

How Much “Mega” in the Mega-Regional TPP and TTIP: Implications for Developing Countries

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Abstract

There is no question that the “mega-regional” trade deals in the Pacific and across the Atlantic are big. If completed and implemented, they will cover a large portion of global trade and investment. American and European negotiators want the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) to be “gold standard” agreements that establish the new rules of trade for a new century. The biggest concern arising from these mega-regional agreements for most developing countries not party to them is that they will undermine the rules-based multilateral trading system. The new or expanded rules that US and EU negotiators want to establish as precedents for the global system will not always be optimal for poorer countries.

This paper examines the TPP text to identify provisions that are more or less development-friendly, especially for

Vietnam, which is the poorest signatory to the deal by far. It then reviews what is under negotiation in the TTIP, and compares it to what is in the TPP, to assess potential implications for the other developing countries and the global trading system. Overall, I conclude that these mega-regional trade agreements are not likely to be as deep or as innovative as advertised. That, in turn, means the impact on developing countries may not be as significant as feared, or in some cases, as beneficial as hoped by those on the inside. I recommend ways for US and EU policymakers to mitigate potential negative effects for developing countries and for the multilateral trading system, including rules of origin that minimize trade diversion resulting from either traditional trade liberalization or regulatory cooperation. TTIP negotiators should also make it a model for a new generation of open, transparent trade negotiations that could begin to rebuild citizens’ trust in trade as a tool to improve their well-being.

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Introduction

There is no question that the “mega-regional” trade deals in the Pacific and across the Atlantic are big. If governments succeed in fully implementing the Trans-Pacific Partnership (TPP), involving the United States and eleven other countries, and the Transatlantic Trade and Investment Partnership (TTIP), between the United States and European Union, nearly two-thirds of US trade and more than 40 percent of extra-EU trade will be covered by these and other preferential trade agreements (PTAs).¹ While the number of PTAs around the world has ballooned—200 of the 300 PTAs in force having been concluded just since 2000²—what sets the mega-regional negotiations apart is that it is the first time the big players are negotiating preferential deals with one another.³ That fact substantially raises the stakes for the future of the rules-based, multilateral trading system.

Since the TPP and TTIP would cover a substantial share of global trade, there is, first of all, the potential for trade diversion at the expense of outsiders. But that risk should not be serious outside a few sectors and for a handful of countries because most tariffs among the countries involved are low already. Because the traditional barriers are low, American and European negotiators view the true value of the agreements as coming from reductions in nontariff barriers and from setting new rules in new areas that they hope will become global eventually. Some of those rules, however, may not be optimal for developing countries, including the poorest TPP party, Vietnam, or others that may try to join later. Many developing countries on the outside are concerned that these agreements would increase the pressures on them to adopt new rules and standards that do not reflect their interests.

Of course, Congress must still ratify the TPP and EU and US negotiators must complete the TTIP. Neither of those things was certain as of early 2016. In addition, analysis of the TPP text raises a number of question about how new or deep the disciplines really are in this purportedly 21st Century agreement. Comparison of the TPP text with reports about what is being discussed in the TTIP negotiations also raises questions about how consistent these agreements will be in designing rules in new areas. Where TPP and TTIP approaches differ, it is not clear which would then be chosen for a global push.

This paper analyzes these issues, which have not been addressed in any depth since the TPP negotiations were concluded.⁴ With the exception of further marginalizing the WTO, which

¹ Calculated from UN Comtrade, International Trade Statistics Database, <http://comtrade.un.org/>.

² World Trade Organization, Regional Trade Agreements Database, available here: <http://rtais.wto.org/ui/PublicMaintainRTAHome.aspx>, last accessed February 24, 2016.

³ Some also point to the Regional Comprehensive Economic Partnership (RCEP), which includes ASEAN, Australia, China, India, Japan, Korea, and New Zealand, seven of which are also parties to TPP; it does not include the United States or European Union.

⁴ Levy (2013) and Akman et al. (2015) assess the potential consequences for developing countries from these mega-regionals, but both were prior to publication of the TPP text. See also World Economic Forum (2014), especially the contribution by Uri Dadush.

remains a serious concern, this paper finds that the mega-regional trade agreements are not likely to be as deep or as innovative as advertised. That, in turn, means that the impact on developing countries may not be as significant as feared, or, in some cases, as beneficial as hoped by those on the inside. The paper concludes with recommendations to steer the mega-regionals in a development-friendly direction.

TPP: Broad but Not So Deep?

The TPP encompasses 12 countries spanning the Pacific Rim that collectively account for 40 percent of global GDP and roughly a third of global trade. The countries include some at very high levels of income—the United States and Japan being the largest—and one relatively poor country, Vietnam. Of the other developing country members, Chile, Mexico, and Peru already had PTAs with the United States, as did Australia, Canada, and Singapore. Malaysia, along with Brunei and New Zealand did not. Elms and Lim (2012) provide a brief history of the TPP and how it evolved from talks among four small countries to the mega-regional agreement that it became.

The agreement is broad in scope, but negotiations across so many countries at very different levels of development turned out to be more difficult and to take longer than anticipated. The result of this effort, assuming that the US Congress approves, will be an agreement that will eventually eliminate most tariffs across the region, raise standards in some areas, and create new obligations in others. US negotiators had to compromise on some issues, such as the period of data protection for biologic drugs. Overall, however, the outcome reflects the asymmetry in bargaining power between the United States and smaller parties to the agreement, particularly Vietnam and other developing countries.

The areas of concern for developing countries include some where less progress was made than hoped, such as agriculture, and some of the new standards and rules that could be a particular burden for developing countries to implement, such as intellectual property protections. But many of the provisions in newer areas are not fully enforceable under the agreement and may have little impact on behavior, or trade or investment (Ciuriak 2016). And, there were some new elements that could set useful precedents for more development-friendly agreements in the future.

Box 1: Key issues from a development perspective in the TPP

Development-friendly:

- Including an explicit exception for capital controls in a crisis
- Allowing countries to preclude foreign investor challenges to tobacco control regulations
- Prohibiting certain fisheries subsidies
- Calling for action against imports produced with forced labor

Of concern:

- Limited and discriminatory agricultural liberalization in key sectors
- Overly restrictive rules of origin for textiles and apparel
- Overly strong intellectual property

Key issues from the perspective of the TPP's developing country parties are summarized in box 1. Table 1 summarizes where the issues fall based on whether they are subject to dispute settlement and whether they are trade barriers that resisted reform, are expanding or extending existing WTO obligations (WTO+), or are in new areas not (generally) covered by WTO rules (WTO-extra). What follows is not a full assessment of the costs and benefits of the TPP's provisions. Rather, it is primarily an analysis of the degree to which the agreement expanded the scope and depth of trade rules as a possible precedent for future trade agreements, including the TTIP.

Old Issues Still Unresolved

Some 20th Century issues continue to plague this 21st Century trade agreement. The United States and some other high income countries continue to shield parts of agriculture and the textile and apparel sectors from import competition. And “trade remedies,” which are frequently manipulated for protectionist purposes, were subject to little in the way of new discipline. These are all issues that tend to affect developing countries disproportionately.

Tariffs, quotas, and agriculture

At US insistence, there is not one tariff elimination schedule that applies to all TPP parties. Instead, the United States and other TPP countries negotiated market access for goods bilaterally. That makes the traditional market access part of the agreement more complex and less transparent than it should be. It also made it easier for countries to shelter sensitive products. And, because quantitative restrictions remain relatively common in the agriculture sector, this approach also made it more likely that the market access outcomes in that sector would discriminate against those with less negotiating power.

Freund, Moran, and Oliver (2016) calculate that TPP parties will immediately eliminate nearly three-quarters of all nonzero tariffs when the agreement enters into force. For the most part, that should not be too difficult because tariffs are relatively low across the TPP countries, ranging from an (export-weighted) average of 0.4 percent in Singapore to 5.3 in Mexico and 6.2 percent in Vietnam (ibid.). The agreement will be fully implemented over 16 years for most products, but the United States will not eliminate all its tariffs on auto and truck imports from Japan until year 30.

At the end, all but five TPP parties will have eliminated all of their tariffs for other TPP parties. Canada, Japan, the United States, Mexico, and Vietnam will retain some tariff-rate quotas, mainly on certain sensitive agricultural products. The most common products excluded from full liberalization are sugar (Japan, US, Mexico, Vietnam), dairy (Canada, Japan, Mexico, US), and various meat products (some beef and pork in Japan, poultry and eggs in Canada, eggs in Vietnam). Mexico also has a tariff-rate quota for Malaysian palm oil exports, while Japan will retain restrictions on imports of wheat and wheat products and is providing very little new access to its rice market.

The liberalization that does occur for these products varies from substantial—Vietnam will phase out tariffs of up to 40 percent on meat products—to the very small increase in access to the Japanese rice market (Hendrix and Kotschwar 2016). Another problem arises, however, because many of these products are protected with tariff-rate quotas and the limited liberalization that occurs discriminates among TPP partners, often to the detriment of developing countries. Thus the United States and Australia get a bit more quota space to export rice to Japan, but Vietnam does not. Australia’s modest increased access to the US sugar market is likely to be at Mexico’s expense.

Finally, as with other bilateral and regional trade agreements, the TPP mostly ignores trade-distorting agricultural subsidies. There is language barring the parties from providing subsidies on agricultural exports to one another, but that is symbolic since none of the parties use explicit export subsidies. US negotiators ensured that these disciplines do not apply to subsidized finance for agricultural exports, which would have required changes to US policy. More usefully, the TPP addresses the use of export restrictions on food, adding new requirements for transparency and consultations with potentially affected TPP importers. The chapter also states that such restrictions should not apply to “food purchased for non-commercial humanitarian purposes.”

Rules of origin for apparel⁵

Rules of origin define the conditions under which a product is eligible for benefits under preferential trade arrangements. These rules are necessary to prevent third parties from capturing benefits by transshipping goods through a preference beneficiary with no or only minimal value-added in the beneficiary country. But rules of origin are often more restrictive than necessary to prevent such trade deflection. Indeed, they are often manipulated by protectionist interests to make them difficult to meet so that it is sometimes less costly for the exporter to forgo trade agreement benefits and just continue paying the nonpreferential tariff.

The TPP has a single set of rules and it permits “regional cumulation,” which means that inputs from any member used by any other member in a final product will count as originating and the product will be eligible for preferential treatment in the importing country. This adds important flexibility, but the TPP’s rules are still complex and could be difficult for new entrants and smaller businesses to navigate.

As is standard in US PTAs, textiles and apparel are subject to a triple transformation rule, which means that textile inputs from the “yarn forward” must originate among the parties to the agreement for the final clothing product to be eligible for tariff reductions. This provision will particularly affect Vietnam, which is a major apparel exporter and for whom

⁵ These issues are addressed in more detail in a companion paper, see Kimberly Ann Elliott, 2016, “TPP Risks and TTIP Opportunities: Rules of Origin, Trade Diversion, and Developing Countries,” CGD Policy Paper 078, Washington: Center for Global Development; Oliver (2016) covers the rules of origin for automobiles.

the United States is a major market. And regional cumulation will not be particularly helpful in this sector, at least in the short run, because most major textile suppliers are not TPP parties. This could change if Korea or Taiwan joins the TPP, or if Vietnam is able to develop an upstream textile sector and provide its own inputs (Elliott 2016; Elliott forthcoming).

Trade remedies

Under international trade rules, countries can impose *temporary* duties on imports that are “*dumped*” at below-market prices or *subsidized* (under certain circumstances) if they cause *injury* to competing domestic firms. All of the highlighted elements are carefully defined in WTO rules with the intent of limiting excessive use of trade remedies. But countries, including the United States, are often quite creative in stretching the definitions so that much less discipline is imposed in practice than the WTO rules intend (Destler 2005, chapters 6 and 9).

Developing countries are frequent targets of “trade remedies” and the United States is a major user of these “contingent protection” measures (Bown 2014, pp. 3, 6). According to the World Bank’s Temporary Trade Barriers database, the US had the second-highest proportion of imports covered by such measures in 2011 (after India). The United States is, by far, the most frequent respondent in WTO complaints regarding the application of anti-dumping and countervailing duties.⁶ So it is not particularly surprising that TPP negotiators made little headway in strengthening the rules in this area. The trade remedies chapter includes an *annex* calling for more transparency and stronger due process with respect to ADD and CVD investigations, but even that modest step is excluded from dispute settlement.

WTO+ and WTO-extra in the TPP

From the perspective of the United States, the progress made in the TPP negotiations is more incremental than revolutionary. Of the 30 TPP chapters, all but six also appear in the most recent set of US trade agreements with Colombia, Peru, and Korea.⁷ There are chapters with extensive obligations to improve market access for investors, service providers, and e-commerce beyond what the WTO requires, or in some cases what US negotiators included in previous PTAs. But the lists of exemptions are often long. The new chapters, those not seen in previous US agreements, are mostly hortatory and not subject to formal dispute settlement (table 1).

Market access for services and foreign investors

⁶ Calculated from the World Bank’s WTO Dispute Database, <http://go.worldbank.org/EFQRPBXL50>.

⁷ The TPP also has a separate chapter on cooperation and capacity-building, but similar provisions are generally included in US PTAs with developing countries, for example in the chapter on administrative and institutional provisions in the agreements with Colombia and Peru (but not Korea).

The WTO's General Agreement on Trade in Services (GATS) created, for the first time, a framework for addressing barriers in this area but it has done relatively little to reduce them in practice. The GATS takes a "positive list" approach, which means that WTO members commit to removing only those barriers that they specifically list in their market access schedules. In addition to making it easier for countries to exclude broad swaths of their economy, this also means that any new services developed are not automatically subject to the rules. US negotiators unsuccessfully pushed the GATS to take a negative list approach, meaning that all services *not* specifically reserved by a country would be open to imports, including new services.

The United States has been more successful in pushing the negative list approach to services trade in its bilateral and regional trade agreements, including the TPP. But the lists of "nonconforming measures" that countries exempted from coverage under the cross-border trade in services and financial services chapters are often lengthy. With respect to cross-border trade in services (other than financial services), Hufbauer (2016, pp. 85-86) concludes that the United States made little in the way of new market-opening commitments. Japan, Malaysia, and Vietnam, by contrast went well beyond their GATS commitments in his assessment. Hufbauer notes that financial sector liberalization tends to be "considerably more limited" relative to other sectors because of regulators' prudential concerns. Gelpert (2016, p. 99) concludes that the TPP's progress in removing barriers to financial services trade is "incremental" but real.

On investment, US and other advanced country PTAs and bilateral investment treaties go well beyond the WTO rules on Trade-Related Investment Measures. Those rules limit the scope for host governments to impose trade-distorting requirements on foreign investors.⁸ The TPP investment chapters, like the services chapters, adopts a negative list approach, so that economies will be open to foreign investors except for those sectors or investment policies explicitly excluded. Moran and Oldeski (2016, p. 102) conclude that these nonconforming measures are not "large or exceptional." Scissors (2015, p. 7), however, finds the investment exclusions broad enough to be troubling and gives the investment chapter a grade of C, compared to a D+ for the SOE chapter (see below). One notable new feature is an explicit exception for countries to use temporary capital controls in response to economic crises (or the threat thereof).⁹

In contrast to other chapters that provide a process for government to government dispute settlement, the investment chapter allows foreign investors to sue host country governments in certain situations. The mechanism was originally created to give investors recourse in cases where host governments with weak legal systems expropriated company property without compensation, or otherwise subjected foreign firms to arbitrary and discriminatory

⁸ The most common are local content and export performance requirements.

⁹ CGD Senior Fellow and former Treasury official Scott Morris provides a brief analysis of this provision in this blog post: <http://www.cgdev.org/blog/hooray-capital-controls-have-won-just-might-reveal-political-vulnerability-tpp>, last accessed February 24, 2016.

treatment. Over time, the investor-state dispute settlement (ISDS) mechanism expanded to include indirect or “regulatory expropriation.” Under the expanded definition of expropriation, multinational companies began to invoke ISDS to challenge environmental and health regulations in a number of cases, which turned ISDS into a lightning rod for critics.

As part of the response to critics’ concerns about ISDS and public health regulation, the TPP allows countries to exclude tobacco product control regulations from the ISDS provisions. This was also a response to Malaysia’s proposal to exclude tobacco from the TPP entirely, and it could be of particular help to Vietnam, which has some of the highest smoking rates in the world.¹⁰ The TPP text, including in the section on ISDS, affirms that nothing in the investment chapter should interfere with any government’s right to take nondiscriminatory regulatory actions to promote public health and safety. The negotiators’ nevertheless carved out tobacco specifically for several reasons that are unique to that product and do not set a precedent for others, such as sugar or alcohol. Most notably, tobacco is a leading cause of death and disease globally and is “the only legal consumer good that has a binding international treaty dedicated to its control and prevention” (Bollyky 2016). It is also a response to Philip Morris International’s decision to use international trade and investment rules to challenge tobacco control regulations in a number of developing countries where smoking is a growing health problem and concerns about legal costs could have a chilling effect on regulatory efforts (*ibid.*). Because of its unique status, this provision is a useful precedent for future trade and investment agreements as well.

The TPP chapter includes other notable reforms to the ISDS process, including to tighten up the language as to what constitutes “fair and equitable treatment” or regulatory appropriation; to prevent forum shopping; to permit the early dismissal of cases that arbitrators deem to be frivolous; and to make the process more transparent and accountable. As discussed below, the European Union wants to go further in TTIP and create a new international court, with an appellate body, to oversee these cases.

While these reforms are useful, questions continue to grow about the rationale for and impact of ISDS mechanisms. A recent analysis of data on nearly 700 disputes from 1994-2013 (Pelc n.d.) finds that 7 out of 10 involved claims of indirect, or regulatory, expropriation and most complaints targeted high income democracies, not institutionally weak or corrupt governments. Defenders of the system argue that the complaining firms lose most of these cases—80 percent or more since the early 2000s—according to the data analyzed in the paper (*ibid.*, pp. 21-22). Thus, governments’ ability to regulate is intact. The author notes, however, that bringing and defending against these complaints is costly. He argues that firms continue to file them despite the low probability of success because the real aim is to deter stronger regulation elsewhere or in the future. This increased targeting of

¹⁰ The most recent tobacco survey for Vietnam (2010) is here, http://www.who.int/tobacco/surveillance/en_tfi_gats_vietnam_report.pdf, accessed March 25, 2016.

legitimate regulation in democratic systems calls for a more fundamental rethink of the ISDS mechanism.

Rules and standards

Among the newer, 21st Century issues, the TPP succeeded most notably in creating or enshrining new, enforceable disciplines on digital trade and state-owned enterprises. There is also a chapter on customs and trade facilitation, parts of which are subject to dispute settlement. But the chapter mostly mirrors the recent WTO agreement on trade facilitation, with the principal difference being that developing countries do not receive special and differential treatment (Freund 2016, p. 3). In other new areas, provisions are often not enforceable using formal dispute settlement procedures and many do little to encourage parties to take action in practice.

There are new chapters on development, competitiveness and business facilitation, small and medium enterprises, and regulatory coherence that generally call for increased transparency, dialogue, and cooperation. But none are enforceable under the dispute settlement procedures of the agreement.

The chapter on regulatory issues, which was supposed to be one of the key innovations in 21st Century agreements, ended up focusing on *intra*-governmental coherence, rather than *inter*-governmental cooperation (Bollyky 2012, p. 181). The chapter does not define the scope of covered measures and only calls on parties to “determine and make publicly available” a list of covered measures and to “aim to achieve significant coverage.” Moreover, the provisions on coordination mechanisms and implementation of “core good regulatory practices” are also presented as things that countries “should consider” doing or encouraging.

Other chapters not subject to dispute settlement include the WTO-extra chapters on competition policy and capacity-building, as well as key parts of the transparency and anti-corruption chapter. The provisions in the competition chapter are similar to what has appeared in previous US PTAs, though the TPP includes more detailed rules for providing due process in the enforcement of competition laws. Contrasting the “soft law” approach in the competition chapter with the “hard law” approach to state-owned enterprises (see below), Gadbow (2016) concludes that the TPP “achieved qualified success in strengthening international law on competition.”

Activities under the cooperation and capacity-building chapter, like those under the development chapter, are not only unenforceable, they are “subject to the availability of resources. And, while the transparency chapter includes more extensive language than in earlier PTAs calling for governments to take steps to combat corruption, countries cannot invoke dispute settlement over the provisions relating to the application and enforcement of anti-corruption laws.

The chapter on temporary entry for business persons is primarily about improving the process to facilitate business travel and it allows countries to use the dispute settlement process only under limited circumstances. All parties, except the United States, also made specific commitments to facilitate such entry for other TPP parties. American negotiators, however, have not made such commitments since Congress made clear in approving the Chile and Singapore PTAs that it considered the provisions in those agreements to impinge on Congress' authority to regulate immigration.

The chapter on sanitary and phyto-sanitary standards, covering food, plant, and animal safety goes beyond the previous approach of simply affirming each party's commitments under the WTO provisions in this area. The TPP provisions push further in stating that standards "shall" be in conformity with international standards or be based on "documented and objective scientific evidence." But that paragraph is not subject to dispute settlement under the agreement. For some other WTO+ provisions, dispute settlement is either phased in or not permitted. Given the deep political sensitivities around food safety, it remains to be seen how countries will implement and enforce these new obligations.

The chapter on e-commerce is not wholly new but digital trade is one of the areas where the TPP pushed furthest in creating *binding* commitments in a new area of increasing importance. It goes beyond the past practice of proscribing tariffs for e-commerce products and providing for nondiscriminatory treatment for digital products crossing borders. The TPP also creates binding rules to ensure the free flow of data across borders and discourage localization requirements, unless they are designed to achieve "a legitimate public policy objective." And in those cases, localization requirements should not be arbitrary or unjustifiably discriminatory, or be a "disguised restriction on trade." The chapter also protects source code and other intellectual property associated with digital trade, and it requires countries to have measures in place to protect consumers and their privacy. Branstetter (2016a, pp. 79-80) notes, however, that the TPP leaves the content of those regulations to national governments. That raises the potential for trade conflicts arising from different levels of privacy protection, such as US and EU negotiators have had to address with the recent "Privacy Shield."¹¹

Aaronson (2016, p. 9) argues that, if the TPP model spreads to other countries, it "could play an important role in encouraging cross-border information flows and in providing tools to challenge censorship and filtering," thereby promoting human rights and democracy. Yet, while policymakers argue that the agreement promotes the "open internet," she notes that policymakers have not adequately addressed a wide range of issues such as cyber security, the lack of shared norms on privacy, and national security exceptions to the free flow of information. Branstetter (ibid.) also notes that the high standards of the TPP template will

¹¹ See Mark Scott, "U.S. and Europe in 'Safe Harbor' Data Deal, but Legal Fight May Await," *New York Times*, February 2, 2016, www.nytimes.com/2016/02/03/technology/us-europe-safe-harbor-data-deal.html? r=0, accessed March 22, 2016.

meet more resistance from other countries in the region and elsewhere. Hence, there is still a long way to go to develop what could become a global framework.

The chapter on state-owned enterprises is the only totally new chapter that is legally binding and subject to dispute settlement procedures. This is the first attempt to craft rules that go beyond limited, nonbinding language in the competition chapter to limit the degree to which SOEs are a source of unfair competition (with an eye to possible future negotiations with China). Miner (2016) lauds the “groundbreaking commitments on transparency,” which require TPP parties to provide lists of all their SOEs to other parties. But there are numerous exceptions to the rules in the text, as well as country-specific “nonconforming measures” that were submitted by all the TPP members except Japan and Singapore. In addition to general exceptions for sovereign wealth funds, Singapore reserved other activities related to its sovereign wealth funds in an annex to the chapter. Scissors (2015) concludes that provisions in some areas, including for sovereign wealth funds, are so weak, and the exceptions so broad, that US negotiators should reopen the chapter lest it become a negative precedent.

The chapters on labor, environment, and intellectual property in US PTAs are not new but they trigger controversy. Relative to the PTAs with Colombia, Peru, and South Korea, which immediately preceded it, the TPP pushed forward in some areas on labor and the environment. But it reverted to an earlier, less development-friendly template for intellectual property rights. While the provisions on intellectual property clearly go beyond existing WTO standards, the substantive content of the labor and environment provisions are generally based on existing international agreements and standards. The issue for many developing countries is how closely to link labor and environmental standards to trade, and whether it should be permissible to use trade sanctions to enforce them (Elliott and Freeman 2003).

In the negotiations over intellectual property protection, the length of the data protection period for new biologic drugs got most of the attention. But the problems from a developing country, or even a developed country, perspective go well beyond that. The stated objective of the agreement in the chapter is textbook:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

But the rules that follow arguably fail to strike that balance for the United States, much less developing countries (Maskus 2007; Moser 2013; Boldrin and Levine 2013). The copyright term, for example, is the life of the author plus 70 years. That is surely far beyond what is needed to encourage creativity among authors and songwriters. And applying the same rules to countries at very different income levels is not optimal. Strong IP rules in developing

countries without much innovative activity to protect are basically a transfer of monopoly profits from the poor to the rich (Fink 2008; Fink and Elliott 2008).

Recent PTA provisions in this area (as well as labor and environment) are rooted in a trade deal struck between the Bush administration and congressional leaders on May 10, 2007. The newly elected Democratic majority wanted the administration's trade negotiators to recognize that developing countries need more flexibility in the area of patents and access to medicines. For PTAs with developing countries, the May 10 deal rolled back some of the WTO+ provisions that could delay the introduction of more affordable generic medicines. In the TPP, the Obama administration reintroduced the earlier, stronger standards for pharmaceutical patents. Vietnam, by far the poorest TPP member, will have longer to implement some provisions in the chapter, but it will eventually have to implement the same standards as all other parties to the agreement. Other developing countries will also be able to take somewhat longer to implement certain provisions.

Biologic drugs are relatively new and had not previously been addressed in trade agreements. US law provides 12 years of protection for data from clinical trials that firms must submit to gain regulatory approval for these drugs. During that period, competitors cannot use the same clinical trial data in their own submissions for regulatory approval. Australia's law provides only five years of data protection for biologics and its negotiators insisted they could not change it. The Obama administration has been pushing to change US law to provide just 7 years of market exclusivity in order to save costs, but trade negotiators pushed for 8 in the TPP in hopes it would satisfy congressional demands. In the face of Australia's unyielding position, TPP negotiators settled on 8 years, or a minimum of 5 years of data protection plus other measures that would achieve a comparable outcome.¹²

The labor provisions in US trade agreements are quite politically sensitive and US trade negotiators must strike a careful balance to avoid losing too many votes in Congress (Elliott 2012). The TPP labor chapter largely follows the template developed in recent trade agreements, which focuses on implementation and enforcement of the core labor standards identified by the International Labor Organization (ILO). But the TPP also adds new provisions in a few areas. Unlike previous agreements, the TPP explicitly calls on parties to take steps to address forced labor. It also explicitly prohibits the waiving or relaxation of labor laws in export processing zones. In addition to these general provisions, the United States negotiated bilateral plans with Brunei, Malaysia, and Vietnam to ensure that their laws and practices are consistent with the ILO standards. The Brunei and Malaysian plans include measures to address the abuse of migrant workers. The TPP negotiators, however, missed an opportunity to address abuses of migrant workers generally and as a core provision of trade agreements.

¹² Branstetter (2016b), p. 3 interprets this provisions, as I do, as providing eight years one way or the other.

With respect to the environmental provisions, the complexity of negotiating with eleven other countries led to a departure from the template of recent agreements, to the chagrin of some stakeholders (Schott 2016). But there are other potentially important new precedents as well. Instead of requiring that parties adopt and implement seven specified multilateral environmental agreements, as was done in other recent US PTAs, the chapter has binding provisions on just three—the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on Ozone Depleting Substances and one on marine pollution.¹³ Those were the ones to which all of the parties had already adhered. On the other hand, the chapter does set a welcome, if relatively narrow, precedent by prohibiting fishery subsidies that contribute to overfishing or illegal or unregulated fishing. It also includes provisions to combat illegal wildlife trafficking, whether or not the species involved are on a CITES list.

Summary

Petri and Plummer (2016, pp. 20-21) calculate that the reductions in nontariff barriers to goods and services and the removal of restrictions on foreign direct investment that are covered by these WTO+ and WTO-extra chapters account for the bulk of the TPP's benefits. Getting rid of most tariffs accounts for just 12 percent of estimated income gains under the TPP. But the estimates of gains from reducing NTBs are subject to a number of assumptions and are based on estimates of the height of nontariff barriers that are themselves plagued by missing data and a number of measurement challenges.¹⁴ Realizing those gains will also depend importantly on how the new obligations are implemented and that may be a challenge for some governments with respect to behind the border issues.

Given the extensive exceptions claimed by many countries in some areas, and the non-enforceability of provisions in others, the direct economic impacts may be less than expected (Ciuriak 2016). From a global perspective, the key question is whether the WTO+ and WTO-extra rules and standards become the new template for multilateral negotiations. For the most part, the provisions on new issues reflect American preferences, which do not always mesh with European preferences. So how is the TPP likely to influence the TTIP negotiations and if the outcomes in WTO+ and WTO-extra areas are substantially different, how will that affect the evolution of the multilateral trading system?

TTIP: Will Balanced Power Mean Compromise or Deadlock?

After almost three years and twelve rounds of negotiations, the prospects for concluding the Transatlantic Trade and Investment Partnership are still highly uncertain. Significant

¹³ The others cover tuna fishing, wetlands, and whaling. Schott (2016, p. 5) lists the agreements and indicates which TPP parties have ratified which agreements.

¹⁴ For a brief review of key issues, see Simon Johnson, Is the TPP Good for America? Project Syndicate, February 1, 2016, available here, <https://www.project-syndicate.org/commentary/is-the-tpp-good-for-america-by-simon-johnson-2016-02>, accessed February 19, 2016.

progress in difficult areas is unlikely until after the US Congress ratifies legislation to implement the TPP, which could occur late in 2016. Even then, however, the US and EU positions in key areas are quite far apart and the path to bridging those gaps is unclear. The analysis that follows focuses, first, on market access, including regulatory cooperation, and then on rules and standards.

Market Access

The primary motivation for the TTIP negotiations is not to get rid of traditional trade and investment barriers. Overall average tariffs in both markets are low and two-way foreign direct investment is extensive (Francois 2013). Moreover, the tariffs that US and EU exporters face in one another's markets are substantially lower than what they face in other major markets (table 2). An EU summary of where things stood after the 11th negotiating round in October 2015 stated that the offers on the table would eliminate 97 percent of tariffs on the agreement's entry into force.

The exception to the generally low tariffs on US-EU trade, not surprisingly, is in agriculture. Average EU tariffs on agricultural and food products remain in double digits. The US average tariff in agriculture is much lower, but it retains tariff peaks on a number of sensitive agricultural products. Overall, 14 percent of EU agricultural tariffs are higher than 25 percent versus just over 2 percent of US agricultural tariffs (WTO/ITC/UNCTAD 2015). But trade in agriculture is just 4 percent of trade in goods between the two.

Most of the 3 percent of tariffs that TTIP will not eliminate immediately will likely be on agricultural products and the negotiations on those will wait to the final stages of the talks. Despite US negotiators' assertions that their goal is to eventually eliminate all tariffs on US-EU trade, it is more likely that not all of them will disappear.¹⁵ Moreover, three percent is more than enough for the United States to be able to protect sugar, dairy, and other sensitive agricultural products, as it did in the TPP. With its relatively higher tariffs on a broader range of agricultural products, the European Union will be facing the larger task in this area.

Also in the trade in goods arena, an agreement to more effectively police trade remedies could be an area of substantial gains for bilateral trade relations. The use of antidumping and countervailing duties, particularly by the United States, has been a major source of irritation in bilateral relations, and the subject of a number of disputes at the WTO. Reforms in this area if applied to all imports would also be useful for developing countries outside the negotiations. But the issues does not appear in any of the EU reports summarizing progress after the sixth round of negotiations in July 2014.

There are two key implications of the market access talks for developing countries. The first is that, as with other PTAs, the TTIP is unlikely to eliminate barriers on sensitive agricultural products or to address domestic subsidies at all, thereby underscoring the poor prospects for

¹⁵ http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf

progress on these issues at the global level as well. Second, trade diversion due to the elimination of other, relatively low tariffs, should not be that significant, but it strict rules of origin could disrupt supply chains to the detriment of developing country exporters.

On services and investment, US and EU negotiators generally take different approaches. American PTAs, as noted, generally use a negative list for scheduling commitments in these areas (countries must explicitly exclude sectors or policies they want to protect).

Commitments in European PTAs are generally on a positive list basis (countries only agree to liberalize what is included on the list). Moreover, EU Commission (2014, p. 3) officials told a TTIP advisory group in 2014 that they were not ruling out the negative list approach. But they also noted that they always exempt “new services,” which undermines a key objective of US negotiators in using the negative list approach. Overall, Francois, Hoekman, and Nelson (2015, pp. 23-24) point to past EU and US reluctance to negotiate much liberalization in services sectors where it really matters, that is where barriers are relatively high, and they conclude that TTIP may not do much better.

On regulatory cooperation, American and European objectives and approaches are again quite different. US negotiators are primarily interested in agreeing on a process-oriented agreement on horizontal regulatory coherence, similar to what they did in the TPP. EU negotiators, while not opposed, want to go further and encourage greater convergence in regulatory outcomes for particular sectors. They initially proposed creation of a regulatory cooperation body that would help to mute unnecessary divergences in future regulations, but subsequently backed off in the face of US skepticism. The latest EU text released in March has a placeholder for “provisions on the institutional set up.”¹⁶

On regulatory cooperation in specific sectors, the EU summary of the results from the October 2015 negotiating round noted that there had “been little progress in two years on substance” in the sectoral discussions, however. Autos were thought to be a sector where a mutual recognition agreement had the highest chance of success. But that is less clear after an industry-commissioned study by independent US and European research institutes concluded that EU and US safety regulations did not lead to equivalent safety outcomes in the areas studied (Flannagan et al. 2015).

A chapter on horizontal process reforms to enhance regulatory coherence is more likely, but there are obstacles there as well. The US Trade Representative emphasizes in an online summary that nothing in the TPP chapter on regulatory coherence will “require changes to U.S. regulations or U.S. regulatory procedures.” Yet EU negotiators have already rejected US proposals to make the EU regulatory process more like the US process in terms of providing notice and opportunities for stakeholder feedback at early stages in the development of new legislation. EU policymakers argue that differences in how the US federal and EU

¹⁶ Available at http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf, accessed March 22, 2016.

transnational governing processes work make the US demands infeasible.¹⁷ Whatever the content, if there is a TTIP chapter on regulatory coherence, it is likely to be excluded from formal dispute settlement, as with the TPP chapter. Indeed, in March 2016, the EU released draft texts of proposed chapters on regulatory cooperation and regulatory coherence, neither of which would be subject to dispute settlement.

Sanitary and phyto-sanitary standards affecting US agricultural exports to the European Union are another major irritant in bilateral relations, from the long-running dispute over growth hormones in beef to antibacterial treatments for poultry and approvals for genetically modified crops. The European Union is also still trying to regain access to the US beef market that was lost as a result of the BSE crisis. US negotiators hope that the TTIP negotiations may lead to resolution of some of these specific issues—indeed, support for an agreement from the US agricultural sector is unlikely to be forthcoming if they do not. But given the differences in policies and public attitudes around food, substantial progress in this area seems unlikely.¹⁸

Overall the prospects for significant gains on regulatory cooperation, including in the SPS area, do not seem promising. US and EU negotiators and representatives of their business communities have been trying to negotiate mutual recognition agreements or other forms of regulatory cooperation for years with little success. There was the Transatlantic Agenda in 1995, the Transatlantic Economic Partnership I 1998, the High-Level Forum for Regulatory Cooperation in 2005, and so on.¹⁹ Commenting on the possibility that a TTIP agreement could reduce regulatory barriers to trade, and do so without discriminating against third parties, Francois, Hoekman, and Nelson (2015, pp. 19-20) note that the argument is “notional, in that negotiators seem to believe in this possibility, but to varying extents and without strong evidence from past experience.”

Rules and Standards

Another stated aim of TTIP negotiators is to agree on standards in the TTIP that will then become global. Developing countries are concerned that they will have no voice in the negotiations on these standards and that may not be appropriate for poorer countries. Without assessing what the standards should be, a task beyond the scope of this paper, how likely is it that TTIP rules in various areas will set the baseline for future negotiations and become global standards?

¹⁷ “EU Poised to Table Two Texts On Regulatory Transparency, Cooperation,” *Inside U.S. Trade*, February 11, 2016.

¹⁸ Alan Matthews has a succinct discussion of the key elements in the SPS negotiations here, <http://capreform.eu/food-safety-in-the-us-eu-ttip-negotiations/>, accessed February 12, 2016.

¹⁹ Alan Matthews of Trinity College Dublin lists the previous initiatives and discusses regulatory cooperation in the context of agrifood trade in a November 2015 conference presentation here, <http://www.slideshare.net/amthhews/matthews-ttip-presentation-gmcc-nov-2015-final>, last accessed February 24, 2016.

In some cases—geographic indications for food products and data privacy issues, for example—divergences between European and American policymakers are so wide that anything more than shallow or nonbinding agreements seem unlikely. Agreements in these areas are also likely to be different from what was negotiated in the TPP and thus will not be good candidates for raising to the global level. For example, US negotiators insisted on including restrictions on the recognition of new geographical indications by TPP members in an effort to stymie EU efforts to expand such recognition through its own PTA negotiations.

Another area where finding common ground will be difficult is on the shape of the ISDS mechanism. The TPP, as noted above, includes a number of changes aimed at mollifying critics, but it has not completely succeeded in that. In the European Union, opposition to ISDS, including in the European Parliament, is even more vociferous and there are widespread demands to exclude it from trade agreements completely. When the European Commission held an online public consultation in the first half of 2015, they received nearly 150,000 responses, most of them opposing inclusion of ISDS in the TTIP.²⁰ The Commission responded with a proposal to replace the ISDS mechanism with a specialized “investment court” that would be more transparent and would include an appellate mechanism, which is not currently a part of the ISDS mechanism.²¹ US Trade Representative Michael Froman’s initial response was not positive, however.²²

On labor and the environment, the United States and European Union have broadly similar approaches, except that the core provisions in US PTAs are enforceable under the same dispute settlement procedures as the rest of the agreement—including the possibility of trade sanctions being imposed for violations. The sustainable development chapter of EU PTAs, which includes the provisions on labor and environment, provides for consultations and the possibility of a report from a panel of experts, but there is no recourse to the dispute settlement chapter that governs the rest of the agreement. It should also be noted that the US labor and environment chapters have provisions on cooperation and capacity-building to encourage improved implementation of standards and it creates institutions to try and resolve disputes through dialogue and without recourse to the formal panel process.

So there is substantial overlap in the approaches on labor and the environment. Still, congressional Democrats fought long and hard to ensure that labor and environmental provisions are enforceable and subject to the same dispute settlement procedures as the rest of the agreement. It is hard to envision them letting go, even in the TTIP context. And, in an early March joint statement, the American AFL-CIO federation and the European Trade

²⁰ The report on the consultation notes that most of the responses were organized and submitted collectively by NGOs with identical or similar responses; the report is here, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf, accessed February 12, 2016.

²¹ A Commission factsheet is here, http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm, accessed February 12, 2016.

²² <http://www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029>, accessed February 12, 2016.

Union Confederation called for “enforceable protections for labour rights, public services, and the environment.”²³ Whatever happens on enforcement, it is important to recall that the provisions in both US and EU PTAs are based on international standards promulgated by the ILO or embodied in multilateral environmental agreements. So in this case, as with the TPP, it is not a question of developing countries being forced to accept new international standards in which they had no say.

Pathways for Impact on Excluded Developing Countries

Developing countries that are not party to the TPP, and are on the sidelines of the TTIP negotiations, point to several areas of concern. These include: the potential for discriminatory liberalization to divert trade and investment from outsiders to insiders; the possibility that regulatory cooperation will be applied preferentially and discriminate against the exports of excluded parties; the possibility that standards set in these agreements will eventually become global without input from developing countries and be to their disadvantage; and the potential for these agreements to further undermine the multilateral trading system.

The trade effects need not be negative if the mega-regional agreements spur economic growth and more trade creation than diversion, as hoped. But as noted above in the discussion of the Petri and Plummer estimates of the TPP’s impact, the results showing net positive results for outsiders depend heavily on highly uncertain assumptions about the impact of nontariff barrier liberalization, including that it will be nondiscriminatory. Francoise (2013) comes to similar conclusions regarding the TTIP. And, since the TTIP is not yet completed, negotiators can take steps to ensure that rules of origin and other provisions mitigate rather than exacerbate any potential discriminatory effects.

Trade Diversion Potential

Overall, the economic impact of trade diversion resulting from preferential tariff liberalization in the mega-regionals is likely to be relatively small (Petri and Plummer 2016, p. 16; Francois 2013, p. 34). One exception is the apparel sector under the TPP, which is likely to have negative effects for poor Asian countries such as Bangladesh and Cambodia. If Vietnam is able to adapt to the strict rule of origin for textiles and apparel and gain substantial new access to the US and Japanese markets it would be in part at the expense of other very poor countries in the region (Elliott 2016).

The TTIP, by contrast, seems to pose relatively less risk of traditional trade diversion, at least for the poorest countries (Rollo et al., n.d.). In addition to having relatively low tariffs, and extensive preference programs for developing countries, the United States and European

²³ Available here, <http://www.aflcio.org/content/download/174668/4155986/TTIP+joint+statement+release.pdf>, accessed March 15, 2016.

Union have sophisticated economies and tend not to trade products that are similar to those exported by low-income countries. Still, the sectors where remaining tariffs are highest are those where many poor countries have comparative advantage, so the risk of trade diversion is not zero. Moreover, even in lower-tariff sectors, restrictive rules of origin could disrupt supply chains and interrupt trade with developing countries that provide intermediate imports (Elliott 2016).

Discrimination via Regulatory Cooperation

But traditional trade barriers are not where the real action is supposed to be in the mega-regionals. Both the TPP and TTIP aim to be 21st Century trade agreements with broader and deeper reach than existing agreements. And US and EU negotiators emphasize the goal of reaching agreement on standards in new areas that will then become the basis for global standards. In the TPP, however, there was more success in expanding market access for services and for foreign investors than on new rules to reduce the trade impact of regulations and other behind the border barriers. In the TTIP negotiations, there is even less to do to eliminate traditional trade barriers (outside of agriculture), however, so there is more of an emphasis on regulatory cooperation and there continues to be a strong push from negotiators to achieve something in this area.

But in examining the potential impact on outsiders, it is important to distinguish two types of rules and standards. The first are *product standards relating to quality and technical specifications* with which exporters must comply to enter a market. In this case, if there is TTIP agreement on regulatory cooperation that goes beyond horizontal process reforms, the effect on outsiders could be positive or negative (Mattoo 2015):

- Harmonization of standards could lower costs for outsiders because they no longer have to meet two sets of standards; if the new standards are higher or more complex, however, the net effect could be higher costs and less access, especially for poorer countries.
- Mutual recognition or equivalence agreements, if applied only to US and EU exporters, would discriminate against outsiders; if applied equally to third party exporters to either market, this would be helpful for outsiders.

As discussed above, and summarized in table 3, TPP did not produce many new, binding behind-the-border rules that are likely to discriminate against outsiders. The rules in areas such as food safety standards and customs facilitation emphasize changes to procedures to improve transparency and due process that countries are likely to implement on a nondiscriminatory basis. To the extent these reforms lower the costs of accessing TPP markets, they would be helpful for excluded developing country exporters as well. It also seems unlikely that countries would implement the new rules to keep digital trade open and to avoid localization requirements in ways that discriminate against non-parties.

The second type includes *domestic policies and standards* that do not directly affect third parties' decisions about what standards to follow. TPP and TTIP parties can agree to enforce higher standards for labor, certain environmental issues, as well as for intellectual property rights-holders and foreign investors in their own economies. But under current international rules they cannot force third party exporters to meet those standards. Moreover, the labor and environment chapters in the mega-regionals are generally based on standards embodied in international conventions and treaties already. The mega-regional provisions on intellectual property rights and investment go beyond existing global rules, but US, European, and (often) Japanese negotiators have been trying to push these higher standards in WTO negotiations for years without much success.

In sum, the examination of the TPP, and what we know so far about the TTIP, suggests that many new rules focus on transparency and process elements of regulation and are likely to be applied on a nondiscriminatory basis. To the degree that EU and US negotiators make deeper progress in addressing regulatory cooperation or other nontariff barriers, the key question for developing countries will be whether the agreement is open or closed.

Impact on Global Standards and the WTO

Agreement on new rules or standards among parties to the TPP or TTIP does not necessarily change the negotiating dynamic at the WTO in the WTO+ or WTO-extra areas. Developing countries will still be able to block provisions with which they disagree. Moreover, whatever increased pressure there is to make mega-regional standards global, it will be muted in areas where new rules or standards differ between the TPP and TTIP.

Still, if the emerging markets do nothing but continue to block further negotiations at the WTO, they could find themselves left further behind. Asian countries concerned about trade diversion as a result of TPP may conclude they have no choice but to accede to the agreement without the possibility of renegotiating any of the rules and with fewer exceptions and less flexibility than the original signatories. That sort of “tying of the hands” strategy could be helpful for governments trying to reinforce domestic economic reforms, even if some provisions go too far for their level of development.

For the majority of developing countries that will remain on the outside, however, a cascade of new East Asian countries seeking to join the TPP would further undermine the WTO. And if the United States and European Union successfully conclude the TTIP negotiations, why bother with the slow, frustrating WTO process at all? And in that case, what recourse will remain for excluded countries to protect themselves from beggar-thy-neighbor or other discriminatory policies?

Recommendations to Steer the Mega-Regionals in a Development-Friendly Direction

Based on what is in the TPP agreement and what we know about the TTIP negotiations so far, the mega-regionals seem likely to turn out to be more evolutionary than revolutionary, assuming they are successfully implemented. The TPP will entail significant liberalization in some sectors and, in particular for Vietnam, but most barriers in the region are already low. Some TPP parties will liberalize their services and investment markets more deeply than they have done to date, but the rules in other WTO+ and WTO-extra areas are often hortatory and not subject to dispute settlement. The TTIP negotiators would like to push further on nontariff barriers and regulatory cooperation issues, but can they?

Overall, the political environment for trade in early 2016 is hostile, at least in the United States and European Union. While there is a need for further research into the political economy of trade and whether the current angst around it is temporary or a fundamental shift, I offer tentative recommendations for making these mega-regional agreements as supportive of development objectives as possible.

As with any preferential agreement, there will be trade and investment diversion at the expense of at least some outsiders. But, with few exceptions, the overall economic impact should be not be large and could even be positive if the more optimistic assumptions about spillovers from the liberalization of nontariff barriers pan out. The TPP and the preferential access that Vietnam will eventually receive for its apparel exports raise concerns for particular poor countries, however. As part of implementing the TPP, US policymakers should address this by following other developed countries in providing duty-free, quota-free market access, including for apparel, to all least developed countries, including Bangladesh and Cambodia (Elliott 2013, 2016).

The possibility that the mega-regionals will result in new rules in new areas that become global without input from most developing countries seems lower now that we can see what is actually in the TPP. Rules in many new areas are nonbinding in the TPP. Where they are binding—such as on some food safety standards and with respect to digital trade—the approaches in the TTIP are likely to be different from what is in the TPP. Such discrepancies would make it difficult to use these agreements as the basis for global standards in new and emerging areas of trade diplomacy.

Still, there are steps the TTIP negotiators should take to make the outcome more development-friendly:

- adopt rules of origin that minimize trade diversion;
- keep regulatory cooperation open, transparent, and nondiscriminatory;
- build on TPP negotiations in areas where, if US and EU negotiators can agree, the issue might be ripe for multilateral agreement;
- make TTIP a model for a new generation of open, transparent trade negotiations.

First, negotiators should adopt rules of origin that minimize potential disruptions to supply chains and avoid discouraging trade with developing countries in intermediate goods. In addition to having rules of origin that are overall simple to use and not restrictive in terms of requiring high levels of US or EU content, negotiators should also consider adopting a cumulation rule that would allow the use of inputs from partners that are eligible for other preferential trade arrangements. This should include unilateral preferences, such as the Generalized System of Preferences, the EU's Everything But Arms, and the American African Growth and Opportunity Act. I discuss this proposal in more detail in Elliott (2016).

Second, the limited TPP outcomes on behind the border issues, along with the continued differences among TTIP negotiators on regulatory cooperation, suggest that addressing nontariff barriers to trade is going to remain a challenge. If negotiators are able to reach mutual recognition agreements in some areas, there is no technical reason that they cannot be open to third parties, and they should be.

Third, negotiators should build on some of the more positive innovations from TPP. The prohibition in the environment chapter on the worst forms of fisheries subsidies, the exemption from ISDS specifically (and only) for tobacco control regulations, and the explicit exception for capital controls in the case of economic crisis are useful precedents that the TTIP should embrace. In addition to that, US and European negotiators should look for areas, such as fisheries subsidies or e-commerce, where they could move negotiations to the WTO.

TTIP negotiators should also pick up on the opportunity in the TPP to protect migrant worker rights. Remittances are an increasingly important tool for improving welfare in developing countries. But that tool is weakened when host country firms exploit migrant workers' vulnerability and cheat them out of wages and benefits. TTIP should build on the initial steps taken in TPP to more effectively address forced labor in traded goods and expand it to encompass protections for migrant workers as well. Though the focus today is on stemming the flow of migrants to Europe, many will stay and they will need protection against further victimization as they search for jobs.

Finally, the biggest concern from the perspective of smaller, more vulnerable countries is that successful implementation of both the TPP and TTIP will further undermine the multilateral trading system. Given the toxic American political campaign, the risks may be larger and more fundamental. US policymakers need to reform policies in a range of areas to rebuild Americans trust in trade as a tool to improve the general welfare. The TTIP negotiations also offer an opportunity to address some of the concerns about trade liberalization masquerading as deregulation, but it requires a very different approach to negotiations in these areas. Negotiations over regulatory cooperation should be about getting rules that serve social objectives as effectively and efficiently as possible, not about trading concessions across sectors or issue areas. Increased transparency and engagement with domestic constituents, not just legislators, must be key parts of negotiations on behind the border issues. In that sense, the TTIP could truly become the model for what a 21st Century trade agreement should like.

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Table 1 Selected Characteristics of TPP Provisions

Issue type	Subject to dispute settlement	Dispute settlement limited or excluded
“Old” trade barriers still with us	<ul style="list-style-type: none"> • Ag/food TRQs retained • Ag subsidies unaddressed (except for export subsidies) • Restrictive rules of origin for sensitive products (textiles and apparel, autos) 	<ul style="list-style-type: none"> • Trade remedies (focus on transparency, due process, but not substantive obligations): no DS for ADD/CVD cases
WTO+	<ul style="list-style-type: none"> • Trade in goods (eliminates most duties) • Textiles and apparel (duties eliminated, but strict ROO) • Customs and trade facilitation (encourages implementation of measures similar to WTO) • TBT (transparency, due process, and mutual recognition of conformity assessment) • Services (negative list but w/exclusions) • Telecommunications • Financial services (w/exclusions) • Government procurement (positive list) • Intellectual property 	<ul style="list-style-type: none"> • SPS (USTR stated aim to align processes with US approach; DS phased in or excluded for key provisions) • Temporary entry for business persons (limited DS; no US commitments on #s)
WTO-extra	<ul style="list-style-type: none"> • E-commerce (temporary exceptions for Malaysia, Vietnam) • Investment (negative list but w/exclusions; provides explicit exception for capital controls)* • State-owned enterprises (negative list but w/exclusions) • Labor • Environment 	<ul style="list-style-type: none"> • Transparency and anti-corruption (limited DS for anti-corruption measures) • Competition policy • Cooperation and capacity building • Competitiveness and business facilitation • Development • SMEs • Regulatory coherence

Chapters **in bold** have not appeared in previous US trade agreements, except for temporary entry for business persons, which has not been in since the Chile and Singapore agreements in the early 2000s because of congressional objections. Certain elements of some of these chapters may have appeared in other chapters, such as references to state-owned enterprises in the competition chapters.

* There are limited provisions on trade-related investment measures in the WTO, but the investment chapters in bilateral and regional trade agreements, like bilateral investment treaties, go well beyond those limited obligations and therefore are listed as WTO-extra rather than WTO+.

See also Horn et al. (2009) for a systematic analysis of WTO+ and WTO-extra provisions in 28 US and EU trade agreements up to 2008.

	In the other TTIP partner	In other major markets (nonpreferential, weighted by market size)
Facing EU exporters		
Agriculture	6.6	18.4
Non-agricultural	3.5	9.1
Facing US exporters		
Agriculture	14.7	17.8
Non-agricultural	4.4	7.1
* Traded tariff lines only. <i>Source: WTO, ITC, UNCTAD, World Tariff Profiles 2015, Geneva.</i>		

Discrimination against outsiders?	Market access/product standards that apply to imports/FDI	Standards applied within countries, not to imports
<p>Yes</p> <p>Mixed (yes for market access when based on quantitative restrictions or mutual recognition; no for rules on transparency, due process)</p> <p>Unlikely, could benefit third parties</p>	<ul style="list-style-type: none"> • Tariff liberalization • Textiles and apparel • Rules of origin • Government procurement • ISDS • Temporary entry for business persons • Services • Investment • Telecom • SPS (TPP not likely; TTIP possible with MRAs) • TBTs (national treatment for conformity assessment bodies perhaps) • Customs facilitation (except cooperation to prevent evasion aimed at non-parties) • Trade remedies • E-commerce 	<ul style="list-style-type: none"> • Regulatory coherence (horizontal cooperation no; TTIP sectorals possible) • IPRs • Environment • Labor • Competition policy • SOEs