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## **The Trans-Pacific Partnership: NAFTA 2.0 or Doha Revisited?**

**Cracks, Crevices and Imbalance in the  
Trans-Pacific Partnership Negotiations**

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## **Abstract**

This report reviews the myths, spin and leaks surrounding the negotiations of the Trans-Pacific Partnership (TPP).

The TPP is a trade agreement which tackles the usual trade agreement issues in a deeper and broader way – and adds several important non-traditional issues to an already complicated mix.

Like the Doha Round, the TPP has become enmeshed in differences and standoffs. Progress has been limited by differences in size, economic clout and levels of development of the participants.

The TPP is a made-in-USA initiative. It is competing for the hearts, minds and wallets of members of the Association of South East Asian Nations (ASEAN) with the Regional Comprehensive Economic Partnership (RCEP), ASEAN +6, which includes China, India Japan and Korea, but not the USA. The 64 Trillion Yen question for Canada is: Will Japan join the TPP?

TPP is not only about trade and investment – and safeguarding and advancing the interests of Hollywood, research-based pharmaceutical companies and corporate America (as well as corporate interests in other economically advanced countries in the region). It is also about enhancing/restoring U.S. military/political influence in Asia.

Trade agreements in Asia and the Pacific must accommodate particular country interests and be flexible. TPP is not. It has been caught up in the complexities and the extreme rhetoric of the promoters. It has not adequately understood or addressed the economic realities of the smaller participants.

This report analyzes the sensitivities of the participants to issues on the table. It also identifies the cracks and crevices in the allegedly comprehensive façade and foundation, as well as nascent movements from the extremes to the middle. Finally, it looks at the implications (of all of the foregoing) for progress on contentious issues during the negotiations.

It tries to answer a very basic and important question: Will the TPP live up to its promise to be NAFTA 2.0 or are the participants looking at Doha Revisited?

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*“Rules? In a knife fight? No Rules.”*

*Harvey Logan to Butch Cassidy,  
“Butch Cassidy and the Sundance Kid”*

## **Trans-Pacific Partnership: NAFTA 2.0 or Doha Revisited?**

### **EXECUTIVE SUMMARY**

1. Next week in Auckland, Canada and Mexico will, at long last, join the Trans-Pacific Partnership (TPP) as full partners.
2. Will the TPP live up to its impressive advance billing or will the cracks and crevices in its façade and its foundation – which are becoming more apparent with every new leak, press report and counterproposal -- shunt the TPP express onto the Doha track?
3. The TPP will be far from comprehensive. Public reports reveal that there are already exclusions, exceptions and reservations, varying in importance from the picayune to the colossal. The wholesale exemption of U.S. states from many of the important proposals currently on the table is clearly colossal.
4. Many reservations and exclusions are from the U.S., which has been driving the negotiations to date. We should expect many more, from all parties. At the end of the day, like most trade deals, the final product will end up being decided by a balance of exclusions.
5. The TPP is built on the Trans-Pacific Strategic Economic Partnership (P-4) agreement concluded in 2006 among Brunei, Chile, New Zealand and Singapore. The P-4 was a flexible agreement that accommodated differences among the Parties. It is a so-called living agreement which others willing to accept its terms could join.<sup>1</sup>
6. In 2008, President Bush asked if the U.S. could join. The big fish was welcomed into a rather tiny pond.
7. Colombia applied in 2010 – but its application was rejected presumably because it was not a member of APEC. Or was it because the US-Colombia deal had not been completed? It is still possible that Japan, Korea, Thailand and the Philippines will join the negotiations at a later stage.

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<sup>1</sup> P-4 Article 20.6 reads:

1. This Agreement is open to accession on terms to be agreed among the Parties, by any APEC Economy or other State. The terms of such accession shall take into account the circumstances of that APEC Economy or other State, in particular with respect to timetables for liberalisation.

2. The agreement on the terms of accession shall enter into force 30 days following the date of deposit with the depositary of an Instrument of Accession which indicates acceptance or approval of such terms.

8. President Obama committed to the negotiations on November 14, 2009 at the APEC summit in Honolulu. That was the eighth anniversary to the day of the launch of the Doha Round in Qatar. Ominous?
9. The P-4 has been hijacked. The present deal has become a U.S. initiative. Not only did the U.S. re-decorate the P-4, they restructured the building, added wings and took charge.
10. The United States is hell-bent on re-making its trading partners in its own image.
11. Two target end dates have been set – tied to APEC Leaders summits in 2011 and 2012. Both dates were missed. Now President Obama and about half of the TPP country leaders are aiming, fingers and toes crossed, for October 2013. Linking end dates to the Annual APEC bodies' photo-op is not a great idea. Could the TPP be headed for the Never Never Land where the Doha Round lies resting?<sup>2</sup>
12. Our research suggests that the TPP was never what it was advertised to be. There has been little progress to date and some of the more adventurous U.S. initiatives have been stalled by the underwhelming response of its trading partners.
13. There are many sensitive issues that TPP participants have addressed by way of exclusion or reservation in their trade regimes and in other bilateral and regional negotiations. (Many are identified in this report.) Notwithstanding the Americans' rush to achieve a comprehensive gold standard deal – which is more likely to turn out to be 10 karat gold-plated – movement on these sensitivities will not willingly be conceded to the U.S.
14. The sketchy reports and strategic leaks available to the public suggest the TPP does not offer enough balance and mutual benefits necessary to attract broad support.
15. Differences in levels of economic development and a general lack of willingness by other countries to adopt U.S. laws and regulations are very problematic.
16. It appears that Washington has begun to recognize that its over-reaching approach and over-management of the process is leading to a level of resistance which could kill the negotiations.<sup>3</sup>
17. We expect to see some flexibility from the U.S. at Auckland.<sup>4</sup> This will be welcome. Very likely it will only be a cautious start. It will need to be further developed – more deeply and more broadly – before others will engage in meaningful negotiations.
18. The negotiations are not nearly as completed as the principal promoters suggest. “Nearly complete”, when no one expects the deal to be done until at least a year from now,

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<sup>2</sup> Notwithstanding the hype and propaganda, the leaders did not include Chile, Peru, Mexico and Canada.

<sup>3</sup> “Breakthroughs Not Likely On Sensitive Products At Auckland TPP Round, Inside U.S. Trade”, November 21, 2012

<sup>4</sup> Ibid.

sounds like the WTO mantra that the negotiations are 80% complete (and have been for years) and only 20% remains to be completed.

19. In fact, new trade negotiations are built on previous agreements – which provide the agreed basis for the next effort. As such, they begin with at least 75% agreed.
20. The measurement should be that 20-25% of the issues are new – and when 20% of TPP issues are left to be decided – this really means that 80% of the core negotiating issues are unresolved.
21. This is why the Comprehensive Economic and Trade signatories with Europe have taken so long to close. Because no one will blink until late in the eleventh hour.
22. After more than a decade of stagnation and frustration with the Doha Development Agenda, it is fair to ask “is the TPP NAFTA 2.0 or Doha revisited?”
23. The U.S appears to be treating the TPP as a hub and spoke negotiation. It is a series of separate bilateral negotiations on market access under a single umbrella with each of the other 10 partners.
24. The market access negotiations are an unstructured mess – a spaghetti bowl of FTAs with different coverage, schedules and origin rules. The U.S. is, in effect, re-selling access to its markets by trying to impose on the other participants its own agenda for the so-called 21st Century issues.
25. There are 26 chapters in the agreement. These range from the usual market access negotiations in goods, services, and agriculture, to intellectual property rights, services, government procurement, investment, rules of origin, competition, labor, and environmental standards and other disciplines.
26. Suggestions that the TPP is not a trade agreement emerge from an overly simplistic focus on a few chapters. In fact, the scope is not much different than NAFTA and most of the issues have been addressed in the WTO as dealing with trade related aspects of, say, investment or intellectual property.
27. Some “behind the border” topics such as disciplines on state-owned enterprises, regulatory coherence and supply chain competitiveness break new ground in FTA negotiations. In many cases, the rules being negotiated are more rigorous than comparable rules found in the WTO’s Uruguay Round Agreement.
28. The Agreement texts will be very detailed. The differences and problems are in the details. In trade agreements, the devil is always in the details – and when it comes to the TPP, the devils travel in packs.
29. *Inside U.S. Trade* reports that the Auckland Round (December 3-12), will focus on chapters covering intellectual property (IP), labor and environmental protections, legal

and institutional issues, market access and rules of origin, investment, sanitary and phytosanitary (SPS) issues, and issues related to technical barriers to trade (TBT).<sup>5</sup> This is pretty much the full range of the deal.

30. Copyright issues such as liability for Internet service providers, and Internet retransmission, enforcement and limitations and exceptions for acts of infringement will be an important focus. Canadians who can now be fined up to \$5,000 for non-commercial infringement know what negotiations on this mean.<sup>6</sup>
31. It is not surprising that after fourteen rounds of negotiations, only three relatively minor chapters have been concluded. These address Co-operation; Small and Medium sized Enterprises; and Administration. Rather underwhelming for three years of work since the U.S. joined in.
32. If and when these negotiations are completed and implemented, the TPP could eliminate tariff and non-tariff barriers to trade and investment among the parties and could become a template for expanding free trade on both sides of the Pacific.
33. However, the TPP is not likely to be concluded any time soon. The smart money says sometime in 2014. And we all know what target dates mean in trade negotiations – even when they go well.

### **The TPP will not be Comprehensive**

34. In fact no trade agreement is ever truly comprehensive. The easy stuff is not controversial. But the hype is focused on universality. Everything is on the table at the start. It never finishes that way – and the more countries involved the less comprehensive the deal will be.
35. The TPP is no exception. This report examines the issues country by country and in detail but let's first consider how the U.S. fails this test.
36. The U.S. is not leading by good example. Here is what we see flowing from U.S. positioning:
  - Exclusion of Investor state arbitration at the sub-national level (the states do not want to be subject to it);
  - Transparency on Medicaid procurement will be limited to central governments;
  - State governments are resisting additional protection on pharmaceutical patents which could delay the introduction of generic medicines;
  - Limited coverage of government procurement;

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<sup>5</sup> “Negotiators to cover full range of issues during TPP Auckland Round”, Inside U.S. Trade, November 15, 2012

<sup>6</sup> “Canadian company collecting info on millions of habitual illegal downloaders”, Daily Brew, by Steve Mertl, November 27, 2012

- Intellectual property proposals do not include the protections that U.S. citizens and residents enjoy under U.S. law.
37. In addition, the U.S. will likely perpetuate regressive yarn forward or double and triple transformation rules of origin for textiles and apparel.
38. What else can we expect from the U.S.?
- it will not likely provide additional access for sugar, cotton and beef;<sup>7</sup>
  - it will not discipline production and export enhancing subsidies like export credits and food aid (unless Australia's diversionary ploy in the Competition/SOE negotiations actually works);
  - it is not proposing to discipline locational subsidies which steal Canadian jobs. If Governor Romney can say that China steals U.S. jobs, can we not say that Canadian jobs at Caterpillar, Electrolux and other Canadian factories were stolen with the help of U.S. state subsidies? The workers who have been displaced would not disagree;
  - the TPP does not anticipate disciplines and further reductions on domestic agricultural support.

### **Roadblocks in the way of a high quality comprehensive TPP Agreement**

39. Government Procurement is a mess. Here, too, sub-national commitments, thresholds and retainers for minority groups and gender-based ownership will detract from the goals. All politics are local; so, it appears, is trade.
40. The state-owned enterprises section of the Competition Chapter is an orphan. Aimed at Vietnam – and at China, there is really no way that other countries will agree first to have their state-owned companies treated less favorably than privately-owned competitors.
41. There needs to be a vigorous debate over disciplining sanitary and phytosanitary measures (SPS). Australia and New Zealand will be the targets. Geographic isolation is not a sufficient defence. The U.S. appears finally to be shifting to the side of the angels on this – that is, to support farmers.
42. There has already been movement by the U.S. to modify its position on medical or pharmaceutical patents. Could it be that U.S. state concerns about medicare/pharmacare costs were a factor?
43. The U.S. needs to be more motivated. It wants a deal for more than just trade reasons – and now it has competition in the form of the recently-launched Regional Comprehensive Economic Partnership (which includes China, India and Japan, among others -- see paragraph 92 for more on RCEP). Time is on the side of those who are not driven by geopolitical goals.

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<sup>7</sup> I will not dash Kiwi hopes by discussing the real problems of their gaining free access to the U.S. dairy market.



44. The U.S. needs to reconsider its proposals – including the gaping hole in coverage created by the exclusion of sub-national SOEs. It is time for Washington and the U.S. states to walk the walk on this.
45. Restrictions on regulation of capital flows are a non-starter for several parties. For example, Malaysia is concerned and Chile has specific reservations in all of their FTAs.
46. Nor will others be keen on importing the United States’ unsupervised approach to financial services regulation which contributed so much to uncertainty and instability around the world.
47. Many aspects of the U.S. initiatives to harmonize and globalize corporate operating environments will be non-starters. Less developed members will resist and reject attempts to re-shape them in America’s image.
48. Rice will be an issue, particularly with the ASEAN countries. The U.S. cannot grow rice without irrigation – which involves very cheap water – and cheap power to make the systems function. Yet the U.S. rice producers push to open Asian markets.<sup>8</sup>
49. Rules of origin: this is a mess. Vietnam and Malaysia don’t like having special trade inhibiting rules for clothing and footwear. Nor should Canada. Any change in our special NAFTA rule would be devastating to what is left of Canada’s apparel exports.
50. Australia has already made it clear that Investor State Dispute Settlement is not welcome in the land of OZ. Meantime, there has been a recent surge of actions in Canada – seriously testing not only Canada’s right to regulate, but also court decisions.
51. The U.S. will avoid improved access for sugar. Sugar will be an issue for Australia, Rules of Origin on sugar will be important for Mexico. A cumulative rule of origin is the only sensible approach in an eleven party deal. Canada could use Australian “raws”, to refine sugar to be used in confectionary and baked goods exported throughout North America.
52. Market access is a hodge podge, a dog’s breakfast – pick your description. This part of the negotiations is comprised of numerous bilateral FTAs among the members which may defy common linkages.
53. Draft intellectual property texts have been leaked. By and large they appear to try to export the disciplines of U.S. law, but not the flexibilities, safe havens and/or user protections available to U.S. citizens and residents.

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<sup>8</sup> “WTO council defers decision on PHL request to extend rice import restriction”, GMA News, November 28, 2012

54. This has been resisted, and if the U.S. does not change its approach, the IP initiative -- which is already fragile and battered -- will crash and burn. The U.S. is expected to continue reworking its initial proposal to try to garner more support.
55. The U.S. will table new language making SPS disciplines which go beyond the WTO enforceable. This is an important shift off the fence for the USA, where farm groups have apparently prevailed over scrutiny-averse regulators.
56. The U.S. and Australia are still at odds on how to approach e-commerce, especially as Australia is worried that the privacy of its citizens could be compromised.

### **What is in the TPP for Canada?**

57. Gordon Ritchie, who was so pivotal in negotiating Canada-U.S. Free Trade, suggests the TPP will not be worth much to Canada. I agree. On the economic issues, the near-term prospects are, frankly, underwhelming.
58. The Trans-Pacific Partnership may be more important for what it can become than for benefits that can be expected from the current membership. Canada has FTAs with four participants; the others, except for Vietnam, are rather small and some are quite distant geographically.
59. Participation in the TPP raises more questions for Canada than it answers.
60. Canada has negative trade balances with all members of the current TPP group other than the U.S. and Australia. Chile and Canada recently updated and enriched their 1997 FTA, adding financial services and updating numerous other provisions.
61. With Japan as a participant there could be very real and very important gains for Canada. Without Japan, TPP as currently envisaged would more likely be a gift to Washington with benefits to Canada being marginal and illusory.
62. Will Japan join the negotiations any time soon? Prime Minister Noda opened the TPP window a crack late in 2011, and followed up with additional teasers before dissolving the Diet for election, making it an election issue in Japan.
63. There has been support for TPP from Japan's opposition leader Shinzo Abe, and a recent survey in Japan found 48% in favour of TPP and only 27% opposed.<sup>9</sup> Japanese media reports suggest the 27% opposed are a very noisy minority. The TPP is particularly important for Japan because it would include Tokyo's biggest trade partner – the United States. The Japanese economy desperately needs revitalization.
64. Canada is in the TPP largely for defensive reasons. In a nutshell, it is better to be inside the tent, sharing preferences than outside losing markets to the preferences enjoyed by others.

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<sup>9</sup> "The Kamikaze election", The Economist, November 17, 2012

65. Every time the United States negotiates another FTA, Canada's preferences in our most important export market are eroded. Because resources have become a much greater part of our declining exports, the impact is concentrated in manufacturing jobs.
66. For Mexico, Chile, Peru and Singapore, the TPP is also a defensive exercise insofar as the U.S. is concerned
67. Canada needs free trade agreements to expand its exports of manufactured goods and services. Canada does not need free trade to export rocks and logs. Raw or semi-processed raw materials are largely duty free in the markets of our major trading partners. And if export controls are removed in TPP, there will be a lot more log exports.
68. There is little new market access that Canada can gain from Chile, Peru and Mexico. The U.S. has made it clear that market access discussions with Canada will be one way – South.
69. Canadians do not own a lot of intellectual property – and investment has been addressed in Canada's extensive network of FIPAs.
70. If the TPP works, it will be a platform to expand trade in Asia. That is its principal value to Canada.
71. There are different motivations among the TPP Parties. These could change as the possible outcome becomes clear, but the following points examine some of the current motivations.
72. New Zealand, Brunei, Vietnam and Malaysia do not have FTAs with the USA. This is their chance to catch the brass ring on the free trade carousel. Perhaps their only chance. These countries want to be on the inside. But will they resist excessive U.S. demands?
73. New Zealand, preparing to host Round XV, has declared that they will walk away from TPP if dairy markets are not opened and their Pharmac is not excluded from provisions on state-owned enterprises and access to medicines.
74. New Zealand has been very concerned about possible anti-China optics of the TPP. Are Prime Minister Key's demands an ultimatum or is New Zealand preparing an exit ramp to avoid friction with China?
75. Those countries with FTAs with the USA -- Chile, Peru and Australia -- will gain little on market access, except with those countries currently outside their FTA networks.
76. Mexico and Canada have different interests than the others because NAFTA goes further than FTAs among the parties and the North American economy is so integrated.

77. NAFTA would benefit from revisions in the regulatory chapters without quantum changes in market access. Canada and Mexico – who are well integrated in the Eastern Pacific – will have to focus their market access gains on the Western Pacific, New Zealand and Australia.
78. It is far from clear how tariff schedules and rules of origin will be integrated and harmonized. The U.S. appears to be too focused on its own bilaterals to be concerned with this.
79. We have examined public expressions of concern<sup>10</sup> by Chile about imbalance in the TPP.<sup>11</sup>
80. Chile has FTAs in place with all other TPP members. Chile and Vietnam concluded their FTA while the TPP was being negotiated.
81. Chile's trade policies are built on an impressive network of FTAs. Chile, together with Peru, Colombia and Mexico, has formed the Pacific Alliance to improve Latin American trade ties with Asia. Canada prudently requested observer status to the Pacific alliance and has been accepted.

### **Will the TPP protect Canadian Jobs?**

82. The answer is no. NAFTA did not. And there is nothing in the TPP to discipline or limit domestic subsidies in the U.S. to agriculture and to manufacturing.
83. The U.S. offers generous locational subsidies that often take the form of financing of plant construction and training through tax-free revenue bonds. This is cheap money to attract investors and jobs.
84. Why did Hyundai and Kia locate in Georgia and Alabama? Because local governments contributed over \$650 million towards the companies' \$3 billion investment in creating what was expected to be more than 5,000 jobs.<sup>12</sup> Why consider Ontario?
85. The State of Tennessee paid Electrolux \$188 million to build a \$190 million plant which moved jobs from L'Assomption, Quebec to Memphis.<sup>13</sup> A very sweet deal for Electrolux. How does Quebec compete with this?

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<sup>10</sup> "Chilean Trade Officials Question #TPP Benefits at Seminar in Santiago", InfoJustice.org, April 16, 2012; "Direcon reconoce opción de no suscribir TPP si el acuerdo no favorece a Chile" "Chile Threatens to Pull out of TPP because of U.S. IP demands", InfoJustice.org, May 10, 2012

<sup>11</sup> "Coping with multiple uncertainties: Latin America in the TPP negotiations", by Sebastián Herreros, Geneva, September 24, 2012, sebastian.herreros@cepal.org

<sup>12</sup> "Transplant" Automakers Get Over \$3.6 Billion in Subsidies; More Unions, Ralph Nader Comment", Huff Post – Business, December 13, 2008 – and – "Kia's Impact Wide in West Georgia", GPB news, by Jeanne Bonner, November 30, 2011

<sup>13</sup> "Memphis Electrolux hiring goes through Workforce Investment Network", The Commercial Appeal, by Thomas Bailey Jr., October 12, 2012

86. Electrolux didn't move because they were Elvis fans who wanted to be closer to Graceland, or because they enjoyed evenings on Beale Street. Tennessee showed Electrolux the money and it was *au revoir*.
87. This is not free trade. It is not fair trade. These are trade related investment measures which should be condemned. U.S. states argue they are competing with each other, which is true. It explains the race for the bottom. It does not make the subsidy battle less distorting, nor less injurious to Canada. These are investment incentives that should be banned or at least strictly disciplined.
88. Nothing is likely to happen to these subsidies. The "fair" in "fair trade" is only for optics. There are no rules in a knife fight. There are no rules in a trade negotiation. It is not about right and wrong. It is about big and little.
89. The issues listed above do not reflect all U.S. exclusions from a comprehensive TPP. There will be further exclusions and reservations by all parties.

### **The TPP and the "Pivot" in the Asia-Pacific Region**

90. The Congressional Research Service<sup>14</sup> reports TPP is tied to President Obama's "pivot to Asia". The perception that the center of gravity of U.S. foreign, economic, and military policy is shifting to the Asia-Pacific region is an important counterweight to the rising economic and military influence of China. The TPP is an important element in the U.S. "rebalancing" toward Asia.
91. China is not standing idly by while the prodigal son returns to its neglected extended Asian family. Beijing considers the TPP to be designed to exclude and isolate China.
92. China's counterpunch is support for the Regional Comprehensive Economic Partnership (RCEP), also known as ASEAN Plus 6, recently launched at Phnom Penh, among Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, plus China, India, Japan, Korea, Australia and New Zealand.<sup>15</sup>
93. In true ASEAN fashion, the RCEP will be more flexible and responsive to individual differences than the TPP. Some ASEAN members not having FTA access to the USA (Malaysia, Vietnam, Thailand and Brunei) will test the waters in both negotiations.
94. For those frustrated with inflexible U.S. demands in the TPP, the RCEP is an option. Given China's involvement and India's, RCEP would cover nearly five times the GDP that the TPP could.

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<sup>14</sup> "Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia", CRS Report R42448, March 28, 2012

<sup>15</sup> "Obama's Asia Trip, Congress Out, Colombia FTA Meeting, Ex-Im Impact Policy", Inside U.S. Trade, November 19, 2012

95. Critical mass is very important to TPP. The TPP of nine seriously fell far short of critical mass. It was underwhelming.<sup>16</sup> Canada and Mexico have helped on this and the TPP desperately needs Japan to join. The U.S. cannot afford to lose any of the existing eleven.

### **Did Canada make advance concessions to the USA to get to the table?**

96. The official answer is no. And as was the case with CETA, everything is on the table.
97. While Canada has made a number of concessions to the U.S. on items on the ever-present U.S. shopping list, we will never know in this nearly totally opaque process whether the timing of any moves that could be viewed as concessions were related to expediting Canada's invitation to join the talks.
98. On July 1, 2012, Canada's tourist exemptions were harmonized on the U.S. exemptions. The maximum exemption available after two days away has been doubled to \$800. This gift to Washington was a pleasant surprise to many Canadian consumers, and was undoubtedly welcomed by American merchants.
99. The losers in this harmonization are Canadian merchants, particularly those located close to the border. They have been and will continue to be hurt by increased cross border shopping encouraged by the strong Canadian dollar. Estimates of \$5 billion Black Friday spending this year by Canadians crossing the border show the generosity of this gift. This concession resolving – a long time U.S. irritant – appears to have been made with little adverse political impact.
100. The budget also increased the scope for foreign ownership of cellular telephone service providers – a gift to Canadian consumers.
101. Another example is the decision to harmonize container sizes for processed food products.<sup>17</sup> U.S.-based and owned food companies will now find it easier to serve Canada from their U.S. plants. The great sucking sound from the South will be Canadian plants and jobs migrating to the U.S. as if this technical barrier is removed. This proposal seems to have been put on the back burner for further consideration.<sup>18</sup>

### **Is the U.S. making TPP more of a gamble than a negotiation?**

102. The TPP negotiations are based on a shaky foundation. Congress has not granted Trade Promotion Authority (TPA) for the TPP.<sup>19</sup> Without TPA, trade agreement negotiations are fraught with risk and uncertainty. It is folly.

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<sup>16</sup> "TPP negotiations present far more questions than answers", iPolitics, by Peter Clark, October 12, 2012

<sup>17</sup> "A food fight worth having", Financial Post, Terence Corcoran, November 22 2012

<sup>18</sup> "Keep container sizes the same say processors", Better Farming, November 9, 2012

<sup>19</sup> "Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia", CRS Report R42448, March 28, 2012

103. Without TPA, the TPP negotiations are a crapshoot for other countries. Without TPA, all Trans-Pacific partners are exposed to the virtual certainty of having to re-negotiate with Congress a hard fought, done deal.
104. The TPP is nowhere near finished. On several important issues, it appears to be stuck in neutral. It will, like all other free trade negotiations, be about hard fought exclusions. In Asia, there are alternatives to the TPP for ASEAN members. The RCEP will be much more user friendly and flexible. This will feed dissent and objections to U.S. demands. In the Americas, all participants already have FTAs with Washington.
105. Will TPP be Doha revisited? The United States cannot afford this. U.S. stakeholders are questioning the extent of the focus on SOEs and its effects. They are openly pressing for flexibility to keep the other parties at the table.
106. The Americans are skilled and generally very pragmatic negotiators. They understand the art of the possible and the art of the deal. They should recognize and try to rebalance their approach.
107. If not, President Obama's decision to join the TPP on the 8<sup>th</sup> anniversary of the Doha declaration could lead the TPP to the same fate.

## **THE TRANS-PACIFIC PARTNERSHIP AGREEMENT: AN OVERVIEW**

108. When U.S. President Barack Obama refers to “organizing trade relations” as a priority he means, of course, the Trans-Pacific Partnership agreement - better known as the TPP, a name designed to make one run for the hills or the Shopping Channel.
109. With apologies to Winston Churchill, the Trans-Pacific Partnership is a riddle inside an enigma which defies solution.
110. Though the TPP has been heralded as a high quality and comprehensive “21st century trade agreement” (or Economic Co-operation Agreement), the negotiators are producing something which will not likely meet the advance billing.
111. The TPP is built on the P-4 among Brunei Darussalam, Chile, New Zealand and Singapore. The TPP negotiating group now encompasses eleven countries. The seven who have joined the negotiations are Australia, Malaysia, Peru, Vietnam, the United States, Mexico and Canada.
112. Japan’s Prime Minister Noda has been running hot and cold, and the issue of joining and TTP membership is now an election issue in Japan.
113. Thailand may be in before mid-2013. There have been suggestions that the Philippines, Indonesia and Korea could also join the pack.
114. Based on current information, the TPP will be very different than the P-4. It will be more extensive, more intrusive and less flexible.
115. The TPP is not all about sandals, diapers, detergents and cucumbers. In some ways it is about how we live, our healthcare, access to medicare and our way of life. It is about how we preserve our heritage and culture. And it is about how those whose ideas shape so many things are properly compensated for their achievements.
116. It appears that the TPP negotiations are a hub and spoke arrangement with the U.S. at the centre. The U.S. is essentially negotiating separately with the other 10 partners is proving to be a frustrating process. The U.S. has hijacked the agenda by preparing the texts. Most of the recent meetings have been in the USA because the host can set the discussion agenda.
117. It is not a true negotiation. On many of the new issues, the terms and conditions are being dictated by the largest player.



## TPP Goals and Objectives<sup>20</sup>

118. The general objectives of the TPP are as follows:
- Create a Free Trade Area for Goods, Services and Investment.
  - Resolve problems presented by the current trade system, mainly non tariff measures (spaghetti bowl, trade facilitation, non tariff measures, internal barriers).
  - Establish a “Next Generation” agreement that goes beyond traditional trade agreements.
119. In order to achieve these objectives, it will be necessary for participating countries to commit to compromises that go beyond what has traditionally been negotiated in previous trade agreements. This encompasses not just going beyond the types of compromises seen in traditional chapters in P-4, NAFTA and KORUS, but also the inclusion of chapters on entirely new obligations and disciplines.
120. Political leaders on both sides of the Pacific have trumpeted the goal of ensuring comprehensive market access by eliminating tariffs and other barriers to goods and services trade and investment. The desired outcome is the creation of new opportunities for workers and businesses and immediate benefits for consumers. Based on our findings, describing the TPP as “comprehensive” is a gross exaggeration.
121. Regional integration is important to facilitate the development of production and supply chains among TPP members, to support the goal of creating jobs, raising living standards, improving welfare and to promote sustainable growth in TPP countries.
122. The TPP will build on work being done in APEC and other fora by incorporating four new, cross-cutting issues:
- i) Regulatory Coherence;
  - ii) Competitiveness and Business Facilitation;
  - iii) Small- and Medium-Sized Enterprises; and
  - iv) Development.

### Regulatory Coherence

123. What is Regulatory Coherence? Our experience in NAFTA suggests that the target is regulatory harmonization. This is an elusive target – but a target nonetheless.
124. Is it ‘do it my way or the highway’? Is it perpetual monitoring and consultation? Will other TPP countries welcome U.S. oversight and lobbying of their regulatory process within the context of a Partnership Agreement? Will involvement of other countries in the already overcomplicated U.S. system fly in Washington? Not likely.

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<sup>20</sup> Much of the information relied upon to complete this section was sourced from Congressional Research Service and USTR. The views are essentially American news, but it is these views the other members must understand.

125. Commitments will promote trade between the countries by making trade among them more seamless and efficient.
- The use of good regulatory practices for planning, designing, issuing and implementing measures to enhance regulatory co-operation in order to further those objectives and promote international trade, economic growth and employment.
  - The difference seems to be between a desire for regulatory coherence which could mean harmonization and a willingness to undertake the expense and resource-draining changes needed to ensure good regulatory practice on the TPP model. There are differences which go beyond the words.
126. We would not expect that other parties will be keen to have the U.S. drive their regulatory processes. This chapter certainly should not be subject to dispute settlement, nor establishing any baseline or undertaking for purposes of investor state arbitration.
127. Achieving universal scope for this chapter will be difficult. Unitary states, will not want the U.S. to assume that it can simply exclude state regulation from its undertakings.

### **Competitiveness and Business Facilitation**

128. Commitments will enhance the domestic and regional competitiveness of each TPP country's economy and promote economic integration and jobs in the region, including through the development of regional production and supply chains.
- This is about building and promoting supply chains. It has become a hot button motherhood issue – for some. For others, it will be viewed as intrusive. They will not buy into the corporate agenda behind the initiative.
  - Like so many other TPP issues, participating countries need to ask, what is in it for them?
  - Supply chains generally operate among businesses – who will have the normal profit motivation to develop, maintain and nurture them? Is this a proper domain for government?
  - Supply Chain management should be a business driven initiative where ROO and tariff removal facilitate business decisions. Does it need a separate chapter? One must also ask how much integration is desirable. Should this happen or be driven by the agreement?
  - We have heard that the TPP proposes activity programs for signatories. Does this make sense? Who designs the programs? Who will they benefit?
  - Is this a feel-good exhortation – or some form of obligation? Should it be subject to review?
  - How many want to take on obligations in this area?

- There is such a thing as too many Committees, particularly where nearly every chapter seems to have one.

### **Small- and Medium-Sized Enterprises**

129. Commitments will address concerns small- and medium-sized enterprises have raised about the difficulty in understanding and using trade agreements, encouraging small- and medium-sized enterprises to trade internationally.
- Promoting small and medium sized businesses and making FTAs friendlier to them is an Obama Administration objective.
  - This requires special and differential treatment for developing countries.
  - The TPP is not an agreement among equals. There are parties at different levels of development and this must be taken into account. Ambitious development goals also applied to the Doha Development Agenda. It may seem to be cynical but the DDA goals were dead on arrival in Congress.
  - This chapter has been completed. It was not controversial. There are no real obligations -- certainly none worth disciplining under dispute settlement.
  - It is a feel-good chapter designed to make the deal, which has been so influenced by large multinational corporations, more friendly to small and medium sized enterprises.
  - President Obama has claimed this is an important objective of his trade policy.
  - How real will it be and will it make a difference? These questions are as yet unanswered.
  - Goals about women and economic growth should not be the subject of debate and disagreement.
  - Ensuring or appearing to ensure development goals makes it easier for smaller or less developed countries to buy into the deal but based on what we have seen they will soon run afoul of the basic mercantilist goals of the TPP.

### **Development**

130. The Development chapter has been completed. It is essentially a motherhood chapter. Who can object to development?
- It envisages comprehensive and robust market liberalization, improvements in trade and investment enhancing disciplines, and other commitments, including a mechanism to help all TPP countries to effectively implement the Agreement and fully realize its benefits. It will serve to strengthen institutions important for economic development and governance and thereby contribute significantly to advancing TPP countries' respective economic development priorities.
  - The advance billing certainly talks the talk – will it walk the walk?

## **ANALYSIS**

131. Perhaps above all else, negotiating a deal such as the TPP requires a creative tension involving the preservation or sacrifice of sovereignty and national identities.
132. Though I have long been an ardent promoter of free trade and regional integration, I am having difficulty placing great faith in the TPP initiative. To begin with, the extreme secrecy raises doubts, if not suspicions.
133. While we are awash in soaring rhetoric, the details are scarce. Washington has pitched the TPP as a comprehensive 21st century trade agreement while Australia refers to elements of the deal being “gold standard”. What does this mean? The world abandoned the gold standard in 1972 with the Nixon shock. And, it is not coming back. At best, the TPP will be (10 karat) gold plated.
134. But, the TPP is supposed to be high quality. If that is the case, the questions become “for who?” and “will it be balanced?” One wonders how much different can the TPP text be than the NAFTA or more recent FTAs concluded by the USA (e.g., the Korea-U.S. FTA, aka KORUS).
135. We are told that the TPP is an ambitious, far-reaching agreement. But the reality is that, if and when it is concluded, it will not be comprehensive. There will be similarities to NAFTA and KORUS but the list of exclusions is extensive and may grow.
136. The TPP will supersede existing arrangements. This is the case because where there are differences in the terms of two trade agreements governing the same parties, the later in time agreement prevails.
137. With this in mind, it is important to acknowledge that the TPP will change NAFTA. One can argue that after 25 years, the Canada-U.S. Free Trade Agreement (CUSTA) and its NAFTA offspring might well benefit from some tweaking and massaging.
138. While true, we should be aware that, on balance, Canada would likely pay more in this game than the United States. Reopening NAFTA on a broad scale would be unthinkable to all three governments. It is a deep, dark Pandora’s Box of political problems. Updating NAFTA through TPP could provide the necessary cover.
139. The TPP will supersede NAFTA in a number of important areas. Even the U.S. International Trade Commission admits there is not much in the deal for Canada and the U.S. bilaterally in TPP. Indeed, without Japan in the negotiations, Canada will likely be a net loser.
140. Unless over-reaching, unbalanced and inflexible U.S. demands frighten other participants away from the deal, TPP could be a template for future trade in the Pacific Rim and perhaps beyond. However, it remains to be seen whether or not the TPP is the best

vehicle for improving Canadian trade and investment opportunities with Asia. Fortunately there are other options.

141. At this point, participation in the TPP raises more questions for Canada than it answers. As noted, with Japan as a participant there could be real gains. Without it, TPP as currently envisaged would more likely be a gift to Washington with benefits to Canada being marginal and illusory. Fortunately for Canada, Trade Minister Ed Fast has made it clear that Canada will not accept bad or unbalanced trade deals. Break a leg, Minister.
142. It is not just NAFTA that is affected. The TPP will also supersede FTAs which Canada has negotiated with other TPP members as well as bilateral and regional arrangements among other members.
143. Those who are promoting the TPP want to change the world of business to the U.S. model; indeed, in some ways they want to go beyond it. There are fears it will revive the Stop Online Piracy Act (SOPA). This could seriously restrict personal freedoms on the Internet, criminalize minor infractions and stifle “fair use” safe harbours available to U.S. citizens.
144. The TPP missionaries are prudent to keep details of the initiative away from politicians and the public. Transparency would almost certainly lead to its quick death.
145. In the U.S., other than those directly involved in the negotiations, there are only 600 business advisors who have access to the text. It is thus of little surprise that Congress is not happy but it is important to note that the Administration has not yet asked Congress for Trade Promotion Fast Track Authority. When that day comes, as it must, Congress will extract its revenge and a key demand will be access to the negotiating texts. Parliament should and would be justifiably outraged.
146. Different countries want and need the deal more than others. New Zealand and Brunei were too small to be considered as candidates for FTAs with the USA. Vietnam has a different economic and business structure – which on its own would raise problems for the United States.
147. This will be New Zealand’s only opportunity to secure an FTA with the USA. Joseph Stiglitz told New Zealanders that when small countries negotiate with large ones, because they lack leverage, they inevitably have to make disproportionate concessions to get the deal. In New Zealand’s case, the access in question is to the U.S. dairy market.<sup>21</sup>
148. While the concessions demanded by the U.S. may hurt interests in New Zealand, the Kiwis clearly want the TPP for what it could do for access to the USA. Adding Japan would be a major bonus. But will the Kiwis be able to find balance? And will N.Z. be able to preserve PHARMAC<sup>22</sup> and fend off efforts to go beyond the WTO TRIPS Agreement. The U.S. always demands a high price when they resell the same preferential

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<sup>21</sup> “No TPP deal unless dairy and Pharmac are in – Key”, The New Zealand Herald, November 26, 2012

<sup>22</sup> Ibid.

- access to their market for the nth time. Will U.S. insistence on their agenda be a deal breaker? Perhaps, but it is too soon to know.
149. Just how comprehensive is the TPP likely to be? It is more fragile than Washington's hype suggests. The recent media focus has been on how Australia and New Zealand can carve out and shelter their own concerns from the universal ambition.
  150. It is normal that parties to trade agreements will have sensitive issues which would require special treatment. Culture, for example, has been an automatic carve out for Canada. A non-starter. But, Hollywood will take dead aim at it, as they have in the past.
  151. The TPP is built on the P-4 Agreement but the P-4 is flexible and less ambitious than the TPP. Washington asked to join P-4, was welcomed and proceeded to hijack the process.
  152. The P-4 addressed many of the same issues as the TPP, but in a more flexible and less comprehensive way. P-4 examined strategic partnership. It did not address regulatory coherence nor did it address financial services, investment, environment; labour issues; and telecommunications.
  153. The TPP as proposed by its U.S. drafters is a very complex agreement. There are important issues in the TPP which have never been included in trade agreements. It goes well beyond traditional trade agreements and certainly beyond NAFTA.
  154. Is it as great as the Obama Administration claims, or have we signed up to buy a pig in a poke? One must hope that unlike other recent U.S. initiatives the TPP is more substance than spin.
  155. The general objectives of the TPP in themselves are not misguided, wrong or evil. But they seem to be perceived by the targets as an effort to Americanize the Asia Pacific region. That is a tough sell, particularly when there is not much more in the deal for countries which already have FTAs with the United States.
  156. The U.S appears to be treating the TPP as a series of bilateral negotiations under a single umbrella in a hub and spoke approach. The U.S. is, in effect, re-selling access to its markets by trying to impose on the other participants its own agenda for the so-called "21st Century issues".
  157. Australia and New Zealand have not yet been able to secure what they want in terms of additional access to U.S. beef, sugar and dairy markets. There has been little or no appetite so far for giving them what they want. But we do not expect either will accept the U.S. position. Australia has already begun to flex its resistance.
  158. I am concerned that the United States, despite claiming this is a high quality comprehensive initiative, is far more focused on opening other TPP countries' markets than their own. And the new issues agenda is driven by and written by U.S. intellectual

property owners and multinational business moguls wanting to protect their investments and create seamless international operating environments.

159. The U.S., a much better preacher than a follower, has carved out complete areas of the negotiations from the outset. U.S. states would get a free ride if these efforts succeeded. This is the power of the pen gone wild.
160. I have little confidence that the deal will be balanced or as comprehensive as advertised. I have previously described TPP as NAFTA 2.0. Those close to the actual negotiations have corrected me – apparently, NAFTA 7.0 would be more accurate.
161. Will TPP live up to its advance billing? Not without a lot of work and much more compromise.
162. The TPP negotiations are based on a shaky foundation. The Congressional Research Service has noted the TPP negotiations are not being conducted under the auspices of formal TPA – the latest TPA expired on July 1, 2007. While the Administration informally is following the procedures of the former TPA it is running the risk of problems down the road. If TPP implementing legislation is brought to Congress, TPA may need to be considered if the legislation is not to be subject to potentially debilitating amendments or rejection.<sup>23</sup>
163. TPA – formerly known as “fast track” – is a statutory mechanism under which Congress defines negotiating objectives and consultative procedures for trade agreements, and authorizes the President to enter into reciprocal trade agreements governing tariff and non-tariff barriers.<sup>24</sup>
164. Under TPA, implementing bills for reciprocal trade agreements are considered under expedited legislative procedures, that is, limited debate, no amendments, and an up-or-down vote. The expedited consideration is conditioned on the President observing certain statutory obligations in negotiating trade agreements, including notifying and consulting Congress.
165. The purpose of TPA is to preserve the constitutional role of Congress to regulate foreign commerce in consideration of implementing legislation for trade agreements that require changes in domestic law, while also bolstering the negotiating credibility of the executive branch by assuring that a trade agreement, once signed, will not be changed during the legislative process. TPA expired in 2007 and, as of this writing, has not been renewed by Congress.<sup>25</sup>

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<sup>23</sup> “The Trans-Pacific Partnership Negotiations and Issues for Congress”, Congressional Research Service, R42694, September 5, 2012

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

166. Negotiating trade agreements with the U.S. if the Administration has not secured TPA from Congress is fraught with risk and uncertainty. It is folly. That the Obama Administration has not yet asked Congress for their blessing and guidance makes the TPP negotiations a crap shoot.
167. The TPA approval process is a negotiation in itself between Congress and the Administration. Congress will lay out demands and conditions for granting TPA which will bind the U.S. negotiators. While the conditions imposed by Congress can be tough, at least everyone knows the rules. Now there is about as much certainty as a trip to the casino.
168. In addition, Congress may seek to weigh in on the addition of new members to the negotiations, before or after the negotiations conclude. Canada and Mexico have been approached. No doubt Congress told the negotiators what should be sought. Will TPA formalize this?

### **How comprehensive will the TPP be?**

169. I have never been persuaded that the TPP, an agreement with 26 chapters to be negotiated among 11 countries at such different levels of development, could be concluded on a truly comprehensive basis. It seems that the U.S. means it must begin with everything on the table. But even that test is not met by the main promoter of the concept.
170. The traditional trade agreement issues are market access, which encompass tariffs on agricultural and non-agricultural goods, sanitary and phytosanitary regulations, import and export quotas, rules of origin, national treatment, trade remedies, technical barriers to trade and trade in services.
171. There are also many “behind the border” issues which give the prospective deal its 21st century label. These include competition policy, investment, intellectual property, government procurement, transparency, regulatory coherence. These cover issues like patent and copyright protection, expropriation and discriminatory treatment of foreign investments and state-owned enterprises. While it tries to open markets for farm products around the Pacific, it does nothing to address trade and production distorting domestic farm support.
172. The U.S. approach on new issues flows from a 2007 congressional bi-partisan consensus which defined and established the terms for U.S. trade agreements with developing countries. The consensus addresses:
  1. Labour – it is no surprise the consensus ignores U.S. failure to ratify several important ILO core labour standards. The U.S. position caters to U.S. organized labour.
  2. Environment – which demands participation in certain (Multilateral Environmental Agreements) MEAs to which the U.S. is a member as well enforcement under the FTA.



3. Intellectual Property – U.S. objectives are captured in a very extensive listing relating to medicines and pharmaceutical patents.
4. Investment – could be seen as NAFTA plus.
5. Government Procurement – it links procurement to labour standards and labour conditions and promotion of environmental protection in government procurement (Nancy Pelosi has already pushed legislation to ban the use of oil sands products by the U.S. military.)

### **Expect carve-outs, exclusions and exceptions to be the rule**

173. Even with a supposedly comprehensive approach, the U.S. has built in its own important carve outs and non-negotiable issues. There were several discussions with *Inside U.S. Trade* and “leaks” have revealed a bit of detail and truth.
174. Thus, the TPP will be like every trade agreement of any significant ambition. There will be exclusions and exceptions. The general exceptions and national security provisions of Articles XX and XXI of GATT (1994) will be imported into TPP. Then country-specific, sensitive issues are carved out. This is the way it is always done. TPP will not be any different in this respect.
175. Indeed, all participants have problems which will dilute the advertised comprehensiveness. We predict with great comfort that there will be a detailed chapter on exclusions. In other chapters, the scope of coverage will in effect define the exclusions.
176. A trade agreement without a safety valve for economically and politically sensitive issues is inconceivable – in fact is not negotiable. If there are exceptions for one, there must be exceptions for all.

### **A balance of exceptions must be found**

177. The key to negotiating a successful agreement, in order to enjoy all the benefits which are easy to agree, is finding a balance of exceptions. Indeed, without safety valves and exclusions, few countries could accept these broadly-based agreements. Sovereignty matters, so do special conditions or situations of individual countries. That is what the real negotiations are about – finding mutually acceptable common ground.
178. What are the exceptions in the TPP likely to be? These will number in the dozens. When the detail is revealed, Canada will find that they will be able to work with like-minded countries, including Australia and New Zealand, to advance common causes. The negotiating is far from over. Indeed, in some areas it has only begun.
179. Sensitivities abound in all potential TPP countries and across the most contentious issues. Some of the disagreements are clear and public. Others are buried in the detail of other agreements and reports. The devil is always in the details. In this deal, the devils travel in packs.

180. We should not assume that the TPP will be concluded on the basis of the current texts. The negotiations are likely less than half done. Remember how the WTO's Doha Round has been 80% done for years? Unless and until the U.S. agrees to additional balance, TPP – like Doha – will likely drift while participants explore other options.
181. If and when TPP is concluded, it may attract additional members. Some of the larger members of ASEAN, as well as Japan and Korea, would make early investment in the TPP farsighted and worthwhile. Without critical mass Canada would be another spoke to the U.S. hub in the TPP wheel. Is it worth all the effort if that is all we can expect?
182. The so-called 21st century trade agreement negotiations venture deeply into new areas such as all aspects of intellectual property rights investment and protection, which are more divisive than cohesive.
183. Other issues like government procurement, trade in services, labour and the environment and competition policy, which crashed and burned at the WTO Doha Round Ministerial at Cancun, are not acceptable to many countries less developed than the United States.

#### **Excessive secrecy**

184. Years of experience have left me very accustomed to the fact that, by necessity, negotiations are conducted behind closed doors. Trade negotiations are not a spectator sport. They could be a cure for insomnia. In the WTO, negotiations are confidential but “Chair’s texts” on nearly every aspect of the negotiations are available to the public. The TPP negotiations, however, take secrecy to another whole level.
185. The TPP negotiating process is secretive in the extreme. The negotiating texts must remain secret until four years after the deal is done or it collapses or implodes. Thank heaven for leaks – I expect we will see more of them.
186. The negotiating texts state:

Declassify on: Four years from entry into force of the TPP agreement or, if no agreement enters into force, four years from the close of the negotiations.
187. What does this mean? Surely if a deal is done, this does not mean the details will be secret for 4 years after it is concluded? This, of course, is theatre of the absurd. It makes no sense – like much about these negotiations. What do the words mean?
188. Congress may soon force the Administration's hand. But this will involve limited and balanced access. Exposing the texts to daylight and broad scrutiny could have potential disastrous implications for the ability of negotiators to negotiate. The U.S. has been its own worst enemy by misplaying normal negotiating confidentiality rules so that the secrecy has become more controversial than the substance.
189. Will there be consultations in Canada with stakeholders as there are in the U.S.? There is a structure for consultations in Canada but will it extend to sharing texts? Probably not.

190. Will stakeholders be able to discuss the real details with Parliamentary Committees? One would hope that the consultations will be about the real issues under discussion and not hopes and fears stirred up by anti-corporate, anti-trade activists.
191. Never before has the secrecy surrounding a trade negotiation been so absolute. Even Congress has not seen the texts. I respect and follow *Inside U.S. Trade* assiduously. But I do not want it to be my only source of information. I wonder how all the information provided by U.S. negotiators fits with the confidentiality restrictions. Just wondering. We know the leaks are strategic for the most part but even the spin contains some information.
192. The plan seems to be to prevent the masses and their elected representatives playing a role in shaping this deal. Wrap it up in a total package with a lot of chapters no one can understand or care about and congratulate the architects of the deal for their vision.
193. I normally encourage negotiation of free trade agreements. I was an advisor to Parliamentary Committees on CUSTA and NAFTA. I believe in free trade. Canada needs to replace declining exports to the United States. But the FTAs must be balanced.
194. My conclusion at this point is that the TPP is not balanced.

**What are the implications of Canada and Mexico arriving late to the negotiating table?**

195. Because of the secrecy surrounding the TPP and the negotiating texts, Canada – in pursuing the TPP sight unseen – was buying a pig in a poke. And without Japan in the mix, it is a rather unattractive, scrawny pig.
196. Canada and Mexico must accept and cannot re-open the negotiating texts which have been completed. U.S. negotiators had been on a global crusade to other TPP participants' capitals trying to close additional chapters before Canada and Mexico came on board. It did not work.
197. As it turns out, what is done is largely, if not exclusively, organizational and tangential to the core issues. The three concluded chapters deal with: i) Small and Medium Size Enterprises; Co-operation; and iii) Administration.
198. And USTR has requested that the texts could be re-opened if and when Japan joins.<sup>26</sup> A double standard. Why not. Let's make up the rules on the run.
199. So, not much water has passed under this bridge after 14 rounds of negotiations. Did Canada miss much in the forced delay in its participation? Not much substance – and flavour does not count.
200. Some participants are asking what is in this U.S. centric deal for them. Canada too will need to assess this – and soon.

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<sup>26</sup> “U.S. Official: TPP Could be Reopened if Japan Joins After Entry Into Force”, *Inside U.S. Trade*, July 6, 2012

201. We can only assume that part of the price to be paid for admission is acceptance of the bizarre and unprecedented confidentiality. It is a fact that negotiations cannot be done in the press or even in the sunlight. Canadians, Americans and citizens in the other TPP countries have much at stake – more than in any other so-called trade agreement. However, Parliamentarians and stakeholders need to be consulted, even if only on a general level. Keeping politicians and stakeholders in the dark like well-fertilized mushrooms cannot and should not continue.
202. Fortunately, while an imperfect solution to the excessive secrecy, leaks have revealed a significant part of what we should know. *Inside U.S. Trade* – which clearly has excellent access to otherwise tight-lipped U.S. negotiators and always loquacious U.S. legislators and stakeholders – has published reports with the following headlines in recent weeks and months:
- *Franken Seeks Support For TPP Letter On Buy American Provisions, Strong Rules Of Origin, Labor Enforceability*
  - *Administration Objects To Footwear MTBs, Trade Groups Fight Back*
  - *Health Groups Urge Obama To Not Demand IPR Changes For Thailand In TPP*
  - *Civil Society Groups Urge Thai Prime Minister To Reconsider Joining TPP, Citing Health, Farming*
  - *State Legislators Meet With USTR Officials To Air Worries About TPP*
  - *Canadian Producers Call On Ottawa To Exclude Lumber Issues From TPP*
  - *Australian TPP Proposal Could Impact U.S. GSM 102, Food Aid Programs*
  - *Hatch Blasts Administration For Delaying Currency Report; Pushes For TPP Disciplines*
  - *Mexican Energy SOEs Likely Fall Outside Scope Of U.S. Proposal In TPP*
  - *Canadian Industry's TPP Demands To Target 'Buy American' Policies*
  - *Eleven Senators Push For Binding, Enforceable Environment Rules In TPP*
  - *Provinces Likely To Play Lesser Role In TPP Than In Canada-EU FTA*
  - *In TPP, U.S. Automakers Face Balancing Act In Proposing Rules Of Origin*
  - *Ontario, Quebec Forest Industries Call On Canadian Government To Exclude Lumber Issues From TPP Talks*
  - *With Canada-EU FTA At Crucial Stage, Links To TPP Negotiations Seen*
  - *Some Business Reps Question Emphasis On SOE Disciplines In TPP Talks*
  - *Canadian Producers Call On Ottawa To Exclude Lumber Issues From TPP*
  - *Doctors Without Borders Warns Thailand's Participation In TPP Could Raise Price Of HIV Medicine*

- *State Legislators To Air TPP Worries In Meeting With USTR Officials*
- *USTR Deliberations On TPP Medicines Proposal Hamstrung By Elections*
- *USTR Official: U.S. Still Faces Big Challenges On TPP Data Flow Proposal*
- *Senate Republicans May Demand Changes If Final TPP Deal Unsatisfactory*
- *U.S., Australia Make Little Headway On Resolving Data Flow Issue*
- *TPP SOE Talks Slowed By Domestic Processes, Australian Ag Demand*
- *U.S., Australia At Odds Over Separate Lane For Express Shipments In TPP*
- *Conservation Group Raises Alarm Over TPP Environment, Investment Chapters*
- *Australian Unions, Activist Groups Lean On Government To Resist Investor-State Mechanism*
- *Textile Groups Oppose Industry Proposal For Lenient Legwear Rule Of Origin In TPP*
- *Australian Opposition On Key U.S. Priorities Emerges As Hurdle In TPP*
- *Letter To Kirk, Nunes Raises Alarm Over Lack Of SPS Enforcement Mechanism In TPP*

203. We have also gained interesting insights and information from Simon Lester's WorldTradeLaw.net blog<sup>27</sup> and from Scott Lincicome,<sup>28</sup> and others following the negotiations.

### **The expansion and extension of U.S. rule**

204. The TPP could result in extra-territorial application of U.S. laws, particularly in the Intellectual Property area, including criminalization of non-commercial infringement. Ask Kiwis about the Megaupload fiasco that found the N.Z. Government illegally spying on its own citizens.
205. Will the U.S. extend its own "fair use" protections in IP law to the TPP? Are all of the U.S. demands consistent with U.S. law – or what Congress has been prepared to consider reasonable legislation for American voters?
206. A BBC report of August 8, 2012, entitled "American Law: How non-U.S. companies are affected", asks the question, "Does the U.S. have a legitimate right to intervene in the behaviour of companies and individuals, or indeed of countries, operating beyond its own borders?"

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<sup>27</sup> <http://www.worldtradelaw.net>

<sup>28</sup> <http://lincicome.blogspot.ca/>

207. My answer, after having dealt with the extra-territorial initiatives of larger trading partners for many years, is no. This is a very relevant question for the TPP intellectual property chapter where the U.S. seeks to criminalize offences.
208. Clearly, the U.S. will need to dilute its ambition externally to secure consensus on a deal and at home – particularly if it is to keep happy and onside the senators from the southeast, who each have their own farm vote concerns (e.g., sugar, cotton and peanuts).
209. Analysts claim that TPP will determine (read restrict) what individuals can do freely in the cyber economy and who from where makes economic decisions which affect our lives. Commercial participants in the knowledge economy are concerned about more rigid enforcement of IP rights having a stifling effect on innovation.
210. The U.S. wants to promote trade and investment in innovative products and services, including those related to the digital economy and green technologies, and to ensure a competitive business environment across the TPP region. The main challenge for the U.S. is to sell these unbalanced proposals to the other ten parties.
211. TPP, like P-4, is designed to be a living agreement: to enable the updating of the agreement as appropriate to address trade issues that emerge in the future as well as new issues that arise with the expansion of the agreement to include new countries. Will or should the extension of the TPP to new partners resemble WTO accession for China and Vietnam? The terms will likely be take-it-or-leave-it and Washington will extract as many additional concessions as possible from newcomers. This will ensure that the deal is essentially unattractive to China.

### **Is the TPP an anti-China initiative?**

212. New Zealand's Trade Minister, Tim Groser, has expressly dismissed any suggestion – coming from the U.S. – that the deal is about China. The assiduous TPP critic Jane Kelsey recently observed that such a thing would be a deal-breaker. Earlier this year, Groser told Radio New Zealand that he had made this clear to the Americans. “The moment we smelt or sensed that this was an anti-China thing, we'd leave the TPP,” he said.
213. While this seems to be a clear statement, Minister Groser later re-stated New Zealand's view. “There is no ambiguity around this,” he said. “TPP is not an anti-China strategy whatsoever. And if it changed in its nature, we would actually not be part of it.”
214. Whether or not the TPP is an anti-China initiative is not as clear as Minister Groser suggests.
215. For all that, even after President Obama confirmed his China strategy at the third presidential debate (in Boca Raton, Florida), there's no sign that Minister Groser is taking his ball and going home. Maybe he didn't catch the presidential debate on foreign policy.

Regardless, the implication that the U.S. is using the TPP as a bayonet to thrust at the Chinese is far from the only issue that is worth examining.

### **Sensitivities and Potential Gains**

216. What are the sensitivities? The following is a partial list.

- Let's start with the main cheerleader for a comprehensive approach – the United States of America. The U.S. is not re-negotiating market access with Chile, Peru or Australia, nor with Mexico. Canada has been targeted for its dairy and poultry markets.<sup>29</sup> What happens to these existing FTAs among the members? What will become of the tariff schedules? Will there be a single set of Rules of Origin or will these differ from country to country? Will some order be brought to the spaghetti bowl of agreements among TPP partners?
- What does the TPP mean for Canada's existing FTAs with Chile<sup>30</sup> and Peru? Is there anything to be gained on market access? Is there a compelling need to go beyond the new non-trade issues with these trading partners? The proposals on these are 21st Century issues which benefit the USA far more than they do Canada. Should Canada pay for advancing the U.S. agenda?
- The United States and the TPP text are pushing for bans and disciplines on export controls going beyond P-4. But the question is: is Washington prepared to eliminate its log export controls? Don't count on it.
- The U.S. will have difficulty applying the State-Owned Enterprise section of the Competition Chapter to its sub-national governments. The State governors are powerful and they do not want the federal government to interfere in their turf. Washington has made it clear that it applies only at the federal level, ignoring the fact that most SOEs in the U.S. are owned by sub-national Governments.
- The Jones Act which requires that U.S. coastal shipping use U.S.-built ships (bottoms) is a long-standing irritant to Canada and other TPP members with shipbuilding industries. It is simply not negotiable. Congress will not accept its elimination.
- For the U.S., participation in the Government Procurement Chapter by its state and municipal governments will be voluntary. Buy American is not likely to disappear anytime soon – particularly in a deal where the U.S. has FTAs with six of the ten other participants, and the other four are characterized as having markets the size of San Diego – or, like Vietnam, sing from a different song book. This imbalance with unitary states will be problematic.

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<sup>29</sup> “Pacific free traders eye Canada's dairy, poultry markets, The Globe and Mail, by Barrie McKenna and Bill Curry, June 20, 2012

<sup>30</sup> The Canada – Chile FTA was recently updated. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx?view=d>

- In government procurement, I expect we will continue to see generous U.S. set-asides for Small Business, Minority-Owned Business, Women-Owned Business and Aboriginal-Owned Business.
- Will Canada benefit from the exclusion of sub-national government activities from the scope of the TPP which have been proposed by the USA? Government Procurement is an important example. On government procurement, Canada seems likely to have a very far-reaching agreement with Europe. It will include sub-national governments and municipalities. Why should Canada accept a narrower deal with the USA?
- Then, of course, there is agriculture, a very challenging subject in WTO negotiations. Fortunately for the TPP negotiators, the success of the TPP deal is not contingent on progress on agricultural issues. In fact, it is barely a negotiation about goods – unless Japan joins with its important market and critical mass. Clearly, the U.S. wants to increase its exports and Japan inside the tent would make that attractive.
- The U.S. will not change its sugar regime to benefit Australia. In fact, Mexico is concurrently lobbying Washington not to provide additional access for Australia.
- The U.S. is not likely to change its WTO-inconsistent cotton program, or peanuts, nor liberalize any of its WTO tariff rate quotas. The U.S. maintains 54 TRQs on dairy, beef, peanuts, tobacco, olives and cotton products. The debate about Canadian dairy and poultry is about TRQs, not supply management. In the Chile-USA FTA many of the U.S. TRQs are listed in the market access sections carving out access for Chile within the TRQs. Other products like poultry were subject to TRQs which were phased out over an extended period of time.
- We do not expect the U.S. position on agricultural border protection/tariff rate quotas or subsidies to come into the 21st century any time soon.
- New Zealand's demands for access on dairy to the USA are being vigorously resisted by U.S. stakeholders. These same stakeholders benefit most years from subsidies to top up income for dairy farmers who cannot recover their costs from the market. Leaving this to the end of the negotiations cannot be comfortable for the Kiwis but U.S. stakeholders do not see much benefit from opening the tiny New Zealand market.
- An examination of New Zealand's import barriers in the following areas shows that most appear to be WTO consistent: Biosecurity Act; Fair Trading Act; Smoke Free Environment Act; Food Act; Ozone Depletion Legislation.
- New Zealand is concerned about the impact of possible regressive changes in patent protection on its PHARMAC (Pharmaceutical Management Agency) plan and the potential cost of drugs to its citizens. They have seen the impact of the Australia-USA FTA on Australia. This is a central part of the intellectual property chapter. Canadians, too, will have similar concerns if the concessions



are not made already in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).

- New Zealand has tabled a position paper on Intellectual Property. Essentially the Kiwis do not want to go beyond the WTO TRIPs Agreement. Neither does Chile and there may be others. The U.S., on the other hand, wants to go well beyond TRIPs to integrate the Anti-Counterfeiting Trade Agreement (ACTA) and to revive the corpse of SOPA. TPP, like the Australia-USA deal, would expand the length of copyright protection terms from 50 to 70 years after the author's death. The normally unpatentable – e.g., plant and animal life – would be patentable.
- Because of its isolated location New Zealand will resist more rigid disciplines of its use of sanitary and phytosanitary regulations at a level acceptable to Canada, U.S., Mexico and Chile. New Zealand continues to ban access to Canadian fresh and frozen pork and poultry. When the Kiwi government approved more reasonable access including for pork, farmers challenged the liberalization the courts struck it down. We have situations where chilled pork cannot be imported into New Zealand for fear that scraps thrown into garbage may be fed to local swine. This notwithstanding that many years ago New Zealand banned feeding garbage to its swine population.
- Foreign ownership of farmland has long been a divisive issue in New Zealand. Acquisition of 16 New Zealand dairy farms by Shanghai Pengxin has been the subject of two court decisions after initial Overseas Investment Office Approval of the proposed investment. The 'right to purchase' issue is now the subject of a Supreme Court proceeding in New Zealand.
- The free market government of John Key is no doubt concerned by comments from the Chinese Ambassador to New Zealand that: "Fonterra in China is facing a much fairer and welcome playground than Pengxin in New Zealand".<sup>31</sup>
- New Zealand has concerns about Criminalization of IP infringement. Chile finds the U.S. proposals in this area too intrusive. So does Canada, which has introduced limited Financial Penalties for non-commercial infringement. According to Michael Geist,<sup>32</sup> Chile has adopted provisions similar to Canada's.
- The intellectual property chapter as drafted would empower U.S. companies to enforce their patents in partner countries - a threat not just to the innovation sector, but also to Pharmac's ability to provide affordable drugs. Copyright periods would be extended, parallel importing could become largely a thing of the past, and even playing a DVD with a non-New Zealand region code would be made a criminal act.

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<sup>31</sup> "China: We want stronger military ties", The New Zealand Herald, by Audrey Young, September 22, 2012

<sup>32</sup> University of Ottawa law professor specializing in copyright, privacy, e-commerce, internet, [www.michaelgeist.ca](http://www.michaelgeist.ca)

- “Investor-state dispute provisions”, meanwhile, could entitle foreign investors to sue the New Zealand Government in an international court of arbitration should it introduce regulations deemed to damage that investment.
- New Zealand wants to target American regulators who are perhaps the least used to co-operating in terms of the chapter on regulatory coherence. Similarly the Australians are interested in exploring new disciplines on agricultural subsidies and the Vietnamese and Malaysians want a major reform of trade in textiles and clothing.
- There are many other examples of challenging issues from investment to state-owned enterprises to labour and environment issues. If the issues weren’t challenging, TPP wouldn’t be worth doing much less taking two or three years of negotiating effort.
- N.Z. negotiators have been quite active in resisting U.S. demands for radical extensions to intellectual property laws, which are designed largely by and for Hollywood. They fear the U.S. proposals would have a serious impact on technology-driven innovation, open access to the internet, privacy and the interests of ordinary consumers. So do New Zealand organizations ranging from the Libraries Association, Royal Society for the Blind, Consumer N.Z. and the local IT industry, who have co-sponsored a website [www.fairdeal.net.nz](http://www.fairdeal.net.nz).
- The U.S. intellectual property rights holders tried and failed to achieve all of their objectives in hard fought negotiations for an international copyright agreement known as the Anti-Counterfeiting Trade Agreement or ACTA. After the secret text was leaked in 2009, massive protests broke out around the world, including in New Zealand.
- Renewed protests in Europe in 2012 saw the European Parliament overwhelmingly reject the agreement. It seems unlikely to be ratified by enough countries to come into force.
- The TPPA is now the vehicle for IPR “gold standard” global rules that will bind all signatory governments through the next century and create rights that the industry can enforce directly against governments in TPP dispute settlements. The internet has proved that governments need flexibility to adapt to new technologies and changing times but the users in many countries will continue to object to restrictions on their freedoms.
- There are interests in Mexico, Australia and New Zealand which are keen to preserve their national identities and cultural sovereignty. Seem familiar? These countries are justifiably envious of Canada’s cultural protections. In CETA, the E.U. is pressing to eliminate the commercial aspects of these cultural protections.
- Australia is pressing the U.S. to deal with its export-distorting subsidies to agriculture – principally export credits and food aid. USTR has undertaken to consult its stakeholders about the Australian request but it is clear that USTR is

not keen to do anything about any part of the U.S. farm support or import regulatory regimes – and we should not anticipate early solutions.

- Australia is the first TPP participant to tie concessions or even willingness to discuss new issues like disciplines on SOEs to progress in unresolved issues from the Doha Round. As an example, Australia has linked discussions about disciplines on State-Owned Enterprises to U.S. support for agricultural exports. The U.S. has indicated it would consider these. Will this be real or are they only looking to be seen to be doing the right thing? It will be hard to know because the process is so incredibly opaque no one knows what is happening. We expect to see more linkages. Australia will not be the last.
- Australia, like Canada has local content requirements for TV and radio programming and also regulates movies in order to protect and preserve their future. There have been indications of some openings for new technologies.
- Brunei does not have a Competition Policy – they are too small – they do not want one and do not need one. Government policy is not likely to be opened.
- A number of TPP members, including Chile, Peru and Brunei, have restrictions on imports of used vehicles. Canada did, too, until the CUSTA. Canada's reason was to protect its dealership networks from good condition recent vintage used cars from the USA. Others cite environment or road safety.
- Brunei maintains export controls on salt, rice and sugar for security of domestic supply. In addition, Brunei maintains price supports on paddy rice.
- Malaysia wants nothing to do with financial controls which would prevent it from managing capital flows in times of economic crises.
- Brunei has constitutional requirements with respect to ownership in its oil and gas sectors. There are exclusions in the P-4 Agreement among Chile, N.Z., Singapore and Brunei.
- Brunei is no more likely to trade away its oil and gas sectors than the U.S. to liberalize its sugar policy – which Australia wants so badly.
- Mexico also has rigorous contracts on foreign investment in its oil and gas sectors.
- Chile has TRQs on imports of dairy products in the predecessor Trans-Pacific Strategic Economic Partnership Agreement (i.e., P-4 Agreement). These TRQs are quite tight and appear to apply only to New Zealand as neither Singapore nor Brunei are global leaders in dairy exports.
- Chile also has WTO-consistent price bands (to limit price fluctuations) for certain agricultural products. An earlier version of the system was challenged and condemned in WTO dispute settlement. Chile amended these to bring them into conformity with the WTO rules.

- The U.S. position on state-owned enterprises (SOE) has run afoul of Singapore – a free port which is a prime mover in Asia for reducing and eliminating barriers to trade in goods, services and investment.
- Vietnam, too, will have problems with the SOE provisions in the Competition chapter.
- While Peru has a recently negotiated and intrusive FTA with the U.S., the Peruvian Government has made it clear that it does not want to go beyond that FTA in the TPP.
- Peru like other countries in the Andean Pact has price band provisions to prevent excessive fluctuations in the prices of certain agricultural products, specifically wheat, maize, rice, sugar and milk. These were eliminated for the U.S. in the Peru-USA FTA. They remain in force for other countries.

### **Intel from South of the Border**

217. While TPPA negotiations are shrouded in secrecy in Canada, the U.S. operates a system of cleared advisers who see and comment on draft texts and inform the U.S. position. Based on this, we have learnt the following.

- The music industry sits on the committee that advises on intellectual property, while the Motion Picture Association of America sits on the committee dealing with services, such as audio-visual production, broadcasting and distribution.
- Several leaked texts of the intellectual property chapter reveal the far-reaching effects that U.S. proposals would have on businesses, educational institutions and consumers in the TPP.
- One target is a ban on parallel importing of books and DVDs. The Warehouse has warned about the cost increases for shoppers, but it would also massively hike the costs for the cash-strapped university and public libraries.
- People who buy movies on DVD from the U.S. or Europe often find there are codes or digital locks that prevent them being viewed in their home country. Using devices to circumvent that coding, even where the DVD was bought legally, would become illegal under U.S. proposals in the TPP. Many educational institutions currently use these mechanisms to access material produced in other parts of the world.
- The monopoly copyright term would be extended from the current life of the creator plus 50 years to over 100 years, further increasing costs to the public.
- Perhaps the most stifling proposal in terms of innovation targets the internet, which operates as a giant copying machine. New rules would control temporary electronic copies that move information from point to point, effectively installing tollbooths along the electronic highway.
- Internet Service Providers would be required to police the internet, and to identify their customers. This is already happening in Canada.

- Under “notice and takedown” rules they would have to enforce notices that are often invalid or open to legal challenge. Recent research shows some ISPs in the U.S. have received around 30,000 notices, only two of which were valid.
- This is too high a price for the jobs and publicity that subsidized mega-productions bring to New Zealand and would stifle the country’s growing movie industry. Hollywood even opposes a weakly worded cultural exception in New Zealand’s trade agreements that allow support for creative arts of national value, including film and creative on-line content.

### **The Trans-Pacific Partnership: Examining the 21<sup>st</sup> Century Issues at Play**

218. The agreement is being negotiated as a single undertaking that covers all key trade and trade-related areas. In addition to updating traditional approaches to issues covered by previous free trade agreements (FTAs), the TPP includes new so-called twenty first century issues we would describe as “behind the border”.
219. Washington claims that the eleven TPP participating countries also have agreed to adopt high standards in order to ensure that the benefits and obligations of the agreement are fully shared. In fact there has been considerable resistance to U.S. proposals which are seen as overly intrusive and unbalanced.
220. The need to appropriately address sensitivities and the unique challenges faced by developing country members will be addressed through trade capacity building, technical assistance, and staging of commitments, as appropriate.
221. The new, cross-cutting commitments are intended to reduce costs, enable the development of more seamless trade flows and trade networks between and among TPP members, and to encourage the participation of small- and medium-sized enterprises in international trade, and promote economic growth and higher living standards.
222. TPP is characterized by all the usual motherhood and ambition statements one expects. The latest trade Agreement must always be advertised as the biggest most ambitious and the best for participants. That is if they are negotiable. Remember the Doha Development Agenda?
223. There are nearly 30 negotiating texts designed to cover all aspects of commercial relations among the TPP countries. Clearly, these go well beyond traditional trade agreement issues. Based on the limited information available under the incredibly opaque TPP secrecy rules, the following are the issues under negotiation as well as a summary of progress where available.<sup>33</sup>

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<sup>33</sup> Some of this information has been obtained from officials and others whose identities cannot be revealed

## **Market Access for Goods**

224. The USTR notes that the TPP tariff schedule will cover all goods, representing some 11,000 tariff lines. The negotiators have not yet decided on whether or not there will be a common schedule applicable to all TPP members. The U.S. is one of the most important derogators from its own demands for comprehensive coverage. And there is no indicator that discrimination among TPP members will be eliminated – for example, Mexico has better treatment on sugar than Australia can ever hope for. The eleven countries also are developing common TPP rules of origin, and are weighing proposals now for how to do this most effectively and simply.
225. The Market access that the participants are to provide to each other has been advertised as ambitious, comprehensive, balanced, and transparent (as long as it does not hurt politically or economically). The text on trade in goods addresses tariff elimination among the partners, including significant commitments beyond the partners' current WTO obligations.
226. The starting point will be applied tariffs, not WTO bound tariffs. Non-tariff Measures that can serve as trade barriers are to be eliminated. Import and export licensing are on the table as well as proposals relating to trade in remanufactured goods. Additional provisions related to agricultural export competition and food security also are under discussion.

## **Rules of Origin**

227. TPP countries have agreed to seek a common set of rules of origin to determine whether a product originates in the TPP region. TPP rules of origin are to be objective, transparent and predictable. Regional cumulation of content in determining origin of goods is an important point of difference to date. In addition, the TPP countries are discussing the proposals for a system for verification of preference claims that is simple, efficient and effective. Given recent activities and crippling penalties imposed by the USA, this will be a welcome change.

## **Customs Procedures**

228. The objective is to establish customs procedures that are predictable, transparent and that expedite and facilitate trade. These will help link TPP firms into regional production and supply chains. The text aims to ensure that goods are released from customs control as quickly as possible, while preserving the ability of customs authorities to strictly enforce customs laws and regulations. TPP urges close co-operation (and information exchanges) between authorities in TPP member countries to ensure the effective implementation and operation of the agreement as well as other customs matters.
229. The provisions of NAFTA are relatively simple. P-4 provides for trade facilitation, Customs Co-ordination, Valuation, Advance Rulings, Reviews and Appeals, Paperless

Trading, Express Shipments, Penalties, Risk Management, Release of Goods, Enquiry Points, Confidentiality.

230. One wonders why all of this information and these rules are needed. The information requested could be used to launch a CVD challenge – or challenges under the WTO SCM Agreement.
231. We deal extensively in obtaining advance rulings. Many can be turned around in a week. Some the same day. It depends on how much work one does prior to filing. A set timeframe tends to become both the minimum and the maximum.
232. Once a Customs administration is faced with a deadline, it will want to ensure that the maximum delay will accommodate complex situations. TPP will not change Canada's dependence on trade with the USA. NAFTA trade should not be bogged down in a bureaucratic time counting system.

### **Textiles and Apparel**

233. In addition to restricting market access on textiles, apparel and footwear through very detailed and protectionist rules of origin, the TPP countries also are discussing a series of related disciplines, such as customs co-operation and enforcement procedures and a special safeguard. This is not trade liberalization. It is very retrograde mid-20<sup>th</sup> century approach, not 21<sup>st</sup> century.<sup>34</sup> It is a clear example of the U.S. inconsistency. It shows that Washington can talk the talk but its domestic politics do not allow it to walk the walk.

### **Trade Remedies**

234. TPP countries have agreed to affirm their WTO rights and obligations with respect to anti-dumping and countervailing duties and safeguards. The negotiations are considering new proposals, including obligations that would build upon these existing rights and obligations in the areas of transparency and procedural due process. Nothing will change in the USA where the system does not lack either clarity or very sharp teeth. One can actually watch the piranhas devour their interests and market position. (Canada's system is also very effective, perhaps a function of its smaller domestic market.) Proposals also have been put forward relating to a transitional regional safeguard mechanism.
235. Chapter 6 of the P-4 (Trade Remedies) is relatively simple – where all rights to maintain existing systems are reserved. In the TPP, there is the same objective, but it could be expanded.
236. In P-4, it was a laissez faire approach – everyone keeps their own AD/CVD system. The same applied in NAFTA – except for the provision of a unique and separate dispute settlement mechanism to replace domestic Judicial Review.

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<sup>34</sup> The author was a textile negotiator, GATT restricted group drafter of the Multi-Fibre Arrangement and a founding member of the GATT Textiles Surveillance Body. I wrote the book on protection – until I saw the light.

237. Trade Remedies measures which are subject to separate dispute settlement under NAFTA Chapter 19 are not subject to similar dispute settlement in TPP.
238. There are interests in the U.S. which would like to eliminate Chapter 19 of NAFTA as part of TPP.<sup>35</sup> Ontario and Quebec have opposed this initiative.<sup>36</sup>
239. There are currently discussions about disciplines on fisheries subsidies with no clear sense of direction as to end results.
240. Our discussions<sup>37</sup> on trade remedies in TPP suggest that Chile and New Zealand would support inclusion of disciplines on fisheries subsidies in the trade remedies section as they did in the Doha Round. Other countries, whose goal appears to be to avoid effective disciplines on fisheries subsidies, would prefer to treat this issue as part of the Environment chapter. Canada will likely agree there is a need for real, enforceable disciplines on fisheries subsidies.
241. There have been transitional safeguard or snapback provisions in CUSTA, in NAFTA, in KORUS and in P-4. This type of safety valve is to be expected.
242. We anticipate that TPP will exclude other members from global safeguards by member countries in TPP would parallel those found in NAFTA Article 8-3. While such exclusions have been addressed in WTO Dispute Settlement they are not precluded but the scope is rather narrow. Rather they require a separate examination to ensure that the imports from outside the FTA have met the criteria for imposing safeguards.<sup>38</sup>

### **Sanitary and Phytosanitary Standards (SPS)**

243. SPS issues have been a significant point of focus for American agriculture in the TPP negotiations. Many across the U.S. agricultural sector have long been working closely with the U.S. negotiating team in pursuit of stronger SPS disciplines and have consistently stressed the need to be able to truly hold their trading partners to those commitments.
244. Industry organizations have highlighted, in particular, the vital importance of “WTO-plus” SPS provisions – that is, obligations that go beyond the WTO SPS Agreement on issues like risk assessment, risk management, transparency, border checks/laboratory testing and facilitating trade through regulatory coherence measures.<sup>39</sup>

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<sup>35</sup> “Senators Urge Kirk to End NAFTA Panels On AD, CVD Cases In TPP”, Inside U.S. Trade, October 12, 2012

<sup>36</sup> “Canadian Producers Call on Ottawa To Exclude Lumber Issues From TPP”, Inside U.S. Trade, November 16, 2012

<sup>37</sup> This information was developed from a number of discussions and our review of the available literature.

<sup>38</sup> WTO WT/DS 248/249/251/252/253/254/258 and 259 /AB/R U.S. steel safeguards, paras 465-466 and WT/DS202/AB/R U.S. Line pipe, para 198

<sup>39</sup> Coalition Letter on SPS Disciplines in TPP Talks, July 26, 2012



245. It is imperative that all elements of the agreement's SPS provisions, including the WTO-plus components, be fully enforceable; otherwise, there will not be tangible value in the TPP process in the critical area of SPS commitments.
246. The TPP countries will try to reinforce and build upon existing rights and obligations under the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures. It remains to be seen whether outright bans on fresh poultry and pork in New Zealand and Australia can and will be made subject to effective disciplines. The SPS text is expected to contain a series of new commitments on science, transparency, regionalization, co-operation, and equivalence. In addition, negotiators have agreed to consider a series of new bilateral and multilateral co-operative proposals, including import checks and verification.
247. Chapter 7 of the P-4 is not much more than the WTO obligations and the SPS Agreement. It is elaborated to introduce greater co-operation and consultations on SPS measures.
248. We expect a push for mandatory review and enforcement of SPS measures. This will likely be supported by Canada, the United States and Chile. The extent to which TPP countries will want to restrict the flexibility of their food safety agencies remains to be seen. Australia will not go further than its agreement with the U.S. and New Zealand may resist.
249. Canada, the U.S. and Chile should be supportive of going well beyond the P-4 texts on Regional Conditions and Equivalence. This will be important should Japan and Korea join the TPP.

### **Technical Barriers to Trade (TBT)**

250. The TBT text will reinforce and build upon existing rights and obligations under the WTO Agreement on Technical Barriers, which will facilitate trade among the TPP countries and help our regulators protect health, safety, and the environment and achieve other legitimate policy objectives. Given decisions against the USA in clove cigarettes, tuna and Country of Origin Labeling, one must understand what drives the U.S. regulatory system.
251. It seems that "regulatory freedom" in the U.S. often wins out over avoiding trade restrictions. Indeed the regulatory system is regularly used to benefit U.S. producers.<sup>40</sup> The text will include commitments on compliance periods, conformity assessment procedures, international standards, institutional mechanisms, and transparency. The TPP countries also are discussing disciplines on conformity assessment procedures, regulatory co-operation, trade facilitation, transparency, and other issues, as well as proposals that have been tabled covering specific sectors.

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<sup>40</sup> See WTO Dispute Settlement proceedings on USA – Clove Cigarettes and USA – Country of Origin Labelling.

## Competition

252. USTR claims that the competition text will promote a competitive business environment, protect consumers, and ensure a level playing field for companies in TPP member countries. The text includes commitments on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action and technical co-operation.
253. While consumer protection is desirable, it is not clear when this migrated from being a domestic legal and administrative issue to making all TPP signatories their brothers' keepers and consciences.
254. Competition is addressed in Chapter 13 of P-4. This chapter does not appear to be overly controversial.
255. We understand that the TPP chapter is more restrictive than P-4.
256. The U.S. has long asserted extra-territorial application of its competition laws to activities outside its borders.<sup>41</sup> Will it assert the same rights in the TPP? What will happen to New Zealand's exemptions from P-4 relating to agricultural exports and farm products marketing boards?
257. Competition Policy was a so-called Singapore Issue, which was one of the causes of the failure of the Cancun Ministerial meeting, and effectively the start of the failure of the Doha Round. The TPP has a legitimate role in combating restrictive trade practices.
258. Brunei was excluded from the Competition Chapter of the P-4<sup>42</sup> because it did not have a competition law.
259. Canada provides exemptions for export consortia under its Competition Act.<sup>43</sup> The USA has long considered that Japan does not adequately enforce its competition polices – and permitted restrictive business practices which have had an adverse impact on foreign competitors.<sup>44</sup>

## State-Owned Enterprises (SOEs)

260. This is the most controversial element of the Competition Chapter. The U.S. is driving this issue, designed to ensure behavior by state-owned enterprises based on commercial consideration. It will only apply to SOEs owned by federal or central governments, not state and other sub-national governments which, in fact, account for many U.S. SOEs.

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<sup>41</sup> "Extraterritorial Application of Competition Laws in the U.S. and the European Union", CUTS Centre for Competition, Investment & Economic Regulation, No. 4/2006

<sup>42</sup> P-4, (Trans-Pacific Strategic Economic Partnership Agreement) Article 20.5(3)

<sup>43</sup> "TPP SOE Talks Slowed By Domestic Processes, Australian Ag Demand", Inside U.S. Trade, September 14, 2012

<sup>44</sup> Discussion between author and Alan Wm Wolff, who is now chairman of the National Foreign Trade Council and was a former U.S. Trade Representative General Counsel.

261. This subchapter appears to be designed to impact Vietnam, and eventually China. But it casts a very broad net. It will also raise concerns in other TPP members including Singapore,<sup>45</sup> Malaysia, and Canada. Australia and New Zealand will have concerns as well.
262. The disciplines proposed go well beyond GATT (1994) Article XVII. The U.S. must soon try to find middle ground.
263. This is an issue on which the U.S. appears to be isolated. Indeed, U.S. business interests have suggested the U.S. is spending too much time fighting for SOE disciplines.<sup>46</sup>

### **Cross-Border Trade in Services**

264. The Services and Investment chapters will cover all service sectors. To ensure the high-standard outcome the eleven countries are seeking, the TPP countries are negotiating on a “negative list” basis (which is designed to be much more inclusive than the positive list approach in the WTO GATS). The TPP approach will presume comprehensive coverage but allow countries to negotiate exceptions to commitments in specific service sectors. In other words, once more we will see a negotiation about exclusions, providing further evidence that the “comprehensive TPP” is not comprehensive.
265. Many other players want nothing to do with including U.S. rules on financial services and telecoms. Important participants want no limits on their ability to regulate capital flows.
266. It has been difficult to date to achieve consensus on the basis of securing fair, open, and transparent markets for services trade, including services supplied electronically and by small- and medium-sized enterprises, while preserving the right of governments to regulate in the public interest.

### **Financial Services**

267. The text related to investment in financial institutions and cross-border trade in financial services will improve transparency, non-discrimination, fair treatment of new financial services, and investment protections and an effective dispute settlement remedy for those protections. These commitments will create market-opening opportunities primarily for the U.S., benefit businesses and consumers of financial products and at the same time protect the right of financial regulators to take action to ensure the integrity and stability of financial markets, including in the event of a financial crisis. There are concerns about the introduction of restrictions on capital flows.
268. There have been problems with Malaysia and Singapore relating to controls on capital flows which will derive from the Financial Services chapter.

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<sup>45</sup> “TPP SOE Talks Slowed By Domestic Processes, Australian Ag Demand”, Inside U.S. Trade, September 14, 2012

<sup>46</sup> Some business reps question emphasis on SOE disciplines in TPP talks, Inside U.S. Trade, October 26, 2012

269. The U.S. is trying to extend the financial services chapter to non-financial institutions. This contrasts with Canada where government policies have kept banks out of the insurance business.

### **Express Delivery Services**

270. A CNBC report indicated that between FedEx and UPS daily volumes are 25 million packages. Much of this relates to online commerce and retailing.<sup>47</sup> This helps to underline the importance of e-commerce and express delivery services to the USA.
271. We understand Chile, New Zealand and Singapore are supportive of Open Skies/air transport services being a feature of TPP. The U.S. wants to keep existing measures in place – and keep airlines passenger services out of the TPP. A leaked E.U. report indicates Canada is resisting E.U. pressures to include these services in the CETA.

### **Telecommunications**

272. USTR claims that the telecommunications negotiations promotes competitive access for telecommunications providers in TPP markets, which will benefit consumers and help businesses in TPP markets become more competitive. However, the benefits will flow to larger U.S. based companies. They will not normally help smaller telecom providers in other TPP countries. They will also advance U.S. agendas at the expense of culture and local content.
273. The proposals will permit large well-established U.S. companies to beat down and stifle competition from smaller players in other TPP countries. In addition to broad agreement on the need for reasonable network access (reasonable meaning unfettered?) for suppliers through interconnection and access to physical facilities, TPP countries are negotiating on a broad range of provisions enhancing the transparency of the regulatory process, and ensuring rights of appeal of decisions. (In Canada, this could mean appealing Cabinet decisions.)
274. Additional proposals have been put forward on choice of technology and addressing the high cost of international mobile roaming. Six cheers for this! (At least some common sense consumer orientation has found its way into the text.)

### **Electronic Commerce**

275. The E-Commerce text is expected to enhance the viability of the digital economy by ensuring that impediments to both consumers and businesses embracing this medium of trade are addressed. The negotiators are trying to address customs duties in the digital environment, authentication of electronic transactions, and consumer protection. Proposals on information flows and treatment of digital products are under discussion.

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<sup>47</sup> Inside the Package Wars, CBNC, November 4, 2012

276. Electronic Commerce is not a P-4 issue.
277. There has been considerable fuss about the U.S.-driven initiative in the negotiation to date. It would be fair to say that these proposals are more divisive than cohesive but there are parties who recognize the importance of adapting to the growth in e-commerce.
278. The general objective is to preclude imposition of duties and taxes on goods transmitted electronically. This relates to digital products as opposed to products purchased online but transmitted or delivered physically.
279. There will be debate about whether or not VAT may still be charged if it is charged on the electronic transmission of content. For example, we would expect that “cloud” content would not be taxed, but if the same content is on a physical medium, i.e., a DVD or USB, it could be assessed both duty and tax.
280. Are digital transmissions goods? Yes – and should they be subject to National Treatment and Rules of Origin? This will be a more difficult discussion.
281. Will the U.S. try to use these provisions to attack subsidies to movie production, i.e., to allow the U.S. to impose CVD on movies and television shows?
282. Canada will need to examine this very carefully in connection with film production subsidies.
283. While not entirely clear at this point, this section would also appear to address digital locks and to criminalize abuses.
284. One would hope that the negotiations could protect consumers from fraud, phishing and outright scams. This is a chapter which may help to create much needed disciplines of fraudulent practices – hopefully it could establish a war on spam, which would undoubtedly facilitate valid electronic commerce, and make so many TPP citizens happy to be rid of a pervasive nuisance.
285. Requirements to store data within a country is likely to be an issue.
286. The U.S. is trying to include an MFN provision in this chapter which will make TPP superior to all other FTAs. In simplest terms, this would mean your TPP partners get the best deal you have given any other country in any FTA. This brings the WTO to the TPP – in other words, all gains achieved in other bilateral or regional agreements become a minimum for the TPP.

### **Government Procurement**

287. The Government Procurement Chapter is designed to ensure that procurement covered under the chapter is conducted in a fair, transparent, and non-discriminatory manner. The text limits commitments to federal or national governments. While the TPP is supposed

to be comprehensive, this chapter clearly will not be, particularly if there is to be a balance between federal and unitary states, which is unlikely.

288. Government procurement packages are being negotiated with each country seeking to broaden coverage to ensure the maximum access to each other's government procurement markets, while recognizing each others' sensitivities. Such sensitivities include the U.S. federal government not being able to cope with the recalcitrance of its state and municipal governments.
289. The TPP negotiators have agreed on the basic principles and procedures for conducting procurement under the chapter, and are developing the specific obligations.
290. The TPP partners are seeking comparable coverage of procurement by all the countries (which is a farce when one considers the differences between federal and unitary states), while recognizing the need to facilitate the opening of the procurement markets of developing countries through the use of transitional measures.
291. We understand that the U.S. has excluded from the scope *ab initio* government procurement by state enterprises, state commercial enterprises and designated monopolies. This is the most serious deficiency in the Government procurement chapter. This is rather underwhelming and certainly not comprehensive.
292. Why does this chapter not include procurement of food for U.S. government nutrition programs?
293. Will the U.S. attempt to achieve other goals by including its offer in the Government Procurement Chapter to put the U.S. on a par with other parties?
294. It will be important to discipline and hopefully eliminate U.S. procurement set asides for:
  - Small Business; Aboriginal-owned Business; Minority-owned Business; and Women-owned Business. All of these preclude competition from other trading partners and indeed from non-qualifying firms in the USA.
  - There is no evidence that various Buy American requirements -- which are principally operated at the state level -- will be on the table.

## **Investment**

295. Article 20.1 of P-4 called for the initiation within two years of negotiations on Investment – on a mutually advantageous basis.
296. The TPP text will be designed to provide better legal protections for investors and investments of each TPP country in the other TPP countries, including ongoing negotiations on provisions to ensure non-discrimination, a minimum standard of treatment, rules on expropriation, and prohibitions on specified performance requirements that distort trade and investment.

297. Investment goes hand in hand with Investor State dispute settlement. Unfortunately, the text on Investment in the TPP leaves much to be desired in the context of reaching consensus.
298. The U.S. wishes to include provision for expeditious, fair, and transparent Investor-State dispute settlement, subject to appropriate safeguards. (Read NAFTA Chapter Eleven.)
299. Negotiations on scope and coverage will be difficult. Indeed, this has already become a divisive issue.
300. Australia will not buy into the investor state dynamic and has rejected the possibility of including this in TPP insofar as Australia is concerned.
301. Investor State dispute settlement always attracts negative attention from Civil Society. The usual complaint is that the existence of investor state dispute settlement permits corporations to sue governments over sound and beneficial public/social policy initiatives which might adversely affect business.
302. To counter this criticism – which became especially loud as a result of NAFTA’s approach to this issue -- the investment text will confirm the rights of TPP countries to regulate in the public interest.
303. In fact, there have been relatively few adverse decisions in NAFTA Chapter Eleven challenges.
304. We can expect that like in NAFTA Article 1106 Performance Requirements -- i.e., trade distorting conditions for approving investments -- will be strictly controlled. But nowhere in the TPP chapter will there be any discipline on locational subsidies to attract investment which are so important in the USA.
305. The sheep’s clothing version of the advance billing for the Intellectual Property chapter suggests it will reinforce and develop existing World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries.
306. In fact, the proposals have been quite divisive and seek to go well beyond TRIPs. They include elements of the Anti-Counterfeiting Trade Agreement (ACTA) which crashed in Europe and Stop Online Piracy Agreement (SOPA) which did not survive Congressional scrutiny and debate. SOPA crashed and burned in Congress, yet the ideas are alive, if not well, in TPP.
307. Many forms of intellectual property are addressed, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and

genetic resources and traditional knowledge. TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.

## Labour

308. The Labour chapter is expected to include commitments on labour rights protection and mechanisms to ensure co-operation, co-ordination, and dialogue on labour issues of mutual concern. It will likely include bilateral and regional co-operation on workplace practices to enhance workers' well-being and employability, and to promote human capital development and high-performance workplaces.
309. These provisions will likely go well beyond the comfort level of republicans in Congress. Indeed had the Administration sought Trade Promotion Authority for the TPP, one would have expected guidance from Congress to reflect these concerns.
310. The U.S. has been very selective about ILO requirements to be a basis for TPP Partnership. These do not include the core labour conventions which the U.S. has not adopted.

## Environment

311. The Environment chapter will follow the objectives of the Congressional Bipartisan consensus.<sup>48</sup> The TPP environment text is expected to include effective provisions on trade-related issues that would help to reinforce environmental protection.
312. There is a very controversial and divisive proposal by the U.S, to establish institutional oversight of TPP member participation in separate MEA within TPP. Congress is pushing for this. The negotiators are discussing proposals on new issues, such as marine fisheries and other conservation issues, biodiversity, invasive alien species, climate change, and environmental goods and services.
313. Proposals for carbon taxes, perhaps including on transport costs, have been advanced by N.Z. These will not likely be well received by Republicans in Congress, nor by the Harper Government.
314. Eleven U.S. senators want to ensure that a final TPP agreement includes enforceable environment rules that are stronger than those in previous U.S. free trade agreements.<sup>49</sup> The U.S. environment proposal in the TPP talks is facing opposition from other participants, especially over the U.S. demand that the environment chapter be fully enforceable under the TPP dispute settlement mechanism.<sup>50</sup> This has been resisted by Peru and Chile.

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<sup>48</sup> Conservation Group Raises Alarm Over TPP Environment, Investment Chapters, Inside U.S. Trade, September 12, 2012

<sup>49</sup> "Eleven Senators push for binding, enforceable environment rules in TPP", Inside U.S. Trade, October 26, 2012

<sup>50</sup> Inside U.S. Trade, June 29, 2012



315. U.S. FTAs with South Korea, Panama, Colombia and Peru make multilateral environmental agreements (MEAs) obligations enforceable under normal dispute settlement procedures. This requires FTA partners to uphold their commitments under MEAs, thus treating them as an accepted condition for membership under the TPP as well as under the MEA.

### **Temporary Entry for Business Persons**

316. TPP countries have substantially concluded the general provisions of the Temporary Entry chapter, which are designed to promote transparency and efficiency in the processing of applications for temporary entry, and ongoing technical co-operation between TPP authorities. Specific obligations related to individual categories of business person are under discussion.
317. This is an issue which has been well-developed in APEC. It is covered in Chapter 13 of P-4. This chapter does not appear to be overly controversial. We understand that the TPP chapter is more restrictive than P-4. Will the U.S. be required to remove limits on special immigration permits?
318. The U.S. visa system is probably the most restrictive element of these discussions.

### **Co-operation and Capacity Building**

319. Capacity building and other forms of co-operation are critical both during the negotiations and post-conclusion to support TPP countries' ability to implement and take advantage of the agreement. It makes sense to help exchange information and ensure that all parties can comply with and take advantage of the agreement. There are similar provisions found in P-4.
320. Capacity building activities can be an effective tool in helping to address specific needs of developing countries in meeting the high standards the TPP countries have agreed to seek. In this spirit, several co-operation and capacity building activities have already been implemented in response to specific requests and additional activities are being planned to assist developing countries in achieving the objectives of the agreement.
321. In a nutshell, this means that countries which do not have U.S.-style regulatory measures will be offered assistance to introduce and operate them.
322. The TPP countries also are discussing specific text that will establish a demand-driven and flexible institutional mechanism to effectively facilitate co-operation and capacity building assistance after the TPP is implemented.
323. The text for this chapter has essentially been completed. It is not a chapter of contractual undertakings. Nor will it be subject to dispute settlement.

324. It is difficult to understand, however, what the U.S. means by completed. Is it really agreed, or is it all over but the shouting?
325. There will be a chapter on Legal Issues. As well as one on Transparency.

### **Administration**

326. The Administration chapter of the agreement will include clear and effective rules for resolving disputes and some of the specific issues relating to the process. This will likely resemble NAFTA Chapter Twenty.

### **Exceptions**

327. Exclusions. As with every trade agreement, there will be a chapter dealing with exclusions from the scope or specific disciplines. These will include General Exceptions, (see GATT Article XX), Security Exceptions (see GATT Article XXI), as well as particular issues which parties do not wish to include. I would expect to see, *inter alia*, Judicial Review for Brunei, Investor-State issues for Australia, log export controls for the USA (and Canada), and price band systems for Chile and Peru.
328. The United States has excluded a range of activities at the sub-national level from the initial scope. Also excluded are domestic agricultural support, trade distorting export support based on export credits and food aid, set asides for Government Procurement and Buy American provisions.
329. Article 19.5 of P-4 addresses New Zealand's special needs under "Treaty of Waitang", which relates to obligations toward the Maori people.
330. The exemption states:
1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.
  2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 15 (*Dispute Settlement*) shall otherwise apply to this Article. An arbitral tribunal established under Article 15.6 (*Establishment of an Arbitral Tribunal*) may be requested by Brunei Darussalam, Chile, or Singapore to determine only whether any measure (referred to in Paragraph 1) is inconsistent with their rights under this Agreement.
  3. Though the U.S. opposes this exclusion, this appears to be a "must have" for New Zealand.

## State of Play

331. *Inside U.S. Trade* reported that after more than 32 months of effort, the talks still face significant obstacles on the toughest issues, and the talks may not wrap up until sometime in 2014. Moving into next year, the administration must start identifying the issues for which it will keep fighting despite resistance from TPP partners, and those for which it can settle.”<sup>51</sup>
332. The TPP negotiations are likely not nearly as complete as the principal promoters suggest. After fourteen rounds of talks, over three years, most of the core negotiating issues remain unresolved. The TPP is nowhere near finished. It will, like all other free trade negotiations, be about hard-fought exclusions.
333. Target dates in 2011 and 2012 already have been missed and we should expect that the ambitious target of completion by October, 2013, will also need to be revised.
334. Some of the more ambitious U.S. proposals have been stalled by the underwhelming response of the other participants. There are signs, however, that Washington has begun to recognize that its over-reaching approach and over-management of the process is creating resistance which could kill the negotiations.
335. The United States cannot afford this. U.S. stakeholders are questioning the extent of the focus on State-Owned Enterprises and the effects on other participants. Others with more traditional interests are openly pressing for flexibility on other issues to keep everyone at the table.
336. If the U.S. is more flexible in Auckland next week, the change of pace will be helpful. If the flexibility does not come soon, closure will continue to be elusive. Indeed, the negotiations may drift year after year with no end in sight.
337. The TPP will not get off the ground if there is only one winner. It needs to provide positive benefits and balance to all participants. Failure to do this will mean TPP will become Doha revisited.

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<sup>51</sup> *Inside U.S. Trade*, “In Second Term, Obama May See Trade Issues As Area Of Compromise”, November 7, 2012

## **CONCLUSIONS**

338. To help replace declining trade with the U.S., Canada must negotiate solid, ambitious trade agreements. The U.S. market will always be important to Canada and will be its most important trading partner. But a return to growth seems quite far off. Canada needs immediate diversified options and opportunities.
339. Gordon Ritchie, who was so pivotal in negotiating Canada-U.S. Free Trade, suggests the TPP will not be worth much to Canada. Although I don't do so with any joy, I agree. What we know so far suggests that Canada has little to gain from the TPP. Of course, if Japan were to enter the mix, my assessment would change. Indeed, it was the prospect of Japan's participation which revitalized the Harper Government's interest in what was an underwhelming initiative.
340. So then, the question becomes "will Japan join the negotiations any time soon?" Prime Minister Noda opened the TPP window a crack late in 2011, but that was a year ago and if the window has not yet slammed shut – it was closing and is now an election issue in Japan. ASEAN Plus, and a possible Trilateral FTA with Korea and China, seems to be very attractive and more flexible options for Japan.
341. The Trans-Pacific Partnership is more important for what it can become than for benefits which can be expected from the current membership. Canada has FTAs with four of the TPP participants; the others, except for Vietnam, are rather small and some are located quite far away.
342. The TPP bubble is New Zealand-bound, with the next, and 15th, round of negotiations to begin in Auckland in two weeks. Eleven nations will be represented, from the minnow host to the dominant U.S. - whose participation, as the President has explained, is motivated by a desire to exert pressure on China.
343. Like the other players, Canada will need and will seek allies to make common cause. Hopefully, the government has been consulting informally with other parties for several months. There should be many such opportunities. As an example, an important issue for Canadian farmers and ranchers is securing stronger disciplines on the use of sanitary and phytosanitary measures by Australia and New Zealand. Chile and the USA will be very like-minded.
344. Canada's Chief Negotiator Kirsten Hillman and her team have been engaged in extensive consultations. I expect them to hit the ground running for the 15th Round in Auckland.
345. Advocates of the process point out that it is a "work in progress" while "consensus is forged". The trouble is that both the work and its progress are conducted entirely behind closed doors - and there is hollowness about any consensus as long as the democracies themselves are blindfolded.

346. TPP is being negotiated as a “single undertaking” which means “nothing is finally agreed until everything is agreed. What can be certain is that not everything currently on the table will be a part of the final agreement. The more ambitious proposals will be the hardest of all to achieve. And that’s the point - TPP is a negotiation, an attempt in a structured process to find scope for consensus where none appears to exist. It’s not for nothing trade negotiations are called the art of the possible.
347. It’s far too early to either dismiss TPP as a useless exercise or embrace it as a cure for what ails the global economy. While we see problems now, they can be fixed, with flexibility and compromise. If the TPP is a wine, it clearly needs some ageing before we can properly pass verdict on its quality.

# **COUNTRY ANALYSIS**

## **AUSTRALIA**

### **Overview and Objectives**

348. Australia is a strong supporter of the U.S. push for an expansive and speedily negotiated TPP.
349. A successful negotiation would mean new FTAs with Peru, Vietnam, Mexico and Canada. Australia also hopes to improve on its FTA already negotiated with the USA.
350. Like Canada, Australia has hoped for the inclusion of Japan in TPP. Australia has indicated that access to Japan's agrifood markets -- which it is trying to negotiate bilaterally -- was an important reason for joining the TPP negotiations.
351. With trade deals in place with several TPP partners, Australia is primarily looking for ways to "improve" upon these past deals. Increased access to the U.S. market for sugar and beef, for example, would be key to offsetting concessions it may end up making elsewhere in the negotiations.<sup>52</sup> Without improved market access in these areas the TPP will not have major gains for Australia.

### **Key Statistics**

352. Australia's population is approximately 22,015,576<sup>53</sup> and its GNP in 2010 was US\$823,018,403,574.10.<sup>54</sup>
353. Its trade<sup>55</sup> with Canada in 2011 was:

	CDN \$
Canada's imports from Australia	\$1,767,000,000
Canada's exports to Australia	\$1,898,000,000
Canada's trade surplus with Australia	\$130,840,000

354. Australia's principal exports<sup>56</sup> are coal, iron ore, gold, meat, wool, alumina, wheat, machinery, transport equipment. Beef, sheepmeat, pork and wine are among its important agricultural exports.
355. Its principal imports<sup>57</sup> are machinery and transport equipment, computers and office machines, telecommunication equipment and parts, crude oil and petroleum products.

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<sup>52</sup> "Australian Opposition On Key U.S. Priorities Emerges As Hurdle In TPP", Inside U.S. Trade, September 19, 2012

<sup>53</sup> Central Intelligence Agency, The World Factbook

<sup>54</sup> World Bank, <http://search.worldbank.org/data?qterm=gross%20national%20product&language=EN>

<sup>55</sup> Industry Canada, Trade Data Online, 2011

<sup>56</sup> Central Intelligence Agency, The World Factbook

<sup>57</sup> Central Intelligence Agency, The World Factbook

## **Australia – USA Trade Relations**

356. Total goods trade between the United States and Australia was \$37.8 billion in 2011, while U.S.-Australia services trade totaled \$18.8 billion. Australia is the third largest U.S. trading partner in services behind Canada and Mexico.
357. The U.S. trade surplus with Australia in 2011 was the largest of any TPP country for both goods (\$17 billion) and services (\$7.6 billion). Part of this large surplus is due to quickly growing exports to Australia in both goods and services over the past decade. From January 1, 2005, when the Australian-U.S. FTA (AUSFTA) took effect, through 2011, U.S. agricultural exports to Australia more than doubled to \$200 million.
358. The primary U.S. goods exported to Australia are machinery, vehicles, and optical/medical instruments, while the top U.S. imports are meat, precious stones/metals, and optical/medical instruments. Fuels and mining products make up the bulk of Australia's exports to the rest of the world.
359. AUSFTA does not contain an investor-state dispute mechanism, a prominent feature in bilateral and regional FTAs the United States has negotiated and a U.S. negotiating objective in the TPP talks. Australia has reportedly insisted on an opt-out from such a provision if it is included in a final TPP agreement.
360. Australia may seek additional access for its sugar, which was excluded from AUSFTA. Australia may also seek to speed up the trade liberalization schedules for its beef and dairy products into the U.S. market. USTR maintains that it will not re-open the market access negotiations of AUSFTA.

## **Trade Agreements**

361. Australia has negotiated FTAs with all TPP partners except Vietnam, Peru, Canada and Mexico.
362. FTAs under negotiation:
  - Australia-China FTA
  - Australia-Gulf Cooperation Council (GCC) FTA
  - Australia-India Comprehensive Economic Cooperation Agreement
  - Australia-Japan FTA
  - Australia-Korea FTA
  - Indonesia-Australia Comprehensive Economic Partnership Agreement
  - Pacific Agreement on Closer Economic Relations (PACER) Plus
  - Trans-Pacific Partnership Agreement



363. Australia has trade initiatives or trade agreements with the countries or groups of countries listed in the following table.<sup>58</sup>

<b>Initiative</b>	<b>Status</b>	<b>Preference Flow</b>
Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)	Bilateral	Reciprocal
Canada-Australia Trade Agreement (CANATA)	Bilateral	Reciprocal
Papua New Guinea-Australia Trade and Commercial Relations Agreement (PATCRA)	Unilateral	Non-Reciprocal
Developing Country Preferential Rates	Dev Country	Non-Reciprocal
South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA)	Bilateral	Non-Reciprocal
Singapore-Australia Free Trade Agreement (SAFTA)	Bilateral	Reciprocal
Australia-U.S. Free Trade Agreement (AUSFTA)	Bilateral	Reciprocal
Thailand-Australia Free Trade Agreement (TAFTA)	Bilateral	Reciprocal
Australia-Chile Free Trade Agreement (ACI-FTA)	Bilateral	Reciprocal
The Agreement establishing an ASEAN-Australia-New Zealand Free Trade Area	Plurilateral	Reciprocal

364. A Malaysia-Australia FTA has been concluded and is undergoing the domestic approval process.

## **KEY ISSUES**

### **Sanitary and Phytosanitary Measures (SPS)**

365. Australia, like New Zealand, maintains an SPS system which its trading partners consider to be excessively rigid. Australian import rules related to pork restrict the USA and Canada to frozen and cooked or processed product. This denies access to the more lucrative market for fresh/chilled pork.

366. These restrictions are due to SPS concerns about Porcine Reproductive and Respiratory Syndrome and Post Systemic Wasting Syndrome (PMVS).

367. Australia has declared the following products to be ineligible for import:<sup>59</sup>

- fresh/frozen poultry
- fresh/frozen lamb
- beef and beef products (with exceptions).

<sup>58</sup> <http://www.customs.gov.au/site/page6010.asp>

<sup>59</sup> USDA, Export Requirements for Australia

368. The following are cooking requirements for processed poultry and pork products:

A. Cooked poultry products must be cooked to one of the following time/temperatures to meet Australian requirements:

74° C for 165 min. or  
75° C for 158 min. or  
76° C for 152 min. or  
77° C for 145 min. or  
78° C for 138 min. or  
79° C for 132 min. or  
80° C for 125 min.

B. Cooked pork products must be cooked to one of the following time/temperatures to meet Australian requirements:

56° C for 60 minutes or  
57° C for 55 min. or  
58° C for 50 min. or  
59° C for 45 min. or  
60° C for 40 min. or  
61° C for 35 min. or  
62° C for 30 min. or  
63° C for 25 min. or  
64° C for 22 min. or  
65° C for 20 min. or  
66° C for 17 min. or  
67° C for 15 min. or  
68° C for 13 min. or  
69° C for 12 min. or  
70° C for 11 min.

369. Import bans and restrictions maintained by Australia include:

- asbestos;
- cultural and heritage goods;
- glazed ceramic ware;
- chewing tobacco and oral snuff;
- cigarette lighters;
- dog collars – protrusion;
- electronic flyswatters/mosquito bats;
- laser pointers;
- pesticides;
- table presses;
- unmanufactured leaf tobacco
- certain toys

- novelty erasers
- wool packs

### **Investment/Investor State Dispute Settlement**

370. Australia appears determined to avoid investor-state dispute settlement -- it was excluded from the Australia-USA FTA.<sup>60</sup>
371. Australia is the only TPPA participant holding out against Investor State Dispute Settlement (ISDS) provisions, a stand that is expected to become difficult to maintain. But Australia appears to be increasingly frustrated with Washington's approach to the negotiations and is very reluctant to paint a bulls-eye on its regulatory system to benefit corporate America.
372. Australia is a leader in legislating plain packaging for tobacco products. This is one of the principal concerns about investor-state dispute settlement. Ukraine has filed WTO complaints against Australia on these measures.<sup>61</sup> On March 22, 2012, Guatemala requested to join the dispute settlement consultations regarding Ukraine's complaint. In the following week, Norway, Uruguay, Brazil, Canada, the European Union, New Zealand and Nicaragua all requested to join the consultations. Subsequently, Australia informed the DSB that it had accepted the requests of Brazil, Canada, the European Union, Guatemala, New Zealand, Nicaragua, Norway and Uruguay to join the consultations.
373. Phillip Morris is seeking HK-Australia Bilateral Investment Treaty (BIT) adjudication with Australia through its Hong Kong subsidiary. Much of this litigation activity is believed to be funded by the U.S. tobacco industry.
374. While the leaked negotiating text on investment includes an investor-state mechanism, it also contains a proposed footnote stating that the mechanism "does not apply to Australia or an investor of Australia," and that Australia "does not consent to the submission of a claim to arbitration under this [s]ection." This proposed footnote is in brackets, indicating disagreement among countries.<sup>62</sup>
375. This is not, in our view, a concession or gift from Washington. This was inserted into the text by Australia.
376. Australia amended the Foreign Acquisitions and Takeovers and Amendments Act 1975, clarifying the operation of foreign investment screenings to include investment

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<sup>60</sup> APEC, Australia, 2007, Report of the Individual Action Plan (IAP) Peer Review of Australia, January 18, 2007, p. 34

<sup>61</sup> World Trade Organization, Disputes by Country/Territory, [www.wto.org/english/tratop-e/dispu-by-country-e.htm](http://www.wto.org/english/tratop-e/dispu-by-country-e.htm)

<sup>62</sup> "Leaked TPP Investment Text Includes Possible Exclusion Of Australia From Investor-State Mechanism:", Inside U.S. Trade, June 13, 2012

instruments which involve the exercise of rights to acquire shares or voting power in the future. The amendments were assented to on February 12, 2010.<sup>63</sup>

### **Intellectual Property – Local Content**

377. The Motion Picture Association of America (MPAA) in representations to USTR under the Intellectual Property Chapter has targeted Australia's local content quotas for audiovisual services. The local content rules in Australia are similar to Canadian content rules for radio and television.

### **Intellectual Property and Culture**

378. The Australian Content Standard of 2005 requires commercial television broadcasters to produce and screen Australian content, including 55% of transmission between 6:00 am and midnight. In addition, there are specific minimum annual sub-quotas for Australian (adult) drama, documentary, and children's programs. A broadcaster must ensure that Australian-produced advertisements occupy at least 80% of the total advertising time screened in a year between the hours of 6:00 am and midnight, other than the time occupied by exempt advertisements, which include advertisements for imported cinema films, videos, recordings and live appearances by overseas entertainers, and community service announcements.<sup>64</sup>
379. The Australian commercial radio industry Code of Practice sets quotas for the broadcast of Australian music on commercial radio. The code requires that up to 25% of all music broadcast between 6:00 am and midnight must be performed by Australians.<sup>65</sup>

### **Intellectual Property – Data Transmission**

380. Australia has problems accepting additional controls proposed by the U.S. in the TPP on data transmission. MPAA wishes to avoid customs duties on electronically transmitted digital products – read music and motion pictures.
381. The Australian proposal on data flows, would specifically allow TPP countries to restrict the free flow of data, so long as the country can justify that such restrictions are not disguised barriers to trade.<sup>66</sup> *Inside U.S. Trade* reported seven out of the then group of nine TPP partners support the Australian proposal, while the U.S. proposal was supported by only one other country<sup>67</sup>.

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<sup>63</sup> European Commission Directorate-General for Trade, Ninth Report on Potentially Trade Restrictive Measures, September 2011- May 1, 2012

<sup>64</sup> USTR 2012 National Trade Estimate Report on Foreign Trade Barriers

<sup>65</sup> USTR 2012 National Trade Estimate Report on Foreign Trade Barriers

<sup>66</sup> "U.S., Australia Make Little Headway On Resolving Data Flow Issue", *Inside U.S. Trade*, September 14, 2012

<sup>67</sup> "U.S., Australia Make Little Headway On Resolving Data Flow Issue", *Inside U.S. Trade*, September 14, 2012

382. There are concerns that the specific exemptions contained in the U.S. proposal are too narrowly tailored and would unduly limit a country's ability to set policy in certain areas, such as the privacy of data that could be transferred over the Internet.<sup>68</sup>
383. Australia has viewed a code of conduct as insufficient to satisfy its current privacy laws, which place strict conditions on transferring personal information out of the country.
384. Australia plans to tighten even further the rules for sending personal data outside the country. Australia continues to resist the U.S. TPP proposal.<sup>69</sup>
385. Australia also has problems with U.S. proposals about **electronic commerce**. Australia has disagreed with the USA over its demand that the TPP agreement include an obligation to put in place an expedited customs process for reviewing shipments sent via express delivery services that is separate from that for normal shipments.
386. According to *Inside U.S. Trade*, the U.S. seeks to exempt TPP countries from the requirement to have a separate lane for express shipments if they meet certain "quality control" standards, such as clearing express shipments within a certain amount of time.<sup>70</sup> Australia considers its customs clearance is already above standard.

## Government Procurement

387. Australia requires that government procurement for declared strategic projects greater than \$A250m should be subject to minimum local content targets and weighting on local content in tender evaluation.<sup>71</sup> The preference extends to SMEs with up to 500 employees.<sup>72</sup>
388. On 25 January 2012, Minister for Finance and Services, the Hon. Greg Pearce, announced the release of a discussion paper outlining the first round of reforms of the NSW Government's procurement system. The NSW Government took steps to reduce disincentives to business, small and medium sized enterprises in particular, seeking government procurement opportunities.

"This is the first step in a new system that will make doing business with NSW Government simpler, easier and more attractive," Mr Pearce said.

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<sup>68</sup> "U.S., Australia Make Little Headway On Resolving Data Flow Issue", *Inside U.S. Trade*, September 14, 2012

<sup>69</sup> "U.S., Australia Make Little Headway On Resolving Data Flow Issue", *Inside U.S. Trade*, September 13, 2012

<sup>70</sup> "U.S., Australia At Odds Over Separate Lane For Express Shipments In TPP", *Inside U.S. Trade*, September 13, 2012

<sup>71</sup> European Commission Directorate-General for Trade, Ninth Report on Potentially Trade Restrictive Measures, September 2011- May 1, 2012

<sup>72</sup> European Commission Directorate-General for Trade, Ninth Report on Potentially Trade Restrictive Measures, September 2011- May 1, 2012

389. The discussion paper proposes a procurement framework that focuses on three distinct areas:

### **1. Easier access for small and medium sized enterprises**

Making it easier for small and medium sized enterprises to gain opportunities to supply goods and services to the Government is one of the core objectives of the review. The Government recognises that value for money is about broader economic benefits and not just the lowest price. Hence the Government is considering possible initiatives to provide greater opportunity for small and medium sized enterprises to engage with government business. Options identified for consideration include the following:

- Price preference schemes; providing a price preference margin in tenders, giving preference to local content over imported content.
- Set-aside contracts; allowing government agencies to reserve certain government contracts exclusively for targeted areas, for example for small and medium sized enterprises where a competitive process applies.
- Contract sizing; considering the size of contracts and opportunities for small and medium sized enterprises to be subcontractors where they are not in a position to be a prime contractor.
- Better communication; A one-stop shop government procurement website with clear guidance material for suppliers has also been identified as a priority.

### **2. A more flexible tendering process**

The Government recognised that the tendering process, the supporting regulatory and policy framework can inhibit the procurement outcomes. Specifically the discussion paper mentions long term panel contracts as limiting the Government's ability to achieve value for money by taking advantage of changes in the market. Furthermore, it is recognized that the lengthy process of establishing panels discourage many suppliers to bid at all.

### **3. Simpler government contracts**

Many suppliers have argued that the contractual terms and conditions on which the Government approaches the market are too complex, uncommercial and unnecessarily risk averse. New templates for contracts have been developed and are intended to establish a more realistic commercial-friendly approach without taking any unnecessary risk. By standardizing terms and conditions on a commercially realistic basis, it is intended that tendering time and cost, will be reduced for suppliers and government, while encouraging competition as a result of more suppliers being willing to participate.

## Agricultural Export Promotion

390. Australia and New Zealand are pushing for a final Trans-Pacific Partnership (TPP) agreement to include commitments to limit agricultural export subsidies and address the trade-distorting aspects of food aid programs, two politically sensitive areas that the U.S. in the past has insisted must be addressed multilaterally. Australia sees this as levelling the playing field with respect to U.S. demands on state-owned enterprises in the agricultural sectors.
391. According to *Inside U.S. Trade*, Australian TPP negotiator Hamish McCormick explained “These are a set of issues that go to anti-competitive practices, practices that really damage ... the medium and longer-term food security issues of food aid recipients, but they’re fundamentally about competition,” he said. “And as we address issues such as state-owned enterprises and competition policy more generally, we want to see that there’s a balanced approach to these issues across the TPP.”<sup>73</sup>
392. McCormick said Australia was not trying to work the Doha agriculture text into the TPP agreement per se, but stressed that the ultimate goal is to try to figure out what sort of outcomes can be included in the TPP to address these same issues. He said Australia has not yet given up on the Doha round, so its move to pursue these issues in TPP is not as an alternative to Doha but rather reflects Australia’s longstanding position of addressing them in free trade agreements.<sup>74</sup>

## State-Owned Enterprises

393. *Inside U.S. Trade* has reported that the U.S. SOE proposal has direct implications for Australia’s telecommunications sector. Optus, one of the largest suppliers, is owned by Singtel which in turn is 54% owned by Temasek, the sovereign wealth fund of the Singaporean government.<sup>75</sup>

## Trade in Services

394. Australia will not likely want to see disciplines on the delivery services of Australia Post.
395. Australia has disagreed with the USA over its demand that the TPP agreement include an obligation to put in place an expedited customs process for reviewing shipments sent via express delivery services that is separate from that for normal shipments.
396. According to *Inside U.S. Trade*, the U.S. seeks to exempt TPP countries from the requirement to have a separate lane for express shipments if they meet certain “quality

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<sup>73</sup> “Australia, New Zealand Seek To Address Export Competition In TPP Deal”, *Inside U.S. Trade*, May 25, 2012

<sup>74</sup> *Ibid.*

<sup>75</sup> “TPP SOE Talks Slowed By Domestic Processes, Australian Ag Demand”, *Inside U.S. Trade*, September 14, 2012

control” standards, such as clearing express shipments within a certain amount of time, sources said.<sup>76</sup> Australia considers its customs clearance is already above standard.

### **Customs Measures: Minimal Value Shipments**

397. TPP proposes to raise the *de minimis* level on minimal value shipments. This would not only prevent a country from charging import tariffs on these shipments, but also from collecting any value-added tax. VAT can be more than 10%. This could result in significant lost revenue and could also have an adverse and discriminatory impact on domestic producers of like or similar products.
398. Raising the *de minimis* level to \$200 would mean that imported goods from TPP partners under that threshold that are shipped to Canada would not have to pay the value-added tax, while HST would still be exigible on a similar good made in Canada.<sup>77</sup>

### **Agriculture**

399. The Australian agricultural industry has pushed its government to engage the U.S. on access for dairy, beef and sugar.<sup>78</sup> However the U.S. has said that it will not conduct market access negotiations with existing FTA partners like Australia with whom concessions from a previous trade deal are still being phased in.<sup>79</sup>

### **Agriculture – TRQs**

400. Australia maintains the TRQs indicated on the table that follows at the end of this section.
401. These are WTO measures. It remains to be seen whether or not Australia would be prepared to liberalize WTO measures in TPP. Would the U.S. tobacco growers want to make gains in Australia?
402. There are restrictions on exports of wine and brandy over 100 litres. Export permits are issued by the Australian Wine and Brandy Commission. The Commission would get caught up in the SOE proposal.

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<sup>76</sup> “U.S., Australia At Odds Over Separate Lane For Express Shipments In TPP”, Inside U.S. Trade, September 13, 2012

<sup>77</sup> Ibid.

<sup>78</sup> “Footwear, Dairy Bills Introduced For MTB Could Conflict With TPP Interests”, World Trade Online – Daily News, July 10, 2012

<sup>79</sup> Ibid.



## WTO Agriculture TRQ

### BASIC DATA \*

REF	MENO	DESCRIPTION	HS	PRO	IN	INQTY	FINQTY	UNIT
<b>AUSTRALIA</b>								
1	1	Cheese	04061000	DA		11500	11500	
2	2	Unmanufactured tobacco	24011012	TB		11184	11184	

\* Tariff and Other Quotas, Background Paper by the Secretariat, WTO Committee on Agriculture Special Session, G/AG/NG/S/7, May 23, 2000

## **BRUNEI**

### **Overview and Objectives**

403. Brunei Darussalam is a small absolute monarchy. It is in TPP because it is an original P-4 member but it seems to be a very strange bedfellow for the larger TPP Partners. Brunei would like to have an FTA with the U.S. and would gain FTAs with, Peru, Mexico and Canada.
404. The TPP will allow Brunei to continue its tradition of openness in the Asia Pacific region, as reflected in their Agreements within APEC and ASEAN.
405. Brunei's economy is heavily influenced by and dependent upon exploitation of its oil and gas reserves.
406. Brunei's Royal Family's extensive involvement in business and trade provides some unique challenges to TPP negotiators. Brunei has significant human resource and capacity challenges that limit its responsiveness at the multilateral level and have affected the pace of implementation of its WTO obligations.<sup>80</sup>
407. On its own, Brunei would never be a candidate for an FTA with the USA or Canada. In 2005, trade with the USA was US\$513.1 million. In 2009, it had declined to US\$58.6 million.<sup>81</sup>

### **Key Statistics**

408. Brunei has a population of 408,786<sup>82</sup> and a GNP in 2009 of US\$19,508,063,793.46.<sup>83</sup> Its trade<sup>84</sup> with Canada in 2011 was :

	CDN \$
Canada's imports from Brunei	\$8,131,000
Canada's exports to Brunei	\$3,687,000
Canada's trade deficit with Brunei	-\$4,445,000

409. Brunei's principal exports<sup>85</sup> are crude oil, natural gas and garments.
410. Its principal imports<sup>86</sup> are machinery and transport equipment, manufactured goods, food and chemicals.

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<sup>80</sup> WTO Trade Policy Review, WT/TPR/S/196

<sup>81</sup> United States Census Bureau, U.S. International Trade Data, <http://www.census.gov/foreign-trade/balance/c5610.html>

<sup>82</sup> Central Intelligence Agency, The World Factbook

<sup>83</sup> World Bank, <http://search.worldbank.org/data?qterm=gross%20national%20product&language=EN>

<sup>84</sup> Industry Canada, Trade Data Online, 2011

<sup>85</sup> Central Intelligence Agency, The World Factbook

<sup>86</sup> Central Intelligence Agency, The World Factbook

## Brunei – USA Trade Relations

411. Brunei is by far the smallest U.S. trading partner among TPP countries. In 2011, total goods traded between the United States and Brunei was \$207 million. U.S. imports from Brunei have declined considerably over the past decade. In 2011, they were only \$23 million, or 4% of their 2005 level of \$562 million. The top U.S. import from Brunei was in the category of precious stones and metals, specifically scrap or waste products.
- The United States does not currently have an FTA with Brunei.
  - Brunei remained on the USTR IPR “watch list” in 2012, due to U.S. concern over intellectual property rights enforcement.<sup>87</sup>

## Trade Agreements

412. Brunei Darussalam, through ASEAN, has concluded FTAs with:
- Australia and New Zealand
  - China
  - India
  - Japan
  - South Korea
413. These are not separate Brunei specific bilateral agreements – Brunei participates as a member of ASEAN.

## KEY ISSUES

### Labour

414. Brunei has been cited by the U.S. State Department for “arbitrary detention; limits on freedom of speech, press, assembly, and association; restrictions on religious freedom; discrimination against women; restricted labour rights; and exploitation of foreign workers.”<sup>88</sup> There is no Labour chapter in P-4. How will Brunei be able to meet the requirements of the TPP?

### Export Taxes

415. Brunei uses export taxes for food security purposes.

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<sup>87</sup> U.S. Trade Representative, 2012 Special 301 Report, [http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report\\_0.pdf](http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf). Brunei, p. 42. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. Countries placed on the Priority Watch List are the focus of increased bilateral attention concerning IPR protection, enforcement, or market access for persons relying on intellectual property.

<sup>88</sup> Comments to USTR concerning the Proposed Trans-Pacific Partnership Trade Agreement, filed by Public Citizen, January 25, 2010, Docket Number USTR-2009-0041

416. Apart from the energy and construction sectors, Brunei's industrial base remains limited. Foreign capital and technology have been deterred by the small domestic market; a poorly developed local private sector; high wage costs; a shortage of skilled labour; slow bureaucratic procedures and lack of transparency; an unwillingness on the part of the Government to underwrite risk-taking ventures; and the ban on foreigners owning land.<sup>89</sup>

### **Government Procurement**

417. USTR reports that all procurement is conducted by Ministries, Departments, and the State Tender Board of the Ministry of Finance. Most invitations for tenders or quotations below B\$250,000 (approximately \$168,000) are published in a bi-weekly government newspaper, but often are selectively tendered only to locally registered companies. The relevant ministry may approve purchases up to a B\$250,000 threshold, but tender awards above B\$250,000 must be approved by the Sultan in his capacity as Minister of Finance based on the recommendation of the State Tender Board. The award process often lacks transparency, with tenders sometimes not being awarded or being re-tendered for reasons not made public.<sup>90</sup>
418. There are a number of reservations for Brunei in the P-4, including for Competition, and we would expect Brunei to seek similar flexibilities in the TPP.

### **State-Owned Enterprises**

419. USTR reports that some of Brunei's foreign investment policies are unclear, including with respect to restrictions on foreign investment and equity participation in specific sectors. Investment in banking, gas stations and travel agencies is regulated to avoid excessive investment.
420. Foreign investment rules require local participation, generally at 30%, and 50% of residents on boards of directors. Within ASEAN, 100% foreign participation is permitted in high technology and export oriented industries.
421. Liquor and armaments businesses are currently closed to both domestic and foreign investors.
422. Brunei operates state-owned monopolies in key sectors of the economy, such as oil and gas, telecommunications, transport, and energy generation and distribution. Brunei has not notified its state trading enterprises to the WTO Working Party on State Trading Enterprises.<sup>91</sup>

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<sup>89</sup> World Trade Organization, Trade Policy Review, Report by the Secretariat, Brunei Darussalam, WT/TPR/S/196, January 21, 2008, page xi.

<sup>90</sup> USTR, National Trade Barriers Estimate on Foreign Barriers to Trade 2012, Brunei Darussalam, p.47

<sup>91</sup> Ibid, p.48

### **Export/Import Controls**

- 423. Export restrictions are maintained on timber for environmental reasons.
- 424. A few products (salt, rice, sugar) are still subject to export restrictions, mainly for security of domestic supply. Paddy rice is also subject to price support.
- 425. Imports of salt, sugar, and rice paddy are restricted to maintain security of domestic supply and for price stability, and to ensure long term sustainable supplies and market stability. Import permits for salt, sugar, and rice paddy may be obtained from the Department of Information Technology and State Stores.
- 426. Imports of used motor vehicles (five years and older) are restricted for road safety reasons.

### **Technical Barriers to Trade**

- 427. There is no national body for setting standards in Brunei. The Construction Planning and Research Unit, based in the Ministry of Development, coordinates for standards and conformity assessment activities.<sup>92</sup>

### **Customs Measures**

- 428. All imported eggs must be marked with the word “imported” on the shell, to identify the source of supply, thereby preventing illegal cross-border movements of eggs and to ensure conformity with the sanitary and food safety requirements of the Veterinary Authority and the Ministry of Health.
- 429. Import permits for used vehicles are issued by the Land Transport Department. In all cases, the importer must also submit the import permit to the Royal Department of Customs to obtain an approval permit (AP).<sup>93</sup>

### **Competition**

- 430. Brunei does not have a National Competition Policy. This was not necessary in P-4. Would state players in the economy support the development of a formal competition policy? Does a small population/economy need one?
- 431. Brunei has a Price Control Act (1974 – amended 1999). The Act applies to rice, sugar, motor vehicles, cigarettes and infant milk. The Price Controller may also regulate movement, imports and exports of controlled products.

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<sup>92</sup> World Trade Organization, Trade Policy Review, Report by the Secretariat, Brunei Darussalam, WT/TPR/S/196, January 21, 2008, p.33

<sup>93</sup> Ibid., p.45

432. Brunei considers that this law is needed for protection of local consumer interests through controlling prices of basic essential items and related controlled items, as well as the prevention of hoarding.

### **Services**

433. Accounting services and education service are sensitive to Brunei, and are not likely to be included on any Services positive list.

### **Export Incentives**

434. Tax incentives are granted to export-oriented manufacturers including exemption from income tax, exemption from import duties on machinery, equipment, component parts, accessories or building structures, and exemption from import duties on raw materials.

### **Intellectual Property – Copyright**

435. New Zealand, Chile, Malaysia, Brunei and Vietnam all want more flexibility to protect existing limitations and exceptions to the general enforcement of copyrights than is being proposed by the USA.
436. Subjecting every limitation or exception to the three-step test<sup>94</sup> severely limits the ability of countries to take advantage of limitations and exceptions that form a part of their own laws or of international treaties that they have signed. These countries may want to de-link the right to use limitations and exceptions from the three-step test.
437. *Inside U.S. Trade* reported the opposition from a majority of TPP countries against the aggressive use of the three-step test “reflects a growing awareness of the importance of exceptions to development and innovation.”<sup>95</sup>

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<sup>94</sup> The so called three step test is from the Berne Convention and Article 13 of the WTO TRIPs Agreement extended broadly by the USA in the TPP.

<sup>95</sup> “Leaked U.S. Copyright Proposal Reveals Opposition From TPP Partners”, *Inside U.S. Trade*, August 7, 2012

## **CANADA**

### **Overview and Objectives**

438. There is little in the TPP for Canada. It is in deficit with most partners, with the U.S. being a notable exception. This TPP negotiation must be seen as defensive for Canada.
439. Canada's interest in TPP was driven by the possibility that Japan would join. Without Japan, the promises of benefits under the TPP are underwhelming.

### **Canada – USA Trade Relations**

440. Canada is the largest trading partner of the United States overall and among TPP participants, with total trade in goods of nearly \$600 billion and total trade in services of \$76.1 billion.<sup>96</sup>
441. The U.S. trade deficit with Canada has been falling in recent years to \$35.7 billion in 2011. The United States recorded a substantial trade surplus in services trade with Canada of \$24.9 billion in 2010. Although rich in natural resources and energy, Canada is also part of an integrated North American supply chain and exchanges many manufactured products with the United States, especially autos, at different stages of production.
- The United States-Canada Free Trade Agreement entered into force on January 1, 1989 and was incorporated into NAFTA on January 1, 1994. As a result, nearly all trade is conducted tariff and restriction free between the two countries, and with Mexico.
  - Canada's willingness to negotiate over its supply management programs for dairy and poultry were reported to be an obstacle for the United States, Australia, and New Zealand to allow Canada's participation in the TPP.
  - For the past several years, the U.S. Trade Representative has placed Canada on its "priority watch list" of countries meriting bilateral attention over intellectual property rights enforcement<sup>97</sup>. Just prior to being invited to join the TPP talks in June 2012, the Canadian House of Commons passed copyright modernization legislation.

### **Trade Agreements**

442. A TPP deal will bring new FTAs with New Zealand, Brunei, Australia, Vietnam and Malaysia. Canada needs to update and enhance its image as a real player in Asia, a region which clearly needs a re-energized focus.

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96 For additional information, see CRS Report RL33087, United States-Canada Trade and Economic Relationship: Prospects and Challenges, by Ian F. Fergusson.

97 2012 Special 301 Report, Canada, p. 25

443. Insofar as difficult issues are concerned, clearly these exist, *inter alia*, with respect to cultural services, agriculture, government procurement, intellectual property and foreign investment. Clearly, there are high priority demands which will be made on Canada by other parties.
444. The Harper Government has stated unequivocally that everything is on the table.



## **CHILE**

### **Overview and Objectives**

445. Chile is an original member of P-4 and wants to use the TPP to consolidate its policy of economic integration towards Asia. At the same time it is a defensive initiative to avoid dilution of existing preferences.
446. It is essential for Chile to reach a balance between the new commitments and new opportunities for Chilean interests. Chile's approach to the negotiations can only be described as cautious but they are open to discussing new issues, consistent with development needs and goals.
447. Chile seeks through TPP to expand the scope of its "goods only" FTAs to include services. Cumulative rules of origin are essential, as are improved disciplines on customs procedures, SPS and TBT.

### **Key Statistics**

448. Chile has a population of 17,067,369<sup>98</sup> and a GNP in 2011 of US\$279,061,329,061.25.<sup>99</sup> Its trade<sup>100</sup> with Canada in 2011 was:

	CDN \$
Canada's imports from Chile	\$1,911,000,000
Canada's exports to Chile	\$818,778,000
Canada trade deficit with Chile	-\$1,091,957,000

449. Chile's principal exports<sup>101</sup> are copper, fruit, fish products, paper and pulp, chemicals and wine.
450. Its principal imports<sup>102</sup> are petroleum and petroleum products, chemicals, electrical and telecommunications equipment, industrial machinery, vehicles and natural gas.

### **Chile – USA Trade Relations**

451. U.S. trade with Chile has been growing over the past decade, with U.S. exports more than quadrupling to nearly \$15.9 billion in 2011 from the advent of the U.S.-Chile FTA in 2004. Total U.S. services trade with Chile is \$3.5 billion. As with Australia and Brunei, Chile's major exports to the world are fuel and mining products, particularly copper. However, it also has a well-developed agriculture sector, which contributes to exports.

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<sup>98</sup> Central Intelligence Agency, The World Factbook

<sup>99</sup> World Bank, <http://search.worldbank.org/data?qterm=gross%20national%20product&language=EN>

<sup>100</sup> Industry Canada, Trade Data Online, 2011

<sup>101</sup> Central Intelligence Agency, The World Factbook

<sup>102</sup> Central Intelligence Agency, The World Factbook

452. The U.S.-Chile FTA entered into force on January 1, 2004, and as a result most goods are or will eventually be exchanged tariff-free.<sup>103</sup>

### Trade Agreements

453. Chile, an original member of P-4, has been in the forefront of trade liberalization. Chile has been one of the most aggressive negotiators of FTAs around the world.
454. Chile concluded its FTA with Canada on December 5, 1996. It is considered by the two governments to be a model because of its treatment of trade remedies. Objections from Canadian stakeholders have prevented the forward looking trade remedies provisions<sup>104</sup> of this model from being extended to other FTAs.
455. Chile recently updated its FTA with Canada and to include financial services within the scope.<sup>105</sup>
456. In 2008, Chile signed FTAs with Australia, Honduras, and Colombia while expanding its agreements with Peru and Cuba. It now has trade agreements with the USA, Canada and 56 other countries. Chile signed an FTA with Vietnam in November 2011-- during the TPP negotiations -- but it is not yet in effect.
457. On market access, Chile also has FTAs with the E.U., Mexico, Vietnam,<sup>106</sup> Malaysia, Australia, Japan, Peru, USA,<sup>107</sup> Turkey, Colombia, Panama, China, European Free Trade Association (EFTA),<sup>108</sup> Republic of Korea, Central American Common Market,<sup>109</sup> and Mercosur.<sup>110</sup>
458. Chile also has bilateral “economic complementation agreements” with Bolivia, Peru, Venezuela, Argentina, Ecuador, Colombia and Mercosur, as well as a partial agreement with Cuba.
459. In March 2011, Chile’s FTA with Turkey came into force, and in April 2012, an FTA with Malaysia came into force.
460. Negotiations with Thailand, India and Hong Kong are still ongoing.
461. Because Chile has negotiated an FTA with the USA, there have been no bilateral market access discussions undertaken in TPP. This means that for the most part Chile would be

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<sup>103</sup> For more information on this agreement, see CRS Report RL31144, The U.S.-Chile Free Trade Agreement: Economic and Trade Policy Issues, by J.F. Hornbeck.

<sup>104</sup> Under the Canada – Chile FTA, once tariffs have been phased out anti-dumping investigations are not possible

<sup>105</sup> <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx?view=d>

<sup>106</sup> FTA is signed but not in force

<sup>107</sup> SICE Foreign Trade Information System, [http://www.sice.oas.org/ctyindex/CHL/CHLagreements\\_e.asp](http://www.sice.oas.org/ctyindex/CHL/CHLagreements_e.asp)

<sup>108</sup> Iceland, Liechtenstein, Norway and Switzerland

<sup>109</sup> Costa Rica, El Salvador, Guatemala, Honduras

<sup>110</sup> Argentina, Brazil, Uruguay, Venezuela (since July 2012), Paraguay, a founding member, has its membership suspended 2012

expected to pay in parts of the negotiations of interest to the USA while not expecting much if anything in return in market access?

462. The situation of Latin American countries in TPP was well summarized at the 2012 WTO Public Forum by former Chilean Diplomat Sebastián Herreros.<sup>111</sup> He is currently on secondment to CEPAL.
463. We extracted the following insights from the PowerPoint presentation to the 2012 WTO Public Forum. Mr. Herreros had this to say about the risks/costs of the TPP to Latin American participants:

#### Risks/Costs

- For LAC countries, the main risk (other than the negotiation dragging on for years) is an outcome that does not clearly improve on the status quo:
  - Assuming heavier commitments on IP, environment, labor, investment than in their bilateral FTAs with the USA and thus further losing “policy space”.
  - Combined with little gains in market access, cumulation of origin, convergence of disciplines and standards.
- The likelihood of this scenario depends mostly on US decisions as the dominant player
- Scrutiny of trade negotiations by Congress, civil society in LAC countries is now more intense than in the past.
  - Not any agreement will do.

#### Would the TPP have an impact on Latin American integration efforts?

- Colombia, Chile, Mexico & Peru formed in 2012 the Pacific Alliance, aimed at creating a “deep integration area” and jointly exploring business opportunities in Asia Pacific.
  - The outcome of the TPP will directly affect the provisions being negotiated in the PA.
- At the political level, the TPP/PA processes may underline the difference between “the free traders” and “the rest” in Latin America.
- It may also encourage Brazil/MERCOSUR to engage in a more active negotiating agenda with Asia.

#### Conclusions

- Still great uncertainty about TPP’s architecture, substantive provisions and membership (including accession procedures after the end of negotiations)
- Thus the answer to what does the TPP offer Latin American countries is still highly speculative. It depends critically on:
  - Whether LA countries (other than Chile, Peru and Mexico) are

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<sup>111</sup> “Coping with multiple uncertainties: Latin America in the TPP negotiations”, by Sebastián Herreros, Geneva, September 24, 2012, [sebastian.herreros@cepal.org](mailto:sebastian.herreros@cepal.org)

- allowed to join; and if so, when and on what terms
  - Which other countries (especially Asian) join the negotiations
  - How an enlarged TPA will relate to FTAs LA countries already have in place with TPP participants (especially the US)
  - Answer today is not very positive: gains look small (and uncertain); risks look larger and more immediate
  - TPP offers the potential to “tame the trans Pacific tangle”
  - Main challenge : Managing the very large diversity among TPP members
  - Need to strike the right balance so that the TPP becomes:
    - i. a “high quality” agreement; and
    - ii. one developing countries would be interested in joining
  - This requires (inter alia):
    - Avoiding extreme regulatory harmonization
    - A robust economic cooperation framework
    - Some generosity from the most powerful player
464. Because Chile’s FTA with the USA predates the 2007 U.S. Congressional Bipartisan Consensus so it does not have the same provisions on issues like investment and intellectual property as in Agreements like USA-Korea, USA-Peru and USA-Colombia. With Chile the, focus of TPP is much more on so-called new issues where its market has been targeted, i.e., it does not stand to gain much from others.
465. It is difficult to see how countries in this situation can reach a balanced result in the TPP. U.S. demands on the new behind the border issues do not help its smaller TPP partners like Chile. What is in it for them is a very legitimate question.

## KEY ISSUES

### Agriculture

466. Chile may apply special safeguards on dairy products from New Zealand under P-4.<sup>112</sup> And Chile recently blocked a merger between Fonterra and Nestle because of reduced competition for Chilean dairy farmers.<sup>113</sup>
467. Chile’s price band system was challenged and condemned in WTO dispute settlement. It now applies a WTO-consistent price band system to the following products:
- edible vegetable oils;
  - wheat and wheat flour; and
  - sugar<sup>114</sup>.

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<sup>112</sup> There are special safeguards which will expire when duties have been phased out.

<sup>113</sup> Discussions with counsel for Chilean dairy farmers.

<sup>114</sup> WT/DS207/AB/R; The following specific HTS subheadings are covered by the price band system: In the wheat or meslin product category, HTS subheading 1001.9000. In the wheat or meslin flour product category, HTS subheading 1101.0000. In the sugar product category, HTS subheading 1701.1100 cane sugar, 1701.1200 beet sugar, 1701.9100 sugar containing added flavouring or colouring matter, and 1701.9900 other. In the edible vegetable oils

468. Chile relies on its price band system to prevent excessive price fluctuations for certain agricultural products. Chile has not negotiated away this protection from any country.

### **Intellectual Property Copyright<sup>115</sup>**

469. Chile has expressed public concerns about the U.S. demands on intellectual property.<sup>116</sup>
470. New Zealand, Chile, Malaysia, Brunei and Vietnam all want more flexibility to maintain limitations and exceptions to the general enforcement of copyrights than are provided for in the U.S. text.<sup>117</sup>
471. Subjecting every limitation or exception to the three-step U.S. test will severely limit the ability for countries to take advantage of limitations and exceptions that form a part of their own laws or of international treaties that they have signed. These countries may want to de-link the right to use limitations and exceptions from the three-step test.
472. In a purported leaked copy of the negotiating text, New Zealand, Chile, Malaysia, Brunei and Vietnam proposed far more general language with no reference to a three-step test at all. Instead, they proposed that countries may provide for limitations and exceptions in accordance with their domestic laws and the relevant international treaties to which they are a party.<sup>118</sup>
473. *Inside U.S. Trade* reports that the opposition from a majority of TPP countries against the aggressive use of the three-step test “reflects a growing awareness of the importance of exceptions to development and innovation.”<sup>119</sup>
474. Many countries also want to broaden the scope in which they can apply limitations or exceptions to allow for the circumvention of technological protection measures (TPMs). TPMs, also known as digital locks, prevent copyrighted material from being copied from various formats, including software and DVDs.

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product category, HTS subheading 1507.1000 crude soya-bean oil, 1507.9000 other crude soyabean oil, 1508.1000 crude ground-nut oil, 1508.9000 other crude ground-nut oil, 1509.1000 virgin oil, 1509.9000 other, 1510.0000 other oils, 1511.1000 crude palm oil, 1511.9000 other crude palm oil, 1512.1110 crude sunflower-seed oil, 1512.1120 crude safflower oil, 1512.1910 other sunflower-seed oil, 1512.1920 other safflower oil, 1512.2100 crude cotton-seed oil, 1512.2900 other crude cotton-seed oil, 1513.1100 crude coconut (copra) oil, 1513.1900 other crude coconut (copra) oil, 1513.2100 crude palm kernel or babassu oil, 1513.2900 other crude palm kernel or babassu oil, 1514.1000 rapeseed, colza or mustard oil, 1514.9000 other, 1515.2100 maize (corn) oil, 1515.2900 other maize (corn) oil, 1515.5000 sesame oil, and 1515.9000 other sesame oil.

<sup>115</sup> “Leak of TPP text on copyright limitations and Exceptions”, Knowledge Ecology International, [www.keionline.org/node/1516](http://www.keionline.org/node/1516)

<sup>116</sup> “Chile Threatens to Pull out of TTP because of U.S. IP demands”, InfoJustice.org, May 10, 2012

<sup>117</sup> “Academics Describe U.S. Clarifications Of Key Provisions In TPP Copyright Proposal”, Inside U.S. Trade, September 10, 2012

<sup>118</sup> Ibid.

<sup>119</sup> “Leaked U.S. Copyright Proposal Reveals Opposition From TPP Partners”, Inside U.S. Trade, August 7, 2012

475. These TPP partners critical of the U.S. proposal also want to amend the U.S. text so that it allows TPP partners to apply both current limitations and exceptions already contained in their domestic laws, as well as new limitations and exceptions that could be legislated in the future, to address the “digital environment,” or the Internet.<sup>120</sup>

### **Import Controls**

476. The Constitutional Organic Law of the Central Bank does not allow the establishment of quotas for imports (or exports). Consequently, Chile does not apply quantitative restrictions on imports, and it has no import licensing regime.
477. Imports of used vehicles, used motorcycles and used and retreaded tires (with the exception of wheel mounted tires) is prohibited.<sup>121</sup>
478. According to the authorities, the reason for maintaining the prohibition is to ensure that there is a modern, safe and environmentally friendly fleet of motor vehicles. This prohibition does not apply to ready mix cement trucks, ambulances, fire fighting vehicles, urban and highway cleansing vehicles, armoured vehicles, motor homes and penitentiary vehicles, inter alia, or to vehicles belonging to Chilean citizens who have resided abroad for one year or more and then returned to Chile, and vehicles intended for free zones. The reason for prohibiting used tires is one of public health. It is to ensure that the mosquito *aedes albopictus*, which transmits epidemic diseases such as dengue and yellow fever, is not introduced into Chile by means of used tires.
479. Other products that may not be imported include asbestos, pornography, dangerous goods such as certain pesticides for agricultural use, toys and articles for children which contain toluene, adhesives with a volatile solvent base and other goods prohibited by decree of the Ministry of Health or Agriculture or other government bodies.
480. Chile also prohibits the import of toxic and hazardous waste pursuant to the Basel Convention, as well as the import of ozone depleting substances and products containing CFCs in accordance with the Montreal Protocol (Annexes A, B and Group II in Annex C) These should not be affected by the TPP.

### **Export controls**

481. Among the products which may not be exported from Chile are anthropological, archaeological, ethnic, historical and palaeontological items and articles; pehuen or Chilean pine (*araucaria araucana*); and psychotropic substances.
482. Endorsements and authorizations are required for the export of some products such as firearms, ammunition, explosives, inflammable and asphyxiating chemical substances, radioactive substances, plant products, wild fauna specimens, fisheries and seafood

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<sup>120</sup> Ibid.

<sup>121</sup> World Trade Organization, Chile, Trade Policy Review, Report by the Secretariat, WT/TPR/S/220, September 2, 2009

products (crabs, prawns and abalone), alga gracilaria, certified bean seeds and works by Chilean and foreign artists.

### **Tariff Quotas**

483. Chile maintains MFN tariff rate (TRQ) quotas on refined and some mixed sugar products. The out of quota tariff rate is the 6% (plus the specific rate duty resulting from application of the PBS), and the in-quota rate is zero. The 60,000 tonne TRQ is allocated on a first-come, first-served basis. Chile also has some preferential tariff quotas, introduced under like-for-like commitments in trade agreements with MERCOSUR, Bolivia, Canada, the United States, the European Union, Japan and some Central American countries.<sup>122</sup>
484. Chile has problems with U.S. proposals about electronic commerce.

### **Environment**

485. The U.S. appears to be alone in pushing for environmental commitments that are fully enforceable. Some countries proposing a non-binding cooperation mechanism as an alternative approach for promoting environmental protection under TPP.
486. The U.S. proposal in TPP, which reflects the May 10, 2007, Bipartisan Consensus template, requires TPP members to enforce their own environmental laws and also ensure that their laws and regulations fulfill their obligations under seven multilateral environmental agreements to which they are signatories. That is the same standard included in the U.S.-Peru FTA.
487. *Inside U.S. Trade* reports some TPP countries have advocated a “carrot” approach that focuses on nonbinding environmental cooperation, which was the model included in the original “P-4” agreement between New Zealand, Chile, Brunei and Singapore.<sup>123</sup>
488. Chile is among the countries opposed to binding dispute settlement (in the environment chapter) which expands the scope of obligations significantly from that included in existing U.S. FTA with Chile. Those agreements only require each party to effectively enforce their own environmental laws.

### **Internet Retransmissions**

489. Copyright limitations and exceptions generally refer to provisions in trade deals under which FTA partners can deviate from standard copyright obligations in limited circumstances. Copyrights were slated to be discussed at the end of this week.<sup>124</sup>

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<sup>122</sup> Chile Individual Action Plan 2007, APEC Peer Review, July 2008

<sup>123</sup> “U.S. Faces Opposition On Enforceability Of TPP Environmental Chapter”, *Inside U.S. Trade*, May 24, 2012

<sup>124</sup> *Inside U.S. Trade*, “TPP Negotiators Discussing U.S. Proposal on Internet Retransmissions,” September 13, 2012

490. This provision is primarily intended to prevent a person from being able to stream a television signal over the Internet to a foreign country, which could place the right holder of the content at a competitive disadvantage when it comes to gaining market share in that country.
491. Critics of the proposed Internet retransmission language argue that it places restrictions on the application of fair use exceptions across borders in other countries, even though those same exceptions could be used under U.S. law.<sup>125</sup>
492. A final TPP text containing the retransmission provision could complicate the ability for online educators to transmit material online across borders, such as news footage for instructional use, even though the instructor could lawfully show students in the U.S. that same footage in a traditional classroom without using the Internet, Public Knowledge argued.
493. The U.S.-Korea FTA contains a footnote that permits retransmission without consent if it occurs within a country's territory over a "closed, defined, subscriber network that is not accessible from outside the party's territory." These cases would not constitute retransmission over the Internet, the footnote clarifies.
494. The Korea FTA and the U.S. TPP proposal both require countries to make it a criminal offense to manufacture or distribute a device or system used to decode an encrypted program-carrying satellite or cable signal without authorization of the lawful distributor. They also require countries to apply criminal offenses to the wilful reception or further distribution of an illegally decoded encrypted signal.

### **Annex 12.C, Payments and Transfers, Chile**

495. In previous trade agreements, including the Chile – Canada and Chile – USA FTAs, Chile has reserved the right of the Central Bank of Chile to maintain or adopt measures in conformity with the Constitutional Organic Law of the Central Bank of Chile (*Ley Orgánica Constitucional del Banco Central de Chile*, Ley 18.840 or other legislation, in order to ensure currency stability and the normal operation of domestic and foreign payments. For this purpose, the Central Bank of Chile is empowered to regulate the supply of money and credit in circulation and international credit and foreign exchange operations. The Central Bank of Chile is empowered as well to issue regulations governing monetary, credit, financial, and foreign exchange matters. Such measures include, inter alia, the establishment of restrictions or limitations on current payments and transfers (capital movements) to or from Chile, as well as transactions related to them, such as requiring that deposits, investments or credits from or to a foreign country, be subject to a reserve requirement ("encaje").

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<sup>125</sup> There has been extensive public debate on these issues in Chile including a very important seminar at the Catholic University in April 2012.



496. The reserve requirement that the Central Bank of Chile can apply pursuant to Article 49 No. 2 of Law 18.840, may not exceed 30% of the amount transferred and shall not be imposed for more than two years.
497. In addition, Chile has reserved the right of the Foreign Investment Committee to regulate the terms and conditions of any investment contract under the Foreign Investment Statute, Decree Law 600. The Foreign Investment Committee is not obliged to enter into investment contracts.

























































































































































