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

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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.

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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

¹ Dave Sherwood, *Eleven Nations – But Not U.S. – to Sign Trans-Pacific Trade Deal*, REUTERS (Mar. 8, 2018, 1:02 AM), <https://www.reuters.com/article/trade-tpp/eleven-nations-but-not-u-s-to-sign-trans-pacific-trade-deal-idUSL2N1QN0S7>. For the full text of the TPP, see *TPP Full Text*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Sept. 23, 2018) [hereinafter TPP].

² Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

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.⁵ 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."⁶

The President's trade policies are elaborated in the President's 2017 National Trade Policy Agenda⁷ submitted by 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.⁸

³ See Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017) (withdrawing from the TPP because of the need for "fair and economically beneficial trade deals" that serve the interests of the American people).

⁴ See Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, B.U. INT'L L.J. (forthcoming 2019) (manuscript at 1–2) (on file with the Boston University International Law Journal) [hereinafter Chow, *Unilateralism*] (analyzing the Trump administration's international trade policies).

⁵ See *id.* (characterizing the Trump administration's trade policies as economic nationalism wherein the U.S. defends against unfavorable trade deals by seeking new agreements intended to promote U.S. interests).

⁶ Donald J. Trump, President of the United States, Inaugural Address (Jan. 20, 2017), <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/> [<https://perma.cc/LEQ9-5VL7>].

⁷ OFFICE OF THE U.S. TRADE REP., THE PRESIDENT'S 2017 TRADE POLICY AGENDA 1 (2017), <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-trade-policy-agenda-and-2016> [<https://perma.cc/6GD7-PURP>] [hereinafter OFFICE OF THE U.S. TRADE REP., 2017 TRADE POLICY].

⁸ *Id.*

In order to achieve what is termed “fair” trade,⁹ 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.¹⁰

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.¹¹ 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.¹² 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.¹³ Under the third, and fourth priorities, the

⁹ 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 1980’s: “Congressman, businessmen, editorialists and the media have repeatedly emphasized fairness in trade, ‘level playing fields’ and reciprocity of access 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 Today*, 10 *WORLD ECON.* 109, 117–18 (1987). See also Patrick K. O’Brien & Geoffrey Allen Pigman, *Free Trade, British Hegemony and the International Economic Order in the Nineteenth Century*, 18 *REV. INT’L STUD.* 89, 105–107 (1992) (discussing the 19th century origins of Britain’s fair trade movement).

¹⁰ OFFICE OF THE U.S. TRADE REP., 2017 *TRADE POLICY*, *supra* note 7, at 2.

¹¹ See Chow, *Unilateralism*, *supra* note 4, at 6–7 (arguing that the Trump administration has interpreted WTO rules as allowing the U.S. to unilaterally void WTO decisions that add or diminish rights set forth in WTO agreements).

¹² See *id.* at 14 (pointing to the U.S. issuance of unilateral trade sanctions against China despite WTO prohibitions).

¹³ When the Trump Administration announced its tariffs, they were generally applicable. See, e.g., Press Release, *President Trump Approves Relief for U.S. Washing Machine and Solar Cell Manufacturers*, OFFICE OF THE U.S. TRADE REP. (Jan. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/president-trump-approves-relief-us> [https://perma.cc/X9DL-NB5A] (announcing new tariffs on all imported washing machines and solar cells). *Cf.* Proclamation No. 9704, Adjusting Imports of Aluminum into the United States, 83 *Fed. Reg.* 11,619, 11,619–20 (Mar. 8, 2018) (announcing generally applicable tariffs on aluminum imports, except those from Canada and Mexico); Proclamation No. 9705, Adjusting Imports of Steel into the United States, 83 *Fed. Reg.* 11,625, 11,625–26 (Mar. 8, 2018) (announcing generally

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.¹⁴ 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.¹⁵ Treasury Secretary Steven 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,¹⁶ 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.¹⁷

applicable tariffs on steel imports, except those from Canada and Mexico). *But see* Everett Rosenfeld, *US Extends Tariff Exemptions for European Union and Other Allies*, CNBC (Apr. 30, 2018, 8:14 PM), <https://www.cnbc.com/2018/04/30/us-extends-tariff-exemptions-for-eu-and-other-allies.html> (while the tariffs were applicable to all countries, multiple exemptions were made for allies) [<https://perma.cc/9AVZ-LWFC>] (reporting that the U.S. has extended deadlines for negotiations on foreign exemptions for steel and aluminum tariffs).

¹⁴ See Chow, *Unilateralism*, *supra* note 4, at 20–22 (reviewing the legality of the Trump administration’s threat of trade sanctions to induce revision of trade agreements and the use of this practice against South Korea).

¹⁵ 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 roughly 70% of the annual average import volume of steel exports from Korea to the U.S. for the years 2015–17. See 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> [<https://perma.cc/9Z5B-6YR8>]; also Press Release, *Joint Statement by the United States Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim*, OFFICE OF THE U.S. TRADE REP. (Mar. 28, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-statement-united-states-trade> [<https://perma.cc/HHP8-DVZF>] (announcing agreement revising the terms of the KORUS agreement and exempting South Korea from steel tariffs); see also Fact Sheet, *New U.S. Trade Policy and National Security Outcomes with the Republic of Korea*, OFFICE OF THE U.S. TRADE REP. (Mar. 28, 2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/new-us-trade-policy-and-national> [<https://perma.cc/4NXT-6R6Z>] (summarizing the outcome of the trade agreement revision).

¹⁶ *Id.*

¹⁷ See Hans von der Burchard & Jakob Hanke, *Trump is Winning Trade War — for Now*, POLITICO (Mar. 27, 2018, 5:07 PM), <https://www.politico.eu/article/president-donald-trump-winning-the-trade-war-for-now-steel-aluminum-tariffs/> [<https://perma.cc/PY9B-J6N6>] (reporting EU objections to the Trump administration’s threats to impose tariff sanctions in exchange for more favorable trade agreement terms).

The revision of KORUS proceeded at a breakneck pace lasting only a few weeks,¹⁸ but revising a multilateral agreement such as TPP with twelve members could prove complex and time consuming.¹⁹ 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.²⁰ Once limited to a bilateral negotiation with a single trading partner, the United States will be able to use its economic clout in a one-on-one negotiation to obtain a new bilateral agreement that will contain terms favorable to the United States.²¹

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.²² CPTPP is scheduled to come into effect within two years if all requirements are met.²³

¹⁸ 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*, *supra* note 15 (announcing conclusion of trade sanctions); Ana Seanson, *Trump to Impose Sweeping Steel and Aluminum Tariffs*, N.Y. TIMES (Mar. 1, 2018), www.nytimes.com/2018/03/01/business/trump-tariffs.html [<https://perma.cc/JH4F-J7RR>] (reporting on President Trump's announced intent to impose steel and aluminum tariffs).

¹⁹ 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> [<https://perma.cc/4GFA-MQCS>] (finding that trade "negotiations take significantly longer when they involve more countries, especially if the countries are spread across different regions").

²⁰ 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." OFFICE OF THE U.S. TRADE REP., 2017 TRADE POLICY, *supra* note 7, at 1.

²¹ While the United States has negotiating leverage in bilateral negotiations, extracting a favorable deal under a bilateral negotiation could bring negotiating states in violation of the WTO. See Harry G. Broadman, *Trump's Misplaced Penchant for Bilateral Trade Deals*, FORBES (Jan. 31, 2018 10:07 PM), <https://www.forbes.com/sites/harrybroadman/2018/01/31/trumps-misplaced-penchant-for-bilateral-trade-deals/#774ca5de57b9> [<https://perma.cc/L83U-437V>] (noting that the WTO requires members negotiating PTAs to comply with WTO rules, and that WTO members that create WTO-inconsistent agreements may face sanctions from members at large). Bilateral negotiations can also harm the United States, as a collection of them prevents harmonization of international trade rules that promote growth. See *id.* (pointing to the difficulties in aligning bilateral and multi-lateral agreements in a globalized market that hinders compliance).

²² Tim McDonald, *Asia-Pacific Trade Deal Signed by 11 Nations*, BBC (Mar. 8, 2018), <https://www.bbc.com/news/business-43326314> [<https://perma.cc/C4DA-XY58>].

²³ 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

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.²⁴ 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.²⁵ 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.²⁶ Not only would TPP have established higher standards for Asia as a whole but TPP was created with the specific goal of containing China, the United States' chief rival in trade.²⁷ It is no exaggeration to say that China was the target of every major provision in TPP.²⁸ Moreover, the United States deliberately excluded China from the TPP negotiations so that China could not challenge or dilute the new standards in TPP.²⁹ The United States' plan was to complete TPP without China and then confront China with a difficult

and Progressive Trans-Pacific Partnership art. 30.5, *opened for signature* 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/>.

²⁴ See *infra* Part III.

²⁵ See *infra* Part II.

²⁶ See OFFICE OF THE U.S. TRADE REP., THE TRANS-PACIFIC PARTNERSHIP: DETAILED SUMMARY OF U.S. OBJECTIVES 5, 7–9 (Sept. 2015), <https://ustr.gov/sites/default/files/TPP-Detailed-Summary-of-US-Objectives.pdf> (rejecting trade rules and practices dictated by China and listing objectives that address tariffs, reciprocal access, and state-owned enterprises in addition to changes that “build on WTO commitments” in several areas).

²⁷ 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, 372–74 (2017) [hereinafter Chow, *Trans-Pacific Partnership*] (explaining how the provisions in the TPP and China's exclusion from the negotiations “w[ere] no accident, but instead w[ere] a deliberate ploy by the U.S. to limit China's growing global trade influence”).

²⁸ See *id.* at 374 (arguing that containing China was the U.S.'s central focus for trade negotiations).

²⁹ See *id.* at 372–73 (positing that the U.S. wanted to dictate the terms of the TPP to limit China's trade influence).

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.³⁰ 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.³¹ Returning the favor, China excluded the United States from the negotiations for RCEP.³² 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.³³

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.

I. 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 under negotiation between the United

³⁰ See *id.* at 375 (stating that the TPP placed China in the difficult position of either choosing to “suffer losses in international trade by refusing to join the TPP, or it can join the TPP and be subject to the humiliation of having to abide by rules written by the U.S. with the express intent of containing China”).

³¹ 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> [<https://perma.cc/MQM5-2ZTW>] (reporting on the renewed focus on the RCEP following the United States's withdrawal from the TPP).

³² See *id.* (stating the United States was not included in the negotiations).

³³ See Freddie Kleiner, *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 withdrawal puts the United States' influence at risk).

States and European Union (EU),³⁴ 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.³⁵ If ratified, TPP was anticipated to reduce more than 18,000 tariffs, including many agricultural trade barriers.³⁶ In 2014, the eleven other members of TPP, accounted for \$680 billion worth of U.S. exports, with Canada, Japan and Mexico accounting for 85% of the total.³⁷

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.³⁸ In the period 2012 to 2016, the volume of world trade grew by only 3% a year, less than half the average rate of expansion of 7.6% in the pre-financial crisis period, reaching a low of 2.4% in 2016.³⁹ 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

³⁴ See Gabriel Felbermayr et al., *Macroeconomic Potentials of Transatlantic Free Trade: A High Resolution Perspective for Europe and the World*, 30 *ECON. POL'Y* 491, 493–494 (2015) (stating that the proposed TPP plan would result in the “largest free trade area in the world” with significant worldwide impact).

³⁵ Peter A. Petri & Michael G. Plummer, *The Economic Effects of the TPP: New Estimates*, in 1 *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, MARKET ACCESS AND SECTORAL ISSUES* 6, 6 (2016), <https://piie.com/publications/piie-briefings/assessing-trans-pacific-partnership-volume-1-market-access-and-sectoral> [hereinafter Petri & Plummer, *Economic Effects*].

³⁶ OFFICE OF THE U. S. TRADE REP., 18,000 TAX CUTS ON MADE-IN-AMERICA EXPORTS: A GUIDE TO HOW TAX CUTS WILL BENEFIT EXPORTING IN YOUR STATES (2015), <https://ustr.gov/sites/default/files/TPP-Guide-to-18000-Tax-Cuts.pdf>; see also Caroline Freund et al., *Tariff Liberalization*, in 1 *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, MARKET ACCESS AND SECTORAL ISSUES* 31, 31 (2016), <https://piie.com/publications/piie-briefings/assessing-trans-pacific-partnership-volume-1-market-access-and-sectoral> (finding that implementation of the TPP would result in the immediate elimination of nearly 75% of non-zero tariffs, and the elimination of 99% of non-zero tariffs following full implementation).

³⁷ See IAN F. FERGUSSON & BROCK R. WILLIAMS, CONG. RESEARCH SERV., R44489, *THE TRANS-PACIFIC PARTNERSHIP (TPP): KEY PROVISIONS AND ISSUES FOR CONGRESS* 3 (2015) (summarizing the export and import statistics among the 11 prospective TPP members compared to the U.S.).

³⁸ Bernard Hoekman, *Trade and Growth – End of an Era?*, in *THE GLOBAL TRADE SLOW-DOWN: A NEW NORMAL?* 3, 4–5 (Bernard Hoekman ed., 2015) (ebook).

³⁹ INT'L MONETARY FUND, *WORLD ECONOMIC OUTLOOK* 63 (2016), <https://www.imf.org/en/Publications/WEO/Issues/2016/12/31/Subdued-Demand-Symptoms-and-Remedies>. Csilla Lakatos & Franziska Ohnsorge, *Arm's-Length Trade: A Source of Post-Crisis Trade Weakness* 1 (World Bank, Working Paper No. 8144, 2017), <https://openknowledge.worldbank.org/bitstream/handle/10986/27647/WPS8144.pdf?sequence=1&isAllowed=y>.

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, 2015.⁴⁰ 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.⁴¹ The United States itself already has fourteen RTAs in force with a total of twenty countries⁴², and there are already eighty-five RTAs in existence affecting the East Asian region⁴³, with others being negotiated.

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 United States, TPP was supposed to serve five 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;⁴⁴ 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;⁴⁵ 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;⁴⁶

⁴⁰ See World Trade Organization, Nairobi Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/DEC (noting that while some members wished to pursue the Doha Development Agenda, other members disagreed and sought “new approaches” for negotiations).

⁴¹ *Facts and Figures*, Subsection to *Regional Trade Agreements*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts [<https://perma.cc/X62A-CW39>].

⁴² See *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements> (listing the countries with which the U.S. has free trade agreements, which includes 12 bilateral treaties and 2 multilateral agreements) (last visited October 1, 2018). See also *Facts and Figures*, *supra* note 41.

⁴³ *Physical RTAs in Force, Participation by Region*, WORLD TRADE ORG., <http://rtais.wto.org/UI/Charts.aspx> (last visited Nov. 11, 2018).

⁴⁴ Peter A. Petri et al., *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment* 6 (East-West Ctr. Working Papers, Econ. Series, Working Paper No. 119, 2011), <https://www.eastwestcenter.org/publications/trans-pacific-partnership-and-asia-pacific-integration-quantitative-assessment> [<https://perma.cc/754B-QULY>] (summarizing the distinguishing features of the TPP).

⁴⁵ *Id.*

⁴⁶ See *id.* at 6; see also Petri & Plummer, *supra* note 35, at 8 (discussing the benefits of the TPP to the United States, which includes increased efficiency in labor and capital markets). 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. *Id.* at 8 n.10.

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;⁴⁷ and fifth, TPP would have created important new constraints on China in international trade well beyond what currently exists under the WTO.⁴⁸

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 2015.⁴⁹ Parallel to these negotiations, many WTO members and non-members have either negotiated or are in the process of negotiating RTAs.⁵⁰ 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 “membership restricted to the willing” (the United States, EU, Japan, and Canada — collectively known as “the Quad”) able to promote multilateralism within the GATT/WTO,⁵¹ 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

⁴⁷ See Petri et al, *supra* note 44, at 6 (explaining that the TPP would help “level the playing field for U.S. exports to Asian markets” due to the exclusion of the U.S. from ASEAN).

⁴⁸ See *id.* at 7 (noting the analyses of the intent behind the TPP, with some considering the agreement an attempt to isolate or control China within the Asia Pacific region).

⁴⁹ See Shawn Donnan, *World Trade Organisation Moves On from Stalled Doha Round*, FIN. TIMES (Dec. 19, 2015), <https://www.ft.com/content/08968f4e-a682-11e5-9700-2b669a5aeb83> (describing the “deep-seated differences” leading to the end of the Doha Round of negotiations initiated in 2001); Editorial, *Global Trade After the Failure of the Doha Round*, N.Y. TIMES (Jan. 1, 2016), <https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html> [<https://perma.cc/RLJ3-6SDP>] (opining on the termination of the Doha talks after 14 years of “fruitless” negotiations).

⁵⁰ See *Facts and Figures*, *supra* note 41 (noting the rise in RTAs which includes a “notable increase in large plurilateral agreements under negotiation”).

⁵¹ See Paul Collier, *Why the WTO is Dead-locked: And What Can Be Done About It?*, 29 WORLD ECON. 1423, 1425 (2006) (describing how the GATT was a means for “OECD countries to strike deals for reciprocal trade liberalisation,” but with the few participating developing countries marginalized in such agreements); see also Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. ECON. PERSP. 95, 106 (2016) (describing how the GATT period was dominated by “the Quad” who held two-third of world imports and directed negotiations for trade agreements).

system.⁵² 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.⁵³ Third, most orthodox trade barriers have already been eliminated through eight successive rounds of the GATT, such that average *ad valorem* manufacturing tariffs have reached historic lows, at less than 4%.⁵⁴

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 2001.⁵⁵ 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.⁵⁶ 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.⁵⁷ 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.⁵⁸ In addition, there has been a significant expansion in bilateral investment treaties, where countries concede national sovereignty in order to encourage inbound FDI.⁵⁹ 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

⁵² See Baldwin, *supra* note 51, at 106 (noting how the increased membership of developing countries to the WTO led to a shift in power resulting in more difficult trade negotiations and increased participation in defensive coalitions by developing countries).

⁵³ See *id.* at 108 (discussing the difficulties in reach a consensus on multilateral trade agreements after developing countries dropped tariffs to increase offshore industrialization).

⁵⁴ See *id.* at 98–101 (providing an analysis of lowering effective tariff rates among low-income and high-income countries, including within the United States, throughout the lifespan of the GATT).

⁵⁵ See *id.* at 106–111 (summarizing the internal and external forces impeding the formation of multilateral trade agreements).

⁵⁶ *Id.* at 106. See also Gordon H. Hanson, *The Rise of Middle Kingdoms: Emerging Economies in Global Trade*, 26 J. ECON. PERSP. 41, 42 (2012) (discussing shifts in international trade from dominant trade flows between high-income countries to an increased share in trade involving developing countries).

⁵⁷ See Baldwin, *supra* note 49, at 107 (noting how the rise in regionalism and difficulty in negotiating WTO trade agreements complicated attempts at reaching multilateral trade agreements).

⁵⁸ See *id.* at 107 (stating that these "deep" RTAs "went beyond tariff-cutting and included legally binding assurances aimed at making signatories more business-friendly to trade and investment flows from other signatories").

⁵⁹ *Id.* at 107–8.

of reference of the WTO.⁶⁰ 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.⁶¹

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.⁶² If a country is “large,” it can use import tariffs to lower the world price of its imports relative to the world price of its 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.⁶³

Mutual exchange of market access was the appropriate focus of trade negotiations in the “made-there-sold-here” economy.⁶⁴ More recently, technological advances have allowed firms to “offshore” production processes that used to be contained within a single, domestic firm.⁶⁵ In 2015, intra-firm trade accounted for about one third of global exports,⁶⁶ and a little less than half of all U.S. trade is intra-firm, or between a parent company and its affiliates

⁶⁰ See *id.* at 108 (noting that these agreements did not directly compete with the WTO, but provided evidence that participating nations sought agreements that “went far beyond the ‘shallow’ disciplines included in WTO talks”).

⁶¹ See *id.* at 108 (discussing how developing countries opted to reduce tariffs to increase industrialization by joining international production networks, which reduced incentives to engage in multilateral talks).

⁶² Kyle Bagwell et al., *Is the WTO Passé?*, 54 J. ECON. LIT. 11–25, 1126–27 (2016) (discussing how the GATT “facilitated gradual, multilateral trade liberalization and allowed countries to sustain an extensive period of low most-favored-nation tariffs” with binding, reciprocal agreements).

⁶³ See *id.* at 1154–61 (analyzing GATT/WTO negotiations and their rules and provisions, which reflect a “norm of reciprocity” and incorporate a nondiscrimination principle embodied in the most-favored-nation rules).

⁶⁴ See Baldwin, *supra* note 51, at 96 (“[T]he rules and procedures of the WTO were designed for a global economy in which made-here-sold-there goods moved across national borders.”).

⁶⁵ See Pol Antràs & Elhanan Helpman, *Global Sourcing*, 112, J. POL. ECON., 552, 553–55 (2004) (discussing integrated and disintegrated firms in light of specialization and foreign outsourcing trends).

⁶⁶ Lakatos & Ohnsorge, *supra* note 38, at 1.

abroad.⁶⁷ International commerce is increasingly characterized by flows of investment and know-how from developed to developing countries in exchange for low-cost intermediate goods.⁶⁸ However, a firm's ability to offshore production depends on the quality of governance in those foreign countries.⁶⁹ Multinational companies (MNCs) and their affiliates are interested in harmonizing economic policy across countries and ensuring that their interests will be protected abroad.⁷⁰ This has increased the "demand" for deep integration among firms in both the developed and developing world.⁷¹

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 are very low by comparison to historical rates from the early twentieth century.⁷² Other barriers pertaining to goods covered by

⁶⁷ See *id.* at 6–7 (noting from 2002 to 2014 the United States's share of intra-firm exports in total U.S. exports was about 30% and the share of intra-firm exports in total U.S. imports was 50%).

⁶⁸ See Jonathan Haskel et al., *Globalization and U.S. Wages: Modifying Classic Theory to Explain Recent Facts*, 26 J. ECON. PERSP. 119, 121 (2012) (describing a surge in international trade with the U.S. increasingly importing intermediates and final products from low- and middle-income countries); see also Marcel P. Timmer et al., *Slicing Up Global Value Chains*, 28 J. ECON. PERSP. 99, 100, 116 (2014) (concluding that global fragmentation of production has rapidly increased resulting in "mature economies relocat[ing] their unskilled-labor-intensive production activities to lower-wage countries, while keeping strategic and high-value-added functions concentrated at home").

⁶⁹ See Alberto Osnago et al., *Deep Trade Agreements and Vertical FDI: The Devil Is in the Details* 3–4 (World Bank Grp., Working Paper No. 7464, 2015) (elucidating how "contractual frictions are pervasive in international transactions because of differences in legal systems, poor institutional quality in certain countries involved in one end of the transaction and limited enforcement ability").

⁷⁰ 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), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199981755.001.0001/oxfordhb-9780199981755-e-25> (stating that "trade and production costs generated by incompatibilities in trade-related domestic regulations across countries now figure more prominently in the strategies of multinational firms" and such firms "are the key promoters of making national regulatory systems compatible, as this helps to reduce the cost of doing business abroad and generally improves the operation of the international supply chain").

⁷¹ See Baldwin, *supra* note 51, at 111 (discussing how the rise in offshoring has led to more deep regional trade agreements and bilateral investment treaties where the WTO was unable to address issues affecting international production networks).

⁷² See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 200 (3d ed. 2017) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW] (noting that WTO member countries have agreed to bind 99

the GATT/WTO are quotas, i.e., numerical restrictions imposed on imports,⁷³ anti-dumping duties imposed on imports sold at below cost or predatory prices to gain a foothold on the internal market,⁷⁴ and subsidies, which are government-provided funds that reduce the cost of production of an exporter, and which gives exporters a competitive advantage.⁷⁵ 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 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.⁷⁶

percent of tariffs for developed countries, 73 percent for developing countries, and 98 percent for economies in transition, which differs significantly from historical rates).

⁷³ *Id.* at 265.

⁷⁴ *See id.* at 469 (discussing how “the exporter may use its artificially low-priced exports to drive domestic competitors in the export market out of business, or to discourage the development of a domestic competitor in the export market[, and] [o]nce this occurs, the exporter can raise its prices or lower the quality of its products[,]” thereby causing harm to the import market’s consumers).

⁷⁵ *See id.* at 518 (defining “subsidy” and explaining that export subsidies may result in exporters engaging in predatory pricing through artificially depressed prices).

⁷⁶ 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. *See* General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (requiring all signatories to reciprocate internal taxation and regulation exemptions and apply such trade provisions similarly among all signatories). 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. *Id.* at art. XXIV (providing exceptions for “customs unions” between member countries). 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. *Id.* 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 area. *Id.* 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 72, 161–62 (providing a general overview of the GATT exceptions to MFN obligations and explaining the special exceptions for preferential trade areas).

One early example of deep integration was the North American Free Trade Agreement (NAFTA), negotiated by the United States, Canada, and Mexico. NAFTA lowered tariffs, but it is important to note that all the signatories to NAFTA were also signatories to the GATT⁷⁷. 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.⁷⁸ NAFTA also greatly strengthened protections for intellectual property and foreign investment.⁷⁹ 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.⁸⁰ 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.⁸¹ RTAs can have dozens of “WTO-extra” provisions.⁸² 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 covered in the WTO, and labor and environmental standards.⁸³ As the prevalence of offshoring grows, harmonizing domestic policy will only become more important.

⁷⁷ See *The 128 Countries That Had Signed GATT by 1994*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/gattmem_e.htm [<https://perma.cc/DMF6-2M8K>] (last visited Nov. 11, 2018) (providing the GATT was signed by Canada in 1948 and Mexico in 1986).

⁷⁸ See North American Free Trade Agreement, arts. 1501, 1502, Sept. 6, 1992, 32 I.L.M. 605.

⁷⁹ See generally 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 & TECH. L. J. 67, 71 (1994) (noting that NAFTA will protect IP via enforcement procedures, dispute settlement and the reduction of compulsory licenses, and will protect investment from discriminatory treatment).

⁸⁰ Bagwell et al., *supra* note 62, at 1137.

⁸¹ See e.g., Henrik Horn et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 WORLD ECONOMY 1565, 1567 (2010) (explaining the difference between WTO-plus and WTO-extra provisions).

⁸² See Henrik Horn et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 WORLD ECON., 1565, 1568 (2010) (analyzing trade agreements involving the European Community or the U.S. and noting that both sets of agreements contain WTO-plus and WTO-extra terms, but European Community agreements use four times more WTO-extra provisions).

⁸³ See, e.g., *id.*, at 1571-2 (2010) (listing examples of WTO-extra provisions).

D. Deep Integration and TPP

TPP committed signatories to eliminate many tariff and non-tariff barriers to trade with other members.⁸⁴ This included a commitment to eliminate tariffs on manufactured goods and greatly reduce protection for agricultural goods.⁸⁵ Tariff cuts would have been phased in at different rates for different products, but 95% of tariff lines would eventually have been cut to zero,⁸⁶ 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 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.⁸⁷ While the tariff cuts appear to offer significant increases in market access, many of the signatories to TPP have existing RTAs with each other. The net effect on actual applied tariffs would have been moderate.⁸⁸ 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,⁸⁹ government procurement,⁹⁰ as well as customs and trade facilitation.⁹¹ It also added new protections for intellectual property, beyond what was negotiated in the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS)

⁸⁴ See FERGUSSON & WILLIAMS, *supra* note 37, at 15 (“TPP would eventually eliminate all industrial goods tariffs and most agriculture tariffs and quotas.”).

⁸⁵ See *id.* at 4.

⁸⁶ See *id.* at 15, 18 (noting how the commitments phase in over time so that “[e]ventually 95% or more tariff lines in each country would be duty-free”).

⁸⁷ See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 72, at 161–62 (discussing the use of customs unions and free trade areas as exceptions to the MFN principle).

⁸⁸ Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, 8 *GLOBAL POL’Y* 107, 108 (2017).

⁸⁹ TPP, *supra* note 1, at ch. 7. SPS measures are governed by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, which is concerned with food safety. See WTO Agreement on the Application of Sanitary and Phytosanitary Measures art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (laying out obligations of signatories to take steps “necessary for the protection of human, animal or plant life or health”).

⁹⁰ See TPP, *supra* note 1, at ch. 15.

⁹¹ *Id.* at ch. 5.

agreement.⁹² This included additional protections for patents, trademarks, copyrights, and trade secrets⁹³. Importantly, TPP required strong domestic enforcement of intellectual property (IP) protections, including criminal penalties for offenders, again beyond what is required under TRIPS.⁹⁴ Similarly, TPP strengthened protections for international trade in services beyond the WTO's General Agreement on Trade in Services (GATS).⁹⁵ TPP also prohibited members from imposing any quantitative restrictions on international trade in services or requiring foreign-service providers to establish a local affiliate.⁹⁶

TPP also included a chapter on investment that went well beyond those commitments contained within the WTO Trade Related Investment Measures (TRIMS) agreement.⁹⁷ 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.⁹⁸ 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.⁹⁹ Investors would also have had the right to seek binding international arbitration against host governments that violate TPP's investment provisions.¹⁰⁰

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.¹⁰¹ TPP prohibited members from blocking or imposing

⁹² See FERGUSSON & WILLIAMS, *supra* note 37, at 8.

⁹³ See *id.* at 10.

⁹⁴ See Kimberly Weatherall, *Intellectual Property in the TPP: Not 'The New TRIPS'*, Melbourne J. Int'l L. 1, 8 (2017) ("[TPP] requires IP protection that significantly exceeds the standards established in TRIPS: copyright and patent rights must last longer; patents (and trade marks) must cover a broader range of subject matters; additional tools of enforcement must be provided, including very broad criminalization.").

⁹⁵ 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. Compare General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, http://www.wto.org/english/docs_e/legal_e/final_e.htm, with TPP, *supra* note 1, at ch. 10, Annex 10-A.

⁹⁶ TPP, *supra* note 1, at art. 10.5, 10.6.

⁹⁷ See FERGUSSON & WILLIAMS, *supra* note 37, at 56 (reviewing TPP provisions on investments that went "significantly beyond WTO agreements").

⁹⁸ See *id.* (noting that the TPP mostly incorporates the 2012 Model BIT's core investor protections and exceptions, as well as some provisions that went "somewhat beyond" the model BIT).

⁹⁹ See *id.* at 54, 57 (pointing to standard protections in the TPP that comport or exceed BIT).

¹⁰⁰ See *id.* at 54.

¹⁰¹ *Id.* at 35, 66.

duties on the transmission of data, or requiring firms from TPP member states to build local data centers or transfer source code.¹⁰² TPP members were also required to ensure that firms have access to domestic telecommunications infrastructure “on reasonable and non-discriminatory terms and conditions,” and any licensing processes are transparent and non-discriminatory.¹⁰³

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, businesses and goods at risk. . . . America should write the rules. America should call the shots. Other countries should play by the rules that America and our partners set, and not the other way around. . . . The United States, not . . . China, should write them.¹⁰⁴

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 largely silent on environmental obligations.¹⁰⁵ TPP sets forth “WTO-extra” environmental obligations in Article 20 as follows:

¹⁰² TPP, *supra* note 1, at arts. 14.3, 14.13.

¹⁰³ TPP, *supra* note 1, at arts. 13.4, 13.22.

¹⁰⁴ Barack Obama, *President Obama: The TPP Would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.518fb2cfe6d9 [https://perma.cc/YW32-TQUT].

¹⁰⁵ 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

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 environment. Accordingly, each Party shall take measure to control the production and consumption of, and trade in, such substances.¹⁰⁶

This provision was aimed squarely at China, the world's largest producer of pollutants that damage the earth's ozone layer.¹⁰⁷ Although China already produces more carbon from fossil fuels than the U.S. and EU combined, China is continuing to increase its use of "dirty fuels" such as coal-fired power plants that damage the earth's atmosphere.¹⁰⁸ 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.¹⁰⁹ 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

concerns could be asserted through GATT Article XX, the general exceptions clause, as a limit on the trade in goods. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 72, at 321–23, 334–37 (giving an overview of the previous WTO rejections of efforts to adopt strict trade standards based on environmental protection objectives, but explaining that subsequent WTO decisions have interpreted the general exceptions clause as authorizing more flexibility in targeting environmental harms through trade agreements). As the basis of an exception under Article XX, 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. *Id.* at 321–23 (citation omitted) (detailing how prior GATT panel decisions concluded that "unilateral measures to force other countries to change conservation policies cannot satisfy the 'primarily aimed at standard'" under the general exceptions clause).

¹⁰⁶ TPP, *supra* note 1, at art. 20.5.

¹⁰⁷ See Chow, *Trans-Pacific Partnership*, *supra* note 27, at 394 ("China poses the world's single greatest threat to the destruction of the ozone layer, and the key objective of TPP Article 20.5 is the protection of the ozone layer.").

¹⁰⁸ See Keith Bradsher & Lisa Friedman, *China's Emissions: More Than U.S. Plus Europe, and Still Rising*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/business/china-davos-climate-change.html> [<https://perma.cc/3W4P-TNYQ>] (stating that China's increase in electricity use last year was met by burning more coal).

¹⁰⁹ *But see* Dominic Dudley, *Renewable Energy Will Be Consistently Cheaper Than Fossil Fuels By 2020, Report Claims*, FORBES, Jan. 13, 2018, <https://www.forbes.com/sites/dominicdudley/2018/01/13/renewable-energy-cost-effective-fossil-fuels-2020/#21d068014ff2> [<https://perma.cc/X8SZ-5799>] ("[A]ll renewable energy technologies should be competitive on price with fossil fuels by 2020.").

costs.¹¹⁰ 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

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 statutes 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 elimination of discrimination in respect of employment and occupation.¹¹¹

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.¹¹² Apart from humanitarian concerns, the United States is concerned that China's disregard of workers' rights creates low labor costs that are a significant competitive advantage over the United States. For example, the average cost of manufacturing labor in China is \$2.62 per hour while

¹¹⁰ *Id.*

¹¹¹ TPP, *supra* note 1, at art. 19.3(1).

¹¹² See, e.g., 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> [<https://perma.cc/A8F4-XK35>] (reporting that companies such as Amazon were investigated by Chinese watchdog groups and cited with "excessive hours, low wages, inadequate training and an overreliance on 'dispatch' or temporary workers in violation of Chinese law"). See also Jane Perlez, *U.S. Report Harshly Criticizes China for Deterioration 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-deterioration-human-rights-russia-also.html> [<https://perma.cc/UJJ8-RETG>] (recounting the U.S. State Department's 2000 annual report on human rights, in which China was greeted with "tough language" regarding their "widespread and well-documented human rights abuses in violation of internationally accepted norms").

the average cost in the United States is \$35.53 per hour.¹¹³ 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.¹¹⁴ By incorporating the standards of the ILO, TPP has created labor standards enforceable under its dispute settlement mechanism.

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.”¹¹⁵ 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.¹¹⁶

¹¹³ 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 (2012), <https://www.bls.gov/news.release/ichcc.toc.htm> [<https://perma.cc/L8BX-AC82>] (stating that the U.S. manufacturing hourly compensation costs in 2011 was \$35.53). For manufacturing hourly wages in China in 2011, see *Manufacturing Hourly Compensation Costs in China and India*, CONFERENCE BOARD (2018), <https://www.conference-board.org/ilcprogram/index.cfm?id=38270> [<https://perma.cc/G2W5-GR9Y>] (reporting that China’s hourly wage in 2011 was \$2.62). However, China has generally been experiencing increases in hourly wages. In 2016, Chinese manufacturing labor hit \$3.60. *‘Made in China’ Isn’t So Cheap Anymore, and That Could Spell Headache for Beijing*, CNBC (Feb. 27, 2017, 12:37 AM), <https://www.cnbc.com/2017/02/27/chinese-wages-rise-made-in-china-isnt-so-cheap-anymore.html> [<https://perma.cc/R5W7-U42L>]. This force of rising labor costs could cause factories to flee for other countries and/or invest in capital equipment. See 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, with lower hourly wages than China, might be used as an alternative source for cheap labor).

¹¹⁴ See Anthony Freeman, *ILO Labor Standards and U.S. Compliance*, 3 PERSP. WORK 28, 29 (1999) (discussing how the ILO is a voluntary organization which that has no enforcement powers other than “condemnatory language”). See also Neil Gough, *The Workers Who Regret Trump’s Scrapping of a Trade Deal*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/business/trump-tpp-trade-vietnam-labor-environment.html> [<https://perma.cc/E44K-G3YJ>] (discussing how agreements like the TPP give teeth to labor protections).

¹¹⁵ TPP, *supra* note 1, at Art. 19.5(1).

¹¹⁶ See Kinglun Ngok, *The Changes of Chinese Labor Policy and Labor Legislation in the Context of Market Transition*, 73 INT’L LAB. & WORKING-CLASS HIST. 45, 55 (2008) (pointing to weak local government oversight of factories and lack of strong enforcement laws for violations of labor contracts as reasons for why the Chinese labor contract system functions poorly). 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> [<https://perma.cc/MWB5-8RXQ>] (arguing that

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 level the playing field by raising labor cost, a key input in manufacturing. From the perspective of the United States, raising labor cost is important because this measure erodes 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).¹¹⁷ The U.S. believes that the Chinese government engages in unfair trade and business practices by providing various forms of financial and regulatory assistance to its SOEs at the expense of multinational companies.¹¹⁸ 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.¹¹⁹

recent labor laws have not protected the Chinese workforce); 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> [<https://perma.cc/Z2XY-XLTD>] (discussing how China's lack of labor law enforcement has led to large-scale unrest among workers).

¹¹⁷ See OFFICE OF THE U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 75–78 (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf> [hereinafter OFFICE OF THE U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA] (discussing the importance of state-controlled entities in China and the United States's unsuccessful attempts at accessing information on these entities by enforcing WTO notification requirements); Zhenhua Lu, *US Urged to Block China's State Companies from Buying High Security Risk American Assets*, S. CHINA MORNING POST (Nov. 16, 2017, 8:28 AM), <https://www.scmp.com/news/china/policies-politics/article/2120122/us-urged-block-chinas-state-companies-buying-high> [<https://perma.cc/2AGH-M48A>] (reporting that the US-China Economic and Security Review Commission recommended “that Congress consider updating legislation pertaining to national security reviews of foreign investment to address ‘current and evolving security risks’” stemming from SOEs in China).

¹¹⁸ See Daniel C.K. Chow, *How China Promotes its State-Owned Enterprises at the Expense of Multinational Companies in China and Other Countries*, 41 N.C. J. INT'L L. 455, 455–56 (2016) (stating that China “uses a set of policies that seem designed to promote its own state-owned enterprises . . . at the expense of foreign multinational companies . . . doing business in China and in other countries”).

¹¹⁹ *Id.* at 466.

China views SOEs as “the lifeline of the economy”¹²⁰ and has vowed to incessantly strengthen their vitality.¹²¹ China has a web of policies seeking to promote SOEs as “national champions”¹²² capable of competing with or surpassing the world’s most powerful multinational companies.¹²³ A key point of contention is the United States’ position that China systematically provides subsidies or financial assistance to SOEs in the form of direct grants or as well as indirect transfers through intermediate entities indirect transfers.¹²⁴ 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 subsidies, to any SOE relating to the production of goods or the supply of services.¹²⁵ Under Article 17.6 “non-commercial assistance” refers to assistance that is not available in the marketplace and is provided by a government.¹²⁶ 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 forgiveness;
 - B. loans, loan guarantees or other types of financing on terms more favourable than those commercially available to that enterprise; or

¹²⁰ See 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> [<https://perma.cc/8TCR-Z8HX>] (quoting Hu Jintao, former general secretary of the Communist Party in China, from his address to the 18th Party Congress before stepping down).

¹²¹ See *China State Arms Maker Pledges ‘Mixed Ownership’ Reforms*, REUTERS (Jan. 5, 2017, 6:17 AM), <https://www.reuters.com/article/us-china-norinco/china-state-arms-maker-pledges-mixed-ownershipreforms-idUSKBN14P165> [<https://perma.cc/CMB9-FZ5S>] (discussing China’s ambitious reform plans to strengthen and make more competitive SOEs).

¹²² See KJELD ERIK BRØDSGAARD & KOEN RUTTEN, *FROM ACCELERATED ACCUMULATION TO SOCIALIST MARKET ECONOMY IN CHINA* 156, 161–62, 164 (2017), <https://www.jstor.org/stable/10.1163/j.ctt1w8h2tj.11> (discussing the Chinese government’s strategies and reforms to its SOEs to compete with multinational corporations).

¹²³ See *id.* at 156, 161–62 (explaining how China’s policies are intended “to strengthen the international competitiveness of” its SOEs).

¹²⁴ OFFICE OF THE U.S. TRADE REP., 2017 REPORT TO CONGRESS ON CHINA, *supra* note 117, at 6–7, 12–13, 75.

¹²⁵ TPP, *supra* note 1, at art. 17.6.

¹²⁶ *Id.* at art. 17.1.

- C. equity capital inconsistent with the usual investment practice, including for the provision of risk capital, of private investors; or
- (ii) goods or services other than general infrastructure on terms more favourable than those commercial available to that enterprise¹²⁷

The WTO also disciplines the use of subsidies under the GATT and the WTO Agreement on Subsidies and Countervailing Measures (SCM),¹²⁸ 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 give 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 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 transfer their technology.¹²⁹ 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

¹²⁷ *Id.* at Art. 17.1.

¹²⁸ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14, https://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter SCM].

¹²⁹ See Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13,099, 13,099–100 (Mar. 22, 2018) (listing grievances against China for coercive trade practices as support for directing the U.S. Trade Representative to investigate issuance of retaliatory tariffs).

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.¹³⁰

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.¹³¹ 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,¹³² 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.¹³³ The reasoning by the Chinese authorities

¹³⁰ *Id.* at 13,099.

¹³¹ China classifies proposals for joint ventures and wholly foreign-owned entities into four categories depending on the industry: encouraged, permitted, restricted, and prohibited under the Foreign Investment Industrial Guidance Catalog first promulgated in 1997 and updated versions in 2002, 2007, 2011, and 2017. NAT. DEV. AND REFORM COMM'N & MINISTRY OF COMMERCE OF CHINA, CATALOGUE OF INDUSTRIES FOR GUIDING FOREIGN INVESTMENT (REVISION 2017), INVEST IN CHINA (July 28, 2017) http://www.fdi.gov.cn/180000012139_4851_0_7.html [<https://perma.cc/6FKK-5SZ2>].

¹³² See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 397-99 (3d ed. 2015) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS] (explaining how the WTO treats foreign direct investment).

¹³³ This observation is based on the author's own experience working in China as in-house counsel for a multinational company. The author was present at numerous meetings with Chinese officials during the approval process for the company's joint ventures and corporate organizations. These officials regularly asked for advanced technology to be transferred to the joint venture. The implication was clear that failure to comply with these requests would result in an impasse or a long delay in the approval process. The author has had discussions with other attorneys in China who indicate that other multinational companies face the similar demands.

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.¹³⁴ As the joint venture is a Chinese company formed under 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 to the Chinese market unless it agrees to form a joint venture. U.S. companies claim that this choice is tantamount to being "forced" to transfer their technology to a Chinese company or to the Chinese government.

United States concerns about China's technology transfer practices are not new to the Trump Administration. Previous United States 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 United States concerns. To close this gap, when the United States drafted TPP, the United States inserted Article 9.10(1)(f), 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 territory¹³⁵

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.

II. 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.

¹³⁴ *See id.*

¹³⁵ TPP, *supra* note 1, at Art. 9.10(1)(f).

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.¹³⁶ There would also have been a significant growth impact for some of the emerging economies included in TPP.¹³⁷ 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.¹³⁸ In particular, Vietnam, a low labor cost economy, was expected to expand as a manufacturing hub in industries such as textiles and apparel.¹³⁹ 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.¹⁴⁰

B. Tariff-Cutting

While there is currently a low trade-weighted¹⁴¹ 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.¹⁴² Average trade-weighted applied tariffs vary from 0.4% in

¹³⁶ Petri & Plummer, *supra* note 35, at 14–15 (citing large projected annual income gains for Malaysia and Vietnam).

¹³⁷ *See id.* (listing the projected benefits for countries such as Malaysia, Vietnam, Brunei, and Peru).

¹³⁸ *Id.* at 14.

¹³⁹ *C.f.* Kimberly Ann Elliott, *Rules of Origin in Textiles and Apparel*, in 1 ASSESSING THE TRANS-PACIFIC PARTNERSHIP, MARKET ACCESS AND SECTORAL ISSUES 66, 70, 72–73 (2016), <https://piie.com/publications/piie-briefings/assessing-trans-pacific-partnership-volume-1-market-access-and-sectoral> (discussing how the TPP could benefit the textile and apparel industries in Vietnam, and that the size of such benefits depends on whether rules of origin are eliminated or if FDI would shift from China to Vietnam).

¹⁴⁰ *See* Petri & Plummer, *supra* note 35, at 15 (concluding that the TPP would result in significant increases in exports, and that the U.S. would have been one of the largest recipients of inward FDI).

¹⁴¹ The average of a country's tariffs weighted by the value of its imports.

¹⁴² Caroline Freund et al., *Tariff Liberalization, in Assessing the Trans-Pacific Partnership*, in 1 ASSESSING THE TRANS-PACIFIC PARTNERSHIP, MARKET ACCESS AND SECTORAL ISSUES 31, 31–33 (2016), <https://piie.com/publications/piie-briefings/assessing-trans-pacific-partnership-volume-1-market-access-and-sectoral> (noting that the extent of liberalization “depends on current applied tariff rates and existing free trade agreements,” and that despite relatively low tariffs, potential TPP members had varying tariff rates).

Singapore to 6.2% in Vietnam.¹⁴³ The United States applies an average tariff of 1.2% against other TPP members, with its highest applied tariff being 4.4% against Vietnam.¹⁴⁴ In terms of actual tariff-cutting, almost 75% of all tariffs were scheduled to be removed once the TPP was formally in place, and eventually, 99% of trade in goods were to be liberalized.¹⁴⁵ 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 sixteen of TPP being in force.¹⁴⁶ 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.¹⁴⁷

C. Trade and Investment Effects

Exports among all TPP countries were projected to grow \$1,025 billion by 2030, an increase of 11.5%.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹

By 2030, inbound FDI would have increased \$446 billion (3.5%) compared to an increase in outbound FDI of \$305 billion (2%).¹⁵² 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.¹⁵³

¹⁴³ *Id.* at 33.

¹⁴⁴ *Id.* at 33.

¹⁴⁵ *Id.* at 31.

¹⁴⁶ *Id.* at 35.

¹⁴⁷ *Id.*

¹⁴⁸ Petri & Plummer, *supra* note 35, at 15–16.

¹⁴⁹ *Id.* at 16.

¹⁵⁰ *Id.* at 17.

¹⁵¹ *Id.* at 15.

¹⁵² *Id.*

¹⁵³ *Id.* at 11.

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.¹⁵⁴ It is well-understood that an RTA does not affect a country's trade balance unless it also affects long-term net national savings.¹⁵⁵ 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 through either selling assets or borrowing from abroad.¹⁵⁶

Likewise, an RTA cannot affect long-term employment in an economy due to market and policy adjustments.¹⁵⁷ Overall employment in an economy is a macroeconomic phenomenon, driven by aggregate demand and supply for labor.¹⁵⁸ If an economy is at full employment, increased trade imports will likely result in changes in the composition of jobs, not the number of jobs, and the central bank will adjust monetary policy accordingly to offset the effects of trade on the job market.¹⁵⁹ If the economy is operating at less than full employment, the central bank will allow trade expansion (contraction) to persist (loosen monetary policy).¹⁶⁰ Of course, there may be short-run adjustments in the labor

¹⁵⁴ See Peter A. Petri & Michael G. Plummer, *The Economics Of Analyzing The TPP*, PETERSON INST. INT'L ECON. 3–4 (April 12, 2016), <https://piie.com/commentary/testimonies/economics-analyzing-tpp> [<https://perma.cc/R2QN-D6JA>] (noting that the figures for net national savings and overall employment will return to normal trend values for long-term macroeconomic analyses).

¹⁵⁵ See *id.* at 3 (stating that trade agreements like the TPP will not change trade balances over time without provisions to change national savings).

¹⁵⁶ See C. Fred Bergsten, *Trade Balances and the NAFTA Renegotiation*, PETERSON INST. INT'L ECON. 2 (June 2017), <https://piie.com/system/files/documents/pb17-23.pdf> [<https://perma.cc/SZ65-RPFH>] (“A shortage of savings generates a net capital inflow that finances a trade deficit while insufficient investment (or excess savings) requires a net capital outflow that is the counterpart of a trade surplus.”).

¹⁵⁷ See *id.* at 2–3 (discussing how trade imbalances require changes to macroeconomic variables, which is why RTAs target microeconomic factors to increase trade levels rather than trade balances).

¹⁵⁸ See Theodore H. Moran, *Will the TPP Create More Jobs for Americans? Why the Answer is “No”!*, PETERSON INST. INT'L ECON.: TRADE & INV. POL'Y WATCH (July 7, 2015, 9:45 AM) (alteration in original), <https://piie.com/blogs/trade-investment-policy-watch/will-tpp-create-more-jobs-americans-why-answer-no> [<https://perma.cc/W82Z-CZTL>] (stating that “the number of jobs in an economy [is] a macroeconomic phenomenon” which is a function of aggregate demand for labor against the supply of labor).

¹⁵⁹ See *id.* (arguing that any change in net exports will result only in a different allocation of labor rather than any increase in demand for labor).

¹⁶⁰ See *id.* (stating that central banks will respond to positive or negative effects of trade policy on the labor market with monetary policy).

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.¹⁶¹ 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 impact on local job markets.¹⁶² 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.¹⁶³ 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.¹⁶⁴

However, some scholars expect that the TPP would not have had a very large impact on U.S. employment.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

¹⁶¹ 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> [<https://perma.cc/LKS9-LSR3>] (relating how President Trump has focused on trade-related issues as a primary cause of job loss).

¹⁶² Daron Acemoglu et al., *Import Competition and the Great US Employment Sag of the 2000s*, 34 U. CHI. J. LAB. ECON. 141, 160–162 (2016) (listing the job loss incurred by American industry due to Chinese imports). See also David H. Autor et al., *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2125 (2013) (showing the negative consequences of low-income-country imports causing unemployment and lost wages on local American labor markets).

¹⁶³ See Shushanik Hakobyan & John McLaren, *Looking for Local Labor Market Effects of NAFTA*, 98 REV. ECON. & STAT. 728, 729–30 (2016) (noting NAFTA's negative effects on American workers in local labor markets).

¹⁶⁴ See Jason Margolis & Lucy Martirosyan, *What is the TPP and Why Are Both Parties So Angry About It?*, PRI: THE WORLD (July 26, 2016, 4:45 PM), <https://www.pri.org/stories/2016-07-26/what-tpp-and-why-are-both-parties-so-angry-about-it> [<https://perma.cc/YWB2-Y6A8>] (noting Democratic Senator Bernie Sanders' and then-presidential-nominee Donald Trump's opposition to the TPP).

¹⁶⁵ See Petri & Plummer, *supra* note 35, at 10–11 (claiming that the TPP shouldn't have very much of an effect on unemployment).

¹⁶⁶ See *id.* at 19.

¹⁶⁷ *Id.*

In terms of employment, it has been estimated that 71,900 jobs per 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).¹⁶⁸ If these job shifts per year are reduced by 25%, which is the percentage of jobs shifted due to voluntary and other separations, 53,700 annual job changes in the United States would have been involuntary and attributable to TPP.¹⁶⁹ Placing this in perspective, fifty-five million jobs are “churned” a year in the United States, with the TPP accounting for less than a 0.1% increase in the rate of churn.¹⁷⁰

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.¹⁷¹ As a consequence, many economists,¹⁷² as well as commentators in the media¹⁷³ 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.¹⁷⁴ 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

¹⁶⁸ *Id.* at 20 (using U.S. data from 2014).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Robert Z. Lawrence & Tyler Moran, *Adjustment and Income Distribution Impacts of the Trans-Pacific Partnership* 12–13 (Peterson Inst. Int’l Econ., Working Paper No. 16-5, 2016), <https://piie.com/publications/working-papers/adjustment-and-income-distribution-impacts-trans-pacific-partnership> [<https://perma.cc/6ZWG-V565>] (advocating for public unemployment insurance and public investment in human capital and training); 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> [<https://perma.cc/E8CD-VS4F>] (explaining that some European countries do not suffer as much from structural unemployment because of sizeable social safety nets).

¹⁷³ See *Trade, at What Price?*, ECONOMIST (Apr. 2, 2016), <https://www.economist.com/unit-ed-states/2016/04/02/trade-at-what-price> (advocating for labor assistance programs for job losses due to trade policies) [<https://perma.cc/4HV5-WFNP>]; see also Editorial, *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> [<https://perma.cc/BY66-CBBM>] (advocating for larger, European-style social safety nets, wage insurance, and subsidies for businesses who rehire victims of trade policy).

¹⁷⁴ See Lawrence & Moran, *supra* note 172, at 2 (arguing for programs to aid victims of trade policies, and specifically supporting an enhanced Trade-Adjustment Assistance program with wage insurance).

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.¹⁷⁵

E. Sectoral Effects

The expected sectoral effects of TPP need to be placed in the overall context of the structure of the U.S. economy. As of 2016, the U.S. manufacturing sector accounted for 10.2% of employment — down from 14.3% in 2000 — a decline that has continued irrespective of U.S. trade policy, driven by growth in productivity.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸

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 2014.¹⁷⁹ The U.S. comparative

¹⁷⁵ See Dani Rodrik, *The Trouble with Globalization*, MILKEN INSTIT. REV. (Oct. 20, 2017), <http://www.milkenreview.org/articles/the-trouble-with-globalization> [<https://perma.cc/2GTJ-HDKK>] (arguing that approaches to economic integration must change if globalization is to be saved).

¹⁷⁶ See Robert Lawrence, *Recent US Manufacturing Employment: The Exception that Proves the Rule* 2, 11, 13 (Peterson Inst. Int'l Econ., Working Paper No. 17-12, 2017) <https://piie.com/system/files/documents/wp17-12.pdf> [<https://perma.cc/S686-Z38H>] (explaining the tradeoff between employment and labor productivity).

¹⁷⁷ See Petri & Plummer, *supra* note 35, at 17 (noting that the TPP benefitted sectors in which the United States had a comparative advantage, including service industries).

¹⁷⁸ See Sarah Oliver, *Auto Sector Liberalization*, in 1 *Assessing the Trans-Pacific Partnership, Market Access and Sectoral Issues* 60, 62 (2016), <https://piie.com/system/files/documents/piieb16-1.pdf> [<https://perma.cc/VJ87-S5SB>] (finding that the TPP maintained some protections for the U.S. auto industry, and pointing to the continued high tariffs on trucks as an example).

¹⁷⁹ Gary Clyde Hufbauer, *Liberalization of Services Trade*, in 1 *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, MARKET ACCESS AND SECTORAL ISSUES* 81–82 (2016), <https://piie.com/system/files/documents/piieb16-1.pdf> [<https://perma.cc/VJ87-S5SB>].

advantage in services is based on three factors: the presence of large efficient firms, highly educated personnel, and extensive use of information technology.¹⁸⁰ At present the sector faces high barriers to cross-border trade with other TPP members, with overall *ad valorem* 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%.¹⁸¹

There was considerable focus in the TPP negotiations on the services sector, the final agreement covering 12 sectors and 168 subsectors. In addition, four of the TPP chapters were targeted exclusively at a range of issues relating to cross-border trade and investment in services.¹⁸² 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.¹⁸³ The bottom line: under TPP, member countries committed to significantly reducing trade barriers, with U.S. service exports expected to increase \$149 billion by 2030, which accounts for 67% of overall increased TPP trade in services.¹⁸⁴ 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.¹⁸⁵ 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, which refers to rules such as minimum capital requirements for banks and appropriate protections for investors and depositors.¹⁸⁶ 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.¹⁸⁷ TPP contained such

¹⁸⁰ *Id.* at 84.

¹⁸¹ *See id.* at 83.

¹⁸² *Id.* at 84.

¹⁸³ *Id.* at 85.

¹⁸⁴ *See id.* at 84.

¹⁸⁵ Anna Gelpern, *Financial Services*, in 1 ASSESSING THE TRANS-PACIFIC PARTNERSHIP, MARKET ACCESS AND SECTORAL ISSUES 91, 91 (2016), <https://piie.com/system/files/documents/piieb16-1.pdf> [<https://perma.cc/VJ87-S5SB>].

¹⁸⁶ *Id.* at 95.

¹⁸⁷ *Id.*

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 2008.¹⁸⁸

2. TPP and Agriculture

Over the period 2010–12, agricultural imports by TPP members totaled \$279 billion.¹⁸⁹ Fifty-one percent were sourced from other TPP partners, while 43% of their agricultural exports went to TPP partners.¹⁹⁰ Canada and Mexico are both highly dependent on other TPP members for agricultural exports and imports, mostly due to their trade with the United States.¹⁹¹ For the United States over the same period, 42% and 47% of its agricultural exports and imports respectively went to or were sourced from other TPP members.¹⁹²

Agricultural products traded between TPP members are currently subject to higher applied tariffs on average than industrial products—7.6% vs. 1.5%—although bilateral protection varies considerably by country.¹⁹³ For example, average applied agricultural tariffs are 3.6% at the U.S. border compared to 23% at the Japanese border.¹⁹⁴ 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 United States, its NAFTA partners.¹⁹⁵ 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, with its average applied tariff on U.S. dairy products being 110% even though Canada and the United States are both members of NAFTA.¹⁹⁶ Japan protects its

¹⁸⁸ See *id.* at 96.

¹⁸⁹ MARY E. BURFISHER ET AL., U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., ECONOMIC RESEARCH REPORT NO. 176, AGRICULTURE IN THE TRANS-PACIFIC PARTNERSHIP 1 (2014), https://www.ers.usda.gov/webdocs/publications/45286/49379_err176.pdf?v=0.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Anne-Célia Disdier et al., *Atlantic Versus Pacific Agreement in Agri-Food Sectors: Does the Winner Take It All?* 11–12 (Ctr. Econ. Stud. & Ifo Inst., Working Paper No. 5460, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2639585 (noting bilateral trade agreements independent of the TPP led to large variance in the applied tariffs on agricultural and manufactured imports).

¹⁹⁴ *Id.* at 12.

¹⁹⁵ See *id.* at 12–13.

¹⁹⁶ *Id.*

markets for beef, rice, wheat, barley, sugar, dairy products, and selected fruit and vegetables.¹⁹⁷ Japan applied import duties on cereals exceeding 200%, largely due to the level of protection afforded to its rice sector.¹⁹⁸ 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%.¹⁹⁹

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 2025.²⁰⁰ Given the ERS study assumed removal of all existing barriers to agricultural trade between TPP countries, 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 2025.²⁰¹ This increase would account for an additional \$8.5 billion in the agricultural marketplace.²⁰² 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.²⁰³ 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 imported by Canada, and rice, wheat and barley imported by Japan.²⁰⁴ With increased market access, USDA/ERS had

¹⁹⁷ BURFISHER ET AL., *supra* note 189, at 17; *see also* JOHN DYCK & SHAWN S. ARITA, JAPAN'S AGRIFOOD SECTOR AND THE TRANS-PACIFIC PARTNERSHIP 8 (2014), https://www.ers.usda.gov/webdocs/publications/43890/49385_eib129.pdf?v=0 (explaining that Japan encourages the planting of wheat, barley, and food-use soybeans over rice production by giving farmers payments per hectare for planting these crops as well as fixed payments based on historical planting levels).

¹⁹⁸ DYCK & ARITA, *supra* note 198, at 12, Figure 5.

¹⁹⁹ *Id.*; Disdier et al., *supra* note 194, at 35, 38.

²⁰⁰ BURFISHER ET AL., *supra* note 189, at 2–3 (studying the potential impact of “eliminating tariffs and tariff-related quotas” on the economies of TPP member countries).

²⁰¹ *Id.* at 25.

²⁰² *Id.*

²⁰³ *See id.* at 10–11 (showing how the TPP would have benefitted U.S. agricultural exports to Japan); *Fact Sheet: How TPP Opens Markets for Made in America Exports*, OFFICE OF THE U.S. TRADE REP. (Oct. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/october/fact-sheet-how-tpp-opens-markets-made> [<https://perma.cc/DVE9-HBD4>] (“Over 50 percent of U.S. farm products (by value) will enter Japan duty free once the agreement is implemented. . . includ[ing] grapes, strawberries, walnuts, lactose, certain fruit juices, and most pet foods.”)

²⁰⁴ *See* Cullen Hendrix & Barbara Kotschwar, *Agriculture*, in 1 ASSESSING THE TRANS-PACIFIC PARTNERSHIP, MARKET ACCESS AND SECTORAL ISSUES 41, 42–55 (2016),

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 2025.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷ However, significant barriers to market access would have remained in some areas, notably the dairy sector, where Canada, Japan and the United States backed off dairy sector reform in order to maintain domestic support programs.²⁰⁸

3. Trade in Automobiles

TPP had the potential to more closely integrate the automobile industries of the United and Japan, two of the largest in the world, as well as open 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.²⁰⁹

The United States and Japanese automobile sectors have three key trade characteristics: first, Japanese exports exceed those of the United States; second, Japanese exports are biased towards the U.S. market while the United States has relatively low exports to Japan; and third, mostly as a result of integration of the U.S., Canadian, and Mexican automobile sector via

<https://piie.com/system/files/documents/piieb16-1.pdf> [<https://perma.cc/VJ87-S5SB>] (providing an example of how particularly thorny issues like Canadian dairy imports and Japanese rice imports would be handled by the TPP treaty scheme).

²⁰⁵ See BURFISHER ET AL., *supra* note 189, at 23–24 (examining the impact of the TPP on intra-TPP agricultural imports and exports by 2025).

²⁰⁶ Hendrix & Kotschwar, *supra* note 204, at 41 (noting that the gradual market liberalization catalyzed by the TPP would unfold gradually over 15 to 20 years.).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 42.

²⁰⁹ See Oliver, *supra* note 178, at 60 (surveying the impact of the TPP on the American and Japanese auto sectors, markets over which both countries had historically exercised trade protections).

NAFTA, the United States exports more than Japan to other TPP members.²¹⁰ 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.²¹¹

In terms of import tariffs, the majority currently fall between 2% and 10%, the notable outliers being Malaysia, whose rates range between 30% to 40%, and Vietnam with rates extending up to 70% respectively.²¹² 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.²¹³ 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.²¹⁴ 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.²¹⁵ 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.²¹⁶

IV. CONSEQUENCES OF THE U.S. WITHDRAWAL 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 in TPP that will be difficult to replicate. Second, the United States

²¹⁰ *Id.* at 60–61.

²¹¹ *See id.* at 61 (pointing out that under the TPP the reduction in tariffs would make Japanese auto exports to NAFTA countries less costly and increase market access for the United States).

²¹² *Id.* at 62.

²¹³ *Id.*

²¹⁴ *See id.* at 63 (listing the TPP regional content requirements using the net cost method and build-down method to calculate the percentage).

²¹⁵ *See id.* 62–64 (explaining the new rules of origin for individual auto parts proposed under the TPP)

²¹⁶ *Id.* at 65.

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 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.²¹⁷ 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 China (subject to WTO tariffs) and purchase the goods from other TPP members, such as Vietnam and Japan, which would have entered 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.²¹⁸ Led by China, RCEP was

²¹⁷ See CHOW & SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS*, *supra* note 132, at 52 (“PTAs [preferential trade agreements] increase trade and political cooperation between the parties and . . . divert trade . . . away from the rest of the world.”)

²¹⁸ Rohit Sinha & Geethanjali Nataraj, *Regional Comprehensive Economic Partnership (RCEP): Issues and Way Forward*, *THE DIPLOMAT* (July 30, 2013), <https://thediplomat.com/2013/07/>

intended to serve as an economic and strategic counter-weight to TPP. Of the sixteen prospective members of RCEP, seven nations are potential members of both TPP and RCEP, and ten nations are also members of another RTA, the Association of Southeast Asian Nations (ASEAN).²¹⁹

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.²²⁰ 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.²²¹ 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 chapters have been leaked to the public,²²² 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 competitor to the U.S.-dominated World Bank in international lending for infrastructure and economic development projects.²²³ While

regional-comprehensive-economic-partnership-rcep-issues-and-way-forward/ [https://perma.cc/PUH2-CRHP].

²¹⁹ See Yifei Xiao, *Competitive Mega-Regional Trade Agreements: Regional Comprehensive Economic Partnership (RCEP) vs. Trans-Pacific Partnership (TPP)*, C. UNDERGRADUATE RES. ELECTRONIC J. 1, 5–7 (2015), <http://repository.upenn.edu/curej/194> [https://perma.cc/4ZLN-4MG7] (listing the members of the TPP, APEC and ASEAN agreements).

²²⁰ See Brock Williams, Cong. Research Serv., R45198, *Bilateral and Regional Trade Agreements: Issues for Congress 51* (2018), <https://fas.org/sgp/crs/row/R45198.pdf> [https://perma.cc/SYA5-RFKK] (detailing China's regional trade agreements) (giving an overview of the enforceable commitments in China's RTA's).

²²¹ See 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/> [https://perma.cc/4NWV-CMP4] (demonstrating how China's RCEP will erode progress made toward cleaner energy sources).

²²² A website has posted leaked draft chapters of RCEP. See *RCEP Leaks*, BILATERALS.ORG, <https://www.bilaterals.org/rcep-leaks> (last visited Nov. 11, 2018).

²²³ See Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255, 1258–59 (2016) [hereinafter Chow, *Why China*] (explaining how China established the AIIB as a competing institution in response to its limited involvement in the World Bank and IMF, and that despite the United States' arguments against the AIIB's creation, many U.S. allies ultimately joined the organization).

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,²²⁴ the AIIB reflects the “Beijing Consensus,” a set of policies endorsed by China that respects the rights of self-determination and sovereignty of each nation to decide controversial issues such as environmental protection and human rights free from the interference of other members.²²⁵ 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.”²²⁶ 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.

CONCLUSION

The 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.

²²⁴ *See id.* at 1277–78 (outlining the policies at the core of the Washington Consensus, which include requirements such as market-determined interest rates, competitive exchange rates, and privatization of SOEs).

²²⁵ *See id.* at 1280–83 (contrasting the Washington Consensus with “China’s doctrine of non-interference”).

²²⁶ ARTICLES OF AGREEMENT, ASIAN INFRASTRUCTURE INV. BANK 18, https://www.aiib.org/en/about-aiib/basic-documents/_download/articles-of-agreement/basic_document_english-bank_articles_of_agreement.pdf (last visited Sept. 23, 2018).

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.²²⁷ Prior to 2000, many countries in “Factory Asia” had unilaterally cut tariffs in order to take advantage of the “unbundling” and offshoring of manufacturing processes by Japan.²²⁸ 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.”²²⁹ China itself started the process when it proposed and subsequently signed the ASEAN-China agreement,²³⁰ with the reaction of countries such as Japan and Korea leading to the so-called East Asian “noodle bowl.”²³¹ Importantly, all prospective TPP members were part of this growing network of Asia-Pacific RTAs.²³² For example, the United States 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.²³³

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, such as the TPP versus 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.²³⁴ 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.²³⁵ Given this

²²⁷ See Richard E. Baldwin, *Multilateralizing Regionalism: Spaghetti Bowls as Building Blocs on the Path to Free Trade*, 29 *WORLD ECON.* 1451, 1451 (2006) (positing that multilateralism will be necessary to achieve “global duty-free trade” instead of tangled, regional trade agreements).

²²⁸ See *id.* at 1489 (explaining East Asia’s quick reduction of tariffs in order to accommodate the outsourcing of Japanese manufacturing).

²²⁹ See *id.* at 1491 (discussing the theory that China’s membership into the WTO triggered international trade agreements amongst neighboring nations).

²³⁰ *Id.*

²³¹ See *id.* (describing Japan and Korea’s efforts to form new bilateral treaties to shore up their defenses against China, in the process creating a tangled “noodle bowl” of agreements).

²³² See FERGUSSON & WILLIAMS, *supra* note 37, at 8 (identifying overlap among prospective TPP member countries and those nations affected by the “noodle bowl” of bilateral agreements structuring Asia Pacific trade at the time).

²³³ See *id.* (listing trade relationships predating the TPP).

²³⁴ See *id.* (providing historical context for trade liberalization in the region covered by the TPP).

²³⁵ See Petri & Plummer, *supra* note 35, at 6, 25 (deeming the TPP a “landmark accord” precipitating extensive trade liberalization which would promote integration in the Asia-Pacific region if used as a blueprint for the FTAAP).

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 United States 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.²³⁶ 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 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.²³⁷

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 U.S. reentry much more difficult as the United

²³⁶ Kayla Tausche, *Can the US Rejoin TPP? Yes — With Permission*, CNBC (Jan. 26, 2018, 11:01 AM), <https://www.cnbc.com/2018/01/26/can-the-us-rejoin-tpp-yes--with-permission.html> [<https://perma.cc/6SBH-TL2P>] (confirming that the TPP allows for the United States to rejoin provided existing members approve).

²³⁷ See Faithin Ungku & Charlotte Greenfield, *Trump Says U.S. Could Rejoin TPP if Deal Improved. How Hard Would It Be?*, REUTERS (Apr. 16, 2018, 3:42 AM), <https://www.reuters.com/article/us-usa-trade-china-tpp-explainer/trump-says-us-could-rejoin-tpp-if-deal-improved-how-hard-would-it-be-idUSKBN1HN0TW> [<https://perma.cc/2ZP3-PGA3>] (writing on President Trump's willingness to rejoin TPP if it were altered to further benefit the United States); 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> (reporting on President Trump's suggestion that the United States would not join the TPP).

States will need the approval of all existing TPP members to rejoin.²³⁸ 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 initiatives, such as “One Belt, One Road,”²³⁹ an immensely vast and ambitious trade project, while the United States remains on the outside. As the case of the AIIB 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.²⁴⁰ 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.

²³⁸ See Tausche, *supra* note 236 (citing officials explaining that rejoining the agreement would be simple, but achieving consensus on altered TPP terms to benefit U.S. would be more difficult).

²³⁹ See Transcript of *China's One Belt, One Road: Will It Reshape Global Trade?*, MCKINSEY & CO. (July 2016), <https://www.mckinsey.com/featured-insights/china/chinas-one-belt-one-road-will-it-reshape-global-trade> [<https://perma.cc/4K79-EEZS>] (identifying a Chinese initiative that might work against U.S. economic and political interests). 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 approximately one third of the global GDP as of 2017 are involved. *See id.*

²⁴⁰ See Chow, *Why China Established the Asia Infrastructure Investment Bank*, *supra* note 223, at 1263 (discussing how China’s approach to international trade under the AIIB works against U.S. interests and “displacing the United States as the final arbiter of the rules of international trade”).