

**THE TPP AND RCEP:
MEGA-TRADE AGREEMENTS FOR THE PACIFIC RIM**

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I. INTRODUCTION

Free trade agreements (FTAs) such as the Trans-Pacific Partnership (TPP) and the Regional Cooperative Economic Partnership (RCEP) seldom include provisions of international commercial law, even though they are the “nitty-gritty” of international trade (and economic development) that relate to modernization and harmonization of diverse national laws, such as those addressing secured transactions, simplified corporate registration, bankruptcy, and warehouse receipts as discussed at the Second Pacific Rim Conference in January 2015. However, long experience with the North American Free Trade Agreement (NAFTA) and other FTAs has shown that without such harmonization the full potential of tariff and non-tariff barrier elimination under FTAs is seldom fully realized, particularly for small- and medium-sized enterprises (SMEs) in developing nations. This has been implicitly recognized by the U.S. government in its statement of objectives for the TPP:

Small- and medium-sized enterprises (SMEs) are the backbone of the U.S. economy and are *key contributors to economic growth in other TPP economies as well . . .* We are seeking through this agreement to provide SMEs the tools they need to compete across TPP markets. TPP will benefit SMEs by eliminating tariff and non-tariff barriers, streamlining customs procedures, strengthening intellectual property protection, promoting e-commerce, and developing more efficient and transparent regulatory regimes. In addition, TPP will include a

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first-ever chapter focusing on issues that create particular challenges for SMEs.¹

All are aware that SMEs in particular find it difficult to compete in the global market place because in many countries, *inter alia*, they have limited or no access to credit, and because the costs of incorporation are sufficiently high that they choose to operate in the “shadow” economy, without incorporating or paying taxes. Doing business in this informal manner makes it virtually impossible for SMEs to gain access to credit and to export or import goods or services, or to compete effectively with increased imports into their home markets. It thus seemed logical to the conference organizers that in the course of a conference devoted to such critically important commercial law issues, some attention should be given as well to certain important FTAs, such as the TPP.

Their foresight was justified because the TPP, with the negotiations concluded in October 2015, includes a separate chapter (24) devoted to addressing the special needs of SMEs. (The extent, if any, the RCEP will address SMEs is uncertain.) The TPP provisions relating to SMEs are essentially limited to assuring better transparency and information-sharing on publicly available websites, capacity building and the creation of an SME Committee to work toward assisting SMEs with awareness of commercial opportunities.² Eventually these initiatives, along with the many other trade liberalizing measures of the TPP, may provide SMEs with an enhanced opportunity to participate in both local economies and globally, although rules enacted independently offering better access to credit and to the formal economy may produce greater benefits for SMEs in the short to medium term.

The shift worldwide over the past several decades from a focus on multilateral trade negotiations to regional trade agreements, resulting today in well over 600 FTAs, customs unions, and other such accords, has been discussed in detail elsewhere³ and need not be treated in detail here. This proliferation has been driven by many factors, but most significantly by the failure of the now 162 members of the World Trade Organization (WTO) to agree on the broad “single undertaking” package of trade agreements contemplated in the negotiations initiated in November 2001 at Doha, Qatar.⁴ Only a single multilateral trade

¹ *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/tpp/Summary-of-US-objectives> (last visited Feb. 27, 2016) (emphasis added).

² See TPP Full Text, signed February 4, 2016 by all parties; not yet in force, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited Mar. 18, 2016).

³ See, e.g., *Regional Trade Agreements*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Nov. 22, 2015).

⁴ See, e.g., David A. Gantz, *LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES* 30-49 (Cambridge University Press, 2013, 2015).

accord, the relatively non-controversial Trade Facilitation Agreement, ratified by only 55 WTO Members in the two years since it was agreed upon,⁵ has been concluded since 1995. Work on “plurilateral” negotiations, on information technology, and on alternative energy goods, among others, has lagged.⁶ It is thus not surprising that many nations, including the two overlapping groups constituting the TPP and RCEP, have shifted their energies to RTAs, although as both the TPP and RCEP negotiations evidence, the economic and political hurdles to reaching agreement among 12 and 16 nations, respectively, have also proven extremely difficult.

This article, based on the presentation made at the conference in early January 2015, discusses the TPP, the RCEP, and more briefly the third mega-free trade agreement, the Transatlantic Trade and Investment Partnership (TTIP), incorporating progress (or lack thereof) realized with each over the past several years. For reasons that are obvious from the discussion, the TPP and RCEP parties have a strong interest in the outcome of the TTIP negotiations given the enormous economic importance of the European Union and the United States.

A. Trans-Pacific Partnership

The TPP negotiations required six years to reach a successful conclusion on October 5, 2015.⁷ The 12 TPP negotiating parties (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam) account for 40% of global GDP and some 30% of worldwide trade in both goods and services. The volume of U.S. trade in goods and services with these 11 countries is approximately \$1.88 trillion USD (with an aggregate deficit of about \$71.8 billion USD),⁸ exceeding U.S. trade with the EU (about \$1.06 trillion USD)⁹ or with Mexico and Canada combined under NAFTA (about \$1.2

⁵ See *Trade Facilitation: Niger, First LDC to Ratify the Trade Facilitation Agreement*, WORLD TRADE ORGANIZATION (Aug. 6, 2015), https://www.wto.org/english/news_e/news15_e/fac_06aug15_e.htm. Two thirds of the membership, or 107 Members, must ratify the Agreement before it can enter into force. *Id.*

⁶ The revised international trade agreement (ITA) was agreed to in principle only in July 2015 with only a minority of WTO members (about 50) participating in the negotiations. See Bryce Baschuk, *U.S., Others Seal Information Technology Deal*, BLOOMBERG BNA INT’L TRADE REP. (July 30, 2015).

⁷ *Trans-Pacific Partnership Ministers’ Statement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Oct. 5, 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/trans-pacific-partnership-ministers>.

⁸ Ian F. Fergusson, Mark A. McMinimy & Brock R. Williams, *The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE 15, 17 (Mar. 20, 2015), <http://photos.state.gov/libraries/vietnam/8621/pdf-forms/tpp-crsreport032015.pdf>.

⁹ *European Union*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/europe-middle-east/europe/european-union> (last visited

trillion USD).¹⁰ The United States already has FTAs in force with Australia, Canada, Chile, Mexico, Peru, and Singapore that were concluded between 1992 and 2007. The TPP parties among themselves have concluded many other FTAs.¹¹

For the United States government, the TPP is seen as a platform for expansion to other Asia Pacific Economic Cooperation (APEC) members, with the hope being that other Asia-Pacific nations, including Korea, Indonesia, the Philippines, Thailand, and even China will eventually become members. It is also anticipated that the TPP will establish the initiative in developing regional trading rules on new policy issues in the global economy, perhaps providing stimulus to future trade liberalization at the WTO.¹² TPP is a key element of the Obama Administration's "pivot" to Asia, and is seen as a means of setting the standard for "wide and deep" future trade agreements, in implicit competition with a less extensive effort at liberalization being undertaken with the RCEP, and ultimately with China's broader "Free Trade Area of the Asia-Pacific" (FTAAP), proposed at an APEC meeting in November 2014.¹³

The 30 TPP chapters include not only improved market access through reductions in tariffs and non-tariff barriers but also disciplines for state-owned enterprises (SOEs); anti-competition rules; transparency and anti-corruption; enforceable rules on labor rights; environmental protection; "WTO-Plus" intellectual property protection; E-commerce; special benefits for SMEs; investment protection including mandatory investor-state dispute settlement; customs, supply chain/trade facilitation and management; government procurement; effective government-to-government dispute settlement; and temporary entry for business visitors.¹⁴

The most politically sensitive issues have included Japanese reluctance to provide better access to its rice, wheat, beef, pork, auto and auto parts, and insurance markets; United States reluctance to facilitate Vietnam's access to U.S. footwear and apparel markets and Canadian and Australian access to the U.S. sugar markets; access to the United States and the other NAFTA countries for autos and auto parts; protection in Canada, the United States, and elsewhere for

Nov. 22, 2015).

¹⁰ *NAFTA Triumphant Assessing Two Decades of Gains in Trade, Growth and Jobs*, U.S. CHAMBER OF COMMERCE 1 https://www.uschamber.com/sites/default/files/legacy/reports/1112_INTL_NAFTA_20Years.pdf (last visited Nov. 22, 2015).

¹¹ See, e.g., ASEAN-Australia-New Zealand Free Trade Agreement Preamble, NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE (Feb. 27, 2009), <http://www.asean.fta.govt.nz/preamble/> (to which Australia, Brunei, Malaysia, New Zealand, Singapore, and Vietnam are parties); Fergusson et al., *supra* note 8, at 9.

¹² Fergusson et al., *supra* note 8, at 2.

¹³ See *APEC Summit: Chinese Trade Pact Plan Backed by Leaders*, BBC NEWS (Nov. 11, 2014), <http://www.bbc.com/news/world-asia-29999782>.

¹⁴ See TPP Full Text, *supra* note 2, chs. 2-4, 17, 16, 26, 19, 20, 18, 14, 24, 9, 5, 22, 15, 18, and 12, respectively.

dairy products; United States insistence on enforceable labor rights and environmental protection provisions; and United States advocacy for “TRIPS-Plus” additional protection for branded pharmaceuticals, particularly those in the “biologics” category. The United States’ negotiating abilities were severely hampered by President Obama’s lack of Trade Promotion Authority (TPA) legislation until June 2015 because only TPA encourages the United States’ negotiating partners to give their final, best positions on contentious issues by assuring them that once a trade agreement is concluded it will not be amended nor indefinitely delayed by the Congress.¹⁵

Efforts to conclude the TPP were thus given a tremendous boost when Congress enacted the TPA that the Obama Administration had been seeking for over 18 months. After a series of complex and contradictory legislative maneuvers,¹⁶ the legislation was adopted by Congress and signed into law by the President on June 30, 2015. In addition to requiring an up or down vote in each house of Congress and precluding inordinate delays in Congress, as well as providing a set of negotiating objectives for trade agreements agreed to by the President and Congress, the TPA provides a variety of procedures to give Congress a greater role in the pending trade negotiations and, perhaps most importantly, to require any trade agreement, including the TPP, to be made public 60 days and to be notified to Congress 90 days (November 5 in the case of TPP) before it is entered into (signed) by the president.¹⁷ Signature by the President is legally possible on or after February 3 under TPA, but submission of the agreement to Congress is not likely before April or May 2016, when the mandatory report on the effects of the TPP prepared by the U.S. International Trade Commission is submitted to Congress.¹⁸

¹⁵ See *Trade Promotion Authority (TPA)*, COALITION OF SERVICES INDUSTRIES, <https://servicescoalition.org/services-issues/trade-promotion-authority-tpa> (last visited Nov. 22, 2015) (stating that in enacting TPA, “Congress recognized the importance of retaining the President’s ability to enter into trade agreement and determined that countries trading with the United States would be reluctant to enter into agreements which would be subject to unlimited congressional debate and amendment.”).

¹⁶ See *Trade Promotion Authority Secures Approval in US Congress*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (June 25, 2015), <http://www.ictsd.org/bridges-news/bridges/news/trade-promotion-authority-secures-approval-in-us-congress>.

¹⁷ Implementation of Trade Agreements, 19 U.S.C. § 4205(a)(1)(A)-(B) (2015) [hereinafter TPA-2015]; see *Notice-Intention to Enter into the Trans-Pacific Partnership Agreement*, WHITE HOUSE OFFICE OF THE PRESS SEC’Y (Nov. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/05/notice-intention-enter-trans-pacific-partnership-agreement>.

¹⁸ The USITC Report is due no later than May 18 (105 days after signature) but could be submitted earlier if finished before that date. See *Trans-Pacific Partnership Agreement Faces Long Road to Approval*, SIDLEY AUSTIN LLP (Nov. 6, 2015), http://www.sidley.com/news/2015-10-20_international_trade_update (setting the various time requirements applicable to the TPP under TPA legislation).

However, those in the Obama Administration and elsewhere who hoped that TPA would allow the TPP ministers to conclude the negotiations at the end of July were disappointed. While the negotiators were said to have reached full agreement on the difficult chapters relating to investment, government procurement, electronic commerce, and environment, they were not able to bridge differences regarding automobile rules of origin, nor the serious disagreements over market access for milk products, of major importance to Canada, New Zealand, and the United States.¹⁹ Mexico, to protect its growing North American market, had apparently sought 65% regional value content, higher than the 55% proposed by the United States or the 40% advocated by Japan.²⁰ (NAFTA rules of origin, article 403(5), require a 62.5% regional value added.)²¹

Nor were the United States' demands fully met for protection of certain pharmaceutical products, strongly supported by some Republicans in Congress and the U.S. pharmaceutical industry but opposed by many Democrats and by most of the other negotiating parties because of the increased costs the proposal could mean for national health services, particularly in developing nations.²² Negotiators also failed in July to resolve Australia's and Canada's demands for increased sugar quotas in the U.S. market, which the United States suggested depends on the parties reaching a broader agreement on outstanding TPP issues,²³ likely including, for Canada, improved market access for imported dairy products and for Australia, full acceptance of investor-state dispute settlements (ISDS).

All of these issues were resolved through a series of compromises just two months later.²⁴ The parties settled, *inter alia*, on a 45% regional content to qualify for duty free auto trade within the region, albeit with long phase-out periods (25-30 years) of current U.S. most-favored nation (MFN) auto and small truck tariffs, while Australia achieved a higher sugar quota in the U.S. market and New Zealand better access to U.S. and Canadian dairy markets. Disagreements on textile rules of origin and state-owned enterprises (SOEs) were also resolved. The United States was forced to settle for only five years of full protection for

¹⁹ See *TPP Ministerial Ends Without Deal as Talks Rupture Over Autos*, WORLD TRADE ONLINE (Aug. 1, 2015), <http://insidetrade.com/daily-news/tpp-ministerial-ends-without-deal-talks-rupture-over-autos>.

²⁰ *Id.*

²¹ *North American Free Trade Agreement*, NAFTA SECRETARIAT, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=2> (last visited Nov. 22, 2015).

²² See Jonathan Weisman, *Trans-Pacific Partnership Session Ends With Heels Dug In*, N.Y. TIMES (Aug. 3, 2015), http://www.nytimes.com/2015/08/04/business/international/trans-pacific-partnership-session-ends-with-heels-dug-in.html?_r=0 (discussing the various issues eluding agreement).

²³ *U.S. Official: Australian, Canadian Sugar Access Hinges on Broader TPP Deal*, WORLD TRADE ONLINE (Aug. 4, 2015), <http://insidetrade.com/daily-news/us-official-australian-canadian-sugar-access-hinges-broader-tpp-deal>.

²⁴ See TPP Full Text, *supra* note 2.

biologic drugs, in contrast to the twelve years sought.²⁵ Controversially, the parties gained the right to exclude their own tobacco control measures from being subject to investor-state arbitration.²⁶ The overall results will be analyzed exhaustively by the 12 governments and their congresses and parliaments over the coming months as ratification processes in all of them get under way.

B. Regional Comprehensive Economic Partnership

The RCEP is a highly ambitious negotiation, led by China, among 16 nations with a combined population of over three billion and combined GDP of over \$17 trillion USD. The participants in the RCEP are Australia, Brunei, Cambodia, China, India, Indonesia, Japan, Korea, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand, and Vietnam. Negotiations have been occurring in parallel to the TPP (which has seven common members), with the seventh round of negotiations taking place in Thailand in February 2015²⁷ and the ninth round following a ministerial meeting in August in Myanmar.²⁸ With the rivalry between the RCEP and TPP, it is obvious that China views RCEP as an alternative route to a Free Trade Area of the Pacific.

The negotiators hope for, *inter alia*:

- (1) Tariff elimination on 95% of tariff lines;
- (2) A common market access schedule;
- (3) Coverage of intellectual property, investment, environmental protection, financial services and labor standards;
- (4) Support of domestic structural reforms;
- (5) Support port, road, power and other infrastructure improvements;
- (6) Trade facilitation, particularly with regard to improving customs administrative services.²⁹

²⁵ See *After Trans-Pacific Partnership Deal Reached in Atlanta, Focus Shifts to Ratification*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (Oct. 8, 2015), <http://www.ictsd.org/bridges-news/bridges/news/after-trans-pacific-partnership-deal-reached-in-atlanta-focus-shifts-to> (last visited Dec. 6, 2015).

²⁶ TPP Full Text, *supra* note 2, at ch. 9; art. 29.5.

²⁷ See *Regional Comprehensive Economic Partnership (RCEP): An Asian Trade Agreement for a Value Chain World*, ASIAN TRADE CENTRE (Feb. 10, 2015), <http://www.asiantradecentre.org/talkingtrade/2015/2/10/regional-comprehensive-economic-partnership-rcep-an-asian-trade-agreement-for-a-value-chain-world>.

²⁸ *Next Round of RCEP Meet from Monday in Myanmar*, TIMES OF INDIA (Aug. 2, 2015), <http://timesofindia.indiatimes.com/business/india-business/Next-round-of-RCEP-meet-from-Monday-in-Myanmar/articleshow/48314930.cms>.

²⁹ See generally *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS,

Given the diversity of the participants and the reluctance of some countries, such as India, to engage in deep tariff reduction and other market liberalization, these objectives are proving difficult to negotiate. The August 2015 meeting was designed in part to encourage India to go beyond its current domestic regime in services through reduction of market access barriers, consistent with India's expressed intent to increase its share of global trade from only two percent in 2015 to three and a half percent by 2020.³⁰ Moreover, Indian businesses, among other participants, are concerned that opening their markets to Chinese automobiles, steel, textiles, dairy, and rubber, among others, could be harmful to their interests.³¹ This has led to an Indian government negotiating strategy that reportedly would provide certain tariffs for the Association of Southeast Asian Nations (ASEAN), Korea, and Japan, with which India already has FTAs (at the level agreed in those agreements), but lesser reductions for the other parties, such as China.³²

The other challenges include differing levels of development; the "low level of ambition" for some parties such as India, as noted immediately above; historical rivalries among some of the parties (Korea-China-Japan, India-China); and territorial conflicts in the East and South China seas. The fact that ten of the 16 members are members of ASEAN, which has had a very poor track record over 20 years in reducing intra-regional tariff and non-tariff barriers and adopting effective government to government dispute settlement mechanisms, also suggests the level of difficulties facing the negotiators.

Not surprisingly, these various challenges led to an agreement in November 2015 to extend the negotiations into 2016. As one minister noted,

Considering the challenges faced and the value of constructive engagements, more time is needed to conclude the negotiations. Hence we the leaders of the RCEP (Regional Comprehensive Economic Partnership) participating countries agreed to allow negotiations to continue and request our negotiators to intensify the efforts to conclude and achieve a mutually beneficial and high quality agreement in 2016.³³

<http://www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf> (last visited Nov. 22, 2015).

³⁰ *Next Round of RCEP Meet from Monday in Myanmar*, *supra* note 28.

³¹ Nayanima Basu, *India Firms up Strategy for Regional Trade Deal*, BUSINESS STANDARD (July 31, 2015), http://www.business-standard.com/article/economy-policy/india-firms-up-strategy-for-regional-trade-deal-115072901317_1.html.

³² *Id.*

³³ *See Countries Agree to Strive for RCEP Agreement*, Nov. 22, 2015, ENGLISH.NEWS.CN (quoting Malaysian Prime Minister Najib Razak), http://news.xinhuanet.com/english/video/2015-11/22/c_134842365.htm (last visited Dec. 7, 2015).

C. Transatlantic Trade and Investment Partnership

Total United States-European Union trade in goods and services is worth over one trillion U.S. dollars annually, comprising about one third of world goods and services trade, and almost half of global GDP.³⁴ The two economies account for nearly four trillion U.S. dollars in reciprocal investment.³⁵ Together, the United States and EU account for about 800 million persons.³⁶ The after-effects of the Great Recession and the slow growth of the two economies (particularly the EU), suggest that both economies would benefit from a reduction of barriers affecting bilateral trade. As with the TPP, United States as well as EU officials see the TTIP as what may be the last practical opportunity for the two developed nation groups, rather than China and the other BRICS,³⁷ to determine the parameters of trade law and policy for the future. For USTR, an objective is thus to “enhance cooperation on the development of rules and principles on issues of global concern”³⁸ As one Chinese scholar aptly observed, “the TTIP seeks to drive multilateral mechanisms forward through bilateral approaches, dominate future global two-way trade and investment arrangements, and establish new rules and mechanisms for global trade and investment.”³⁹

In some respects the complexity of the issues being discussed in the TTIP exceeds those of the TPP, since only trade in agriculture currently remains subject to high tariffs. The focus is thus in the area of regulatory cooperation and coherence, along with improved consultation and mutual recognition of regulations, all of which would facilitate supply chain management in a world where almost no complex product is made in a single jurisdiction. Financial services market access, expanded government procurement obligations applicable to sub-federal governmental entities in the United States, and a limited number of agricultural and manufacturing goods tariffs are also under discussion. Both the EU and the United States appear committed to TRIPS-Plus protections for the pharmaceutical industries, with the inclusion of labor rights and environmental protection obligations (the latter two not necessarily enforceable). Data protection and privacy issues are also being discussed, with the EU particularly interested as

³⁴ *Fact Sheet: United States to Negotiate Transatlantic Trade and Investment Partnership with the European Union*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Feb. 13, 2013), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/february/US-EU-TTIP> [hereinafter *Fact Sheet*].

³⁵ *Id.*

³⁶ Susanne Kraatz, *The Transatlantic Trade and Investment Partnership (TTIP) and Labour*, EUROPEAN PARLIAMENT (Nov. 2014), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536315/IPOL_BRI\(2014\)536315_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536315/IPOL_BRI(2014)536315_EN.pdf).

³⁷ “BRICS” is an acronym for Brazil, Russia, India, China and South Africa.

³⁸ *Fact Sheet*, *supra* note 34.

³⁹ Cui Hongjian, *The Transatlantic Trade and Investment Partnership: Origins, Objectives and Impact*, CHINA INSTITUTE OF INTERNATIONAL STUDIES (Nov. 7, 2013), http://www.ciis.org.cn/english/2013-11/07/content_6440336.htm.

well in expanding the scope of geographical indications. As with the United States in the TPP negotiations, both parties appear to have an interest in including market-based disciplines for SOEs.⁴⁰

The United States also remains committed to protection of foreign investors, including “meaningful procedures for resolving disputes between U.S. investors and the EU and its Member States. . . .”⁴¹ The EU Commission was only able in November 2015, after an 18 month hiatus on treatment of investor-state dispute settlement, to agree on a negotiating position, one which contemplates several controversial elements such as extremely broad protection for state regulatory flexibility from liability and the substitution of a court and appellate mechanism for the traditional ad hoc arbitral tribunals.⁴² TTIP ISDS may well be a make-or-break issue for the United States given that the Republican majorities in Congress are strong proponents of ISDS, as reflected in the TPA negotiating objectives.⁴³

The negotiations, initiated in 2013, have moved very slowly due as well to the complexity of the issues being considered, EU Parliamentary ambivalence, and U.S. government (and private sector) preoccupation since the beginning of 2014 with obtaining TPA and successfully completing the TPP negotiations and obtaining Congressional approval.

In an 11th round of negotiations, held in October 2015, the EU and the United States apparently discussed a number of matters, including market access (offers to reduce tariffs on 97% of tariff lines), regulatory cooperation, and rule (such as sustainable development),⁴⁴ but it does not appear from official reports that major progress was made.

II. CONCLUSION

The Doha Round of WTO multilateral trade negotiations seems no more likely as of the end 2015 to be resuscitated than it did five or six years ago, after

⁴⁰ *Fact Sheet, supra* note 34. See also *U.S. Objectives, U.S. Benefits in the Transatlantic Trade and Investment Partnership: A Detailed View*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Mar. 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View> [hereinafter *U.S. Objectives*].

⁴¹ *U.S. Objectives, supra* note 40, at 6.

⁴² EU Commission, *EU Finalises Proposal for Investment Protection and Court System for TPP*, Nov. 12, 2015, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396> (last visited Dec. 6, 2015).

⁴³ TPA-2015, *supra* note 17.

⁴⁴ See Commission, *Report on the Eleventh Round of the Negotiations of the Transatlantic Trade and Investment Partnership*, Nov. 5, 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf (last visited Dec. 5, 2015).

six years of deadlock.⁴⁵ Agreement on new trade disciplines and on market access for agricultural trade (along with reduction of agricultural subsidies), industrial goods, and services has proved elusive.⁴⁶ Under such circumstances the proliferation of RTAs including efforts to conclude and put into force the “mega-RTAs” such as TPP, RCEP, and TTIP, will no doubt continue. That being said, the negotiators of the mega-RTAs have all discovered, unsurprisingly, that negotiating trade agreements with broad reductions in tariff and non-tariff barriers, and in related issues such as disciplines for SOEs and regulatory coherence, among 12 (TPP), 16 (RCEP), or 29 (TTIP)⁴⁷ nations is extremely challenging.

Many of the political complications with the TPP have already been noted. The unfortunate delay in obtaining TPA prolonged the final TPP negotiations until October, with signing delayed until February 2016, as noted earlier. Under the best of circumstances, the formal transmittal of the Agreement and implementing legislation is unlikely before April 2016, well into the 2016 campaigns to elect a new President and Congress.⁴⁸

Moreover, early approval by Congress is anything but certain despite the likely continued strong support of most Republicans in the Senate and Congress. The vociferous opposition to TPA experienced by a majority of Democrats in both the House and Senate in May and June 2015 will engender a similar legislative battle at such time as the President decides to submit the TPP itself to Congress,⁴⁹ as many members will fear that support for TPP would lead to their defeat in

⁴⁵ Director-General Roberto Azevedo reported to the WTO members at the end of July that there had not been sufficient progress to deliver a work program on remaining issues of the Doha Development Agenda (DDA) by the July 31 deadline, which he characterized as a “very disappointing result.” *DG Azevedo: Expect “Intense, Relentless” Engagement on DDA Issues in September*, WORLD TRADE ORGANIZATION (July 31, 2015), https://www.wto.org/english/news_e/news15_e/tnc_31jul15_e.htm. Azevedo much later urged WTO Members to “‘seize the last opportunity to show the flexibility and political will that we need’ for a successful Ministerial Conference” in December 2016. *DG Azevedo Urges Flexibility and Political Will for a Successful Ministerial Conference*, WORLD TRADE ORGANIZATION (Dec. 7, 2015), https://www.wto.org/english/news_e/spra_e/spra99_e.htm.

⁴⁶ Bryce Baschuk, *Agricultural Stalemate Thwarts WTO’s Market Access Talks*, 32 BLOOMBERG BNA INT’L TRADE REP. (July 23, 2015).

⁴⁷ Although the EU Commission negotiates on behalf of the 28 EU Member nations, it seems almost certain that any final agreement will have to be ratified by the individual members as well as the EU, a significant challenge if any final agreement meets the objectives of the negotiators.

⁴⁸ See *TPP Backers See Window for Congressional Approval in 2016 Despite Election*, WORLD TRADE ONLINE (Aug. 13, 2015), <http://insidetrade.com/inside-us-trade/tpp-backers-see-window-congressional-approval-2016-despite-election> (quoting Gabe Horwitz of Third Way and Bill Reinsch of the National Foreign Trade Council).

⁴⁹ See Carter Dougherty & Angela Greiling Keane, *Obama Victory on Trade Wins Him Another Fight with Fellow Democrats*, BLOOMBERG BNA INT’L TRADE REP. (June 25, 2015).

November even if they are not opposed to trade agreements in principle. Still, a few optimistic pro-trade Democrats believe that there may be a window for consideration of the Agreement after the “super Tuesday” primaries March 1 but before the summer recess and the Presidential nominating conventions,⁵⁰ but only if the President and Congressional leaders believe they have sufficient votes to pass the legislation.

Otherwise, barring consideration in a post-November election “lame duck” session, TPP’s submission to Congress would be in the hands of a new president, and approval or disapproval would be the responsibility of the next Congress. A Republican president would probably support TPP, and be able to garner sufficient Democratic votes in the House and Senate to assure enactment. Whether Hillary Clinton would submit the Agreement to Congress, should she become president, is uncertain. While she strongly supported TPP as Secretary of State, as a presidential candidate she refused to support TPA and has equivocated on TPP,⁵¹ although as president her views likely would be influenced by the security and foreign policy considerations in Asia that have encouraged President Obama to strongly support TPP. In the writer’s view, it is likely that Ms. Clinton, if elected President, would support Congressional approval of the TPP, realizing that without TPP her Administration would be bereft of a credible Asia policy.

While the RCEP negotiators are publicly committed to concluding the negotiations by the end of 2016, it seems obvious that this will be possible only if the negotiators bow to the demands of India for very limited reductions in tariffs and discrimination against certain parties. In the writer’s view, the RCEP negotiators are likely to be faced with a difficult choice among inordinate delays, settling for an agreement that results in very limited trade liberalization beyond the FTAs that many of the 16 parties have already concluded among themselves in the past, a situation where one or more of the negotiating parties (probably India) withdraws from the negotiations, or the negotiations are abandoned entirely.

The TTIP is perhaps on the slowest of the three tracks, and cannot reasonably be concluded until well into the next U.S. presidential term. On one key issue, investor state dispute settlement, as indicated earlier, no meaningful negotiations have been undertaken since March 2014, as the EU Commission, Parliament and Member states did not resolve their internal disagreements until November 2015. Controversy within the European Parliament also exists with regard to data protection and protection of public services, even though in the latter case the United States and the EU have agreed that the TTIP will not restrict domestic governments from providing water, education, health, and other

⁵⁰ *TPP Backers See Window for Congressional Approval in 2016 Despite Election*, *supra* note 48.

⁵¹ See Clark Mindock, *Hillary Clinton and Trans-Pacific Partnership: Obama Aide Calls Her Out on TPP Past*, *INT’L BUS. TIMES* (June 19, 2015), <http://www.ibtimes.com/hillary-clinton-trans-pacific-partnership-obama-aide-calls-her-out-tpp-past-1975980> (contrasting Clinton’s earlier TPP support with more recent support of Democrats opposed to TPA and TPP).

services, or require privatization of any of them.⁵² Nor should one assume that EU Members that have traditionally insisted on strong protection for their agricultural products, such as France and Italy, have moderated their views. Technical discussions are likely to continue on a regular basis throughout 2016, but it will probably not be evident until sometime in 2017 or later whether the United States and the EU have the political will to conclude the ambitious and far-reaching agreement that they have proposed to each other.



⁵² *EU Parliament Adopts TTIP Resolution, ISDS Compromise Language*, International Centre for Trade and Sustainable Development (July 9, 2015), <http://www.ictsd.org/bridges-news/bridges/news/eu-parliament-adopts-ttip-resolution-isds-compromise-language>.

