

The Trans Pacific Partnership Agreement: Moving Beyond the WTO

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The Trans-Pacific Partnership (TPP)² is a US engendered free trade agreement (FTA) among 12 Asia-Pacific countries, with aspirations to become a 21st century World Trade Organization — plus (WTO+) trade agreement. If ratified by all of the member states, it would be the largest regional FTA in which the US participates. Despite the fact that the PRC is not a member of this agreement, the rules of origin imbedded in the agreement would allow the PRC to fully participate in the agreement as long as their products are part of the value chain of member country exports to the other participants. Since the US already has FTAs with 6 of the 11 other countries participating in the TPP, this agreement is not about reducing tariff barriers. In fact, apart from the trade with Mexico, Canada and Japan, the remaining TPP participants represent an inconsequential percentage of US trade.

As the hegemon of this agreement, the US seeks to liberalize investment rules and establish new rules and disciplines in the region beyond what exists in the WTO. The most striking new trade rule corrections contained in the TPP involve reducing barriers to digital trade, regulating transactions of state-owned enterprises (SOEs), and ensuring regulatory coherence. That is, the TPP intends to establish a new understanding of “the global competition rules” to govern trade in goods and services and investment between its member states and those non-member countries who would benefit from future participation with TPP members. In effect the TPP is a US attempt to revitalize the post-Doha rules-based global trading system.

There are 30 chapters in the TPP agreement, ranging from increased market access, such as continued elimination of tariff and nontariff barriers and quotas within agriculture, to specific system related standards, such as intellectual property rights, treatment of state-owned enterprises, digital and E-commerce standards, industrial regulatory issues, and labor and environmental standards.

In terms of market access one would expect that the agricultural agreements within TPP would be exceptionally positive for the US given the importance of agricultural exports to its trade sector. Nothing could be further from the truth. The TPP has not continued the process of eliminating tariffs and tariff-quotas initiated in earlier US-FTA agreements with Australia, Canada, Chile, Mexico, Peru, and Singapore. For the TPP to make a dent in agricultural protectionism, one would have expected that Canadian dairy and poultry quotas would have been eliminated, along with Mexican barriers in sugar and Japanese quotas and tariffs on a wide range of agricultural goods, including corn and rice. This has not been the case within the TPP. The US has, in effect, decided to undertake a short-term strategy of appeasing its agricultural lobby at the expense of its citizens and at the expense of liberalizing agricultural markets in the potential new entrants into

¹ See Pelzman, *Spillover Effects of China Going Global*, London: World Scientific Press, 2016.

² Currently the TPP partners include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

the TPP – the PRC and India. It is unfortunate that in the post-TPP environment the US remains the second-most protectionist TPP party in agriculture, second only to Japan. The US agricultural lobby should be pleased to maintain its quotas on sugar, to keep its high tariffs on beef for an additional 15 years, and to keep its tariffs on dairy products for 30 years.

In contrast to agriculture, the TPP makes a significant contribution in trade enforcement measures as they affect trade in digital products and E-commerce. These issues are covered in Chapter 18 and in part in Chapter 14. The key contributions contained in the agreement is the application of the principle of nondiscrimination as it applies to E-commerce. Furthermore, the TPP prohibits customs duties on digital products and electronic transmissions of digital assets, adopts and maintains consumer protection laws against online fraud, adopts measures to stop unsolicited online commercial messages (spam), and adopts measures protecting online privacy and cybersecurity. It also prohibits forced disclosure of software source code with governments or commercial rivals.

The most important pro competition measures contained in the TPP are embedded in Chapter 18 which focuses on protecting intellectual property (IP) rules. While most of the existing signatory countries are in their infancy on IP protection, this agreement outlines a set of ‘best practices’ which will support and protect innovation in the coming decades. It is very difficult to empirically measure the benefits of these codified IP rules to local innovators. At a minimum the TPP expands the level of IP protection beyond the current WTO provisions contained in the 1994 Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

The major downside of the TPP rules for IP protection is its discriminatory treatment of both product categories and member countries. In the case of biologic medicines, the TPP provides countries a choice between an eight-year data exclusivity period, or a five-year period along with an additional three-year period “recognizing market circumstances.” For pharmaceuticals, the TPP requires member countries to provide a five-year data exclusivity period for patent linkages, and patent term extensions in their domestic law, and an additional three years of data exclusivity for new clinical information for an existing drug covering a new “indication, formulation, or administration.” The implementation period for these new rules depends on the level of member country economic development and ability to protect public health “consistent with the WTO TRIPs agreement.” As one would expect, the transition periods vary by country and provision, ranging up to 10 years with possible extensions for developing countries like Vietnam, at the discretion of the TPP Commission.

Chapter 3 of the TPP agreement contains the intricate rules of origin (ROO) requirements for duty free access. The length of the chapter and the product specificity contained in the appendixes attached to it, confirm the long standing presumption that the TPP will continue to keep trade in sensitive sectors under protective control. The two major groups where this is patently obvious include textiles and apparel and automobiles. Chapters 2, 4 and Annex IV cover market access rules affecting trade in textiles and apparel, where ROO rely on a “yarn-forward” rule of origin, requiring components be sourced within the TPP region, including the yarn or fabric. To verify compliance in this sector, Chapter 4 includes a multiple-page guideline on site visits. Clearly the TPP agreement intends to limit trade in textiles and apparel to the insiders.

Within the automobile sector, the existing ROO requires 45% or 55% regional value content for finished vehicles, depending on the method of calculation, and 35%-45% for auto parts. Generally, the percentages in this sector relate to the degree of transformation a product undergoes in a TPP partner country or the share of a product’s value that is produced within the TPP region. The automobile sector within the PRC is expected to benefit from these set of ROO requirements.

In order to expand the WTO general and unenforceable suggestions with respect to SOE behavior, the TPP includes a chapter (Ch. 17) on SOEs stipulating certain non-competitive SOE activities that negatively affect trade in goods and services and investment. The intent of these new rules is to require institutional economic reforms in TPP members with substantial state sectors, such as Malaysia and Vietnam. Under TPP rules SOEs are designated as non-competitive “monopolies.” A firm is simplistically considered an SOE if the government owns more than 50% of capital share, controls more than 50% of voting rights, or selects a majority of board members. The long history of privatization in the former Soviet Union proves the ineffectiveness of this simple definition of an SOE. Nevertheless, the TPP intends to institutionalize reporting requirements that aim to ensure SOEs make purchase and sale decisions in a nondiscriminatory manner and on the basis of commercial considerations. It prohibits noncommercial assistance to SOEs that adversely impact another TPP party and authorizes TPP country courts to have jurisdiction over foreign SOEs operating in their territory and authorize their antitrust bodies to regulate the economic activities of SOEs and domestic private firms. Overall, the new set of “non-market” intrusive rules for SOE behavior will make it much more challenging for the PRC to join at a later date.

It is an accepted economic paradigm that long-term economic prosperity stems primarily from competition and innovation. Will the five thousand plus page TPP agreement result in a net positive outcome in terms of competition and innovation? How much competition does it really encourage in those smaller TPP countries with limited markets? Despite the many years of negotiations and thousands of printed pages, the TPP falls short of its potential. Whether something positive will arise in two or three decades is yet uncertain. What is certain is that all the exceptions contained in the TPP, by country and product, will neutralize many, if not all, of the pro-competitive aspirations of this agreement.