oct. 23, 2011), *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf.

244 TPP, *supra* note 24, art. 25.11.

245 *See e.g.,* TPP, *supra* note 24, arts. 25.4, 25.6 and 25.7.

246 TPP, *supra* note 24, art. 25.3.

framework established for future deepening of integration with regard to regulatory barriers to trade.

A. GOOD REGULATORY PRACTICES

Under the TPP, each party must "endeavor to ensure that it has processes or mechanisms to facilitate the effective interagency coordination and review of proposed covered regulatory measures", and "shall consider" establishing and maintaining a national coordinating body.[247] Although this provision does not prescribe the form that this body should take, the United States' proposal to include this provision was based on its desire that other parties create an agency or mechanism with a function similar to its Office of Information and Regulatory Affairs (OIRA).[248] The purpose of this coordination mechanism is to ensure that the development of measures adheres to "good regulatory practices", while minimizing overlap or duplication between agencies and advising on systemic regulatory improvements.[249]

The good regulatory practices encouraged by the TPP centre around the conduct of RIA, "to assist in designing a measure to best achieve the Party's [regulatory] objective."[250] The TPP allows some flexibility by acknowledging "differences in the Parties' institutional, social, cultural, legal and developmental circumstances."[251] Nevertheless, it states that RIA should "rely on the best reasonably obtainable existing information"[252] and include the following elements: (a) an assessment of the need for a regulatory proposal;[253] (b) an examination of the costs, benefits and risks of feasible alternatives;[254] and (c) an explanation of why the selected regulatory approach was chosen.[255]

These provisions of the TPP go further in prescribing general standards for the development of regulatory measures than any previous PTA. The good regulatory practices it requires are focused on improving domestic governance, and nothing in their text is explicitly linked to international trade or investment. In contrast, the European Union's proposal for the regulatory coherence chapter of its TTIP with the United States contains far narrower obligations relating to impact assessment.[256] Under the proposal, the European Union and United States would affirm their intention to carry out RIA in accordance with their respective domestic rules and procedures, but with the added requirement that the parties examine "relevant international

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247 *Id.* art. 25.4.1.

248 Thomas J. Bollyky, *Regulatory Coherence in the TPP Talks*, in THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST-CENTURY TRADE AGREEMENT 171, 181 (Chin L. Lim, Deborah K. Elms & Patrick Low eds., 2012).

249 TPP, *supra* note 24, art. 25.4.2.

250 *Id.* art. 25.5.1.

251 *Id.* art. 25.5.2.

252 *Id.* art. 25.5.2(d).

253 *Id.* art. 25.5.2(a).

254 *Id.* art. 25.5.2(b).

255 *Id.* art. 25.5.2(c).

256 EU Textual Proposal for TTIP Regulatory Cooperation Chapter, Apr. 2015 (publicly released May 4, 2015), *available at* http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf.

instruments", the "regulatory approaches of the other Party", and the "impact on international trade and investment" when evaluating options under consideration.[257]

Given the diverse economic and political systems of the TPP parties, it may seem surprising that they were able to reach common ground on how regulatory measures should be developed. All TPP parties are members of APEC and, in that context, had already expressed their support for regulatory reform along these lines. In their 2011 Leaders' Declaration, the APEC nations committed to ensuring transparency, implementing internal coordination mechanisms, and developing or strengthening domestic RIA procedures.[258] Thus, while the TPP sets an important new precedent for the treatment of regulatory measures in PTAs, the mechanisms and processes it endorses have been the subject of considerable discussion and agreement in other fora.

B. Cooperation, Harmonisation and Institutional Provisions

The literature on the inclusion of regulatory coherence or cooperation requirements in PTAs has generally focused on the integration of parties' domestic regulatory systems through institutional cooperation, harmonization of standards, or mutual recognition arrangements.[259] Although these aspects of regulatory coherence are the key elements of other mega-regional PTAs - such as CETA and the TTIP[260] - the extent of the cooperation provisions that would be included in the TPP was always somewhat doubtful.[261] While harmonization of regulatory standards would be the most effective means of eliminating the harm of regulatory barriers to trade, this goal is politically unrealistic in most circumstances.[262] Substantive harmonization or mutual recognition of each party's domestic standards is rare, and generally limited to situations involving a high degree of political, economic and/or cultural similarity between the parties. For example, within the cooperative framework established by the 1983 Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA),[263] Australia and New Zealand have achieved mutual

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257 Transatlantic Trade and Investment Partnership, art. 7.

258 APEC Leaders Declaration, Annex D, Strengthening Implementation of Good Regulatory Practices, (Nov. 12-13, 2011), *available at* http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexD.aspx.

259 *See e.g.,* Bollyky, *supra* note 248; Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences* 18 J. Int'l Econ. L. 625 (2015).

260 Elizabeth Sheargold & Andrew D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?* World Trade Rev. (FirstView Articles) 1, 9-11 (2016).

261 Bollyky, *supra* note 248; Rodrigo Polanco, *The Trans-Pacific Partnership Agreement and Regulatory Coherence*, *in* Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership 231 (Tania Voon ed., 2013).

262 Alberto Alemanno, *Is There a Role for Cost-Benefit Analysis Beyond the Nation-State?: Lessons from International Regulatory Co-Operation*, *in* The Globalization of Cost-Benefit Analysis in Environmental Policy 104, 105 (Michael A. Livermore & Richard L. Revesz eds., 2013).

263 *Australia-New Zealand Closer Economic Relations Trade Agreement*, signed Mar. 28, 1983, 1329 UNTS 176 (entered into force Jan. 1, 1983).

recognition of certain product standards and professional qualifications,[264] as well as a joint food standards code.[265] Given the range of parties involved in the TPP, deep integration or harmonization provisions were never likely to have been included in the regulatory coherence chapter.

The institutional mechanisms created in the TPP do have the potential to provide significant avenues for integration of the parties in the future, although the depth of integration or harmonization that they will achieve is uncertain. Article 25.6 of the TPP establishes a Committee on Regulatory Coherence[266] to consider the implementation and operation of the chapter, as well as "identifying future priorities, including potential sectoral initiatives and cooperative activities."[267] Apart from a direction that it coordinate with other TPP bodies and relevant forums to avoid duplication of work,[268] the text provides no guidance about the sectoral activities or other cooperation initiatives that the Committee might pursue. At least once every five years, the Committee must review the good regulatory practices espoused by the TPP and consider whether the chapter could be improved.[269] Another clear directive to the Committee is that it "establish appropriate mechanisms to provide continuing opportunities for interested persons of the Parties to provide input on matters relevant to enhancing regulatory coherence."[270]

In addition to work through the formal committee process, the TPP encourages parties to cooperate through mechanisms such as information exchanges and dialogues.[271] The language of this requirement provides a non-exhaustive list of examples of regulatory cooperation, suggesting that the choice of cooperation activities "take into consideration each Party's needs."[272] The use of these sorts of cooperation mechanisms, while not usually required by PTAs, is often already occurring.[273] The TPP has formalized these processes to some extent by including them in treaty text. However, the flexible and open-ended nature of these obligations means that, in practice, the efficacy of these mechanisms is not guaranteed and will be determined by the political will of the parties. Despite their limitations, including these provisions in a plurilateral treaty with a diverse range of members sets an important precedent that is likely to influence many future PTAs.

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264 Debra P. Steger, *Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements*, 39 Leg. Issues Econ. Integration 109, 115 (2012); Council of Austl. Gov'ts., *The Trans-Tasman Mutual Recognition Arrangement*, *available at* https://www.coag.gov.au/the_trans-tasman_mutual_recognition_arrangement (last visited Apr. 20, 2016).

265 Food Standards Australia and New Zealand, *About FSANZ*, *available at* http://www.foodstandards.gov.au/Pages/default.aspx (last visited Apr. 20, 2016).

266 TPP, *supra* note 24, art. 25.6.1.

267 *Id.* art. 25.6.2.

268 *Id.* arts. 25.6.3 and 25.6.4.

269 *Id.* art. 25.6.7.

270 *Id.* art. 25.8.

271 *Id.* art. 25.7.

272 *Id.* art. 25.7.

273 Alemanno, *supra* note 262, at 106-08.

VI. Conclusion

In this article we have examined four key areas of the TPP, each of which helps to demonstrate the negotiating dynamics and policy tensions that shaped the formation of this significant mega-regional PTA. From its inception, the TPP was intended to be "ambitious, comprehensive, high standard", yet also "balanced."[274] Achieving both these goals required the TPP to go beyond previous PTAs in some areas, such as its new disciplines on regulatory coherence, while creating new flexibilities in other areas, such as investment. The negotiating dynamics that drove the agreement are clearly reflected in its outcomes, with the United States pushing for high standards in key areas such as intellectual property, but having to compromise in order to reach consensus with such a diverse range of parties. The significance of the TPP and the ways in which it has balanced competing interests is not limited to the twelve current parties, as the agreement is likely to influence many current and future PTA negotiations, such as the ongoing negotiations for the TiSA and the TTIP.

Although the TPP text has been finalized and signed, the treaty still faces a long process to achieve ratification in many parties, particularly the United States. Even once (or if) the treaty comes into force for the current parties, the ambition of the TPP will not end. The final paragraph of the preamble to the pact states that one of the objectives of the parties is to "expand their partnership by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration."[275] The TPP sets out a detailed process governing accession of new members, which requires the agreement of all parties and the establishment of a working group to negotiate the terms and conditions of accession.[276] Yet for this process to become relevant, other states or customs territories must seek membership of the TPP. Whether or not major economies in the Asia-Pacific region, such as China, South Korea and Indonesia, will pursue membership of the TPP is still highly uncertain. The high standards pursued by the treaty, such as its TRIPS-Plus intellectual property provisions and negative list approach to services liberalization, may deter some from seeking membership. Again, the TPP can be understood as representing a difficult balancing act between the push for greater trade liberalization and innovative disciplines, and the desire to create an attractive basis for a future "Free Trade Area of the Asia Pacific."[277]

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[274] Ambassador Michael Froman, U.S. Trade Representative, *Transcript of the Trans-Pacific Partnership Atlanta Ministerial Closing Press Conference* (Oct. 5, 2015).

[275] TPP, *supra* note 24, preamble.

[276] *Id.* art. 30.4.

[277] *Id.* preamble.