Applying Public Choice Theory to Trade Negotiations and Agreements

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Draft of May 10, 2016

Introduction

Trade negotiations and trade agreements have always involved a battle of interest groups, as producers who focus on the domestic market are at odds with those who export. Producers who sell domestically tend to favor high tariffs, whereas exporters want to see tariffs reduced. These two groups have always been at the heart of fights over how much liberalization should take place in trade negotiations.

In recent decades, though, the role of interest groups has grown. First, the scope of the trade regime was expanded through lobbying by these groups. For example, various intellectual property holders convinced developed country governments that their issues were "trade" issues, and should be on the trade agenda, successfully for trade agreements to provide substantive intellectual property protections. With that precedent set, the expansion continued, as business groups pushed other issues, and civil society groups chimed in with their own issues.

Second, having expanded the scope, lobbying ensued over exactly what the rules in these new areas should say. Now, instead of just haggling over which industries should see tariff cuts, interest groups face off over substantive policy matters. IP holders got their issues into trade agreements, but civil society then fought back, by trying to narrow the scope of the rules.

The result is that modern trade agreements have become just like typical domestic legislation and regulation, which are heavily influenced by interest groups with strong feelings about particular issues. Today's trade agreements are, to a great extent, a set of international rules that govern specific domestic policies. Exactly what those rules should say is argued about behind the scenes by interest groups, with the winners getting a set of rules that favor their policy preferences.

In this way, the content of today's trade agreements -- the choice of issues covered, and the specific obligations -- can be explained by public choice theory. Public choice involves a variety of concepts and ideas, but a key point is that interest groups are able to play an outsized role in governmental decision-making. Just as this happens with domestic regulation, it is now a core feature of international trade negotiations as well. Rather than assuming that governments act in the public interest, public choice theory shows how government actions and decisions are largely a response to interest group influence.

The main purpose of this paper is to explore how interest groups have influenced today's trade obligations, focusing in particular on a number of provisions of the Trans Pacific Partnership (TPP). Some of these obligations seem to have only weak support on policy grounds and from the public at large, and their inclusion is only explained by an examination of the lobbying process. That is not to say that these specific provisions are necessarily bad, and the paper does not take a position on their merits.
Rather, it seeks to provide an understanding of their origin and how they arose from the process. The paper also makes tentative suggestions for possible reforms to the current system.

The paper begins with a brief explanation of how public choice theory applies to global trade governance. It then examines how public choice led to the expansion of the trade regime. Finally, it examines the application of public choice to a number of specific TPP provisions.

As a final introductory point, this paper focuses to a great extent, although not exclusively, on issues related to interest group influence in the United States. These issues exist in other countries as well, and the absence of a discussion does not suggest they are unimportant. However, the international aspects of the issue will have to await further research and study.  

Public Choice Theory and Global Trade Governance

It is beyond the scope of this paper to provide a detailed explanation of public choice theory. I will simply offer a brief overview, along with a discussion of how the theory differs slightly in the trade law context because we are dealing with global governance rather than a domestic government.

At its core, public choice theory applies economic thinking to politics and government. By doing so, it can help explain the outcomes of policy-making, emphasizing that government officials acting in the public interest is too simplistic an explanation for how governments behave. In this regard, public choice theory tells us to look at the interests of particular non-governmental groups, and their influence on government decision-makers. In this way, it can shed light on the choices governments make. Ideally, public choice explanations could generate better decision-making outcomes, as new governing approaches could be adopted that would correct the existing flawed policies.

Public choice theory involves a number of specific concepts and ideas. It explains that public officials have their own interests, such as maximizing their power and status; it considers the role of voting and rationality; it shows how interest groups with strong and passionate views can lobby more effectively than diffuse, larger groups with weakly held views, and how the opaque nature of the process works to the advantage of these interest groups; it talks about how votes on one issue can be traded for votes on another (log-rolling); and it covers rent seeking, by which groups persuade governments to grant them special economic privileges.

1 Although a recent statement from EU Trade Commissioner Cecilia Malmström suggests that the role of a wide range of interest groups is strong in EU trade policy-making as well: "And no, the EU industry does not have greater access to EU negotiating positions than other stakeholders. We take into account submissions by industry, but exactly the same applies to submissions by trade unions, consumer groups or health or environmental organisations – all of which are represented in the advisory group that regularly meets our negotiating team."


2 This overview is drawn from Eamonn Butler, Public Choice - A primer.

4 P. 36.
5 Pp. 49-57
6 Pp. 58-61
7 Pp. 58-61
8 Pp. 66-74.
9 Pp. 75-81.
Public choice theory is a wide ranging field of study of the behavior of government decision-making. While the overlap is not perfect, many of the concepts can also apply to the global governance arising from international trade relations. Just like interest groups shape domestic governmental decision-making, they also shape international trade negotiations and agreements.

Trade agreements are not "government," of course, but they are a form of supra-national "global governance." National government involves a domestic political system with a great deal of political power, whereas global governance is a much weaker international network of agreements and institutions.

Domestic government consists of, among other things, elections, legislators making laws, and bureaucrats implementing regulations. Political decision-making is susceptible to interest group influence at each stage; the precise manner in which groups and individuals act in their self-interest, and what role this plays, reflects the particular processes involved.

By contrast, global governance in general, and trade governance in particular, have different elements. Rather than citizens voting in elections, their representatives engaging in legislation, and an executive branch implementing regulations, international governance involves a different set of players and institutions. By and large, national governments are the actors in international affairs, and decision-making is undertaken collectively by these governments. Importantly, these national governments are actually made up of many and varied agencies, government branches, and sub-national government entities, each of whom can play an independent role.

In an international negotiation, national governments come together to "legislate," in a sense, creating new law in the form of an international agreement. Decision-making is, generally speaking, based on consensus, although it should be emphasized that the power of the parties is unequal, with some having a more effective voice than others.

The resulting agreements may involve binding and enforceable rules that constrain or require government action. They are, in a limited sense, a "constitution" of international economic obligations, with national governments as the subjects.

Unlike with domestic government, however, with global governance there is only a limited international bureaucracy, mostly relevant for its judicial power. The agreements sometimes create permanent institutions, but often these institutions are simply information providers, or facilitators of future negotiations.

While its special nature influences the analysis, the formulation and implementation of trade agreements is susceptible to the same kind of examination that public choice theorists apply to government decision-making. The institutions, the process, and the degree of power may differ. Nevertheless, this paper will show that public choice concepts can help explain how global trade governance has developed in the particular way it has in recent decades.

In terms of the core elements of public choice, the role of interest groups and the bureaucracy are particularly crucial in international trade affairs. Interest groups shape the trade regime at two stages. First, they establish the scope of the trade regime, by influencing what issues are brought within its framework. And second, they guide the specific provisions of the regime, as opposing interest groups lobby governments to advocate for their preferred policy outcomes.
The influence of interest groups is enhanced by the nature of the trade negotiating process. This process is a relatively obscure governmental function, in which ordinary citizens are often uninformed and unaware of the implications. Even if the general public did understand the significance, it would be difficult to organize an effort to counter interest group demands. Small groups with strong interests in a particular issue are usually able to overcome the weakly held views of the broader public. Furthermore, as shown in the next section, interest groups have been able to establish influence within the domestic trade bureaucracy, with groups such as intellectual property holders and labor unions, among others, having a constituency among trade officials. As a result, interest groups are able to play an outsized role in the process, with few checks provided by the views of the broader public.

It is worth emphasizing that in the trade negotiation context, interest groups include private interests, of course, but also national governments, and departments within those governments, who are both the creators and the subjects of the agreements. The role of governments as participants in the international governing system is probably the biggest difference from domestic government, although it has parallels in the way that domestic bureaucracies develop an incentive to expand their own powers.

In the next sections, the paper offers a historical overview of how private groups have played a role in trade negotiations. It then explains how interest group influence expanded the trade regime beyond traditional protectionism in the 1980s and subsequent decades. Finally, it considers how specific issues were resolved through lobbying battles in the TPP negotiations.

The Role of Interest Groups in the Expansion of Trade Agreements into Domestic Policy-Making

In their original form, taking the 1930s era bilateral trade agreements as the starting point, trade agreements focused on the lowering of tariffs and quotas. Through negotiations, governments agreed to reduce their protectionist measures in exchange for their trading partners doing the same. The resulting agreements consisted mainly of schedules of tariff concessions, that is, promises to lower tariffs on designated products.

Even in this early era, though, governments recognized that domestic regulations and taxes could serve as a substitute for protectionist tariffs. To address this concern, they came up with rules to act as a check on disguised regulatory protectionism. For example, in GATT Article III, they instituted a requirement of National Treatment, under which all laws, regulations and requirements must not treat imported products less favorably than domestic products. Thus, while the focus of these trade agreements was tariff reductions, there were also more general rules, but they were limited in the extent to which they affected domestic policy. A national treatment obligation should have little impact on policy-making, as governments can adopt any policy they choose, as long as it does not discriminate.

During this time, the motivation for trade negotiations, at least in the United States, did not come primarily from industry. Rather, it was part of a general reformulation of trade policy-making in the U.S. government, the implications of which may not have been well understood. To a great extent, the reciprocal trade agreements of the time were a response to the Smoot-Hawley tariffs of 1930, and an attempt to establish new procedures that would avoid a repetition of that protectionist failure. Rather than have members of Congress agree to each other's demands for protectionism to help each one's constituents (log-rolling), the Reciprocal Trade Agreements Act put the Executive branch in charge of
negotiating lower tariffs with trading partners. With the Executive branch now taking the lead, the practical result was that trade negotiations were sponsored by certain influential government officials, such a Secretary of State Cordell Hull, based on the view that they constituted good economics and would encourage peaceful international relations.

Some industries supported the idea of trade liberalization, while others objected, but the arguments took place in the context of whether to reauthorize the Reciprocal Trade Agreements Act, rather than in the negotiations themselves. In fact, industry complained that it was shut out of the process that was being run by the Executive branch. The structure of industry interaction with the trade bureaucracy and the negotiating process itself were designed to keep private interests at a distance.

Thus, at this time, the initiative for trade negotiations, and their content, came mainly from government officials who were pursuing a particular policy vision, not from industry demands. It was perhaps a historical accident and an anomaly, but the role of interest groups was diminished during this transition period. The dominant role of Executive branch officials in guiding the scope and content of trade negotiations continued through the planning for, and negotiation of, the GATT/ITO.

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10 Irwin http://www.nber.org/chapters/c6899.pdf; see also, http://www.dartmouth.edu/~dirwin/docs/III.pdf
11 See Hull memoirs, p., 352 ("I was thirty-six years old when in my maiden address in Congress I pleaded follower tariffs and fewer trade restrictions. I was sixty-two years old when in 1934 we finally won the fight to reduce them, after our temporary victory with the Underwood Act of 1913 which the World War badly handicapped and the Republicans promptly tore to pieces when they came to power in 1921. In all that interval I never ceased urging a liberal commercial policy for the United States. There was never any narrowing or compromising of my attitude; rather it broadened from 1916 on as I saw the effect that a freer flow of commerce could have on world peace. I never ceased attempting, by acts and utterances in and out of Congress, to keep alive and advance my economics and peace policy and to implement it at the earliest possible stage."); Ikenberry, p. 170 ("There is a consistency in the orientation of Cordell Hull and other State Department officials that runs throughout the Roosevelt period. This was the conviction that an open international trading system was central to American economic and security interests and that such a system was fundamental to the maintenance of peace."); add wilcox citation; Irwin, Mavroidis, Genesis of the GATT, pp. 9-13
12 Aaronson, p. 36 ("Workers, congressmen, and some business leaders complained that the process for determining tariff reduction was secretive and did not include representatives from the people or affected interests.")
13 Haggard, pp. 115-116
14 Irwin, pp. 341-342 http://www.nber.org/chapters/c6899.pdf ("Unlike Smoot-Hawley, Congress’s consideration of the RTAA attracted virtually no participation by interest groups. Haggard reasons that “in contrast to 1930 . . . when interest groups were the main protagonists and specific tariff rates the issue, the most important issues at stake in 1934 were institutional, centering on the transfer of authority from Congress to the executive” (1988, 112). The RTAA was simply enabling legislation, and no one knew how the authority would be used, how successful the negotiations would be, or how extensive the agreements might be. When the RTAA was passed, Congress could not anticipate how important the legislation would become or even whether it would be sustained by future Congresses. In view of the many short-lived trade policy experiments of the past three decades, it was not obvious that the RTAA would necessarily bring a lasting, durable change in U.S. trade policy making. Perhaps this accounts for the minimal participation of interest groups, even among export associations, in the RTAA’s passage.")
15 Aaronson, pp. 34-60 ("… State Department officials were overconfident of their ability to broker between various interests to develop American trade policies. After all, the Trade Agreements Division … had the responsibility of recommending measures to implement Article VII of the Atlantic Charter. This, they thought, gave them alone, rather than with members of Congress or business leaders, the expertise to broker the national interest on trade policy through a multilateral trade negotiation." p. 54); Irwin, Genesis of the GATT, 46-52; Wilcox, 38-40.
Over time, domestic trade policy making changed in the United States, with industry and other private groups exerting more influence. As everyone learned the new process, interest groups came to play a more important role. Congressional reform measures in the mid-1970s meant special interests had additional opportunities to weigh in during the legislative process. But the most important change came on the Executive branch side, where the Advisory Committee system gave various private actors special channels to communicate their views with trade negotiators, from which they had been effectively shut out in the 1930s and 1940s.

Advisory Committees started tentatively as part of the 1962 trade legislation, but were more fully developed as part of the 1974 Trade Act. The new system had its first test in the Tokyo Round of GATT talks. John Ikenberry argues that this system "institutionalized" private interests, thereby allowing the U.S. Trade Representative's Office to "co-opt" them, and in this way build a trade consensus for the Tokyo Round, which passed Congress easily.

But the co-option of industry proved to be short-lived, and interest groups’ relationship to the government moved in the other direction. In the next big trade negotiations, the Uruguay Round and the NAFTA, the scope of trade agreements expanded in terms of their impact on domestic policy-making. Instead of simple constraints on discriminatory domestic policies, there were now trade rules that constituted regulation in and of themselves, on intellectual property, labor, and the environment, to name a few. To a great extent, this expansion was the direct result of lobbying by interest groups, including both industry and civil society. The general framework established for the trade regime was susceptible to the influence of interest groups who saw how they might use it to their advantage. These groups came up with theories as to why their issue belonged in trade agreements, and were able to convince key governments that an expansion of trade agreements made sense as a matter of policy.

One of the first big new areas to be included was intellectual property protection. International agreements and institutions already existed here, but certain industries considered them ineffective for promoting their interests, and wanted something stronger. Several U.S. companies and groups saw a possible connection between IP protection and trade, and convinced the U.S. government that IP protection should be part of trade agreements. They also brought their European and Japanese counterparts on board with the effort, and together they were able to argue successfully for including IP protections in the Uruguay Round of the GATT negotiations (as well as the NAFTA negotiations).

16 Destler, American Trade Politics, pp. 68-69 ("More open floor procedures also offered new opportunities for special interests to press their proposals.")
17 Exec. Order No. 11, 143, 3 CFR 181; Exec. Order No. 11, 159, 3 CFR 211.
18 Campbell, pp. 379-386; Winham, JWT article, pp. 383-385
19 Ikenberry, pp. 297-301. He explains that through these committees, "the role of interest groups was made more predictable." See also, Winham, Tokyo Round book, pp. 308-317; Winham, JWT article, p. 393.

In the TPP, one of the big objections from civil society groups has been that the business groups who make up the bulk of these advisors get special access to negotiating documents, and generally have too much influence. [cites] The most detailed and comprehensive explanation of the role of IP companies in U.S. and global trade policy comes from Susan Sell, Private Interests, Public Law. With regard to the TRIPS Agreement, she describes its creation as follows: "What is new in this case is that industry identified a trade problem, devised a solution, and reduced it to a concrete proposal that it then advanced to governments." P. 96; Drahos, pp. 2-6 ("TRIPS was not a case of simple lobbying because it required the drafting of a detailed international agreement containing US standards of intellectual property protection and then ultimately steering it through a multilateral trade negotiation.
The WTO's rules in this area purport to address only the "trade related aspects" of intellectual property protection. But reading the specific obligations, it is clear that this is not the case. The TRIPS Agreement sets out substantive regulations for intellectual property, for example, establishing minimum term lengths for copyright and patent protection.21

At the same time these negotiations were taking place, labor, environmental, and other civil society groups had begun to notice the impact of trade agreements on their issues, and were often opposing trade agreements as a result. In response, rules to blunt the perceived negative impact were developed. Early rules were non-binding, but over the years, they became stronger.22

As an illustration, consider the environmental side agreement of the NAFTA. Trade had generally been segregated from environmental issues, but some GATT litigation involving environmental measures, and the prospect of trade with a developing country that had weak environmental protections (Mexico), led to concerns by a number of environmental groups. Some of these groups were so adamantly opposed to trade agreements that they were not willing to engage on the issue in a good faith way. Others, by contrast, decided to play a constructive role in the process, and make suggestions for new trade agreement provisions that would satisfy some of their concerns. During the NAFTA negotiations, environmental groups demanded that U.S. environmental regulations be protected, and that Mexican environmental laws be enforced.23 Then, after the initial NAFTA text was deemed insufficient, these same groups played an important role in drafting an environmental "side agreement." While some of the more strident critics refused to endorse NAFTA, the moderate groups set out conditions for environmental rules in the NAFTA which would allow them to support it, including a strong and independent environmental commission. The final text reflected their input.24

Importantly, when interest groups argued for favorable new rules, it was not simply a one-off lobbying victory. Rather, in many cases, a permanent private sector-government connection was created, to be used to push the rules further at a later time. In this way, industries and civil society groups developed close ties to the trade bureaucracy.

For example, as intellectual property holders argued for the U.S. government to use trade policy to toughen IP protections around the world, a special section within USTR was created, and later expanded, to handle these issues. In the early to mid-1990s, the relevant USTR office was made up of several individuals doing a mix of IP, investment and services. Then in the 2000s, with the accession of China to the WTO, more serious concerns began to emerge related to IP protection. By the mid-2000s, more power and more resources were devoted to IP issues. In 2006, a separate IP office was created, involving more than one hundred states and that lasted from 1986 to 1993. The key to explaining how this was achieved lies in a small number of corporations creating ever widening circles of influence that brought more actors and networks into the cause of global intellectual property rights.”) See also, Stewart, GATT Uruguay Round, vol. 1 ("As a leading country in the export of intellectual property, the U.S. government began to receive pressure from its industries to seek protection in foreign markets.") p. 2255

21 [history of NAFTA Commissions; look at Charnovitz paper for labor history; research role of unions here -- who asked for these rules]
22 Mayer, p. 84.
23 Mayer, pp. 166-216; Hudson JOC article.
headed by an Assistant USTR for Intellectual Property, as well as a Deputy in charge of enforcement. By this time, the IP staff consisted of multiple, dedicated individuals. Currently, it is called the Office of Intellectual Property and Innovation, with 7-8 staffers working there.

Similarly, labor interests eventually pushed successfully for a permanent labor section at USTR to deal with their issues. A dedicated labor office at USTR was created towards the end of the Clinton administration, but it was the Bush administration that hired the first staffer. A second and third person were hired during that administration. A fourth staffer came during the Obama years, but one person then left (they are currently in the process of adding a replacement). All three current staffers came from the Department of Labor. They have also had a number of "detailees" over the years, from the Labor and State Departments.

The expansion of the trade regime, and the ties between interest groups and the government, continued to play a major role in shaping the U.S. trade agenda over the years. When the Obama administration decided to focus on the TPP as its major trade initiative, the trend continued. The next section offers a number of specific examples of how interest groups participated in the TPP negotiations.

Public Choice in Action in the TPP Negotiations

One of the highest profile trade negotiations in recent years has been the Trans Pacific Partnership, a wide-ranging agreement among 12 Pacific nations. The TPP contains all of the subjects covered by the great trade expansion of earlier decades, and a few new ones. This section discusses a number of specific issues in the TPP, in order to illustrate the role of interest groups in shaping the content of the trade regime.

The point of this section is not the result, who won or who lost on a particular issue, or who was right. Rather, the point is to explain the process as one dominated by interest groups. You may be in favor of strong IP protection and ISDS, or you may be anti-tobacco, pro-cheap medicines, and anti-shark finning. Either way, it is important to understand the trade negotiating process as one where interest groups argue for their positions and causes, and one where important social policies are made largely through lobbying battles. Of course, government officials play a role, and an Obama administration would likely take a different approach on some issues than a Bush administration would. Nevertheless, private groups play an important role in framing the debate and influencing the outcome.

Biologics


In addition, there has, to some extent, been a revolving door between the private groups who lobby on IP issues and USTR. See, e.g., http://insidetrade.com/short-takes/ustr-services-chief-leaves-head-industry-group-ip-official-promoted ("Stanford McCoy, who previously held the position, left USTR to become a lobbyist for the Motion Picture Association of America.")

26 Conversations with U.S. government official.

27 Conversations with U.S. government official.
Medicines are often very expensive to develop. Pharmaceutical companies argue that in order to recoup these high costs, they need a period in which they are the exclusive seller of the drugs they develop: A monopoly, in the form of a patent granted by the government. Under the WTO's TRIPS Agreement, the patent period is 20 years, although because of the time needed for regulatory approval procedures, the companies might not be able to sell the drug for the full 20 years.

In the TPP, a related issue was vigorously discussed, and was arguably the most contentious issue in the whole negotiation. For certain kinds of drugs made with living organisms (biologics), patents are difficult to apply, and the pharmaceutical industry wanted a period in which the data they rely on to obtain regulatory approval could not be used by competitors to make what are called "biosimilars." In essence, they wanted to prevent their competitors who make generic versions of the drug from getting started on their own development and approval process.

In the United States, current law provides for a period of 12 years of data protection. In many TPP countries, the period was zero, prior to the TPP. Balancing out all of the different views, and setting a standard for the TPP, proved to be very difficult.

For the U.S. pharmaceutical industry, the TPP was not just an opportunity to raise standards outside the United States, but also a chance to lock in the existing U.S. standard. But it sensed a reluctance on the part of the Obama administration to push this issue in the TPP, as the administration has favored changing the U.S. period to 7 years, and this had the industry worried from the outset.

For NGOs and other public health groups, the biologics issue was a fresh chance to fight on intellectual property issues. While they may have been caught off guard with the TRIPS Agreement, they were now fully aware of the implications of trade agreement rules on IP, and they were ready to battle here. They worked closely with a number of U.S. trading partners who resisted U.S. demands for longer protections.

The fight over biologics involved, at its core, a battle between two interest groups: the pharmaceutical industry, on the one hand, and a variety of public health groups, on the other. In addition, government entities themselves were part of the fight. Other TPP trading partners were opposed to longer protections; and within the U.S. government, key members of Congress pushed for strong protection, whereas the Obama administration appeared to be ambivalent.

In the end, a compromise was reached that agreed on a term of 5 years of data exclusivity, but with special provisions that may effectively guarantee 8 years of protection (although opinions differ on this, and a final resolution may have to await dispute resolution).

In terms of the interest group winners and losers on this issue, the U.S. pharmaceutical industry has expressed great dismay. Its champions in Congress, such as Senator Orrin Hatch, have indicated that the TPP provisions on these issues are unsatisfactory, and need fixing. NGOs may not be ecstatic about the result, but they probably recognize that things could have been worse.
As noted, however, the battle might not be over, and the lobbying continues. Congress needs to sign off on the final result. It may not do so with the biologics provisions in their current form, and both sides will continue the fight.

_Shark Finning_

Shark finning, which involves removing shark fins and discarding at sea the rest of the animal, often used for shark fin soup, is a long-standing concern of environmentalists. It has been prohibited under U.S. law for many years.

With a general goal of gaining support for -- or at least reducing opposition to -- the TPP from environmental groups, at the outset, USTR pushed for a strong environmental chapter, and was looking for new issues to include. In response, as part of the notice and comment process for the TPP, several environmental groups raised the issue of shark finning, and argued that the TPP offers an opportunity to encourage domestic actions to prevent this practice.\(^{30}\)

In reaction to this request, USTR included provisions on shark finning in its proposals for the TPP environmental chapter, described by U.S. officials as a "prohibition."\(^{31}\) It subsequently explained that, "Shark populations in the region are at particular risk, and the United States has proposed specific obligations in this area, such as actions to deter 'shark-finning' practices."\(^{32}\)

However, the U.S. demands ran into opposition from other TPP countries, who were wary of enforceable provisions on this issue, although details of the negotiations on this issue are limited.\(^{33}\)

30 Oceana and HSI submissions.

The U.S. proposal also contains new provisions directed at protecting shark populations, the official said.

"This is one area where we do have a proposal that is species-specific, and that is due to the fact that in some respects sharks have fallen through the cracks in terms of existing arrangements and agreements," the official said. The United States proposes that countries maintain measures to "ensure shark conservation," he said.

This would include some form of prohibition on "shark finning," the official said. ...


("The Office of the US Trade Representative said that the negotiations were still ongoing, and they would be pushing hard for strong environmental measures, including a ban on shark finning.
"A prohibition on shark-finning is one among the many trailblazing proposals that the United States has contributed to the TPP," said a spokesman.
"Despite resistance, we are continuing to push for the strongest possible outcome that is fully supported by comprehensive environmental enforcement."
)


33 Leaked TPP Environment Text Underscores U.S. Isolation On Enforceability, MEAs
of the TPP countries already prohibit shark finning;\textsuperscript{34} their decision not to support the U.S. position probably stems from a general objection to including such provisions in trade agreements. A few do not have such laws, and these countries may have been concerned about the burden of making changes.

Perhaps sensing that more pressure was needed, environmental groups sent a letter to USTR on shark finning and other environmental issues, demanding stronger obligations.\textsuperscript{35} Ultimately, however, the final TPP text on this issue remained relatively weak.\textsuperscript{36} Apparently, this was not an area where the United States was willing to push too hard. This result lead to a statement by the Sierra Club that the TPP was a "shark-killing" agreement.\textsuperscript{37}

The lobbying fight over the strength of the shark finning provisions was mostly fought by U.S. environmental groups and other TPP governments. There is no evidence of push back by U.S. groups who objected to a shark finning ban, aside from the very general objections of those who do not support including environmental issues in a trade agreement. The issue of shark finning is somewhat obscure, and probably did not attract much attention. The practice is already banned in the United States, so there is not a powerful domestic industry to advocate for it.

In addition to falling short of U.S. demands on dispute settlement and MEAs, the Canadian compromise text also fails to fully satisfy initial U.S. demands for groundbreaking conservation provisions. Among other things, the U.S. has pressed for the TPP to include a ban on fisheries subsidies that contribute to overcapacity and overfishing; a ban on the practice of cutting off shark fins, and a ban on trade in illegally obtained plants and wildlife.

On shark finning, the Canadian compromise text does not include any specific requirement for countries to ban this practice, although it mentions that as one option countries can take to promote conservation of marine animals. Specifically, Article SS.16.4 states that “[e]ach party's fisheries management system shall, based on the best scientific evidence available, promote the long term conservation of sharks, marine turtles, seabirds and marine mammals through the implementation and effective enforcement of conservation and management measures that may include, as appropriate, the collection of species specific data, fisheries bycatch mitigation measures, catch limits, and prohibitions, such as on finning and commercial whaling.”

\textsuperscript{34} http://www.sharksavers.org/en/our-programs/shark-sanctuaries/learn-more/laws-protecting-sharks

\textsuperscript{36} https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf

4. Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures. Such measures should include, as appropriate:

(a) for sharks: the collection of species specific data, fisheries bycatch mitigation measures, catch limits, and finning prohibitions; …

\textsuperscript{37} http://content.sierraclub.org/press-releases/2016/02/trade-representative-touts-shark-killing-trade-deal-aquarium ("The TPP not only fails to meaningfully address the problem of shark fin trading, but it could actually lead to the slaughter of more sharks.")
The Tobacco Carveout from ISDS

Another example of interest group influence in the TPP negotiations can be seen in the idea of a "tobacco carveout." Here, a number of groups played a role in the TPP governments' development of a novel provision in a trade agreement: business associations, the tobacco industry, public health groups, and certain anti-cancer groups all fought over the high-profile issue of how tobacco should be treated.

The inclusion of tobacco in trade agreements has long been controversial. In the late 1980s and early 1990s, the U.S. government's push to open foreign tobacco markets was seen by some public health groups as spreading a dangerous product to unsophisticated consumers in the developing world, who would fall prey to the nefarious efforts of cigarette advertisers. There was particular concern over how trade rules might affect anti-tobacco regulation, although even the lowering of tobacco tariffs came under attack. Eventually, a compromise was reached, under which the U.S. government would continue to lobby against discriminatory tobacco measures (including tariffs, and discriminatory internal taxes and regulations), but would not try to fight other measures.38

This delicate balance was upset by the move to bring ISDS into trade agreements. With ISDS, challenges are possible against measures that do not discriminate on the basis of nationality, and they can be brought by the companies themselves, with no government filter on claims. Two ISDS lawsuits against domestic tobacco control measures, against Uruguay and Australia, prompted new concerns, and tobacco in general became a big issue in the TPP.

At various points, there were proposals for a "full" tobacco carveout from the TPP (which might have meant that tariffs would not be lowered)39; to modest tweaks that might be as limited as calling tobacco "unique," although the full text of such proposals was never circulated, making them difficult to evaluate.40 In the end, the special treatment of tobacco was dealt with through a special provision in the Exceptions chapter, under which "tobacco control measures" would be carved out of ISDS only.41

The carveout raises a number of political and legal questions, such as: Can the TPP be ratified by the U.S. Congress with this tobacco carveout? Objections from key members of Congress are quite strong.42 And who exactly decides whether a particular measure is a "tobacco control measure"? Presumably, there must be some oversight, either from the relevant secretariat, or from a tribunal.43 But for the purposes of this paper, the relevant issue is which interest groups were pushing for and against the carveout, and how exactly did we end up where we did.

On the public health side of this issue, it is hard to believe that a tobacco carveout was the preferred solution of the public health community. Assuming they could accept any version of a TPP, their minimum goal would presumably be a broad, general exception applying to the entire TPP, including ISDS, along the lines of GATT Article XX (they might prefer no ISDS as all). Even if they

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consider tobacco particularly important as a health issue, a tobacco carveout gives them only a very small portion of what they hoped for.

On the other hand, a sub-set of the public health community is so focused on cancer caused by cigarettes that they were apparently quite excited by the tobacco carveout in spite of its limited scope, and also in spite of the other concerns generated by the TPP on other cancer and general health issues. Two groups in particular began lobbying for the TPP, specifically because of the carveout. The significance of this development should be emphasized: Two groups that have no ostensible interest in free trade in general were lobbying for the TPP because it carved out tobacco from ISDS. For them, apparently, the precedent set by the tobacco carveout -- treating tobacco as a uniquely harmful measure under international law -- was so important that they spoke publicly in favor of a trade agreement.

Moving to the other side, the business lobby in general has long been skeptical of carving out particular products for different treatment. If it is tobacco today, what product might it be tomorrow? And yet, after numerous consultations with industry groups about the TPP, the U.S. government pushed for the tobacco carveout in the final TPP text. Presumably, the government officials involved believed they could sell the TPP to the public and to Congress despite the carveout being in there. That is not to say the business groups were in favor of the carveout. But it suggests the government thought their opposition to the carveout would be weak enough that it could still pass Congress.

Of course, one group adamantly opposed the carveout: The tobacco industry. As the particular interest groups discriminated against, there was no way they could accede to this provision, and they are continuing to fight against it.

In terms of strategy, we do not yet know whether the Obama administration's approach here will be successful. The lobbying over the TPP is just beginning, and the power of particular players in industry, NGOs, and government remains to be seen.

Regardless, the tobacco carveout illustrates how interest groups play a crucial role in developing the regulations that are now a core part of trade agreements. Business groups strongly favor ISDS; most NGOs oppose it. Focusing on ISDS exclusively, the TPP is a clear victory for the business groups, with ISDS tweaks in the TPP quite limited, as noted above.

But when you consider the issue of tobacco, the story is a very different one. Here, a couple groups who have strong feelings about tobacco broke from the general public health community, and in exchange for agreeing to publicly support the TPP, were able to achieve the goal of casting tobacco in a negative light, and taking away legal protections from the tobacco industry that are given to investors generally. The tobacco industry was the big loser in this political battle.

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Thus, on the issue of how tobacco would be treated in the TPP, big business got its way generally, but a smaller health group was able to make an effective push for its position.

As with biologics, the battle may not be over. Senate Majority Leader Mitch McConnell of Kentucky, a tobacco-producing state, has long protested against a tobacco carveout.\textsuperscript{47} Passing a TPP with the carveout in it may be a very difficult task.

Also like biologics, it is important not to focus exclusively on U.S. interests. Australia has a long-standing concern with ISDS, and tobacco in particular, due to the Philip Morris ISDS lawsuit it faced,\textsuperscript{48} and Malaysia was also a very important player here, as its public health groups had been some of the strongest proponents of carving tobacco out of the TPP.\textsuperscript{49}

\textit{The Minimum Wage Provisions}

After traditionally playing little role in trade agreements, over the last couple decades, labor issues have grown in importance. Beginning with the NAFTA, where a labor commission was established, more recent U.S. trade agreements have included binding rules on labor rights that are enforceable under the agreements' dispute procedures. These rules include requirements to enforce domestic laws; and to apply certain ILO Conventions.

If there is a general requirement to enforce domestic laws, of course, that would include minimum wage laws. But until the TPP, there had never been a specific obligation to have a minimum wage. The TPP changes this. After many hints along the way that the minimum wage would somehow be included in the TPP,\textsuperscript{50} the labor chapter includes the following obligation in Article 19.3:

\begin{quote}
2. Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
\end{quote}

There are questions about what this provision means. Could the minimum wage be set at any amount, such as one cent per hour? And will there be any legal challenges brought on this issue? Only Brunei and Singapore do not have a minimum wage, and few labor complaints are brought under trade agreements anyway. As a result, maybe this provision is only for show, and not intended to be enforced.

As to who it is to be shown to, presumably it was designed as part of the push by the Obama administration to market the TPP as "the most progressive trade agreement in history."\textsuperscript{51} There are numerous administration references to the minimum wage in their TPP promotion efforts.\textsuperscript{52}

In terms of interest group involvement and support, the question is, who is this provision for? Despite their general opposition to trade agreements, labor unions do push for expanded labor protections in trade agreements. There was a proposal by labor union groups to have broad rules on complying with

\textsuperscript{47}News articles
\textsuperscript{50}
\textsuperscript{51}
\textsuperscript{52}
ILO standards, which included references to the minimum wages. The TPP language seems to be a version of this demand.

**Financial Services Data Localization**

Sometimes interest group battles spill over from the private sector to the government. Interest groups are mainly business and civil society groups, but they might also be individual government agencies. These agencies also participate in the lobbying fights over trade agreement provisions.

One of the biggest issues for the U.S. government in recent trade talks has been data flows. For various reasons, foreign governments sometimes restrict the flow of data out of their country (this may be about protectionism, but could also reflect privacy concerns). The United States has pushed hard to use trade agreements to restrict this practice.

There is one exception: In financial services, the U.S. Treasury Department wants to maintain its ability to limit data flowing abroad. The rationale has to do with what some U.S. agencies, such as the SEC, believe is necessary in relation to their efforts to maintain adequate access to companies' data.

The final TPP text prohibits data flow restrictions in general, but not in the area of financial services, indicating that Treasury's view prevailed. However, once again, the negotiations may not be over, as the U.S. financial sector and its allies in Congress continue to push this issue. In order for Congress to pass the TPP, some changes might need to be made, either in the TPP, or through a binding commitment related to future FTAs.

**Currency Manipulation Provisions**

As noted above, sometimes a government agency can be an interest group. In the case of currency manipulation, a number of U.S. industries, including in particular the automobile industry, have pushed hard for binding provisions on currency manipulation. They have made very detailed proposals in this regard.

In reaction, U.S. trading partners have voiced strong objections. In addition to resistance from trading partners, there was also pushback from the U.S. Treasury Department, which had concerns that such a provision might constrain U.S. monetary policy. In the end, no such provisions were included in the TPP; there was merely a side accord setting out some general principles.

**Conclusions**

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53 TPP model labor chapter. ("labour laws means a Party’s statutes and regulations, or provisions thereof, that are related to the following rights:

... (f) acceptable conditions of work with respect to wages (including minimum wages), hours of work, occupational safety and health, workers representatives, termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement.")


55 Id.

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We always hope that the governing process is objective and evidence-based. Public choice theory tells us that it will not always be so, and explains why that is. In this regard, trade negotiations are no different than domestic regulation. Today's trade negotiations involve interest group battles over what global trade rules should say. In some cases, that leads to sub-optimal results.

At the beginning of the modern era of trade agreements, the scope for lobbying mischief was probably more limited. The main goal of trade negotiations was to lower tariffs and quotas. Interest groups might slow that process, or point it to certain industries rather than others, but aside from that the impact of lobbying was limited. Executive domination of the trade policy making process limited the role of private demands.

Over time, however, interest groups were able to use their influence to broaden the role of trade agreements. A channel of industry communication was created, and was initially used as a way for government to coopt the industry. Later, however, it became a means for private groups to push their agenda on the government. At that point, interest group fights broke out that mirror those in domestic governance. Today, rent-seeking, interest group dominance over ordinary citizens' wishes, and bureaucratic capture are all deeply embedded in the trade regime. Thus, when we analyze trade negotiations and trade agreements, the traditional contest between free trade and protectionism is much less important. Rather, interest group battles are crucial for understanding the results.

As a consequence, we should not delude ourselves into thinking that trade agreements will represent the public interest. Trade rules are made the same way as other rules, with all the political decision-making flaws. That is not to say that all such trade rules are bad ones. Some interest groups lobby for good policies, and sometimes laws and regulations are useful. But it does mean that we should not blindly accept trade governance rules as being good. Rather, we should look critically at their origins, and think carefully about their impact.

That impact should be understood in two ways. First, there is substantive governance that arises from trade agreements. We should think about whether the policies adopted are good ones. Second, with more global governance, there is less domestic regulatory autonomy. Putting aside any policy disagreements, the division of power between national and international governing entities is a sensitive issue that should be approach with care.

This paper mainly seeks to explain and understand the current trade regime. A full solution to the identified problems is outside of the scope. But here are some tentative thoughts on improving the situation. One is of a constitutional nature; the other relies on changes to domestic trade institutions.

In terms of constitutional oversight, public choice theory recognizes that constitutions may be used to guide domestic decision-making and reach better outcomes. Could international law offer a constitutional constraint on what takes place in trade negotiations and agreements? A formal constitution is probably impractical. But perhaps there could be an informal one, with some attempt at an agreement as to scope of trade and investment agreements, and how they fit with the rest of international law.

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Butler, pp. 95-103.
For many years, international law has dealt with the issue of "fragmentation." In the international economic law context, for example, we see trade agreements overlapping with other international agreements that deal more specifically with particular issues (such as intellectual property); questions about how to use general international law to interpret trade agreements; and possible conflicts between trade agreements and health agreements that restrict trade in some way (such as the WHO's Framework Convention on Tobacco Control). In this way, the evidence from existing agreements shows that governments have been moving forward in international economic law in a haphazard and disorganized way. More international law is continuously being created, with only limited thought as to how it fits with past international law.

To address this problem, at the highest levels, governments could convene an international law conference, to set up some boundaries and organizing principles. As part of this, governments could set limits, and define boundaries, as to what should be covered in trade agreements. Currently, the answer seems to be, whatever a particular interest group can lobby successfully for. There is no logical limit based on what is in there now, and it feels as though international economic law may swallow up all other fields. (If the international gun lobby were strong enough, one could imagine an Agreement on Trade Related Aspects of Gun Rights). This state of affairs seems flawed and increasingly unworkable, and governments may find it worthwhile to consider the issue outside the scope of a particular negotiation, in order to be able to engage in a more measured and thoughtful consideration of the issues.

Beyond this kind of constitutional oversight, there are also changes that could be made to domestic trade institutions. As things stand now, government officials who set the trade negotiating agenda are part of a system in which special interests play a significant role in directing the trade agenda. As described above, interest groups are able to push the agenda towards specific outcomes, and have a close relationship with government officials, with interest group personnel often going back and forth to a role in government.

But there is another model for making policy. In some areas, there are independent agencies who are shielded, to a great extent, from outside influence. In the trade world, there are entities such as the International Trade Commission in the United States and the Productivity Commission in Australia. No group is completely immune from lobbying, but these organizations are known for their independent judgements on trade matters. Beyond trade, there are entities such as the Federal Reserve and other central banks, who are given a great deal of discretion to set policy.

One could imagine the use of such independent bodies in setting the trade agenda, that is, establishing the scope and content of trade negotiations. These agencies would still solicit the views of the broader public, and take them into account. There would be written submissions and there would be open public hearings. But the decision-making process for determining how to approach trade policy would involve more independent thinking and would be less susceptible to lobbying. A particular government's proposed negotiating texts would not be written by, or vetted by, interest groups. They would be written by government officials who had been informed of everyone's stated interest, and then had the freedom to make a policy decision without further influence. In this way, the role of interest groups could be constrained, to ensure that they do not coerce a trade agenda that is not in the general public interest.

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