

1

The Trans-Pacific Partnership

Looking Ahead to Next Steps

Deborah Kay Elms, Director, Asian Trade Centre in Singapore

THE UNFINISHED BUSINESS IN THE END GAME

After more than four years of negotiations, officials have been scrambling to conclude the Trans-Pacific Partnership (TPP) among the current 12 participating members: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. After dozens of rounds of very complex bargaining across an expanding set of members, negotiators are down to the final political decisions on how deep, wide, and ambitious the TPP agreement will ultimately become.

Most of the final sticking points could have been (and were) predicted at the outset of the negotiations. Rather than rehash specific problem areas, such as sugar, dairy, rice, intellectual property rights, or the environmental chapter (Elms 2013a, Schott et al. 2013), the focus here is on some of the broader issues that remain in the negotiations.¹ This chapter discusses the context of the negotiations, the concept of a “living agreement,” and the importance of creating a TPP Secretariat, and it engages in a discussion of future admission procedures for new members.²

These broader issues are likely to be critical to the future success of the TPP. Many of these ideas were discussed at length at the very outset of negotiations, starting in March 2010 in Melbourne. However, once officials began getting serious about the technical issues, most of the deeper concerns fell by the wayside. As officials limp toward the finish line, the urgency in finding creative solutions to these far-reaching aspects of the agreement has only increased.

THE CLUSTER APPROACH

One of the biggest challenges in getting the TPP to reach the highest aspirational goals of the “twenty-first century, high quality” agreement set forth from the beginning has been prodding trade officials to think as broadly as possible about the implications of their actions. Since the TPP-12 has been so active in negotiating free trade agreements (FTAs) in the past, many of the officials involved view the TPP as just another trade agreement, albeit one that is bigger and harder to negotiate than many of the others.

In the initial round of negotiations in Melbourne, officials wanted to think creatively. Rather than split themselves into traditional “chapters” for discussions (goods, services, investment, intellectual property, etc.), they tried dividing themselves into clusters. These clusters were supposed to consider overarching themes that ran across multiple issue areas and that might better conform to the “real world” of business than past FTA practices. However, the cluster idea quickly broke down once the discussions started moved into substantive areas. Officials reached for the familiar settings of traditional chapters, and the whole “cluster” approach was rapidly abandoned.

The only exception was the “horizontal” chapter, where nearly everything new and innovative about the TPP was tossed. This included ideas such as fostering small- and medium-sized enterprises, encouraging supply chains, bringing about regulatory coherence, and all things related to development and cooperation.

A moment’s reflection, however, will suggest that this approach was also going to be problematic. Placing all these diverse issue areas into

one basket left a handful of officials grappling with a wide range of topics and concerns. To compound the difficulties, these were all issues that had never before been addressed in a trade agreement—mostly because they were extremely tough to tackle. Now they were all bundled together and handed to one team.³ It is therefore not particularly surprising that the results from the horizontal chapter will be deeply disappointing to many.

The efforts to assist small- and medium-sized enterprises quickly devolved into a website.⁴ Much of the “meat” of the supply chain/business connectivity issues got pulled out and placed elsewhere in the agreement. This is fine, except that many in the supply chain industry, particularly those in logistics, have argued for years that the primary problem for supply chain operators is precisely that their issues fall in between ministries and, therefore, are never appropriately managed by anyone. The TPP was supposed to represent a rare opportunity to pull together a host of issues into one place and keep governments focused on this critical web of interlocking elements for business in the twenty-first century. By pulling these items out of their own special “chapter” and placing them back into various substantive chapters, such as goods or services, some of the synergies that were supposed to be unlocked by bundling them together will have been lost.

The regulatory coherence agenda may be the most disappointing of all. Whenever officials in the TPP have been asked about the twenty-first century components of the agreement, they cite regulatory coherence. The idea was that all the economies would try to harmonize standards in food, agriculture, and other areas if such a thing were possible. If not, they would at least try to accept as small a set as possible of compatible, multiple standards. As an example, if Economy A permitted a certain type of food safety inspection for apples, Economy B would be willing to accept this certification, even if their own apple inspection might be different. They would not be forced to harmonize standards to the same degree (which was seen as *too* ambitious), but they would go beyond what is typically found in an FTA—especially one with multiple parties.

The November 12, 2011, the Trans-Pacific Partnership Leaders’ Statement highlighted regulatory coherence in particular, noting that members pledged to “work to improve regulatory practices, eliminate

unnecessary barriers, reduce regional divergence in standards, promote transparency, conduct our regulatory processes in a more trade-facilitative manner, eliminate redundancies in testing and certification, and promote cooperation on specific regulatory issues.”

Such high ambition proved problematic to implement. It was especially difficult to get regulators from different ministries and agencies to cooperate with trade officials in the TPP around a broad agenda of increasing market access for members. In the end, the TPP chapter on regulatory coherence will be about the institutional framework for coherence. It will contain information on inquiry points and procedures for obtaining information and promoting transparency. It will not really discuss standards at all. Some of this material got put into the specific chapters on sanitary and phytosanitary standards (SPS) or technical barriers to trade (TBT). But in general, it proved too difficult to get regulators to cooperate in the TPP.⁵ The final result will be much less ambitious and twenty-first century than the early rhetoric would have suggested.

A LIVING AGREEMENT

All is not yet lost. One of the best ideas of the TPP from the beginning was to create the TPP as a “living agreement.” The idea gained momentum after officials observed problems in the World Trade Organization’s (WTO) Information Technology Agreement (ITA), which was being renegotiated at the same time that the TPP was getting underway. In the ITA, the electronics sector was liberalized and unleashed tremendous growth, especially in Asia. However, officials soon came to recognize that it had a serious flaw—given the method of negotiations (a positive list), technology was only liberalized if it was included on the list (c.f., Beltz 1997, Lee-Makiyama 2011, Lin 2011). This meant that as new technology was developed, it was not automatically included for market opening. Over time, and in a rapidly evolving industry, the ITA became less and less relevant as fewer and fewer traded products were covered. Record players might be eligible, but not smart phones, for example. Getting economies to sit down and reopen negotiations also proved extremely difficult and tedious.

It is true that FTAs usually have a clause for regular reviews. However, in practice, such reviews are frequently not held or are largely superficial. Even when economies take the review process seriously, the revisions undertaken generally consist of changes to the legal language of the document to bring sections into conformity with one another, or to try to bring different FTA provisions into compliance with one another. But periodic reviews have not, so far, been used for major renegotiations of an FTA.

Officials are not oblivious to these problems in other agreements. There are generally two different approaches taken to avoid creating obsolete commitments in “modern” FTAs. First, officials try to negotiate on the basis of a “negative” list. This approach means that new sectors are automatically opened for partner preferences, unless members specifically meet and declare reservations to opening the sector. The TPP uses a negative list for both services and investment, partly as a mechanism for remaining relevant in the future without the need for complex revisions to the agreement. It ensures that new industries and sectors are automatically opened for investment or foreign competition.

Second, most next-generation FTAs have complex committee structures built into their agreements from the beginning. The parties may agree to create a general trade committee that meets every year or every two years. This is supplemented with specific committees on goods, services, investment, government procurement, and so forth. These subcommittees or working groups are also scheduled to meet regularly—often every two years.

However, while these committees have made arrangements to meet, the actual practice of holding consistent, productive meetings has yet to be seen. In many of the latest generation of FTAs, it is frankly too soon to tell how well these committee structures will work because many have only just been completed and no reviews have been held. If there is an obvious flaw in the agreement, the committees will allow the parties to correct the problem. But modifications or improvements to the agreement to make it work better overall are less likely to happen. In most cases, committee meetings will probably be short affairs attended by junior staff.

Recall the promiscuity of many TPP members, as they signed multiple FTA agreements. Chile has agreements with 60 economies. By the

time it joined the TPP, Mexico had 12 FTAs linking 44 economies. By 2013, Singapore had 20 agreements, with another 5 under negotiation. Many of these deals come with complex committee structures for management. In most of the TPP economies, some portion of their trade ministry officials could spend their whole careers just preparing for one FTA committee review after another.

Because of this, TPP officials suggested a slightly different approach early on in the talks. This FTA would become a “living agreement.” This meant that it would not just be opened for annual reviews. Instead, it would be up for regular and ongoing discussions and revisions going forward. In this way, the TPP would never be out of date.

From an institutional perspective, a benefit of a living agreement is that TPP member economies would dedicate specific individuals to oversee and monitor their TPP commitments. The TPP would not just be examined in the every-two-years committee period.

A living agreement could, for example, take the rather limited framework for regulatory coherence in the original TPP document and, over time, turn it into something much more substantial.⁶ Regulators from across the TPP economies could engage in ongoing meetings and become accustomed to coordinating their regulations with one another before proceeding with changes that might impact the membership. New elements like sub-federal-level entities or states could be added to the government procurement commitments relatively easily under a living agreement provision. Reservations in specific service sectors or subsectors could be removed over time without requiring a wholesale renegotiation of the agreement.

The idea of the living agreement was discussed at length early on in the TPP negotiations. It was then largely dropped from conversations for most of the next three years while officials moved on to more substantive conversations about specific chapters. At the time of the end-game negotiations in 2014, it is not clear whether the idea will survive at all, or whether it will simply be a puffed up or enhanced version of the regular FTA review mechanisms.

A TPP SECRETARIAT

If it is to survive and be meaningful, a living agreement cannot be managed without a robust secretariat dedicated to supervising the TPP agreement. The intention of the TPP is to continue to expand in the future—at least in terms of membership. If the living agreement idea gains traction, the issue areas and coverage of the agreement will also increase over time.

Even if it does not expand any further, the TPP includes nearly 30 chapters and 12 member economies. Many of the rules go well beyond anything promised in the WTO or other FTAs. Commitments will be phased in over the implementation period(s), with different start dates likely for many members. This will add to the complexity of administering the agreement.

The TPP will require a dedicated staff to monitor implementation and reach out to the business community in each of the member economies. Otherwise, the provisions negotiated at great cost and difficulty through so many years are likely to be underutilized.

For example, many of the commitments in the agreement go well beyond obligations made in the WTO. This will make it impossible to use WTO dispute settlement for many issues in the TPP. Like most FTAs, the TPP has its own dispute settlement mechanism (DSM). However, unlike most FTAs, the TPP DSM has been designed to be actively used. Managing dispute cases will require an institutional structure. If the DSM picks up momentum over time, the case load could increase. It might even be possible to imagine a scenario under which the TPP develops a standing dispute system (more similar to the WTO).

Even leaving dispute settlement aside, such a complicated agreement cannot be managed by trade officials in the Asia desk, as in many other bilateral FTAs. Existing regional FTAs do not extend nearly as far, nor do they include such deep, behind-the-border commitments. The fact that these FTAs have worked without a secretariat is not a convincing argument for managing the TPP in the future. As it stands, many TPP officials have already complained about the difficulties of coordination in the negotiation stage.

Some have suggested that the APEC Secretariat could be used as the TPP Secretariat. After all, the TPP is officially one of the four possible pathways to the Free Trade Area of the Asia-Pacific (FTAAP) for APEC.⁷ So far, all TPP members are also APEC members. The accession clause for the TPP privileges APEC members as well.⁸ Leaving aside the issue of whether or not the TPP might eventually become the FTAAP, let us focus instead on whether or not the APEC Secretariat could do double-duty as the TPP Secretariat as well.

There are at least three reasons why using APEC is problematic. First, APEC's own statement of purpose is to "serve as an incubator of ideas." This function would be lost if the secretariat were to become somehow divided between staff responsible for monitoring the TPP, and staff incubating ideas in a nonbinding manner. APEC already has a very complex organizational structure of its own, and an extremely small secretariat staff to manage hundreds of meetings and thousands of participants in a rotating set of locations.

Second, not all of the APEC members are also members of the TPP. It is highly likely that the non-TPP members of APEC would find the suggestion to convert APEC into the TPP Secretariat quite objectionable. Even if only a portion of the APEC Secretariat was kept busy with TPP tasks, it would run the risk of diluting the non-TPP portion of the agenda.

Third, two of the possible pathways to the FTAAP are currently in play—the TPP and the Regional Comprehensive Economic Partnership (RCEP). The RCEP involves 16 parties in Asia, and may also need a secretariat at some point in the future, depending on if this agreement also progresses to become a kind of deep integration effort similar to the TPP. But this would mean that the APEC Secretariat would effectively be split into three different elements—a nonbinding ideas hub in APEC, the deeply ambitious TPP, and the (slightly?) less ambitious RCEP.

It is possible to argue that, in the long run, these functions might merge again in the FTAAP. In the meantime, the costs involved in setting up the institutional structure of a TPP Secretariat could be significant. However, even if the TPP eventually evolves into the FTAAP, such an outcome is likely to be well over a decade (and more likely two decades) away. In the interim period, businesses could

substantially benefit from a strong institutional structure to effectively implement the complicated TPP agreement.

In short, using the APEC Secretariat as the TPP Secretariat is a poor idea. The two ought to coordinate, but they must remain separate to provide the best service to both institutions. The TPP needs its own dedicated secretariat to manage this complex, binding agreement.

ACCESSION OF NEW TPP MEMBERS

In addition to the institutional issues around a secretariat, another broader, long-term issue that must be sorted out prior to closure of the TPP agreement is the procedures for accession of new members. Under the current “rules,” new members have been admitted after first applying to the current members. Each prospective member must then engage in a series of bilateral meetings to discuss possible irritants in the relationship that may prove problematic for the group as a whole. These issues may require resolution or progress toward resolution prior to entry to avoid having them interfere negatively on negotiations with others. Finally, the whole TPP membership has to collectively approve the new member for admission. New members must then wait for final domestic procedures to be completed before they are allowed to see the negotiating texts and formally sit down with other members at the table.⁹

A further informal provision introduced when Canada and Mexico joined in late 2012 prevented new members from “reopening” any closed chapters or provisions that had already been agreed upon by the existing members. Outstanding issues (those remaining in square brackets, which is how negotiators signal disagreements over specific points in a text) could be discussed and new issues tabled, but anything resolved could not be taken up again.

Taken as a package, these accession procedures suggest that, going forward, the next tranche of TPP members will have no room for negotiating on the TPP rules. New members will engage in bargaining over their own market access commitments in goods, services, investment, government procurement, and so forth, but they will have no input into the rest of the document.

From the perspective of those who have just spent more than four years negotiating over every comma, clause, and paragraph in the existing agreement, such provisions make a great deal of sense. They do not see any need for new members to be able to reopen any portion of the document that was finally nailed down. After all, many probably feel that the agreement was open to new members (particularly from APEC economies) at any point starting in 2008. If any new economy had wanted to enter at the negotiating stage, they could simply have put their hand up, gotten in, and negotiated for whatever priorities they might have wanted.

However, a lack of flexibility collides with one important political reality. The TPP would be substantially strengthened if China—currently with world's second-largest economy—enters. After all, one of the most important factors driving this mega-regional is the opportunity to knit together global value chains in a seamless trade agreement that contains not just tariff reductions but also substantial behind-the-border provisions. Since many of the presumptive second tranche of members, such as China, South Korea, Hong Kong, and Chinese Taipei, are deeply enmeshed in value chains across the Asia-Pacific region, getting them into the TPP would provide significant economic benefits (Wignaraja 2013; Baldwin and Kawai 2013; Petri, Plummer, and Zhai 2012).

For China, in particular, joining the existing TPP with no opportunity at all for discussing any of the existing provisions may present political difficulties at the domestic level. This suggests that current TPP members would be wise to think carefully about a mechanism that would apply specifically to the first batch of new entrants in the next tranche of negotiations. To write into the agreement that accession terms are to be negotiated later with each new entrant will be unacceptable to many. Some sort of clarity, therefore, is needed on what sort of accession provisions will be required of new aspirants.

One suggestion is that officials think creatively now about a clause that gives certain measures of flexibility to the first set of members entering the TPP. Such a clause will not allow a wholesale rewriting of the agreement, but might allow for some modest changes, or perhaps participation in writing new rules or new chapters. Done carefully, it would

satisfy the demands for new members to put their collective stamp on the agreement, while not prolonging new negotiations.

Such a mechanism would also encourage any economy considering membership to declare its interest. This would have the added benefit of getting all potential new members into the deal at the same time. The alternative could be to add new members on an ongoing and regular basis, which would be deeply problematic.

Some sort of clause in the agreement that privileges entrants in the first wave of new applicants could be extremely helpful in pushing TPP expansion in the near term. The clause does not need to allow wholesale changes to the existing text, but some ability to show flexibility may be necessary to encourage new entrants. Otherwise, entry becomes a “take it or leave it” proposition and increases the risk that prospective members may opt to “leave it.”

CIRCLING BACK TO THE LIVING AGREEMENT

Managing revisions is tricky, of course. It also comes with one final caveat for officials. Although there are some strong incentives to create a living agreement overall that allows for general flexibility and improvements to the document going forward, there is at least one challenge to be addressed. For economies that require a ratification procedure for approval of the TPP, there is, presumably, some threshold level of change that cannot be exceeded in the document before it triggers a new ratification process. In other words, it remains to be worked out how much change can take place within the TPP in terms of revisions to the text, rules, schedules, commitments, new members, and so forth without going back to member-state domestic procedures for ratification. These conditions should be specified as clearly as possible in advance of closing the agreement so that members know what to expect from one another in the future.

CONCLUSIONS

Pressure has been building for closure of the TPP. Getting the deal done is important. The economic benefits from this 12-party agreement are likely to be substantial. But the TPP is not just another FTA. It represents the chance to set a trade agenda for the future across a wide range of topics for economies throughout the Asia-Pacific region. This means that the agreement should not be settled in haste. More importantly, it also means that key decisions need to be reached about broader issues related to the institutional structure of the TPP. These decisions must be made now, before the deal is closed, on issues such as creating the TPP as a living agreement, setting up a TPP Secretariat, and clarifying entry conditions for future members. These choices must be made deliberately and carefully, even while officials are struggling to get closure on the most highly sensitive issues remaining in settling the agreement. It will not be easy, but wise decisions are necessary now to ensure the long-term success of the TPP.

NOTES

1. To show how deep and enduring the sticking points have been in these talks, the book by Lim, Elms, and Low (2012) is likely to have highlighted nearly every problem area still contested in October 2013, although the book was completed by the team of authors very early in 2012.
2. See also a longer version in “The Trans-Pacific Partnership Agreement: Looking Ahead to the Next Steps,” Asian Development Bank Institute Working Paper Series, No. 443, December 2013.
3. Of course, officials will quickly argue that they had other individuals they could engage as resources whenever and wherever needed. But I believe that history will show that most of the teams on the horizontal chapter managed the bulk of the details on their own.
4. And, I would argue, this is even worse than it sounds—unless the TPP creates a meaningful secretariat, such a website will rapidly collapse since no one will be responsible for maintaining it.

5. If the living agreement idea takes off, this may not be a fatal blow, as regulators would meet regularly to discuss changes and, perhaps, move toward harmonization.
6. Other than the European Union, perhaps the closest trade agreement to a “living” agreement idea is the Australia–New Zealand Closer Economic Relations (Leslie and Elijah 2012). Another potential model might be APEC itself, where commitments made by member states evolve over time. The difference, of course, with APEC is that APEC is not binding.
7. The others are what is now called the Regional Comprehensive Economic Partnership (RCEP) or ASEAN-Plus-Six, consisting of the 10 members of ASEAN plus China, Japan, South Korea, India, Australia, and New Zealand; ASEAN-Plus-Three; and “other.”
8. The relevant clause is drawn from the original P4 agreement and reads, “The Agreement is open to any APEC economy or any other State (Article 20.6), subject to terms to be agreed among the Parties.”
9. In practice, this basically means that if a new member did not have clearance from the US Congress in the form of existing coverage under trade promotion authority (TPA), the new member had to wait for the Office of the US Trade Representative (USTR) to inform Congress of the intention to begin negotiations. New members then wait 90 days for comments inside the United States before US domestic procedures were considered concluded. For the existing members, Malaysia already “had” approval under a stalled bilateral negotiation and could join the talks almost immediately, but Japan, Mexico, and Canada did not and had to wait 90 days before entry. This was true even though TPA technically was expired, since the USTR was acting “as if” TPA rules were in place for TPP negotiations. For details on what is now called TPA, see Destler 2005, Fergusson et. al., 2013.

SOURCES

- Baldwin, Richard E. and Masahiro Kawai. 2013. *Multilateralizing Asian Regionalism*. ADBI Working Paper No. 431.
- Beltz, Cynthia. 1997. “Global Telecommunications Rules: The Race With Technology.” *Issues With Science and Technology* 13 (3): 63–70.
- Destler, I.M. 2005. *American Trade Politics*, 4th Edition. Washington, DC: International Institute for Economics.

- Elms, Deborah. 2013a. "The Trans-Pacific Partnership Negotiations: Some Outstanding Issues for the Final Stretch." *Asian Journal of WTO and International Health Law and Policy* (AJWH) 8 (371).
- . 2013b. "The Trans-Pacific Partnership Agreement: Looking Ahead to the Next Steps." Asian Development Bank Institute Working Paper Series, No. 443, December.
- Fergusson, Ian, William H. Cooper, Remy Jurenas, and Brock R. Williams. 2013. *The Trans-Pacific Partnership Negotiations and Issues for Congress*. CRS Report No. 7-5700. Washington, DC: Congressional Research Service.
- Kawai, Masahiro, and Ganeshan Wignaraja. 2011. *Asia's Free Trade Agreements: How Is Business Responding?* Northampton, MA: Edward Elgar.
- Lee-Makiyama, Hosuk. 2011. "Future-proofing World Trade in Technology: Turning the WTO IT Agreement (ITA) into the International Digital Economy Agreement (IDEA)." *Aussenwirtschaft* 66 (3): 279–322.
- Leslie, John, and Annmarie Elijah. 2012. "Does N=2? Trans-Tasman Economic Integration as a Comparator for the Single European Market." *Journal of Common Market Studies* 50 (6): 975–993.
- Lim, C.L., Deborah Elms, and Patrick Low, eds. 2012. *Trans-Pacific Partnership: A Quest for a 21st Century Trade Agreement*. Cambridge, UK: Cambridge University Press.
- Lin, Tsai-Yu. 2011. "Systemic Reflection on the EC-IT Product Case: Establishing an 'Understanding' on Maintaining the Product Coverage of the Current Information Technology Agreement in the Face of Technological Change." *Journal of World Trade* 45 (2): 401–430.
- Petri, Peter, Michael Plummer, and Fan Zhai. 2012. *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment*. Washington, DC: Peterson Institute for International Economics.
- Schott, Jeffrey, Barbara Kotschwar, and Julia Muir. 2013. *Understanding the Trans-Pacific Partnership*. Washington, DC: Peterson Institute for International Economics.
- Wignaraja, Ganeshan. 2013. "Regional Trade Agreements and Enterprises in Southeast Asia." Asian Development Bank Institute Working Paper Series, No. 442.