THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW

How the United States Withdrawal From the Trans-Pacific Partnership Benefits China

Daniel C.K. Chow
Ian Sheldon
William McGuire

Public Law and Legal Theory Working Paper Series
No. 451

August 7, 2018

Center for Interdisciplinary Law and Policy Studies

This working paper series is co-sponsored by the Center for Interdisciplinary Law and Policy Studies at the Moritz College of Law

HOW THE UNITED STATES WITHDRAWAL FROM THE TRANS-PACIFIC PARTNERSHIP BENEFITS CHINA

Daniel C.K. Chow*
Ian Sheldon**
William McGuire***

University of Pennsylvania Journal of Law and Public Affairs (forthcoming 2019)

Only days after his inauguration as U.S. President, Donald J. Trump withdrew the United States from the Trans-Pacific Partnership (TPP), a "mega" regional free trade agreement that would have established the world's largest free trade zone. Although President Trump announced that the withdrawal was justified because the TPP was an unfair agreement, the Trump Administration seems to have ignored or been unaware of the negative consequences of the decision: (1) as a consequence of the U.S. withdrawal, China has achieved a major strategic advantage in Asia through its own rival free trade agreement and now will be able to write the rules for trade in Asia and possibly beyond; and (2) the TPP would have resulted in significant economic gains to the United States as supported by a large body of economic studies analyzed in this article. Although the U.S. withdrawal has harmed its own interests, the decision is reversible because the United States can rejoin the TPP. While the path to reentry seems smooth at the moment, there is urgency for U.S. action. Reentering the TPP could become much more difficult if China first joins as the United States will need the approval of all TPP members, including China, to rejoin.

TABLE OF CONTENTS

---

* Frank E. and Virginia H. Bazler Chair in Business Law, The Ohio State University Michael E. Moritz College of Law. The author is grateful to John C. Dever, 3L Moritz College of Law, and Susan Azyndar, Moritz Reference Librarian, for their assistance on this article.

** * Andersons Chair of Agricultural Marketing, Trade and Policy, The Ohio State University Department of Agricultural, Environmental and Development Economics.

*** Assistant Professor of Economics, University of Washington Tacoma School of Interdisciplinary Arts and Sciences

I.
INTRODUCTION

On January 30, 2017, only ten days after his inauguration as U.S. President, Donald J. Trump withdrew the U.S. from the Trans-Pacific Partnership (TPP), a "mega" regional trade agreement (RTA) consisting of twelve nations encompassing most of Asia and approximately 40% of world trade.[1] The U.S. withdrawal terminated an arduous nearly eight year effort by the Obama Administration to create the world's largest free trade zone.[2] The reason given by the Trump Administration for withdrawal is that TPP is an unfair agreement that harms U.S. interests.[3] This reason is linked to President Trump's "America First" trade policies that are based on a theory of economic nationalism and protectionism.[4] These policies reflect the belief that international trade is a zero-sum game, and that the United States has long been the victim of "unfair" trade agreements that benefit trade partners at the expense of the U.S. In his inaugural address, President Trump indicated that U.S. policy would take a different direction under his administration:

> We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. . . . Protection will lead to great prosperity and strength.[5]

---

[1] Dave Sherwood, *Eleven Nations – But Not U.S. – to Sign Trans-Pacific Trade Deal*¸ REUTERS (Mar 8, 2018), https://www.reuters.com/article/trade-tpp/eleven-nations-but-not-u-s-to-sign-trans-pacific-trade-deal-idUSL2N1QN0S7.
[2] Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obamas Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html.
[3] Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, Jan. 23, 2017, *available at* https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/.
[4] *See* Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization,* B.U. INT'L L.J. (forthcoming 2019) at 2 (manuscript on file with the Boston University International Law Journal) (hereinafter "Chow, Unilateralism").
[5] President Donald J. Trump, Inaugural Address (Jan. 20, 2017) *available at* https://www.whitehouse.gov/briefings-statements/the-inaugural-address/.

The President's trade policies are elaborated in the President's 2017 National Trade Policy Agenda[6] submitted by Robert Lighthizer, the United States Trade Representative (USTR) and the chief U..S official on trade policy. The USTR declared:

> The overarching purpose of our trade policy – the guiding principle behind all of our actions in this key area – will be to expand trade in a way that is freer and fairer for all Americans. Every action we take with respect to trade will be designed to increase our economic growth, promote job creation in the United States, promote reciprocity with our trading partners, strengthen our manufacturing base and our ability to defend ourselves, and expand our agricultural and services industry exports.[7]

In order to achieve what is termed "fair" trade,[8] the USTR identified four priorities:

> (1) defend U.S. national sovereignty over trade policy; (2) strictly enforce U.S. trade laws; (3) use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property rights; and (4) negotiate new and better trade deals with countries in key markets around the world.[9]

Under the first priority, the United States has indicated that it will ignore international law, including the rules and decisions of the World Trade Organization (WTO), when it harms U.S. interests.[10] Under the second priority the United States has asserted the right to impose unilateral trade sanctions in the form of increased tariffs against many of its trading partners.[11] These sanctions apply not only to trade with China, but also to nations such as Canada, Mexico, Germany, and Japan with which the United States has friendly relations.[12] Under the third, and

---

[6] Adam Taylor, *A Timeline of Trump's Complicatied Relationship with the TPP*, WASH. POST (Apr. 13, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/04/13/a-timeline-of-trumps-complicated-relationship-with-the-tpp/?utm_term=.e66df5a6c654.

[7] U.S. TRADE REPRESENTATIVE, THE PRESIDENT'S 2017 TRADE POLICY AGENDA 1 (2017), *available at* https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-trade-policy-agenda-and-2016.

[8] The concept of "fair" trade has its roots in political discourse in 19th Century Britain, but it also characterized U.S. criticism of trading relations with Japan, South Korea and Taiwan in the 1980s, "Congressman, businessmen, editorialists and the media have repeatedly emphasized fairness in trade, 'level playing fields' and reciprocity as a pre-condition for a trade regime to be acceptable to the United States . . . ." *See* Jagdish N. Bhagwati & Douglas A. Irwin, *The Return of the Reciprocitarians – US Trade Policy*, 10 WORLD ECON. 117, 109-139 (1987).*See also* Patrick O'Brien & Geoffrey Allen Pigman, *Free Trade, British Hegemony and the International Economic Order in the Nineteenth Century*, 18 REV. INT'L STUDIES 89, 105-107 (1992) (discussing Britain's fair trade movement).

[9] *See* Taylor, *supra* note 6.

[10] *See* Chow, Unilateralism, *supra* note 4, at 7.

[11] *See id*. at 14.

[12] When the Trump Adminstration announced its tariffs, they were generally applicable. *See, e.g.*, Press Release, U.S. Trade Representative, President Trump Approves Relief for U.S. Washing Machine and Solar Cell Manufacturers (Jan. 22, 2018); Proclamation No. 9704, Adjusting Imports of Aluminum into

fourth priorities, the United States is using the threat of economic sanctions to induce its trading partners to make trade concessions and revise existing trade agreements that are supposedly "unfavorable" to the United States.[13] For example, after the United States announced across-the-board additional tariffs on steel and aluminum on March 1, 2018, South Korea immediately agreed to revise the U.S.-Korea (KORUS) free trade agreement by agreeing to export less steel and aluminum to the United States in order to avoid the tariffs.[14] Treasury Secretary Steve Mnuchin declared, "I think the strategy has worked, quite frankly. We announced the tariff. We said we were going to proceed. But, again, we said we'd simultaneously negotiate." Secretary Mnuchin boasted that this was a "win-win" situation for both countries,[15] suggesting that the United States is hoping to duplicate this approach to induce other countries to revise their trade agreements. Some countries claim that the United States is not negotiating but is using the threat of trade sanctions to intimidate its trading partners to capitulate to new trade concessions.[16]

The revision of KORUS proceeded at a breakneck pace lasting only a few weeks,[17] but revising a multilateral agreement such as TPP with twelve members could prove complex and time consuming.[18] In the case of TPP, the U.S. strategy is to first withdraw from the agreement and then to negotiate bilateral agreements with each of the other eleven nations.[19] Once limited to a bilateral negotiation with a single trading partner, the United States will be able to use its

---

the United States, 83 Fed. Reg. 11,619 (March 8, 2018); Proclamation No. 9705, Adjusting Imports of Steel into the United States 83 Fed. Reg. 11,625 (March 8, 2018); *but see* Everett Rosenfeld, *US Extends Tariff Exemptions for European Union and Other Allies*, CNBC (Apr. 30, 2018), https://www.cnbc.com/2018/04/30/us-extends-tariff-exemptions-for-eu-and-other-allies.html (while the tariffs were applicable to all counties, multiple exemptions were made for allies).

[13] *See id*. at 20-22.

[14] On March 28, 2018, South Korea agreed to limit its exports of steel and aluminum to the U.S. to 2.68 tons of steel exports to the U.S. per year or roughly 70% of the volume of steel exports from Korea to the U.S. for the years 2015-17. Press Release, U.S. Trade Representative, Joint Statement by the Uniteds States Trade Representative Robert E. Lightizer and Republic of Korea Minister for Trade Hyun Chong Kim (Mar. 28, 2018); Fact Sheet, U.S. Trade Representative, New U.S. Trade Policy and National Security Outcomes with the Republic of Korea (Mar. 28, 2018), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/new-us-trade-policy-and-national.

[15] Alan Rappeport & Jim Tankersley, *Trump Gets First Major Trade Deal as South Korea Looks to Avoid Tariffs*, N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/business/south-korea-us-tariffs.html (quoting Steve Mnuchin about the new KORUS deal).

[16] *See* Hans von der Burchard & Jakob Hanke, *Trump is Winning Trade War — for Now*, POLITICO (Mar. 27, 2018), https://www.politico.eu/article/president-donald-trump-winning-the-trade-war-for-now-steel-aluminum-tariffs/.

[17] The trade sanctions were announced on March 1, 2018 and South Korea agreed to trade concessions and revisions of KORUS on March 27, 2018. *See* Press Release, U.S. Trade Representative, Joint Statement by the Uniteds States Trade Representative Robert E. Lightizer and Republic of Korea Minister for Trade Hyun Chong Kim, *supra* note 14 (announcing conclusion of trade sanctions); Ana Seanson, *Trump to Impose Sweeping Steel and Aluminum Tariffs*, N.Y. TIMES (Mar. 1, 2018),

[18] *See* Christopher Moser & Andrew Rose, *Why do trade negotiations take so long?*, VOX: CEPR POLICY PORTAL (June 8, 2012), https://voxeu.org/article/why-do-trade-negotiations-take-so-long (discussing the difficulties with multi-lateral trade negotiations).

[19] The USTR has stated that "[a]s a general matter, we believe that [U.S.] goals can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations – and by renegotiating and revising trade agreements when our goals are not being met." U.S. TRADE REPRESENTATIVE, *supra* note 7, at 2

economic clout in a one-on-one negotiation to obtain a new bilateral agreement that will contain terms favorable to the United States.[20]

Although the U.S. withdrawal was originally thought to signal the demise of TPP, the remaining 11 nations completed new negotiations and, on March 8, 2018, the revised agreement, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), also known as TPP11, was signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.[21] CPTPP is scheduled to come into effect within two years if all requirements are met.[22]

While the United States' decision to withdraw from TPP is consistent with its announced trade policies, the United States seems to have overlooked the potential harms to its immediate and long term economic and strategic interests. First, the Trump Administration seems to have ignored a large body of economic research indicating that TPP would have resulted in significantly increased trade and economic development opportunities for the United States and other TPP countries.[23] These are opportunities that may now redound in some form to the benefit of the remaining eleven members, but in which the United States will not share. In addition, it is unclear whether and how long it will take for the United States to negotiate bilateral trade agreements with the remaining eleven nations. Even if this were to occur, it is unclear whether these agreements will result in equivalent trade benefits. Second, in addition to economic benefits from TPP, there are also significant strategic U.S. interests that may be compromised by a withdrawal.[24] TPP was designed to allow the United States to create new legal standards for trade in Asia, China's own backyard, which would far exceed those set forth by the WTO.[25] Not only would TPP have established higher standards for Asia as a whole but TPP was created with

---

[20] While the United States has negotiating leverage in bilateral negotiations, to extract to favorable a deal under a bilateral negotiation could bring negotiating states in violation of the WTO. Bilateral negotiations can also harm the United States as a collection of them prevents harmonization of itneranational trade rules that promote growth. *See* Harry Broadman, *Trump's Misplaced Penchant for Bilateral Trade Deals*, FORBES (Jan. 31, 2018), https://www.forbes.com/sites/harrybroadman/2018/01/31/trumps-misplaced-penchant-for-bilateral-trade-deals/#774ca5de57b9.

[21] Tim McDonald, *Asia-Pacific Trade Deal Signed by 11 Nations*, BBC (Mar. 8, 2018), https://www.nytimes.com/2018/03/01/business/trump-tariffs.html https://www.bbc.com/news/business-43326314.

[22] The CPTPP will enter into force sixty days after the signatories have ratified it or, if this does not occur not within two years of its initial signing, when at least half of the signatories accounting for 85% of the combined GDP of the original signatories in 2013 have signed it. Comprehensive and Progressive Trans-Pacific Partnership art. 30.5, Mar. 8, 2018, [hereinafter CPTPP], https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/#CPTPP.

[23] *See* Part III *infra*.

[24] *See* Part II *infra*.

[25] *See* U.S. TRADE REPRESENTATIVE, THE TRANS-PACIFIC PARTNERSHIP DETAILED SUMMARY OF U.S. OBJECTIVES 13-41 (2015), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/september/ustr-releases-detailed-summary.

the specific goal of containing China, the United States' chief rival in trade.[26] It is no exaggeration to say that China was the target of every major provision in TPP.[27] Moreover, the United States deliberately excluded China from the TPP negotiations so that China could not challenge or dilute the new standards in TPP.[28] The United States' plan was to complete TPP without China and then confront China with a difficult choice: reject TPP and lose the trade benefits that would come with membership or join TPP and be subject to tough new standards that were specifically designed to address U.S. concerns about some of China's most controversial trade practices.[29] Of course, China did not stand by idly while the United States embarked on this plan; China was creating a competing RTA of its own for Asia, the Regional Comprehensive Economic Partnership (RCEP), which by some measures would be even larger than TPP.[30] Returning the favor, China excluded the United States from the negotiations for RCEP.[31] By rejecting TPP, the United States may now have relinquished this strategic goal of containing China, giving China, armed with its own RTA designed to offset TPP, the clear upper hand in Asia. [32]

This article will develop these themes as follows. Part II will discuss the background to TPP and how it includes standards exceeding those of the WTO that were designed in significant part to limit China. Part III will examine the large body of economic research that shows the expected economic benefits of TPP for the United States and its other members. Part IV will discuss China's competing RTA for Asia and how China may have gained the advantage with the U.S. rejection of TPP. The article concludes by examining future courses of action for the United States.

II.
GOALS OF TPP

A. History of TPP

TPP, signed in early-October 2015, would have been the largest RTA struck in the past two decades, and along with the Transatlantic Trade and Investment Partnership (TTIP) that was

---

[26] *See* Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHICAGO J. INT'L L. 372, 372-78 (2017) (hereinafter "Chow, Trans-Pacific Partnership").
[27] *See id*. at 374.
[28] *See id*.
[29] *See id*. at 375.
[30] *See* Rosalind Mathieson, *Agreeing on RCEP — China's Favorite Trade Deal — Set to Drag into 2018*, JAPAN TIMES (Nov. 14, 2017), https://www.japantimes.co.jp/news/2017/11/14/business/agreeing-rcep-chinas-favorite-trade-deal-set-drag-2018/#.W1oOT9JJGUk.
[31] *See id*.
[32] *See* Freddie Kleiner, Opinion, *Trump Leaves Asia door Open for china to Dominate Trade*, FIN. TIMES (Mar. 2, 2017), https://www.ft.com/content/2fe572fc-ff39-11e6-96f8-3700c5664d30 (discussing how the Trump Administration's withdrawl allows China to put the U.S.'s influence at risk).

under negotiation between the United States and European Union (EU),[33] it represented an important new direction in trade liberalization.

In 2014, TPP countries accounted for approximately 36% of the world's economy, and 23% of world trade.[34] If ratified, TPP was anticipated to reduce more than 18,000 tariffs, including many agricultural trade barriers.[35] In 2014, the eleven other members of TPP, accounted for $727 billion worth of U.S. exports, with Canada, Japan and Mexico accounting for 85% of the total.[36]

TPP, and other "mega"-trade deals such as TTIP, have emerged amidst uncertainty about the global trading system and the future of the WTO. Starting in the early-2000s, the rate of growth of global trade slowed relative to GDP growth, and following the "great recession" trade was not driving growth of either industrialized or emerging economies.[37] In the period 2012 to 2016, the volume of world trade grew by only 3%, less than half the average rate of expansion of 7.6% in the pre-financial crisis period, reaching a low of 2.4% in 2016.[38] Also, despite limited progress in the WTO with agreements to simplify customs rules and eliminate agricultural export subsidies being signed in December of 2013 (Bali Ministerial Conference) and 2015 (Nairobi Ministerial Conference) respectively, the Doha Round of multilateral trade negotiations, initiated in 2001 and stalled for years, has been officially declared dead by the Nairobi Ministerial Declaration issued on December 19, 2015.[39] At the same time, there has been a significant increase since 1992 in the number of RTAs globally, with over 455 currently in force and notified to the WTO.[40] The United States itself already has fourteen RTAs in force with a total of twenty countries, and there are already thirty-nine RTAs in existence affecting the Asia-Pacific region, with others being negotiated.[41]

The negotiation of the TPP can be seen as the development of a framework for guiding further economic integration in the Asia-Pacific region, given the rapid growth of bilateral and regional RTAs that have affected countries in the region since 2000. From the standpoint of the

---

[33] *See* Gabriel Felbermayr, Benedict Heid, Mario Larch, & Erdal Yalcin, Macroeconomic Potentials of *Transatlantic Free Trade: A High Resolution Perspective for Europe and the World*, 30 ECON. POL'Y 493, 491-537 (2015).

[34] Peter A. Petri & Michael G. Plummer, *The Economic Effects of the TPP: New Estimates, in Assessing the Trans-Pacific Partnership, in* VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES, at 23 (Peterson Inst. Int'l Econ, 2016).

[35] *Id.* at 31-33.

[36] *See* IAN F. FERGUSSON ET AL., THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS 2 (Cong. Research Service Report, 2015).

[37] BERNARD HOEKMAN, "TRADE AND GROWTH – END OF AN ERA?" IN BERNARD HOEKMAN, THE GLOBAL TRADE SLOWDOWN: A NEW NORMAL? 3 (2015).

[38] *See* Csilla Lakatos & Franziska Ohnsorge, *Arm's-Length Trade – A Source of Post-Crisis Trade Weakness* 1 (World Bank, Working Paper No. 8144, 2017).

[39] *See* World Trade Org., Nairobi Ministerial Declaration, December 19 (2015), https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm.

[40] *See* World Trade Org., Regional Trade Agreements: Facts and Figures (2018), https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts

[41] *See* Office of the United States Trade Representative's Office (2018), https://ustr.gov/trade-agreements/free-trade-agreements. *See also* World Trade Org., *supra* note 40.

United States, TPP was supposed to serve four important goals: first, it represented a "gold standard" for future trade agreements involving the United States, i.e., it was designed to cover dimensions such as trade in services and foreign direct investment (FDI) that are not part of the Doha Round;[42] second, TPP has been seen as paving the way for broader economic integration in the Asia-Pacific region with the potential of generating much greater economic benefits than a typical, narrowly-defined RTA;[43] third, TPP could have provided a model for taming the Asia-Pacific "noodle bowl" of overlapping RTAs in the region, where complex rules of origin (ROOs) can result in economic inefficiency. ROOs are designed to ensure that only goods primarily produced within an RTA are eligible for tariff preferences, therefore, a single set of ROOs would allow intermediate inputs produced in any TPP country to count towards meeting ROO standards;[44] fourth, the United States would have got preferential access to some Asian markets covered by existing RTAs such as the Association of Southeast Asian Nations (ASEAN), which it is currently not a member;[45] and fifth, TPP would have created important new constraints on China in international trade well beyond what currently exists under the WTO.[46]

B. Regionalism and the Rise of "Deep Integration"

The pace of multilateral trade negotiations has slowed significantly since the conclusion of the Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT) in 1994, and the subsequent formation of the WTO. The latest round of WTO negotiations, known as the Doha Development Round, begun in 2001, were in deadlock for years before their official termination in 2015.[47] Parallel to these negotiations, many WTO members and non-members have either negotiated or are in the process of negotiating RTAs.[48] This shift in focus to regional trade liberalization has been driven by several factors. First, the world economy has become multi-polar, moving from one dominated by a "coalition of the willing" (the U.S., EU, Japan, and Canada — collectively known as "the Quad") able to promote multilateralism within the GATT/WTO,[49] to one where emerging economies such as Brazil, Russia, India, China, and South Africa (BRICS) are now more able to influence and re-arrange the global trading system.[50] Second, trade linkages have become much more complex with disintegration of the vertical production chain and the associated increase in offshoring of production of intermediates by developed to developing countries.[51] Third, most orthodox trade barriers have already been

---

[42] Peter A. Petri et al, *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment* 6 (East-West Center Working Papers, Economics Series No. 119, 2011)
[43] *See id.* at 6.
[44] *See id.* at 6. See also Petri & Plummer, *supra* note 34, at 8.
[45] *See id* at 6.
[46] *See id.* at 6-7.
[47] *See* Shawn Donnan, *World Trade Organisation Moves on from Stalled Doha Round*, Financial Times (Dec. 19, 2015), https://www.ft.com/content/08968f4e-a682-11e5-9700-2b669a5aeb83; *Global Trade After the Failure of the Doha Round*, NY TIMES (Jan. 1, 2016), https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doharound.html?_r=0.
[48] *See* World Trade Org., *supra* note 40.
[49] *See* Paul Collier, *Why the WTO is Dead-locked: And What Can Be Done About It?*, 29 WORLD ECON. 1425, 1423-49 (2006).
[50] *See* Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30, WORLD ECON. 95, 106 (2016)
[51] *See id.* at 108.

eliminated through eight successive rounds of the GATT, such that average *ad valorem* manufacturing tariffs have reached historic lows, from over 40% to less than 4%.[52]

In this context, there are a number of reasons for why the WTO has made little progress towards further multilateral trade liberalization since the Doha Round began in 2001.[53] First, during the lifetime of GATT, the Quad dominated global trade, accounting for two-thirds of imports, whereas now they account for half of world imports.[54] The rapid growth of emerging economies and their accession to the WTO have probably reduced the Quad's ability to push for increased market access. Second, the rapid growth of RTAs and associated tariff-cutting that might otherwise have been completed under the WTO, has resulted in member countries using up domestic political capital, thereby making completion of the Doha Round more difficult.[55] Third, many of the more recent RTAs have incorporated what are termed "deep" provisions that go well beyond tariff-cutting, instead focusing on restricting the use of explicitly "national" rules on investment, and intellectual property protection.[56] In addition, there has been a significant expansion in bilateral investment treaties, where countries concede national sovereignty in order to encourage inbound FDI.[57] The combination of deep RTA provisions and investment treaties suggests that many countries want to place disciplines on economic activities that were never included in the terms of reference of the WTO.[58] Fourth, despite the lack of any substantive progress in the Doha Round, the rise of offshoring has resulted in unilateral cutting of tariffs by developing countries seeking to become part of international production networks, and as a consequence, developed countries are now less interested in multilateral trade talks.[59]

C. Deep vs. Shallow Integration

There is an important qualitative difference between the "shallow" integration of the GATT/WTO, characterized by tariff-cutting, and the "deep" integration typically found in RTAs. The GATT/WTO was designed to prevent countries from using tariffs to improve their own terms-of-trade at the expense of their trade partners, i.e., increase their exports while decreasing their imports.[60] If a country is "large," it can use tariffs to raise (lower) the price of its exports (imports) relative to its imports (exports), and extract surplus from its trade partners. The GATT/WTO contains provisions that curb member states' appetites for tariffs beyond what is politically optimal by promoting reciprocal exchange of market access granted in a non-discriminatory way to all other GATT/WTO members.[61]

---

[52] *See id.* at 98-101.
[53] *See id*. at 106-111.
[54] *See* Gordon H. Hanson, *The Rise of Middle Kingdoms: Emerging Economies in Global Trade*, 26 J. ECON. PERSP. 43-48, 41-64 (2012).
[55] *See* Baldwin *supra* note 50, at 107.
[56] *See id*. at 107.
[57] *See id.* at 108.
[58] *See id*. at 108.
[59] *See id.* at 108.
[60] Kyle Bagwell et al., *Is the WTO Passé?*, 54 J. ECON. LIT. 1125-28, 1125-31 (2016).
[61] *See id.* at 1154-61.

Mutual exchange of market access was the appropriate focus of trade negotiations in the "made-there-sold-here" economy.[62] More recently, technological advances have allowed firms to "offshore" production processes that used to be contained within a single, domestic firm.[63] In 2015 intra-firm trade accounted for about one third of global exports,[64] and approximately half of all U.S. trade is intra-firm, or between a parent company and its affiliates abroad.[65] International commerce is increasingly characterized by flows of investment and know-how from developed to developing countries in exchange for low-cost intermediate goods.[66] However, a firm's ability to offshore production depends on the quality of governance in those foreign countries.[67] Multinational companies (MNCs) and their affiliates are interested in harmonizing economic policy across countries and ensuring that their interests will be protected abroad.[68] This has increased the "demand" for deep integration among firms in both the developed and developing world.[69]

The GATT and its successor the WTO was and is not an appropriate mechanism for "deep integration" that goes beyond the reduction of tariffs. The GATT/WTO has been concerned primarily with reducing barriers to the trade in goods. The most commonly used trade barrier is tariffs; thus, the focus of the GATT/WTO throughout most of its existence has been tariff reductions with great success; today's tariff rates very low by comparison to historical rates from the early twentieth century.[70] Other barriers pertaining to goods covered by the GATT/WTO are quotas, i.e., numerical restrictions imposed on imports,[71] and anti-dumping duties imposed on imports sold at below cost or predatory prices to gain a foothold on the internal market,[72] and subsidies, which are government provided funds that reduce the cost of production of an exporter giving it a competitive advantage.[73] All of these barriers are directly related to the trade in goods and are subject to discipline under the GATT/WTO and its related agreements. The concerns of MNCs about governance and economic policy, including issues relating to environmental regulation and labor and working conditions, are beyond the scope of

---

[62] *See* Baldwin, *supra* note 50, at 96.

[63] *See* Pol Antràs & Elhanan Helpman, Global Sourcing, 112, J. POL. ECON., 552-56, 552-80 (2004).

[64] *See* Lakatos & Ohnsorge, *supra* note 38, at 1.

[65] *See id.* at 7.

[66] *See* Jonathan Haskel et al., *Globalization and U.S. Wages: Modifying Classic Theory to Explain Recent Facts*, 26 J. ECON. PERSP. 119, 121 (2012); *see also* Marcel P. Timmer et al., *Slicing Up Global Value Chains*, 28 J. ECON. PERSP. 99, 99-100 (2014).

[67] *See* Alberto Osnago et al., *Deep Trade Agreements and Vertical FDI – The Devil is in the Details* 3-4 (World Bank, Working Paper No. 7464, 2015)

[68] Soo Yeon Kim, *Deep Integration and Regional Trade Agreements*," in THE OXFORD HANDBOOK OF THE POLITICAL ECONOMY OF INTERNATIONAL TRADE, 360-61 (Lisa L. Martin, ed., 2015).

[69] *See* Baldwin, *supra* note 50, at 111.

[70] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 200 (3d ed. 2017) (hereinafter "Chow and Schoenbaum, International Trade Law").

[71] *See id.* at 265.

[72] *See id*. at 469. The foreign seller can use low prices to drive domestic competitors in the export market out of business or prevent the development of domestic competitors. Once the foreign seller gains a foothold in the domestic market, the seller then raises its prices or lowers the quality of its goods thereby causing harm to the import market's consumers.

[73] *See id*. at 518.

the GATT and other WTO agreements. To achieve deep integration on these matters of economic policy, countries had to negotiate agreements containing these provisions outside of the WTO in the form of RTAs or bilateral trade agreements.[74]

One early example of deep integration was the North American Free Trade Agreement (NAFTA), negotiated by the United Sates, Canada, and Mexico. NAFTA lowered tariffs, but it is important to note that all the signatories to NAFTA were also signatories to the GATT. Although bound tariff rates were fairly high for Mexico under GATT, the United States and Canada were members of the Quad, and had already cut tariffs significantly. Perhaps more important were the behind-the-border changes; NAFTA required reforms to domestic laws governing market access, competition policy, state owned enterprises (SOEs), and regulation of monopolies. NAFTA also greatly strengthened protections for intellectual property and foreign investment.[75] These reforms required under NAFTA would not have been possible under the WTO.

NAFTA illustrates some important features of modern RTAs. First, although RTAs frequently include tariff reductions, their effects on tariffs globally has been modest. Despite the recent explosion of RTAs, 84% of global merchandise trade (excluding intra-EU trade) still takes place at GATT/WTO-negotiated tariff rates.[76] Second, RTAs tend to cover a wide range of issues. The literature distinguishes between "WTO-plus" provisions, which simply extend commitments already covered under the WTO, and "WTO-extra" provisions, which deal with issues not covered by WTO agreements. RTAs can have dozens of "WTO-extra" provisions.[77] An exhaustive list is beyond the scope of this article, but they typically include provisions governing competition policy, foreign investment, intellectual property issues beyond those

---

[74] The compatibility of free trade areas and the GATT/WTO needs some explanation. Under GATT Article III, the Most Favored Nation (MFN) Principle, all WTO members have an obligation to extend any trade benefits given to one WTO member to all other members. Under MFN, free trade areas would be impossible because members of the free trade area would have to extend zero tariffs to all other WTO members, which would completely undermine the purpose of having a free trade area, i.e. to provide zero tariffs only to members of the free trade area. GATT Article XXIV creates an exception to the MFN Principle for free trade areas. GATT Article XXIV explicitly recognizes free trade areas as consistent with the GATT/WTO so long as they do not reduce trade between members of the free trade area with non-members below levels that would have existed in the absence of the free trade area. In other words, free trade areas are permitted so long as they do not result in trade diversion from non-members of the free trade area. Members of free trade areas are required to first obtain authorization from the GATT/WTO before setting up a free trade ara. As a practical matter, countries have first established free trade areas and then seek approval. Of course, a rejection of a free trade area by the GATT/WTO would require the undoing of an existing free trade area created after many years of negotiations with sunk political costs. For this reason, no free trade area has even been challenged or found invalid due to trade diversion effects. For a further discussion of how preferential trade areas in goods, services, and intellectual property are compatible with MFN, see Chow & Schoenbaum, International Trade Law, *supra* note 70, 161-62.
[75] *See* Kent S. Foster & Dean C. Alexander, *Opportunities for Mexico, Canada and the United States: A Summary of Intellectual Property Rights under the North American Free Trade Agreement*, 20 RUTGERS COMPUTER & TECHNOLOGY L.J. 71, 67-105 (1994).
[76] *See* Bagwell et al., *supra* note 60, at 1136-37.
[77] *See* Henrik Horn et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 WORLD ECON., 1565, 1567-68 (2010).

covered in the WTO, as well as labor and environmental standards. As the prevalence of offshoring grows, harmonizing domestic policy on these issues will only become more important.

D. Deep Integration and TPP

TPP committed signatories to eliminate many tariff and non-tariff barriers to trade with other members.[78] This included a commitment to eliminate tariffs on manufactured goods and greatly reduce protection for agricultural goods.[79] Tariff cuts would have been phased in at different rates for different products, but 99% of tariff lines would eventually have been cut to zero,[80] resulting in free trade for the vast majority of goods. These proposed tariff cuts were part of the "WTO-extra" commitments included in TPP – meaning they extended commitments the signatories have already made under the GATT/WTO. In other words, these tariff cuts resulting in free trade would be available for the members of TPP trading within the RTA but would not be available for non-members when they trade with members of TPP. Members of TPP would be entitled to treatment more favorable than that available to non-TPP members under an exception to the Most Favored Nation (MFN) Principle of the WTO.[81] While the tariff cuts appear to offer significant increases in market access, it is important to note that many of the signatories to TPP have existing RTAs with each other. The net effect on actual applied tariffs would have been moderate.[82] The projected economic benefits of TPP were more the result of the "deep integration" provisions contained in the agreement.

Besides cutting tariffs, the agreement also strengthened WTO disciplines around Sanitary and Phyto-Sanitary (SPS) Measures dealing with food safety,[83] government procurement,[84] as well as customs and trade facilitation.[85] It also added new protections for intellectual property, beyond what was negotiated in the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.[86] This included additional protections for patents, trademarks, copyrights, and trade secrets. Importantly, TPP required strong domestic enforcement of intellectual property (IP) protections, including criminal penalties for offenders, again beyond what is required under TRIPS.[87] Similarly, TPP strengthened protections for international trade in services beyond the

---

[78] *See* FERGUSSON ET AL., *supra* note 36, at 1.
[79] *See id*.
[80] *See id*. at 16.
[81] *See* Chow and Schoenbaum, International Trade Law, *supra* note 70.
[82] Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, 8 GLOBAL POL'Y 108, 107-12 (2017).
[83] SPS measures are governed by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, SPS, which is concerned with food safety. *See* WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493, *available at* https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.
[84] TRANS-PACIFIC PARTNERSHIP FULL TEXT ch. 15 [hereinafter "TPP"], https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text
[85] TPP ch. 5.
[86] *See* FERGUSSON ET AL., *supra* note 36, at 29.
[87] TPP art. 18.77

WTO's General Agreement on Trade in Services (GATS).[88] In addition to reinforcing the core WTO principles of national treatment and MFN, TPP also prohibited members from imposing any quantitative restrictions on international trade in services or requiring foreign-service providers to establish a local affiliate.[89]

TPP also included a chapter on investment that went well beyond those commitments contained within the WTO Trade Related Investment Measures (TRIMS) agreement.[90] This chapter enshrines many of the provisions contained in the model U.S. Bilateral Investment Treaty (BIT) used by the State Department as a template for all future U.S. BITs.[91] Especially important were guarantees for the free transfer of funds across borders (subject to some non-discriminatory safeguard measures) and prohibitions on so called "performance requirements" such as technology transfers.[92] Investors would also have had the right to seek binding international arbitration against host governments that violate TPP's investment provisions.[93]

TPP's other "WTO-extra" provisions covered a range of issues outside the scope of current GATT/WTO agreements, although some already exist in other RTAs. For example, TPP introduced new rules focused on e-commerce and telecommunications.[94] TPP prohibited members from blocking or imposing duties on the transmission of data, or requiring firms from TPP member states to build local data centers or transfer source code.[95] TPP members were also required to ensure that firms have access to domestic telecommunications infrastructure "under reasonable terms," and any licensing processes are transparent and non-discriminatory.[96]

E. "WTO-Extra" Provisions Directed at China

The United States included, starting in 2008, several key provisions in TPP that were general in application but specifically directed at China. In a 2016 article, "The TPP Let America, Not China, Lead the Way on Global Trade," President Obama stated:

> [The TPP] would give us a leg up on our economic competitors, including . . . China. Of course, China's greatest economic opportunities also lie in its own neighborhood, which is why China is not wasting any time. As we speak, China is negotiating a trade deal that would carve up some of the fastest growing markets in the world at our expense, putting American jobs, buisness and goods at risk. . . .

---

[88] For example, while GATS includes legal service under its ambit, they are not as detailed as the TPP's or as effective in allowing for transnational legal practice. *See* General Agreement of Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade in Services, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS], available at http:// www.wto.org/english/docs_e/legal_e/final_e.htm; TPP ch. 10, Annex 10-A.

[89] TPP art. 10.5, 10.6.

[90] *See* FERGUSSON ET AL., *supra* note 36, at 36-37.

[91] *See id*. at 36.

[92] *See id.* at 36.

[93] *See id.* at 36-37.

[94] *See id.* at 41-42.

[95] TPP arts. 14.3, 14.13.

[96] TPP arts. 13.4, 13.22.

> America should write the rules. America should call the shots. Other countries should play by the rules that American and our partners set, not the other way arounds. . . . The United States, not . . . China, should write them.[97]

Obama's statement also reflects the U.S. strategic interest in having TPP establish the rules for trade in the Asia region before China could do so through a rival agreement. As we shall see in the discussion below the U.S. and China have starkly contrasting views on standards of international business and trade.

1. Environmental Obligations

The WTO agreements are laregly silent on environmental obligations.[98] TPP sets forth "WTO-extra" enviromental obligations in Article 20 as follows:

> 1. The Parties recognize that the emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the enviroment. Accordingly, each Party shall take measure to control the production and consumption of, and trade, in such substances.[99]

This provision was aimed squarely at China, the world's largest producer of pollutants that damage the earth's ozone layer.[100] China is a leading user of "dirty fuels" such as coal-fired power plants that damage the earth's atmosphere. While "dirty fuels" are environmentally harmful, they are much cheaper than environmentally sustainable alternatives such as gas, solar and wind power commonly used in the United States.[101] The crux of the U.S. concern about China's use of "dirty fuels" was that it was not only harming the environment but was also giving China a competitive advantage in the form of lower manufacturing costs.[102] TPP Article 20.5 would provide the legal basis for the United States to require China to use alternative fuels and erode China's cost advantages.

2. Workers' Rights

---

[97] Barack Obama, *The TPP Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://perma.cc/YW32-TQUT.

[98] The issue of environmental obligations has a long and tortuous history in the WTO. After several decades of indecision, it was finally established that environmental protection concerns could be asserted through GATT Article XXI, the general exceptions clause, as a limit on the trade in goods. As the basis of an exception under Article XXI, environmental protection concerns have only a narrow application within the GATT/WTO. Unlike the TPP, no provision in any of the WTO agreements creates affirmative environmental obligations. *See* Chow and Schoenbaum, International Trade Law, *supra* note 70, at 321-44.

[99] TPP, art. 20.5.

[100] *See* Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHICAGO J. INT'L L. 370, 394-95

[101] *Cf.* Dominic Dudley, *Renewable Energy Will Be Consistently Cheaper Than Fossil Fuels By 2020, Report Claims*, FORBES (Jan. 13, 2018),

[102] https://www.forbes.com/sites/dominicdudley/2018/01/13/renewable-energy-cost-effective-fossil-fuels-2020/#5be929904ff2 (reporting that fossil fuels should be competitive on price with fossil fuels by 2020).

As in the case of environmental obligations, the WTO is silent on issues of labor and workers' rights. By contrast, TPP Article 19.3(1) provides:

> Each Party shall adopt and maintain in its statures and regulations, and practices thereunder the following rights as stated in the ILO [International Labor Organization] Declaration: (a) freedom of association and the effective recognition of the right to collective bargaining: (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour and . . . a prohibition on the worst forms of child labour; and (d) the climination of discrimination in respect of employment and occupation.[103]

China is often criticized by the United States for subjecting workers to dangerous and unsanitary working conditions, long hours, and permitting what is tantamount to slave and forced labor.[104] Apart from humanitarian concerns, the United States is concerned that China's disregard of workers' rights creates low labor costs that are a signficant competitive advantage over the United States. For example, the average cost of manufacutring labor in China is $2.62 per hour while the average cost in the United States is $35.53 per hour.[105] TPP was designed to address these concerns. The ILO standards referenced in Article 19.3 are unenforceable outside of TPP as the ILO is a toothless organization without any enforcement powers.[106] By incorporating the standards of the ILO, TPP has created labor standards enforceable under its dispute settlement mechanism.

---

[103] TPP art. 19.3(1).

[104] *See* Alwyn Scott, *Foxconn says investigating labor conditions at China factory used for Amazon*, REUTERS (June 10, 2018), https://www.reuters.com/article/us-amazon-china-labor/foxconn-says-investigating-labor-conditions-at-china-factory-used-for-amazon-idUSKBN1J610V; Jane Perlez, *U.S. Report Harshly Criticizes China for Deteriation of Human Rights; Russia Also Faulted*, N.Y. TIMES (Feb. 26, 2000), https://www.nytimes.com/2000/02/26/world/us-report-harshly-criticizes-china-for-detoriation-human-rights-russia-also.html.

[105] Internationally comparable data on workplace compensation is hard to find for China. For the hourly manufacturing wage for the United States in 2011, see BUREAU LABOR STATISTICS, USDL-12-2460, INTERNATIONAL COMPARISONS OF HOURLY COMPENSATION COSTS IN MANUFACTURING, 2011 5 (2012). For manufacturing hourly wages China in 2011, see CONFERENCE BOARD, INTERNATIONAL COMPARISONS OF HOURLY COMPENSATION COSTS IN MANUFACTUING, 2016 – CHINA AND INDIA, https://www.conference-board.org/ilcprogram/index.cfm?id=38270. Also, China has generally been experiencing increases in hourly wages. In 2016, Chinese manufacuturing labor hit $3.60. This force of rising labor costs could cause factories to flee for other countires and/or invest in capital equipment. *'Made in China' isn't so cheap anymore, and that could spell headache for Beijing*, CNBC (Feb. 27, 2017), https://www.cnbc.com/2017/02/27/chinese-wages-rise-made-in-china-isnt-so-cheap-anymore.html. *See also* Pan Kwak Yuk, *Want Cheap Labour? Head to Mexico, not China*, FIN. TIMES (Jan. 14, 2016), https://www.ft.com/content/bddc8121-a7a0-3788-a74c-cd2b49cd3230 (reporting that Mexico as alternative source for cheap labor compared to China).

[106] Anthony Freeman, *ILO Labor Standards and U.S.* Compliance, 3 PERSP. WORK 28, 29 (1999); *see* Neil Gough, *The Workers Who Regret Trump's Scrapping o a Trade Deal*, N.Y. TIMES (Mar. 1, 2017), https://www.nytimes.com/2017/03/01/business/trump-tpp-trade-vietnam-labor-environment.html (discussing how agreements like the TPP give teeth to labor protections).

In addition, TPP Article 19.5(1) states:

> No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this agreement.[107]

Like many countries, China has extensive labor laws on the books but does not actively or regularly enforce these laws due to systemic problems such as official corruption or indifference.[108] Due to these systemic weaknesses, any attempt to use China's legal system to enforce labor laws will be difficult, if not futile. Under TPP, China's enforcement of its own labor laws becomes a TPP obligation and enforceable through the TPP dispute settlement system. These two provisions (along with others) are designed to raise the level of protections for workers in China and, perhaps even more importantly from the perspective of the U.S., level the playing field by raising labor costs, a key input in manufacturing, thus eroding one of China's major advantages in international trade.

3. State-Owned Enterprises

One of the most contentious issues between the U.S. and China concerns State-Owned Enterprises (SOEs).[109] The U.S. believes that the Chinese government engages in unfair trade and business practices by providing various forms of financial and regulatory assistance its SOEs at the expense of multinational companies.[110] An SOE is a business entity that is an administrative unit of the State and is owned by the State as opposed to any private person or group of persons.[111]

---

[107] TPP art. 19.5(1).

[108] *See* Kinglun Ngok, *The Changes of Chinese Labor Policy and Labor Legislation in the Context of Market Transition*, 73 INT'L LABOR & WORKING-CLASS HIST. 45, 55 (2008). *See also China's Labour Law Is No Use to Those Who Need it Most*, ECONOMIST (Aug. 17, 2017), https://www.economist.com/china/2017/08/17/chinas-labour-law-is-no-use-to-those-who-need-it-most; Geoffrey Crothall, Opinion, *Refusing to Honor Labor Rights Backfires on China*, N.Y. TIMES (May 12, 2016), https://www.nytimes.com/2016/05/13/opinion/refusing-to-honor-labor-rights-backfires-on-china.html.

[109] *See* U.S. TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 2, 75-83 (2018), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/ustr-releases-annual-reports-china; Zhenhua Lu, *US Urged to Blcok China's State Companies from Buying High Security Risk American Assets*, SOUTH CHINA MORNING POST (Nov. 16, 2017), https://www.scmp.com/news/china/policies-politics/article/2120122/us-urged-block-chinas-state-companies-buying-high.

[110] *See* Daniel C.K. Chow, *How China Promotes its State-Owned Enterprises at the Expense of Multi-National Companies Doing Business in China and in Other Countries*, 41 NORTH CAROLINA J. INT'L L. 455, 455-56 (2016).

[111] *See id*. at 466.

China views SOEs as "the lifeline of the economy"[112] and has vowed to incessantly strengthen their vitality.[113] China has a web of policies seeking to promote SOEs as "national champions"[114] capable of competing with or surpassing the world's most powerful multinational companies.[115] A key point of contention is the United States' position that China systematically provides subsidies or finanical asistance to SOEs in the form of direct grants or indirect transfers.[116] China's state provided financial and non-financial assistance to SOEs allows them to operate at lower costs allowing them to enjoy a competitive advantage both within China and in the international realm.

TPP Article 17.6 prohibits any "non-commercial assistance," including susidies, to any SOE relating to the production of goods or the supply of services. Under Article 17.6 "non-commercial assistance" refers to assitance that is not available in the marketplace and is provided by a government. Specifically assistance to SOEs refers to:

> i. direct transfers of funds or potential direct transfer of funds or liabilities such as: A. grants or debt foregiveness; B. loans, loan gurantees or other types of financing on terms more favourable than commercially available to that enterprise; or C. equity capital inconsistent with the usual investment practice, including for the provision of risk, of private investors . . . goods or services other than general infrastructure on terms more favourable than those commerical available to that enterprise.[117]

The WTO also disciplines the use of subsidies under the GATT and the WTO Agreement on Subsidies and Countervailing Meaures (SCM),[118] but the WTO deals with subsidies in general while TPP deals specifically with subsidies provided to SOEs. TPP's broad definition of a subsidy is crucial because a breach of this obligation allows the United States to impose sanctions in the form of countervailing duties, i.e., an additional tariff, to offset the financial effect of the subsidy. In other words, TPP would allow the United States a stronger legal justification for the imposition of countervailing duties on China's SOEs than that currently available under the WTO. The availability of this option under TPP would allow the United

---

[112] Ian Johnson & Keith Bradsher, *On Way Out, China's Leader Offers Praise for the Status Quo*, N.Y. TIMES (Nov. 8, 2012), https://www.nytimes.com/2012/11/09/world/asia/hu-jintao-exiting-communist-leader-cautions-china.html?mtrref=www.google.com (reporting Hu Jintao's address to the 18th Party Congress before stepping down).

[113] *See China State Arms Maker Pledges 'Mixed Owndership' Reforms*, REUTERS (Jan. 5, 2017), https://www.reuters.com/article/us-china-norinco/china-state-arms-maker-pledges-mixed-ownership-reforms-idUSKBN14P165 (discussing China's ambitious reform plans to strengthen and make more competitive SOEs).

[114] *See* Kjeld Erik Brødsgaard & Koen Rutten, FROM ACCELARATED ACCUMLATION TO SOCIALIST MARKET ECONOMY IN CHINA 156-64 (2017), *available at* https://www.jstor.org/stable/10.1163/j.ctt1w8h2tj.11.

[115] *Id.* at 156,161-62.

[116] *See* U.S. TRADE REPRESENTATIVE, *supra* note 109 at 6-7, 12-13, 75.

[117] TPP art. 17.1.

[118] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 14 [hereinafter SCM].

States to have a stronger case for imposing trade sanctions on China to offset the effect of subsidies given to SOEs and erode one of China's major advantages in international trade.

4. Technology Transfer

The Trump Administration has repeatedly voiced vehement objections to China's alleged practices that force U.S. companies to tranfer their technology.[119] In a Presidential Memorandum issued on March 22, 2018, President Trump declared:

> China uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. China also uses administrative review and licensing procedures to require or pressure technology transfer, which, inter alia, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms.[120]

The concerns expressed by the Trump Administration typically arise in the following context. An MNC with its headquarters in the U.S. seeks to establish a wholly owned business entity in China in order to manufacture products or provide services for the Chinese and international markets. Due to China's legal restrictions on foreign investment, the MNC is not permitted to establish a wholly owned business entity in the particular industry, such as telecommunications.[121] Rather, foreign investment in the industry is permitted only in the form of a joint venture, a business entity that is jointly owned by the MNC and a Chinese company. As the WTO does not cover investment, except tangentially,[122] and the United States and China do not have a BIT, China is free to set any restrictions on foreign investment consistent with its own internal legal requirements. China is free to require that the MNC partner with a local Chinese enterprise, such as an SOE. If the MNC decides to go ahead with the joint venture, it will be required to obtain various regulatory approvals by Chinese authorities. When the MNC applies for approval, Chinese authorities require or pressure the MNC at the approval stage or later in an administrative review or licensing stage to transfer technology to the joint venture. The reasoning by the Chinese authorities is that the joint venture cannot be successful unless it has access to the U.S. company's advanced technology in the form of patents, trademarks, copyrights, trade secrets, or know-how. As the joint venture is a Chinese company formed under

[119] *See* Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation (March 22, 2018) available at https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/.

[120] Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation, (Mar. 27, 2018), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/.

[121] China classifies proposals for joint ventures and wholly foreign own entities into four categories depending on the industry: encouraged, permitted, restricted, and prohibited under the Foreign Investment Industrial Guidance Catalog first puromulgated in 1997 and updated revised in 2002, 2007, 2011, and 2017. CATALOGUE OF INDUSTRIES .FOR GUIDING FOREIGN INVESTMENT (REVISION 2017), http://www.fdi.gov.cn/1800000121_39_4851_0_7.html

[122] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 397-99 (3d ed. 2015) (explaining how the WTO treats foreign direct investment).

Chinese law, the transfer of technology by the MNC to the joint venture is a form of technology transfer to a Chinese company. Moreover, since the Chinese partner is an equity owner of the joint venture, the Chinese partner, an SOE in our hypothetical, also becomes an owner of the U.S. sourced technology. Although the MNC is not actually being "forced" to set up a joint venture in China and submit to this technology transfer process, the U.S. company cannot have access the Chinese market unless it agrees to form a joint venture. US companies claim that this choice is tantamount to being "forced" to transfer their technology to a Chinese company or to the Chinese government.

U.S. concerns about China's technology transfer practices are not new to the Trump Administration. Previous U.S. administrations recognized that the WTO's TRIPS agreement, although a landmark agreement, is silent on the type of technology transfer arrangement that is discussed above and that is the crux of U.S. concerns. To close this gap, when the United States drafted TPP, the United States inserted Article 9.10 (1), which provides:

> No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking . . . to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory . . . .[123]

By going beyond TRIPS, TPP provided the United States with a legal basis to challenge China's scheme to compel U.S. companies to transfer their technologies as a condition of being allowed to set up a company in China.

III.
EXPECTED ECONOMIC BENEFITS OF TPP

While the previous part of this article examined the strategic goals of TPP, this part now turns to the expected economic benefits of TPP. A large body of academic work supports the view that TPP would create significant economic benefits for the United States and its other members.

A. Income Gains

Substantial global economic growth was expected from TPP. Under TPP, \$492 billion would have been added to global GDP by 2030, including a \$131 billion increase (0.5%) in U.S. GDP and a \$125 billion (2.5%) in Japanese GDP.[124] There would also have been a significant growth impact for some of the emerging economies included in TPP.[125] For example, Vietnam and Malaysia were anticipated to experience 8.1% and 7.6% increases respectively in their GDP, amounting to \$41 and \$52 billion.[126] In particular, Vietnam, a low labor cost economy, was

[123] TPP art. 9.10(1).
[124] *See* Petri and Plummer, *supra* note 34, at 14-15.
[125] *See id*. at 14-15.
[126] *See id.* at 14-15.

expected to expand as a manufacturing hub in industries such as textiles and apparel.[127] These expected gains in GDP reflect benefits from both increased trade as well as FDI, with a large part of the gains to the United States likely to have come from trade in services and FDI in the service sector.[128]

B. Tariff-Cutting

While there is currently a low trade-weighted,[129] average tariff rate of 2.6% applied by TPP members against other TPP members, there is quite a bit of variation across TPP members, leaving room for substantial trade liberalization.[130] Average trade-weighted applied tariffs vary from 0.4% in Singapore to 6.2% in Vietnam.[131] The U.S. applies, an average tariff of 1.2% against other TPP members, with its highest applied tariff being 4.4% against Vietnam.[132] In terms of actual tariff-cutting, upon implementation of TPP almost 75% of all tariffs were scheduled to be removed, and in the long-run, 99% of trade in goods were to be liberalized.[133] With respect to the timeline and specific products, almost all tariffs, including the 350% tariff on U.S. tobacco and tobacco products would have been zeroed out by year 16 of TPP being in force.[134] After year sixteen, only U.S. tariffs on imports of Japanese automobiles and trucks, at 2.5% and 25% respectively, would have remained in place until year 30 of the agreement.

C. Trade and Investment Effects

Exports among all TPP countries were projected to grow $1,025 billion by 2030, an increase of 11.5%.[135] The lion's share of export growth would have been captured by the United States, Japan, Vietnam and Malaysia, their exports increasing by $357 (9%), $276 (23%), $107 (30%) and $99 (20%) billion respectively.[136] For the United States, export gains would have occurred in primary goods (agriculture and mining), advanced manufacturing and service sectors, with increased imports in labor-intensive sectors such as textiles and apparel.[137] At the same time, the potential for trade diversion, where trade between TPP members displaces trade with non-TPP members, while tangible for countries such as China, India, Korea and Thailand, would have been small relative to those countries' GDP.[138]

---

[127] *See* KIMBERLY ANN ELLIOT, RULES OF ORIGIN IN TEXTILES AND APPAREL, IN ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES 66 (Peterson Institute for International Economics Briefing 2016).
[128] *See* Petri & Plummer, *supra* note 34, at 17.
[129] The average of a country's tariffs weighted by the value of its imports.
[130] Caroline Freund et al., *TARIFF LIBERALIZATION, IN ASSESSING THE TRANS-PACIFIC PARTNERSHIP, in* VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES, at 32 (Peterson Inst. Int'l Econ., 2016).
[131] *See id*. at 33.
[132] *See id.* at 33.
[133] *See id.* at 31.
[134] *See id.* at 35.
[135] *See* Petri & Plummer, *supra* note 34, at 15-16.
[136] *See id*. at 15-16.
[137] *See id*. at 17.
[138] *See id*. at 15.

By 2030, inbound FDI would have increased $446 billion (3.5%) compared to an increase in outbound FDI of $305 billion (2%).[139] The largest recipients of inbound FDI were expected to be the United States., Canada, Japan, and Malaysia; and the largest sources of outbound FDI were expected to be the United States, Japan, and the EU — inbound FDI exceeding outbound FDI due to the improved investment environment within TPP.[140]

D. Trade Balance and Employment Effects

In evaluating the macroeconomic effects of TPP, it is important to recognize that net national savings and overall employment will typically vary around normal long-run levels once any short-term adjustments have occurred.[141] It is well-understood that an RTA does not affect a country's trade balance unless it also affects long-term net national savings.[142] This follows from an identity stating that the difference between national savings and investment is equal to net exports (imports), i.e., if a country is running a current account deficit, it has to finance this through either selling assets or borrowing from abroad .[143]

Likewise, an RTA cannot affect long-term employment in an economy due to market and policy adjustments.[144] Overall employment in an economy is a macroeconomic phenomenon, driven by aggregate demand and supply for labor.[145] If an economy is at full employment, increased exports (imports) will result in changes in the composition of jobs not the number of jobs, and the central bank will tighten (loosen) monetary policy accordingly to offset the positive (negative) effect in the job market.[146] If the economy is operating at less than full employment, the central bank will allow trade expansion (contraction) to persist (loosen monetary policy).[147] Of course, there may be short-run adjustments in the labor market from an RTA that can represent an important economic burden in specific sectors/communities. In the current political climate, trade has been singled out as the main culprit for loss of U.S. manufacturing jobs.[148] At the same time, recent studies indicate that import competition from China over the past decade has had a significant effect on the number of manufacturing job losses as well as a negative

---

[139] See *id.* at 16.
[140] See *id.* at 16.
[141] *See* PETER A. PETRI & MICHAEL G. PLUMMER, THE ECONOMICS OF ANALYZING THE TPP 3-4 (Peterson Inst. Int'l Econ., 2016), *available at* https://piie.com/commentary/testimonies/economics-analyzing-tpp.
[142] *See id*. at 3.
[143] *See* C. FRED BERGSTEN, TRADE BALANCES AND THE NAFTA RENEGOTIATION 2, 17-23 (Peterson Inst. Int'l Econ.,2017).
[144] *See id*. at 2-3.
[145] *See* Theodore H. Moran, *Will the TPP Create More Jobs for Americans? Why the Answer is "No"!*, PETERSON INST. INT'L ECON.: TRADE & INVESTMENT POL'Y WATCH (July 7, 2015), https://piie.com/blogs/trade-investment-policy-watch/will-tpp-create-more-jobs-americans-why-answer-no.
[146] *See id*.
[147] *See id*.
[148] *See* Donald J. Boudreaux, *Trade Is Not a Job Killer*, N.Y. TIMES (Mar. 28, 2018), https://www.nytimes.com/2018/03/28/opinion/trump-tariffs-trade-war.html

impact on local job markets.[149] There is also empirical evidence that NAFTA had very strong local labor market effects in the United States, driving down wage growth for blue-collar workers in the most affected industries and geographic locations.[150] It is not surprising therefore that TPP has been attacked by politicians from both sides of the aisle as they tap into deep public concern about the effects of globalization.[151]

However, the expectation is that TPP would not have had a very large impact on U.S. employment.[152] As resources continue to shift from basic manufacturing to traded services and advanced manufacturing, TPP was likely to favor skilled labor in the United States, given that the service sector is skilled-labor intensive and basic manufacturing is capital/low-skilled labor intensive.[153] While returns to all inputs would have increased due to productivity gains, wages would have increased by more than returns to capital, and wages of skilled workers would have increased more than those of unskilled workers.[154]

In terms of employment, it has been estimated that 72,000 jobs/year in the United States would have been "shifted" over the period 2018-2028 due to TPP, where job shifts account for inter-sectoral changes in jobs, i.e., jobs lost in one sector(s) relative to jobs gained in another sector(s).[155] If these job shifts/year are reduced by 25%, the number of jobs shifted due to voluntary and other separations, 54,000 annual job changes in the United States would have been involuntary and attributable to TPP.[156] Placing this in perspective, fifty-five million jobs are "churned" a year in the U.S., TPP accounting for less than a 0.1% increase in the rate of churn.[157]

Nevertheless, while some workers displaced by TPP would have been reemployed, others would have found it either harder due to age and location, and/or they would have ended up getting jobs paying lower wages.[158] As a consequence, many economists,[159] as well as

---

[149] Daron Acemoglu et al., *Import Competition and the Great U.S. Employment Sag of the 2000s*, 34 J. OF LABOR ECON. 141, 160-162 (2016). *See also* David H. Autor, David Dorn, & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AMERICAN ECON. REV. 2125, 2121-68 (2013).

[150] *See* Shushanik Hakobyan & John McLaren, *Looking for Local Labor Market Effects of NAFTA*, 98 REV. ECON. & STAT. 728, 729-30 (2016).

[151] *See* Jason Margolis & Lucy Martirosyan, *What is the TPP and why are both parties so angry about it?* PRI's The World (July 26, 2016), https://www.pri.org/stories/2016-07-26/what-tpp-and-why-are-both-parties-so-angry-about-it

[152] *See* Petri and Plummer, *supra* note 34, at 7.

[153] *See id*. at 19.

[154] *See id*.

[155] *See id.* at 20.

[156] *See id.*

[157] *See id.*

[158] *See id*. at 7.

[159] *See* Robert Z. Lawrence & Tyler Moran, *Adjustment and Income Distribution Impacts of the TPP, in* ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES 5 (Peterson Inst. Int'l Econ., 2016). *See also* Paul Krugman, *Trade, Labor, and Politics*, N.Y. TIMES (Mar. 28, 2016), https://www.nytimes.com/2016/03/28/opinion/trade-labor-and-politics.html

commentators in the media[160] have suggested that the United States should target strategies to support workers who bear the cost of trade liberalization, including upgrading skills through vocational training, helping workers find new jobs via job exchanges and relocation grants, and developing a system of wage insurance to protect workers against income loss.[161] In other words, the objective is to get the winners from trade to compensate those that lose. A more radical view argues that policies relating to global economic integration should be rebalanced in three ways: from capital and the business sector to labor and society at large, from global to national governance, and to an outcome where the overall benefits are larger.[162]

E. Sectoral Effects

The expected sectoral effects of TPP need to be placed in the overall context of the structure of the US economy. As of 2014, the U.S. manufacturing sector accounted for 12% of GDP, and only 9% of employment – down from 13% and 11% respectively in 2004, a decline that has continued irrespective of U.S. trade policy, driven by growth in productivity.[163] Given that the U.S. economy is unambiguously a service-oriented economy, it is perhaps not surprising that the expected positive impact of TPP on trade would have been concentrated in that sector, along with sectors such as agriculture and advanced manufacturing, where the United States has clear comparative advantage.[164] In light of this, it is interesting to examine what the expected benefits of TPP were for the U.S. services and agricultural sectors, along with the automobile sector, where the United States managed to bargain a degree of continued protection for its domestic market against Japanese import competition.[165]

1. Trade in Services

Currently, the U.S. tradeable business services sector, which includes financial services, R&D, healthcare, and education services, accounts for 25% of U.S. employment, and the sector enjoyed a trade surplus in cross-border transactions of $233 billion in 2014.[166] The U.S. comparative advantage in services is based on three factors: the presence of large efficient firms, highly educated personnel, and extensive use of information technology. At present the sector faces high barriers to cross-border trade with other TPP members, with overall *ad valorem*

---

[160] *See Trade at What Price?*, ECONOMIST (April 2, 2016), https://www.economist.com/united-states/2016/04/02/trade-at-what-price; *See also* Opinion, *Jobs and Trade on the Campaign Trail*, N.Y. TIMES (Apr. 2, 2016), https://www.nytimes.com/2016/04/03/opinion/sunday/jobs-and-trade-on-the-campaign-trail.html.
[161] *See* Lawrence & Moran, *supra* note 147, at 16-17.
[162] Dani Rodrik, *The Trouble with Globalization*, MILKEN INSTITUTE REVIEW (Oct. 20, 2017), http://www.milkenreview.org/articles/the-trouble-with-globalization.
[163] *See* Robert Z. Lawrence, *Recent US Manufacturing Employment: The Exception that Proves the Rule* 2 (Peterson Inst. Int'l Econ., Working Paper No. 17-12, 2017).
[164] *See* Petri & Plummer, *supra* note 34, at 17.
[165] *See* Sarah Oliver, *Auto Sector Liberalization, in Assessing the Trans-Pacific Partnership, Volume 1: Market Access and Sectoral Issues* 60 (Peterson Institute for International Economics Briefing 16-1, 2016).
[166] GARY CLYDE HUFBAUER, LIBERALIZATION OF SERVICES TRADE, IN ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES 81-82 (Peterson Institute for International Economics, Briefing 16-1, 2016).

equivalent tariffs on service imports estimated to range from 20% in Singapore to 73% in Mexico, the average tariff equivalent in the financial services sector being 55%.[167]

Services received a good deal of attention in the TPP negotiations, 12 sectors and 168 subsectors being covered in the agreement, and four TPP chapters covering issues relating to cross-border trade and investment in services.[168] Essentially, TPP members agreed to "fair and equal" treatment for firms who wanted to enter their markets through trade or investment or both, and any unilateral liberalization offered by one TPP member would be offered to all other TPP members.[169] The bottom line: under TPP, member countries committed to significantly reducing trade barriers, U.S. service exports being expected to increase $149 billion by 2030, accounting for 67% of overall increased TPP trade in services.[170] In the case of financial services, it is important to note that while TPP committed members to increased market access and non-discrimination, it would have essentially preserved national sovereignty over this sector.[171] Nevertheless, the TPP chapter was significant for two reasons: first, post-financial crisis, it would have brought together a set of countries with quite different financial sectors; second, commitments by TPP members generated a set of standards for regulation of the sector, which could then have been applied to countries such as China and Korea if they subsequently chose to join TPP.

The TPP agreement also recognized the importance of proper "prudential" financial regulation by members, the latter referring to rules such as minimum capital requirements for banks and appropriate protections for investors and depositors.[172] Previous trade and investment agreements have exempted such regulations from their scope, as long as they are not used to undermine members' commitments to an agreement.[173] TPP contained such a prudential "carve-out" which also covers national monetary and credit policies, and financial emergency rescue policies such as the U.S. Troubled Asset Relief Program (TARP) implemented in 2008.[174]

2. TPP and Agriculture

Over the period 2010-12, agricultural imports by TPP members totaled $279 billion.[175] Fifty-one percent were sourced from other TPP partners, while 43% of their agricultural exports went to TPP partners.[176] Across TPP members, Canada and Mexico are both highly dependent on other TPP members for both agricultural exports and imports, mostly due to their trade with the

---

[167] *See id*. at 83.
[168] *See id*. at 84.
[169] *See id*. at 85.
[170] *See id*. at 84.
[171] *See* ANNA Gelpern, Financial Services, in Assessing the Trans-Pacific Partnership, *in* VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES, at 91 (Peterson Inst. Int'l Econ., 2016).
[172] *See id.* at 95.
[173] *See id*. at 95.
[174] *See id*. at 96.
[175] *See* Mary E. Burfisher et al., *Agriculture in the Trans-Pacific Partnership, Economic Research Service* 1 (U.S. States Dep't of Agriculture Econ., Research Report No 176, 2014).
[176] *See id*. at 1.

U.S.[177] In the case of the United States over the same period, 42% and 47% of its agricultural exports and imports respectively went to/were sourced from other TPP members.[178]

Agricultural products traded between TPP members are currently subject to higher applied tariffs on average, than manufactured products — 5.2% vs. 1.15% — although bilateral protection varies considerably by country.[179] For example, average applied agricultural tariffs are 3.6% at the U.S. border compared to 23% at the Japanese border.[180] Agricultural tariffs also vary based on whether trading partners are members of an existing RTA, and also by product. For example, Mexico's average applied agricultural tariff against TPP members is 15.6%, ranging from 30.7% against Australia to 3.2% and 1% on agricultural imports from Canada and the U.S., its NAFTA partners.[181] In the case of specific agricultural products, different TPP members currently have high levels of protection for different products. For example, Canada protects its markets for dairy products, poultry and eggs, its average applied tariff on U.S. dairy products being 110%, even though Canada and the United States are both members of NAFTA.[182] Japan protects its markets for beef rice, wheat, barley, sugar, dairy products, and selected fruit and vegetables.[183] Japanese applied import duties on cereals exceeding 200%, largely due to the level of protection afforded to its rice sector. In the case of the United States, sugar, selected dairy products, and tobacco are protected with the applied tariff on tobacco products currently applied at 350%.[184]

In order to evaluate what might have been the extent and potential impact of agricultural trade liberalization under the TPP agreement, it is useful first to report the results of the U.S. Department of Agriculture's (USDA) Economic Research Service (ERS) study that estimated the impact of removing all agricultural tariffs and tariff-rate quotas (TRQs) by 2025.[185] All things being equal, this can be considered an upper bound to what might have been the likely trade effects of TPP on the agricultural sector. The USDA/ERS estimates indicate that TPP would result in a 6.3% increase in agricultural trade by 2025.[186] This increase would account for an additional $8.5 billion in the agricultural marketplace.[187] TPP was also expected to increase U.S. market access to several countries where it currently has no RTA, notably Japan, where 50% of U.S. agricultural exports would have faced zero tariffs once TPP was implemented.[188] In the case of other agricultural products, preferential access would have been given under new TRQs, where specified levels of imports would be subject to low tariffs, including dairy products

---

[177] *See id*.
[178] *See id*.
[179] Anne-Célia Disdier, Charlotte Emlinger, & Jean Fouré, *Atlantic versus Pacific Agreement in AgriFood Sectors: Does the Winner Take it All?* 12 (CEPII, Working Paper No 2015-10, 2015).
[180] *See id*. at 11-12.
[181] *See id*. at 12.
[182] *See id.*
[183] *See id.*
[184] *See* Freund et al., *supra* note 130, at 35.
[185] *See* Burfisher *et al*., *supra note* 175, at 2-3. TRQs are a policy instrument whereby a country commits to a minimum amount of imports (quota), subject to an in-quota tariff, while imports over the quota are subject to, a higher over-quota tariff.
[186] *See id*. at 25.
[187] *See id*.
[188] *See id*. at 10-11.

imported by Canada, and rice, wheat and barley imported by Japan.[189] With Japan being its fifth largest agricultural export market, reduction in their agricultural tariffs has been a long-held objective of U.S. trade policy, and one not addressed as of yet in the WTO. With increased market access, USDA/ERS had anticipated that TPP would result in the U.S. accounting for 33% and 10% respectively of the overall increase in intra-TPP agricultural exports and imports by 2025.[190] Overall, the U.S. agricultural sector was expected to be a big winner from implementation of TPP, exports to Japan accounting for a large share of these trade gains.

Of course, while TPP was expected to result in considerable liberalization of agricultural trade, the nature of the agreement was such that there would have been a phase-in period across countries and products.[191] Once the agreement took effect, almost 32% of tariff lines in Japan, 31% in Vietnam, 92% in Malaysia, all but one tariff line in Australia, and 99% in New Zealand were to be eliminated, with additional liberalization being phased in over 15 to 20 years.[192] However, significant barriers to market access would have remained in some areas, notably the dairy sector, where the Canada, Japan and the United States backed off dairy sector reform in order to maintain domestic support programs.[193]

3. Trade in Automobiles

TPP had the potential of more closely integrating the automobile industries of the United and Japan, two of the largest in the world, as well as opening up market access to TPP members such as Australia, Malaysia, New Zealand and Vietnam. Liberalization would have lowered tariffs, reduced non-tariff barriers (NTBs) such as tax breaks for purchase of domestically-produced automobiles, and begun a process of mutual recognition of safety and emissions standards.[194]

The United States and Japanese automobile sectors have three key trade characteristics: first, Japanese exports exceed those for the U.S.; second, Japanese exports are biased towards the U.S. market while the U.S. has relatively low exports to Japan; and third, mostly as a result of integration of the U.S., Canadian and Mexican automobile sector via NAFTA, the U.S. exports more than Japan to other TPP members.[195] As a consequence, TPP was expected to expand market access for U.S. automobiles to the Japanese and other TPP members' markets, and at the same time increase Japanese exports to Canada and Mexico, while lowering its costs of exporting to the United States.[196]

---

[189] *See* Cullen Hendrix & Barbara Kotschwar, *Agriculture, in Assessing the Trans-Pacific Partnership, in* VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES 42-55 (Peterson Inst. Int'l Econ., 2016).
[190] *See* Burfisher *et al*., *supra* note 175, at 23-24.
[191] Hendrix & Kotschwar, *supra* note 189, at 41.
[192] *See id*. at 41.
[193] *See id*. at 42.
[194] *See* Sarah Oliver, *Auto Sector Liberalization, in Assessing the Trans-Pacific Partnership, in* VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES, at 60 (Peterson Inst. Int'l Econ., 2016).
[195] *See id*. at 60-61.
[196] *See id*. at 61.

In terms of import tariffs, the majority currently fall between 2% and 12%, the notable outliers being Malaysia and Vietnam who have rates of 30% to 40% and up to 70% respectively.[197] With the exception of U.S. tariffs against Japanese imports of automobiles and trucks, all automobile tariffs would have expired within twelve years of TPP being implemented.[198] However, at the same time as the proposed schedule for tariff-cutting, the negotiated ROOs would have had a significant impact on trade liberalization in the automobile sector: in order to qualify for zero-tariff rates, all finished automobiles traded were required to contain 45% TPP-sourced content.[199] The objective of this ROO was to provide an incentive to U.S. and Japanese automobile firms to source parts from countries such as Vietnam, and represented a compromise for ROOs applied under NAFTA, and those that Japan has previously negotiated in previous trade agreements.[200] Overall, TPP would have liberalized market access to developing country members such as Malaysia and Vietnam where demand is growing, but the agreement essentially focused on protecting the U.S. and Japanese automobile sectors through trade-distorting ROOs, and the slow expiration of import tariffs.[201]

IV.
CONSEQUENCES OF THE U.S. WIHDRAWAL FROM TPP

A. Abandoning the Strategic Goals of TPP and its Economic Benefits

The withdrawal of the United States from TPP by the Trump Administration compromises major U.S. interests at least two ways. First, the United States stands to lose the economic benefits that would have been created by its membership of TPP that will be difficult to replicate. Second, the United States loses the opportunity to lead a deep integration RTA setting standards for Asia and containing China in international trade. Although the remaining eleven members have signed the CPTPP, the United States was the main architect behind TPP and would have been vigilant in policing and enforcing TPP standards. Even if China were to join CPTPP, it seems doubtful whether any of the remaining members have the economic clout or political will to vigorously enforce TPP standards against China and other members. A third disadvantage of withdrawing from TPP is that China now has the upper hand in promoting RCEP, its own RTA for Asia.

When the United States drafted TPP, the strategic goal was to box in China with the difficult of choice of joining TPP and being subjected to "WTO-extra" standards that it had no hand in drafting, or ignoring TPP and losing its trade benefits. While it should be clear that ignoring TPP would have meant that China would not have enjoyed the benefits of free trade with all TPP members, including the United States, it may be less clear that China would also have suffered trade losses from non-participation in TPP. Like all RTAs, TPP would have been a double edged sword: TPP could have both created trade among its members and diverted trade from non-members. Importers in the United States faced with the choice of buying goods from China and other TPP members would have had an economic incentive to forgo goods from

[197] *See id*. at 62.
[198] *See id.*
[199] *See id*. at 63.
[200] *See id*. 63-64.
[201] *See id.* at 65.

China (subject to WTO tariffs) and purchase the goods from other TPP members, such as Vietnam and Japan, which would have entered enter the United States tariff-free. In other words, China would have felt pressure to join TPP because ignoring it would likely have harmed its ability to export to the U.S., its largest and most important market. This was the stark choice that TPP was designed to present to China.

B. RCEP

The exclusion of China from the TPP negotiations prompted China to formally initiate talks for RCEP, a competing free trade agreement for Asia, in 2012. Comprised of sixteen nations, including the world's two most populous nations, China and India, RCEP, when completed and in effect, will include 45% of the world's population and 40% of world trade.[202] Led by China, RCEP was intended to serve as an economic and strategic counterweight to TPP. Of the sixteen prospective members of RCEP, seven nations are potential members of both TPP and RCEP, and 10 nations are also members of another RTA, the Association of Southeast Asian Nations (ASEAN).[203]

Unlike TPP, RCEP contains no substantive obligations on environmental protection, workers' rights, SOEs, and technology transfer. This is consistent with all of China's recent regional trade agreements, which also lack any provisions on these subjects.[204] Indeed, RCEP seems to further China's interest in promoting the use of fossil fuels such as coal. RCEP contains provisions that are intended to promote the use of "dirty fuels" by reducing 90% of tariffs on fossil fuels and by allowing its members to challenge environmentally friendly regulations by other members as barriers to trade.[205] While China is facing international pressure to reduce the use of "dirty fuels," RCEP is designed to protect China's ability to do so in the vast Asian market.

Although RCEP lacks provisions on subjects such as workers' rights, RCEP is likely to contain a provision requiring members to respect the right of self-determination in its members. Although the final text of RCEP is still being negotiated and only drafts of some articles have been leaked to the public, it is possible to draw some lessons from the articles of the Asia Infrastructure Investment Bank (AIIB) established under the leadership of Beijing to serve as a

---

[202] Rohit Sinha & Geethanjali Nataraj, *Regional Comprehensive Economic Partnership (RCEP): Issues and Way Forward*, THE DIPLOMAT (July 30, 2013), https://thediplomat.com/2013/07/regional-comprehensive-economic-partnership-rcep-issues-and-way-forward/ (listing that RCEP covers 40% of the world's GDP); MINISTRY OF TRADE SIGNAPORE, FACTSHEET: WHAT YOU NEED TO KNOW ABOUT REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) 1 (2014), *available at* https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/FACTSHEET-WHAT-YOU-NEED-TO-KNOW-ABOUT/Factsheet%20on%20RCEP%20(June%202014).pdf (listing that the RCEP covers 45% of the world's population).

[203] Yifei Xiao, *Competitive Mega-regional Trade Agreements:Regional Comprehensive Economic Partnership (RCEP) vs. Trans-Pacific Partnership (TPP)*, COLLEGEUNDERGRADUATE RESEARCH ELECTRONIC JOURNAL 1, 7 (2015), *available at* http://repository.upenn.edu/curej/194

[204] *See* BROCK WILLIAMS, CONG. RESEARCH SERVICE, BILATERAL AND REGIONAL TRADE AGREEMENTS: ISSUES FOR CONGRESS 51 (2018), *available at* https://fas.org/sgp/crs/row/R45198.pdf.

[205] Sam Cossar-Gilbert, 5 *Hidden Costs of the RCEP to the People and the Planet*, THE DIPLOMAT (Oct. 12, 2017), https://thediplomat.com/2017/10/5-hidden-costs-of-the-rcep-to-people-and-planet/.

competitor to the U.S.-dominated World Bank in international lending for infrastructure and economic development projects.[206] While the World Bank seeks to promote the Washington Consensus, a set of policies reflecting the western values of capitalism and free markets of the U.S. and its European allies,[207] the AIIB reflects the "Beijing Consensus," a set of policies endorsed by China that respects the rights of self-determination and sovereignty of each nations to decide controversial issues such as environmental protection and human rights free from the interference of other members.[208] Article 31(2) of its Articles of Agreement state that the AIIB, "its President, officers, and staff shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be relevant to their decisions."[209] Although the final text of RCEP has not been reached and made available to the public, it seems highly likely that China, consistent with all of its recent trade agreements, will seek to include basic tenets of the Beijing Consensus preserving the rights of members to decide issues such as environmental protection and workers' right for themselves. In addition, it also seems likely that China will not include any provisions limiting the activities of SOEs or technology transfer practices that will harm its own interests.

With the withdrawal of the United States, China faces a weakened CPTPP with greater confidence. RCEP creates economic benefits for China and RCEP members, and perhaps more importantly, allows China to write the rules of trade for Asia for the twenty first century and to cement its role as the leading power in Asia.

V. CONCLUSION

Signing of TPP had the potential to have important economic effects on its member countries in terms of growth in GDP, trade, and cross-border investment flows. However, its real significance lay beyond its initial impact due to the fact that it has been considered to be pioneering a new type of RTA that would have gone beyond shallow integration via tariff-cutting to one addressing deep integration in terms of its provisions concerning trade in services, FDI, rules on competition and regulatory harmonization.

In terms of the mode of trade liberalization, TPP was considered as having the potential to deliver additional economic benefits in the long run if it provided a means to eventually untangling the Asia-Pacific "noodle bowl" of multiple RTAs with their complex ROOs.[210] Prior to 2000, many countries in "Factory Asia" had unilaterally cut tariffs in order to take advantage

---

[206] *See* Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 Vand. J. Trans. L. 1255, 1258-59 (2016).
[207] *See id*. at 1277-80.
[208] *See id.* at 1280-85.
[209] Asian Infrastrucrue Investment Bank Articles of Agreement art. 31(2), June 29, 2015, *available at* https://www.aiib.org/en/about-aiib/basic-documents/_download/articles-of-agreement/basic_document_english-bank_articles_of_agreement.pdf.
[210] *See* Richard E. Baldwin, *Multilateralizing Regionalism: Spaghetti Bowls as Building Blocs on the Path to Free Trade*, 29 WORLD ECON. 1506, 1451-1518 (2006).

of the "unbundling" and offshoring of manufacturing processes by Japan.[211] With China's accession to the WTO in 2001, unilateral tariff-cutting in the region was replaced by a rapid growth in RTAs, described as a "domino" effect.[212] China itself started the process when it proposed and subsequently signed the ASEAN-China agreement, [213] the reaction of countries such as Japan and Korea leading to the so-called East Asian "noodle bowl".[214] Importantly, all prospective TPP members were part of this growing network of Asia-Pacific RTAs.[215] For example, the U.S. already had RTAs with six TPP members: Australia, Canada, Chile, Mexico, Peru, and Singapore; four members of TPP were already members of ASEAN: Brunei, Malaysia, Singapore and Vietnam; and three members of TPP also had bilateral RTAs with ASEAN: Australia, Japan, and New Zealand.[216]

These overlapping RTAs forming the "noodle bowl" should also be seen in the context of the competing efforts to increase trade liberalization in the region, i.e., TPP vs. RCEP, and the Free Trade Area of the Asia-Pacific (FTAAP) proposed in 2010 by the twenty-one member countries of the Asia-Pacific Economic Cooperation (APEC) Forum.[217] Importantly, there is a view that TPP would have been more ambitious than RCEP in terms of the extent of trade liberalization, and that economic benefits would be greater from FTAAP being based on TPP as opposed to RCEP.[218] Given this background, it is not surprising, therefore, that TPP also had the strategic goal of allowing the United States to write the rules of trade for Asia and to contain China's most controversial trade practices.

Despite the strategic and economic benefits of the TPP, when Donald J. Trump was elected to the U.S. Presidency, he decided to withdraw the U.S. from TPP. It is unclear in making this decision whether the Trump Administration studied or even considered the possible negative consequences of this decision as set forth in this article. Rather than following through with the existing strategy of writing the rules for trade in Asia while isolating and boxing in China, the United States has chosen to rely instead on threats of tariff increases in order to pressure countries into capitulating on trade issues. It remains unclear whether a trade policy based on intimidation against powerful countries capable of retaliating on equal terms, such as China, will be the best long term approach.

While the U.S. withdrawal from TPP creates serious disadvantages for the United States, the decision is reversible and the path to rejoin TPP is both open and straightforward at the moment. Nothing prevents a nation that has left TPP from rejoining so long as all existing members approve.[219] Given the United States's role in spearheading the TPP and its economic clout the CPTPP members might be relieved by the reentry of the United States. Rejoining TPP

[211] *See id*. at 1489.
[212] *See id*. at 1491.
[213] *See id*.
[214] *See id*.
[215] *See* FERGUSSON ET AL., *supra* note 36, at 8.
[216] *See id*. at 8.
[217] *See id*.
[218] *See* Petri et al., *supra* note 34, at 40.
[219] Kayla Tausche, *Can the US Rejoin TPP? Yes — With Permision*, CNBC (Jan. 26, 2018), https://www.cnbc.com/2018/01/26/can-the-us-rejoin-tpp-yes--with-permission.html.

in the near future might allow the United States to regain the lost strategic and economic benefits discussed in this article. In fact, the Trump Administration considered rejoining TPP in April 2018 but ultimately balked.[220]

The United States should be cautioned, however, that a smooth path to reentry into TPP may not be available indefinitely. The United States's departure from TPP has created a strategic opening for China. If China takes advantage of the U.S. departure by joining TPP before the United States can rejoin, China could make United States reentry much more difficult as the U.S. will need the approval of all existing TPP members to rejoin.[221] China could block or delay the United States from rejoining or seek to exact concessions from the United States as the price of readmission. China could also attempt to seize a leadership role in TPP in the absence of the United States, relegating the United States to a diminished role upon its reentry. Even if China decides against joining TPP, a U.S. delay in reasserting its presence at the multilateral level in Asia could prove harmful. China will be able to continue to strengthen its power in Asia through RCEP, which has purposely excluded the United States, and other intiatives, such as "One Belt, One Road,"[222] an immensely vast and ambitious trade project, while the United States remains on the outside. As the case of the Asia Infrastructure Investment Bank illustrates, China is intent on dominating trade in Asia, aggressively defending its interests in Asia against U.S. intrusion, and seeking a leadership position in international trade.[223] At the moment, the U.S. strategy in Asia appears to be limited to one of intimidation through threats of tariff increases. Aside from tariff increases, the United States appears to be at a standstill or a point of indecision about its trade policy in Asia and any next steps in Asia or the rest of the world. The U.S. withdrawal from TPP, without further action by the United States such as a reversal of the decision, could shift the balance of power over trade and economic relations in Asia and then globally to China.

---

[220] Faithin Ungku & Charlotte Greenfield, *Trump Says U.S. Could Rejoin TPP if Deal Improved. How Hard Would It Be?*, REUTERS (Apr. 16, 2018); Edward White, *Trump Says He Is Now Opposed to Re-Joining TPP*, FIN. TIMES (Apr. 17, 2018), https://www.ft.com/content/ed6b16f4-42b5-11e8-803a-295c97e6fd0b.
[221] *See* Tausche, *supra* note 219.
[222] The "One Belt, One Road" initiative is designed to increase China's trade with other countries in Asia, Central, and Eastern Europe. The ambitions and capital expenditures of this initiative are enormous. Overall, 68 countries, including 65% of the world's population and 40% of the global GDP as of 2017 are involved. See China's One Belt, One Road: Will it Reshape Global Trade?, https://www.mckinsey.com/featured-insights/china/chinas-one-belt-one-road-will-it-reshape-global-trade.
[223] *See* Chow, *Why China Established the Asia Infrastructure Investment Bank*, *supra* note 206, at 1263.