

A REQUIEM FOR THE *TRANS-PACIFIC PARTNERSHIP*: SOMETHING NEW, SOMETHING OLD AND SOMETHING BORROWED?

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On 4 February 2016, after almost seven years of negotiations, the Trans-Pacific Partnership Agreement ('TPP') was signed by 12 negotiating countries. The TPP was then labelled by all signatory countries as a 'new', 'high standard', and '21st century agreement'. However, the ratification process of the agreement was stalled and most likely in a definitive way, after the United States decided to withdraw from the TPP in January 2017. Before regretting this development, looking back to the halt of the ratification process of the TPP one can ask how much innovation this treaty really had and the usefulness of mourning the failure of having a TPP agreement, either in terms of future usage of TPP text, or in terms of political relevancy. This article aims to describe the level of novelty of the TPP, specifically in comparison with existing trade and investment agreements between TPP signatory countries, notably the United States. For that purpose, we have focused on the core disciplines of the agreement that were highlighted as novelty parts of the TPP, or that generated debate during the negotiation of the treaty. As a benchmark, we have compared the texts of the previous treaties concluded between TPP signatory states, with the TPP chapters on investment, government procurement, regulatory coherence, sustainable development, intellectual property, cross-border trade in services, telecommunications, electronic commerce, competition, and state-owned enterprises, small and medium-sized enterprises ('SMEs'), transparency and anti-corruption. The article concludes that the TPP was largely 'Made in America' — the same country that triggered its demise — as the structure and content of the treaty clearly follow the texts of previous agreements concluded by the United States. However, the influence of other TPP signatories is also perceived in the final text, notably Australia, Canada, Chile and Peru. We also conclude that some parts of the TPP were not particularly novel for signatory countries, as the treaty built on existing trade and investment agreements, offering a consolidation of commitments already present in treaties in force between TPP signatories. However, the TPP also delivered innovation, by including certain disciplines that have not been traditionally established in preferential trade agreements (like regulatory coherence and e-commerce) and others that have benefited from a larger development compared to existing agreements (like intellectual property and sustainable development). Both consolidation and innovation features can be useful for a TPP 11 or for future preferential trade agreements.

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I BACKGROUND: SHALL WE MOURN THE *TRANS-PACIFIC PARTNERSHIP*?

On 5 October 2015, after almost seven years, the 12 countries taking part in the negotiations towards a *Trans-Pacific Partnership* ('*TPP*') — Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Viet Nam — announced an agreement whose final text was signed on 4 February 2016 in Auckland, New Zealand. For years, *TPP* negotiations were criticised for being kept secret, as, since the beginning of the negotiations, none of its documents were officially released for public review. However, some of them were leaked and made publicly available by organisations like Citizens Trade Campaign¹ and Wikileaks.² An official text of the agreement was officially available on 5 November 2015, and a 'legally verified' text of the *TPP* was released on 26 January 2016.³ However, the ratification process of the agreement was stalled, and most likely in a definitive way, after the US decided to withdraw from the *TPP* on 23 January 2017.⁴

¹ Citizens Trade Campaign ('CTC'), *Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations* (13 June 2012) <<http://www.citizenstrade.org/ctc/blog/2012/06/13/newly-leaked-tpp-investment-chapter-contains-special-rights-for-corporations/>>, archived at <<https://perma.cc/JN27-S7T9>>. CTC published *TPP* proposals from the United States on intellectual property, regulatory coherence and drug formularies in late 2011 and leaked a version of the investment chapter in June 2012.

² WikiLeaks, 'WikiLeaks Secret *Trans-Pacific Partnership Agreement (TPP)* — Investment Chapter' (Press Release, 25 March 2015) <<https://wikileaks.org/tpp-investment>>, archived at <<https://perma.cc/V57X-QDWY>>. WikiLeaks also leaked different chapters of the agreement: Intellectual Property Rights (November 2013), Environment (January 2014), and Investment (March 2015).

³ Office of the United States Trade Representative ('USTR'), *TPP Full Text* (2015) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>>, archived at <<https://perma.cc/Z5E9-4NKY>>.

⁴ Peter Baker, 'Trump Abandons *Trans-Pacific Partnership*, Obama's Signature Trade Deal', *New York Times* (online), 23 January 2017 <<https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>>, archived at <<https://perma.cc/GM7H-X8RC>>.

Of all the *TPP* signatories, only Japan⁵ and New Zealand⁶ have ratified the agreement. Since the withdrawal of the US, the rest of the *TPP* signatories have been analysing how to proceed after this significant drawback. In Viña del Mar, Chile, on 16 March 2017, at the sidelines of a High-Level Dialogue on Integration Initiatives for the Asia-Pacific, government representatives from all *TPP* partners (except the US) issued a joint statement communicating that they ‘exchanged views on their respective domestic processes regarding *TPP* and canvassed views on a way forward that would advance economic integration in the Asia Pacific’.⁷ The so-called ‘*TPP* 11’ met again on 20 May 2017 in the margins of an Asia-Pacific Economic Cooperation (‘APEC’) meeting of Ministers responsible for trade to discuss the future of *TPP*, also releasing a joint statement in which they ‘agreed to launch a process to assess options to bring the comprehensive, high quality agreement into force expeditiously, including how to facilitate membership for the original signatories’.⁸ The trade ministers also ‘underlined their vision for the *TPP* to expand to include other economies that can accept the high standards of the *TPP*’.⁹

Due to these recent events, the future of *TPP* still appears uncertain, notwithstanding the withdrawal of the US. One can wonder, what is motivating the *TPP* 11 countries to try reviving *TPP*? We believe there are two possible explanations: first and foremost, although it is not a treaty in force, the *TPP* contains principles, standards and provisions beneficial for its signatories if properly implemented. It can open new markets and sectors that before *TPP* were unviable for some exporters. The *TPP* is also a refined agreement, whose negotiations and signing involved significant efforts for all its governments and carefully written by its signatories, after eight years of arduous work. Related to this last point, *TPP* has become a template for negotiations and in fact, an ambitious one, in topics such as anti-corruption, environment and labour. In the same line, the *TPP* is still an attempt for its signatories to have trade rules that have been discussed but not agreed at the World Trade Organization, a concept often referred to as ‘regional multilateralism’.¹⁰

Secondly, by reason of the current juncture that globalisation and global economy are facing, with a revival of protectionism and nationalism regarding trade and investment, it becomes politically relevant for *TPP* signatories to give

⁵ Mitsuru Obe, ‘Japan Ratifies *Trans-Pacific Partnership*, which Trump Has Promised to Leave’, *Wall Street Journal* (online), 9 December 2016 <<https://www.wsj.com/articles/japan-ratifies-trans-pacific-partnership-which-trump-has-promised-to-leave-1481273551/>>.

⁶ Todd McClay, *McClay Says TPP Ratification Keeps Options Open* (11 May 2017) Beehive NZ Government <<https://www.beehive.govt.nz/release/mcclay-says-tpp-ratification-keeps-options-open>>, archived at <<https://perma.cc/WH4Q-RSGU>>.

⁷ Todd McClay, *Joint Statement by TPP Partners* (16 March 2017) Beehive NZ Government <<https://www.beehive.govt.nz/release/joint-statement-tpp-partners>>, archived at <<https://perma.cc/VFH9-AFTM>>.

⁸ Anthony Fensom, ‘New Life for the *TPP*?’, *The Diplomat* (online), 22 May 2017 <<http://thediplomat.com/2017/05/new-life-for-the-tpp/>>, archived at <<https://perma.cc/U9UB-CE5Y>>.

⁹ *Ibid.*

¹⁰ Harris Mylonas and Emirhan Yorulmazlar, *Regional Multilateralism: The Next Paradigm in Global Affairs* (14 January 2012) <<https://wcfia.harvard.edu/publications/regional-multilateralism-next-paradigm-global-affairs-0>>, archived at <<https://perma.cc/AVV2-8D2Z>>.

a signal that free trade negotiations continue, as well as to show a commitment refraining from protectionist or chauvinist policies. In fact, the *TPP* 11 countries have been demonstrating that this agreement is more than just a way for the US to grow its influence in the Asia-Pacific region, contesting China's, as was suggested by many during the first years of *TPP* negotiations.

The US publicly claimed that the *TPP* was 'Made in America', and that it was designed to 'level the playing field for American workers & American businesses'.¹¹ The ambitions of the US were also to provide through the *TPP* a 'first mover' platform in regulatory issues. Then US President Barack Obama even declared:

the *TPP* means that America will write the rules of the road in the 21st century. When it comes to Asia, one of the world's fastest growing regions, the rulebook is up for grabs. And if we don't pass this agreement — if America doesn't write those rules — then countries like China will.¹²

After the *TPP*'s demise at the beginning of the Trump administration, the case to move ahead on a *TPP* 11 has mainly been a political response to the 'America First' trade rhetoric, and the intent by the current US government to replace inclusive regional or multilateral agreements with one-on-one negotiations on terms essentially dictated — and not negotiated — by the US.¹³

After a meeting of *TPP* 11 was in Hakone, Japan, on 14 July 2017, according to the *New York Times*, Japan's chief negotiator, Kazuyoshi Umemoto, stated that the group 'achieved mutual understanding on a path forward', adding that 'we need a new international agreement'.¹⁴ His words have to be taken in the context of the ongoing negotiations of the *Regional Comprehensive Economic Partnership* ('*RCEP*'), led by China, an allegedly less ambitious deal that involves 16 countries, including some of the *TPP* 11.

On 11 November 2017, in the margins of an APEC meeting, the *TPP* 11 countries declared that they have agreed on the core elements of a '*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*' ('*CPTPP*'). Ministers agreed to an annex (Annex I) that provides an outline of agreement incorporating provisions of the *TPP*, and to an annex (Annex II) which lists a set of twenty provisions which will be suspended. A final text of the *CPTPP* is reportedly in the making.¹⁵

According to a recent study on the outcomes for the *TPP* signatories if the agreement goes ahead as negotiated without the US, although the *TPP* 11 in

¹¹ USTR, *TPP Full Text*, above n 3.

¹² Barack Obama, *Here's the Deal: The Trans-Pacific Partnership* (6 November 2015) <<https://www.whitehouse.gov/blog/2015/11/06/heres-deal-trans-pacific-partnership>>, archived at <<https://perma.cc/24PL-M7V7>>.

¹³ Carlo Dade et al, 'The Art of the Trade Deal: Quantifying the Benefits of a *TPP* without the United States' (Report, Canada West Foundation Trade and Investment Centre, 2017) 2 <<https://papers.ssrn.com/abstract=2985355>>.

¹⁴ Motoko Rich, '*TPP*, the Trade Deal Trump Killed, Is Back in Talks without U.S.', *New York Times* (online), 14 July 2017 <<https://www.nytimes.com/2017/07/14/business/trans-pacific-partnership-trade-japan-china-globalization.html>>, archived at <<https://perma.cc/M693-BVHY>>.

¹⁵ Department of Foreign Affairs and Trade, Australian Government, '*Trans-Pacific Partnership Ministerial Statement*', 11 November 2017 <<http://dfat.gov.au/trade/agreements/tpp/news/Pages/trans-pacific-partnership-ministerial-statement.aspx>>, archived at <<https://perma.cc/ZA8G-5RTL>>.

aggregate is much smaller than the *TPP* 12, some countries would be better off with the *TPP* 11, specifically Canada, Chile, Mexico and Peru. The authors state that the *TPP* 11 is better for these countries as they ‘avoid erosion of existing preferences in the U.S. market ... while they pick up market share in the Western Pacific from the U.S.’.¹⁶ On the other hand, they conclude that countries like Viet Nam and Japan would be worse off because ‘they stood to gain the most in the U.S. market under the *TPP* 12’.¹⁷ Therefore, we can anticipate a complex scenario for *TPP* 11 countries in terms of market access negotiations. This complexity adds to the legal issues surrounding the different frameworks to bring the *TPP* back on track without the US. Also, another challenge is to review those provisions that were pushed by the US and accepted as a trade-off by many *TPP* signatories because of enhanced market access to the US market. However, it also reveals that a *TPP* 11 agreement might be highly relevant for the Eastern Pacific countries, especially having in mind the *North American Free Trade Agreement* (‘*NAFTA*’) modernisation process officially began in August 2017.

But to ponder how useful it is to mourn the *TPP* and its political economy, it is maybe necessary to assess how useful this agreement is, either in terms of future usage of *TPP* text, or in terms of novelty.

The *TPP* was labelled as a ‘new’,¹⁸ ‘high standard’,¹⁹ ‘21st century’²⁰ agreement. But just how accurate are these descriptions? This article aims to examine the level of novelty of the *TPP*, specifically in comparison with existing trade and investment agreements between the 12 countries that were part of its negotiation, notably the US.

For that we need first to provide some historical context. In its origin, the *TPP* negotiations formally started as an update and enlargement of an agreement the US was not party to: the *Trans-Pacific Strategic Economic Partnership Agreement* (‘*P4*’) concluded between Brunei, Chile, New Zealand, and Singapore in 2005. However, one can say the *TPP* also existed in the context of several preferential trade agreements (‘*PTAs*’) and international investment agreements (‘*IAs*’) previously concluded between the countries that negotiated the *TPP*.

¹⁶ Dan Ciuriak, Ali Dadkhah and Jingliang Xiao, ‘Quantifying the *TPP* without the United States’ (Research Report, Ciuriak Consulting, 2017) <<https://papers.ssrn.com/abstract=2973995>>.

¹⁷ Ibid.

¹⁸ Laura Dawson and Kent Hughes, *The Trans-Pacific Partnership: What’s New, What’s Not, What’s Next* (23 November 2015) Wilson Center <<https://www.wilsoncenter.org/article/the-trans-pacific-partnership-whats-new-whats-not-whats-next>>, archived at <<https://perma.cc/MF2Y-SHKZ>>.

¹⁹ Jeffrey J Schott, Barbara Kotschwar and Julia Muir, *Understanding the Trans-Pacific Partnership* (Peterson Institute for International Economics, 2013) ch 4 <https://piie.com/publications/chapters_preview/6727/04iie6727.pdf>, archived at <<https://perma.cc/669E-6EKT>>.

²⁰ Tsuyoshi Kawase, ‘The *Trans-Pacific Partnership* as a Set of International Economic Rules’ on *E15 Initiative* (2016) <<http://e15initiative.org/blogs/trans-pacific-partnership-as-a-set-of-international-economic-rules/>>, archived at <<https://perma.cc/Q4XX-7W6H>>.

that have negotiated the *TPP*. At the same time, Chile has signed four bilateral investment treaties ('BITs') with Australia, Malaysia, Peru and Viet Nam (terminated in 2009 after being replaced with an FTA with the same country).

Therefore, one can rightfully ask how much of the *TPP* was really 'new' and how much was a consolidation of existing rules? Was the US really the driving force behind this agreement? What is the level of contribution of the other signatories to the *TPP* taking into account their previous agreements?

In quantitative terms, Todd Allee and Andrew Lugg compared the *TPP* text to the previous 74 PTAs that the *TPP* members have signed since 1995. In their text analysis, they identified the concordance between the wording in every preferential trade agreement of each *TPP* signatory since 1995 and the language of the *TPP* text. The data extracted allowed the authors to assess the level of influence of each *TPP* signatory in writing the *TPP*, as well as the preponderance of certain countries' previous PTAs on each chapter of the agreement. The results showed that the US had the strongest hand in writing the *TPP*, with nearly 45 per cent of the text of US PTAs signed between 1995–2015 found almost verbatim in the agreement, followed by Australia, Canada and Peru who had averages close to 30 per cent.²⁴ Regarding specific chapters, the authors concluded that the US had the greatest average of percentage copied from previous PTA chapters in investment (79.9), financial services (67.6), general services (61.6), telecommunications (57.6), safeguards (47.2), intellectual property (44.7), dispute settlement (38.6), technical barriers to trade (35.5), labour (32.2), sanitary and phytosanitary (32) and antidumping (18.7).²⁵

But in order to determine the usefulness of *TPP* for future negotiations of PTAs, such quantitative analysis needs to be complemented by a more in-depth contextual and qualitative account on how some *TPP* issue areas have benefited from consolidation or have brought novelty, with respect to existing agreements.

To qualitatively assess the novelty of the *TPP* in the background of agreements previously concluded by its signatories, we have focused on certain issues that have been flagged as innovative or controversial during *TPP* negotiations, such as investment, government procurement, regulatory coherence, sustainable development, intellectual property, trade in services, telecommunications, electronic commerce, competition, state owned enterprises, SMEs, transparency and anti-corruption. It is important to note that all these issues have not developed the same way in previous PTAs; therefore, the length and breadth of the discussion that take place in the following sections vary considerably.

II ANALYSIS OF SPECIFIC *TPP* CHAPTERS

A *TPP and Investment*

The negotiations of an investment chapter in *TPP* took place in a background where several IIAs had already been concluded between *TPP* signatories, including BITs and treaties with investment provisions ('TIPs'). All of these countries have concluded more than one IIA with other *TPP* signatories.

²⁴ Todd Allee and Andrew Lugg, 'Who Wrote the Rules for the *Trans-Pacific Partnership*?' (2016) 3 *Research & Politics* 1, 4.

²⁵ *Ibid* 7.

According to the information provided by the United Nations Conference on Trade and Development ('UNCTAD'), there are 53 IIAs concluded between TPP signatories, considering 16 BITs and 37 TIPs that also include investment chapters of PTAs.²⁶

BITs		Date of Signature
1	<i>Mexico–Singapore BIT</i>	12 November 2009
2	<i>Japan–Peru BIT</i>	22 November 2008
3	<i>Canada–Peru BIT</i>	14 November 2006
4	<i>Australia–Mexico BIT</i>	23 August 2005
5	<i>Japan–Viet Nam BIT</i>	14 November 2003
6	<i>Peru–Singapore BIT</i>	27 February 2003
7	<i>Chile–Peru BIT</i>	2 February 2000
8	<i>Chile–Viet Nam BIT</i>	16 September 1999
9	<i>Chile–New Zealand BIT</i>	22 July 1999
10	<i>Australia–Chile BIT</i>	09 July 1996
11	<i>Australia–Peru BIT</i>	07 December 1995
12	<i>Malaysia–Peru BIT</i>	13 October 1995
13	<i>Chile–Malaysia BIT</i>	11 November 1992
14	<i>Singapore–Viet Nam BIT</i>	29 October 1992
15	<i>Malaysia–Viet Nam BIT</i>	21 January 1992
16	<i>Australia–Viet Nam BIT</i>	5 March 1991
Treaties with Investment Provisions		Date of Signature
1	<i>Australia–Japan EPA</i>	8 July 2014
2	<i>Additional Protocol to the Framework Agreement of the Pacific Alliance (Chile, Colombia, Peru, Mexico)</i>	10 February 2014
3	<i>Australia–Malaysia FTA</i>	22 May 2012
4	<i>Chile–Viet Nam FTA</i>	12 November 2011
5	<i>Japan–Peru FTA</i>	31 May 2011
6	<i>Mexico–Peru FTA</i>	06 April 2011
7	<i>Australia–New Zealand Investment Protocol</i>	16 February 2011
8	<i>Chile–Malaysia FTA</i>	13 November 2010

²⁶ United Nations Conference on Trade and Development ('UNCTAD'), *International Investment Agreements by Economy* (2016) <<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>>.

9	<i>Malaysia–New Zealand FTA</i>	26 October 2009
10	<i>ASEAN Investment Agreement</i> (Brunei Darussalam, Malaysia, Singapore and Viet Nam)	26 February 2009
11	<i>ASEAN–Australia–New Zealand Free Trade Agreement</i> ('AANZFTA') (ASEAN, Australia and New Zealand)	27 February 2009
12	<i>Japan–Viet Nam EPA</i>	25 December 2008
13	<i>Australia–Chile FTA</i>	30 July 2008
14	<i>Canada–Peru FTA</i>	29 May 2008
15	<i>Peru–Singapore FTA</i>	29 May 2008
16	<i>ASEAN–Japan FTA</i>	14 April 2008
17	<i>Brunei–Japan EPA</i>	18 June 2007
18	<i>Chile–Japan EPA</i>	27 March 2007
19	<i>Chile–Peru FTA</i>	22 August 2006
20	<i>Peru–US FTA</i>	12 April 2006
21	<i>Japan–Malaysia EPA</i>	13 December 2005
22	<i>P4 Agreement</i> (Brunei Darussalam, Chile, New Zealand, Singapore)	3 June 2005
23	<i>Japan–Mexico EPA</i>	17 September 2004
24	<i>Australia–US FTA</i>	18 May 2004
25	<i>Chile–US FTA</i>	6 June 2003
26	<i>Singapore–US FTA</i>	6 May 2003
27	<i>Australia–Singapore FTA</i>	17 February 2003
28	<i>Japan–Singapore EPA</i>	13 January 2002
29	<i>New Zealand–Singapore Partnership Agreement</i>	14 November 2000
30	<i>US–Viet Nam Trade Relations Agreement</i>	13 July 2000
31	<i>Mexico–Chile FTA</i>	17 April 1998
32	<i>Canada–Chile FTA</i>	5 December 1996
33	<i>ASEAN Services</i>	15 December 1995
34	<i>NAFTA</i> (Canada, Mexico, United States of America)	17 December 1992
35	<i>Organisation of the Islamic Conference Investment Agreement</i> (Brunei Darussalam, Malaysia)	5 June 1981
36	<i>LAIA Treaty</i> (Chile, Mexico, Peru)	12 August 1980
37	<i>SPARTECA</i> (Australia, New Zealand)	14 July 1980

As said by its negotiators, the *TPP* investment chapter aimed to improve the current standards of protection for foreign investors, 'striking an interesting balance between the protection of foreign investments and the sovereign right of

states to regulate their interests in pursuit of legitimate public policy objectives'.²⁷

However, a detailed analysis of the *TPP* investment chapter shows that the agreement was not so innovative in 'improving' standards of investment protection. Tomer Broude et al have concluded that the *TPP* investment chapter builds significantly on existing agreements, being very close to *NAFTA*.²⁸ Wolfgang Alschner and Dmitriy Skougarevskiy have found that this part of the agreement offers 'more of the same' with few truly novel features and 81 per cent of its main text coming from the 2006 *US-Colombia FTA*.²⁹ Already Mélida Hodgson had drawn a similar conclusion, after comparing a leaked version of the chapter with the 2012 *US Model BIT*, finding almost complete similarity on issues such as expropriation, customary international law, regulatory space, as well as in limitations related to balance of payments and public debt.³⁰ In the same line, José Álvarez has concluded that the *TPP* investment chapter's structure and essential content follows the general outline of the *US-Argentina BIT* (1991)³¹ and Bernasconi Osterwalder, who determined that the text mirrors most of the 2004 *US Model BIT*, falling short of its supposedly progressive goals.³² Luke Nottage also concludes that *TPP*'s investment chapter largely follows US past treaty practice.³³

But to know how similar the *TPP* is to other previous investment agreements only tells you part of the story. Probably what matters the most are differences.³⁴ So, even though the *TPP* investment chapter in practice works more as a consolidation of the level of protection of foreign investment already existing in IIAs concluded by *TPP* signatories, certain features can be considered innovative on both substantive protection and procedural issues. This requires a more qualitative analysis that we try to undertake in the following sections.

²⁷ Directorate General of International Economic Affairs ('DIRECON'), *Acuerdo Transpacífico TPP Inversiones* <http://www.direcon.gob.cl/tpp/capitulo_inversiones/>, archived at <<https://perma.cc/KDR9-SY2R>> [author's trans].

²⁸ Tomer Broude, Yoram Z Haftel and Alexander Thompson, 'The *Trans-Pacific Partnership* and Regulatory Space: A Comparison of Treaty Texts' (2017) 20 *Journal of International Economic Law* 391, 409.

²⁹ Wolfgang Alschner and Dmitriy Skougarevskiy, 'The New Gold Standard? Empirically Situating the *Trans-Pacific Partnership* in the Investment Treaty Universe' (2016) 17 *Journal of World Investment & Trade* 335, 341, 353.

³⁰ Mélida Hodgson, 'The Leaked *TPP* Investment Chapter Draft: Few Surprises ... Is that a Surprise?' (2015) 6 *Transnational Dispute Management* 1 <<https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=579>>, archived at <<https://perma.cc/8E5H-G8KT>>.

³¹ José E Álvarez, 'Is the *Trans-Pacific Partnership*'s Investment Chapter the New "Gold Standard"?' (Working Paper 2016/3, Institute for International Law and Justice, 1 March 2016) 16 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756145>.

³² Nathalie Bernasconi-Osterwalder, 'How the Investment Chapter of the *Trans-Pacific Partnership* Falls Short' (6 November 2015) on *International Institute for Sustainable Development* <<https://www.iisd.org/blog/how-investment-chapter-trans-pacific-partnership-falls-short>>, archived at <<https://perma.cc/QYB5-QRVX>>.

³³ Luke Nottage, 'The *TPP* Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification' (2016) 17 *Melbourne Journal of International Law* 313, 331.

³⁴ In November 2015, during a discussion at the OGEMID mailing list about some of the quantitative analysis mentioned before, it was rightly pointed out that humans and chimpanzees (and also acorn worms) share a large amount of the same genes. But we cannot for that reason conclude that they are the same animal.

1 *Substantive Protection*

The elucidation of the concepts of ‘investment’ and ‘investor’ is found in footnotes of the *TPP* investment chapter, which limits its scope of application. With respect to the definition of investment, certain exclusions are considered in the definitions of ‘branch’,³⁵ ‘loan’,³⁶ and ‘investment authorization’.³⁷ Regarding the definition of investor, of particular significance is a footnote that could limit pre-establishment protection,³⁸ through the clarification of what the parties understand when an investor ‘attempts to make’ an investment, meaning that when that investor ‘has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for permits or licenses’.³⁹ But this is not novel for the Latin American countries that are signatories of the *TPP* (Chile, Mexico and Peru) as these limitations on pre-establishment were already considered with almost the same wording (although in Spanish) on the investment chapters of FTAs concluded between them, like in *Chile–Peru FTA* (2006), *Mexico–Peru FTA* (2012), and the *Additional Protocol to the Framework Agreement of the Pacific Alliance* (2014).⁴⁰

Another novel addition is the clarification of the notion of ‘like circumstances’ in national treatment and most favoured nation (‘MFN’), according to which the analysis of these relative standards depends ‘on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives’.⁴¹ This is further clarified in more detail on a Drafters’ Note, with the intention of ensuring that tribunals will follow the approach set out by

³⁵ ‘For greater certainty, the inclusion of a “branch” in the definitions of “enterprise” and “enterprise of a Party” is without prejudice to a Party’s ability to treat a branch under its laws as an entity that has no independent legal existence and is not separately organised’: *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not in force) ch 9 n 1 (*TPP*).

³⁶ After clarifying in n 2 that ‘[s]ome forms of debt, such as bonds, debentures, and long term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics’, in the same terms found in the *United States Model BIT* of 2012, *TPP*, ch 9 n 3, adds a further clarification that ‘[a] loan issued by one Party to another Party is not an investment’.

³⁷ ‘For greater certainty, the following are not encompassed within this definition: (i) actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws; (ii) non discriminatory licensing regimes; and (iii) a Party’s decision to grant to a covered investment or an investor of another Party a particular investment incentive or other benefit, that is not provided by a foreign investment authority in an investment authorisation’: *TPP* ch 9 n 10. In contrast, the same clarification in the *United States Model BIT* of 2012 only included competition laws as example of laws of general application.

³⁸ Hodgson, above n 30, 7.

³⁹ *TPP* ch 9 n 12.

⁴⁰ *Peru–Chile Free Trade Agreement*, signed 22 August 2006 (entered into force 1 March 2009) art 11.28 n 15; *Mexico–Peru Trade Integration Agreement*, signed 6 April 2011 (entered into force 1 February 2012) art 11.1 n 1; *PA* art 10.1 n 4. The *PA* was established in April 2011, and formalised by a *Framework Agreement signed in Paran al*, Chile, June 6 2012. An additional protocol including an investment chapter was signed on 10 February 2014 and entered into force on 1 May 2016. Current members are Chile, Colombia, Peru and Mexico.

⁴¹ *TPP* ch 9 n 14.

the parties that comparisons are made only with respect to investors or investments on the basis of relevant characteristics.⁴²

As mentioned, another important substantive novelty is the inclusion of a corporate social responsibility ('CSR') clause,⁴³ a provision that is not part of the US 'template' for investment treaties. This type of clause has been typically found in Canadian FTAs, like those concluded with Colombia, Panama and Peru.⁴⁴

2 *Investor-State Dispute Settlement*

On procedural issues, the architecture of the section on investor–state arbitration is similar to the *NAFTA* ch 11 structure, detailing the procedure from the arbitration's commencement to its end.⁴⁵ Yet, some innovations can be detected from that model.

First, the *TPP* foresees the adoption by the parties of a code of conduct for arbitrators and of guidelines on conflicts of interest, based on the Code of Conduct for Dispute Settlement Proceedings under ch 28 (Dispute Settlement) and other relevant rules or guidelines on conflicts of interest in international arbitration.⁴⁶

Secondly, it is explicitly stated that investors bear the burden of proving all elements of their claims, keeping consistency with the general principles of international law that are applicable to international arbitration (art 9.23.7).

Thirdly, the *TPP* seems to expand the scope of dispute settlement that is traditionally found in United States agreements. The general practice was to limit ISDS to the core substantive standards, but now other provisions also appear to be subject to dispute settlement, like Non-Conforming Measures (art 9.12), Subrogation (art 9.13), Special Formalities and Information Requirements (art 9.14), Denial of Benefits (art 9.15), Investment and Environmental Health and other Regulatory Objectives (art 9.16) and even the above-mentioned CSR provision (art 9.17).⁴⁷

Some procedural innovations come from the change of recent practice of some *TPP* signatories. This is the case of Australia, which before the *TPP* did not consider investor–state arbitration in its Economic Partnership with Japan (2014), in the FTA with United States (2004), and in the Investment Protocol with New Zealand (2011) established under the *Australia–New Zealand Closer Economic Relations Trade Agreement* ('*ANCERTA*'). By virtue of a side letter, the exclusion of investor–state arbitration will only remain with respect to New

⁴² *Drafters' Note on Interpretation of "In Like Circumstances" under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)* New Zealand Foreign Affairs and Trade [1] <[https://www.tpp.mfat.govt.nz/assets/docs/Interpretation of In Like Circumstances.pdf](https://www.tpp.mfat.govt.nz/assets/docs/Interpretation_of_In_Like_Circumstances.pdf)>, archived at <<https://perma.cc/BB85-56B6>>.

⁴³ *TPP* art 9.17.

⁴⁴ Vid Prislán and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements' in Andrea K Bjorklund (ed), *Yearbook of International Investment Law and Policy 2012/2013* (Oxford University Press, 2014) 386.

⁴⁵ Alschner and Skougarevskiy, above n 29, 344.

⁴⁶ *TPP* ch 9 art 9.22 [6].

⁴⁷ Hodgson, above n 30, 8.

Zealand, in order to keep consistency with the *ANCERTA*.⁴⁸ However, no proposal for a similar side letter between Australia and the US (or any other treaty partners) was formally tabled in relation to the *TPP*.⁴⁹

A certain influence of Australian policy has also left its mark in the text of the *TPP*, as tobacco control measures are carved out from ISDS in its exception chapter (art 29.5),⁵⁰ probably in the effort to address the challenges raised by *Philip Morris Asia Ltd v Australia* with respect to plain packaging policies.⁵¹

In sum, although the *TPP* investment chapter is a consolidation of the level of protection of investment already considered in IIAs concluded by *TPP* countries, there are few important substantive and procedural innovations that could inform future negotiations of investment agreements. On substantive protection, the *TPP* includes important clarifications on the notions of ‘investor’ and ‘investment’, national treatment and MFN, and the inclusion of novel provisions on CSR. On procedural issues, although the chapter follows the *NAFTA* structure, certain innovative features are found in ISDS, such as the inclusion of a code of conduct for arbitrators, and provisions on the burden of proof and the overall scope of ISDS.

B *TPP and Government Procurement*

With the exception of Malaysia, all *TPP* signatories had concluded a prior PTA with another *TPP* country, including a special chapter on public procurement. Nowadays, there are 21 PTAs between *TPP* countries with a special chapter on government procurement.

Agreements with a Government Procurement Chapter	Entry into Force
<i>Australia–Japan FTA</i>	15 January 2015
<i>Pacific Alliance Additional Protocol</i> (Chile, Colombia, Peru, Mexico)	10 February 2014
<i>Peru–Japan FTA</i>	1 March 2012
<i>ASEAN–Australia–New Zealand Free Trade Agreement</i> (<i>‘AANZFTA’</i>) (including Viet Nam)	1 January 2010
<i>Canada–Peru FTA</i>	1 August 2009
<i>Peru–Singapore FTA</i>	29 May 2009
<i>Australia–Chile FTA</i>	6 March 2009
<i>US–Peru TPA</i>	1 February 2009
<i>Chile–Japan SEP</i>	3 September 2007

⁴⁸ Side Letter from Todd McClay to Andrew Robb, 4 February 2016 <[https://www.tpp.mfat.govt.nz/assets/docs/side-letters/New Zealand-Australia Side Letter Relationship between TPP and Other Agreements.pdf](https://www.tpp.mfat.govt.nz/assets/docs/side-letters/New_Zealand-Australia_Side_Letter_Relationship_between_TPP_and_Other_Agreements.pdf)>, archived at <<https://perma.cc/XP9V-E57E>>.

⁴⁹ Nottage, above n 33, 17.

⁵⁰ *TPP* art 29.5 (Tobacco Control Measures): ‘A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.’

⁵¹ Bernasconi-Osterwalder, above n 32, 33.

<i>Trans-Pacific Free Trade Agreement (P4: Chile, New Zealand, Singapore and Brunei Darussalam)</i>	8 November 2006
<i>Mexico–Japan EPA</i>	1 April 2005
<i>US–Australia FTA</i>	1 January 2005
<i>US–Chile FTA</i>	1 January 2004
<i>US–Singapore FTA</i>	1 January 2004
<i>Australia–Singapore FTA</i>	28 July 2003
<i>Singapore–Japan EPA</i>	30 November 2002
<i>New Zealand–Singapore CEP</i>	1 January 2001
<i>Mexico–Chile FTA</i>	31 July 1999
<i>Canada–Chile FTA</i>	5 July 1997
<i>NAFTA (Canada, Mexico and the United States of America)</i>	1 January 1994
Agreements with a Government Procurement Side Agreement	Entry into Force
<i>Australia–New Zealand Closer Economic Relations Trade Agreement</i>	1 September 2007

As we can see, the majority of *TPP* signatories have already opened public procurement under earlier PTAs, and these commitments are complemented with those undertaken by the *WTO Agreement on Government Procurement* ('*GPA*') — to which Canada, Japan, New Zealand, Singapore and the US are parties. It is in this context that the level of novelty of *TPP* on government procurement should be assessed for its contracting parties, both procedurally and in its coverage.

A detailed procedural analysis of this part of the agreement finds that the *TPP* procurement chapter virtually copied the provisions of the *GPA* with minor modifications. This explains that the coverage considered in the chapter generally emulated the solutions presented in the *GPA* model, with lists of covered procurement, goods and services, as well as value thresholds and country specific commitments.⁵²

On coverage, *TPP* countries basically restated or modestly improved the procurement that had opened under the earlier agreements.

1 *GPA Countries*

In the case of the *GPA* parties, Canada, Japan, New Zealand, Singapore and the US basically granted its *GPA* coverage, with certain variations.

For Canada, *TPP* would have opened markets for bidders coming from Australia, Brunei, Malaysia and Viet Nam,⁵³ expanding commitments granted under the *GPA* and *NAFTA*, augmenting the list of covered federal entities from

⁵² Jędrzej Gorski, 'The Impact of the *TPP* on Opening Government Procurement to International Competition in the Asia-Pacific Region' (2016) 8(2) *Trade Law and Development* 67.

⁵³ Riyaz Dattu and Sonja Pavic, *Trans-Pacific Partnership: Key Takeaways from the Legal Text* (10 November 2015) Osler, Hoskin & Harcourt <<https://www.osler.com/en/resources/cross-border/2015/trans-pacific-partnership-key-takeaways-from-the>>, archived at <<https://perma.cc/62TN-2CB2>>.

78 to 95 entities, and adding 12 entities to the list of ‘Other Entities’ under coverage.⁵⁴

Japan effectively would have opened a new procurement market for Malaysia. In the case of the *Economic Partnership Agreement* (‘EPA’) between Japan and Viet Nam (2009) and the *EPA Japan–Brunei* (2008), although there is not a separate chapter devoted to this discipline, one provision states that both parties shall endeavour to accord MFN treatment and ensure fairness, efficiency and transparency in government procurement,⁵⁵ allowing these countries to import the treatment given to third countries with respect to public procurement. In *TPP*, Japan largely followed its *GPA* coverage but adds one city (Kumamoto-shi) and 12 ‘Other Entities’, primarily railway companies, and others that are not found in the *GPA* (JKA, Management Organization for Postal Savings and Postal Life Insurance, and the Open University of Japan Foundation).⁵⁶

New Zealand would have opened new markets for Malaysia, Mexico and Peru, granting the *GPA* coverage, with the exception of sub-central entities. However, its *TPP* coverage included less ‘Other Entities’ than in the *GPA* (10 instead 19 entities in the *GPA*)⁵⁷ and withholding all those entities from Mexico.⁵⁸

Singapore would have opened new markets for Mexico, Malaysia and Viet Nam. Regarding coverage, it followed its *GPA* commitments, adding 10 new authorities, boards, councils and the Civil Service University (‘CSU’), but excluding two universities (Nanyang Technological University and National University of Singapore) that are listed in the *GPA*. The coverage of services was basically the same as in the *GPA*, with the addition of one: the placement services of office support personnel and other workers.⁵⁹

For the US, the *TPP* included all entities of the central level of government listed in the *GPA* Schedule, including a new one (the Denali Commission),⁶⁰ with no sub-central government entities. This made the *TPP* the broadest entity coverage by the US to date.⁶¹ The *TPP* effectively would have opened new markets for Brunei, Malaysia and Viet Nam. However, the US also imposed limitations on Malaysia (procurement for the generation or distribution of electricity, including the commitment with respect to financing provided by the Rural Utilities Service of power generation projects) and Viet Nam (access to

⁵⁴ Jean Heilman Grier, *TPP Procurement: Modest Improvements in Existing Coverage* (17 May 2016) <<http://trade.djaghe.com/?p=2833>>, archived at <<https://perma.cc/NRB8-ATX6>>.

⁵⁵ *Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership*, signed 25 December 2008 (entered into force 1 October 2009) art 106; *Agreement between Japan and Brunei Darussalam for an Economic Partnership*, signed June 2007 (entered into force 31 July 2008) art 98.

⁵⁶ Grier, above n 54.

⁵⁷ *Ibid.*

⁵⁸ *TPP* annex 15-A (‘New Zealand’) s C.

⁵⁹ Grier, above n 54.

⁶⁰ The Denali Commission is an independent federal agency designed to provide critical utilities, infrastructure, and economic support in Alaska: Official Guide to Government Information and Services, *Denali Commission* <<https://www.usa.gov/federal-agencies/denali-commission>>.

⁶¹ Grier, above n 54.

Department of Defence procurement to two entities: Education Activity and the Defence Commissary Agency).

2 *Non-GPA Countries*

In the case of Australia, the *TPP* would have opened new markets for Brunei, Malaysia, Mexico and Peru. However, coverage to sub-central government entities was only granted with respect to bidders from Canada, Chile, Japan, Mexico and Peru.⁶² The major impact of the *TPP* on Australian central procurement entities would have been the requirement that complaints regarding the procurement process are not handled internally (as established in existing Commonwealth Procurement Rules), but by an impartial administrative or judicial authority that is independent of the procurement entity.⁶³

Brunei Darussalam would have opened new markets for all *TPP* signatories, with the exception of Chile, New Zealand and Singapore, already parties with that country in the *P4 Agreement*. It is noteworthy to highlight that in the *TPP* Brunei only included central government entities as it does not have any sub-central government entities.⁶⁴

Chile would have opened new procurement markets for Malaysia and Viet Nam, largely following its commitments included in its FTA with the US, although it lists three new ministries in the *TPP*, which are not in that agreement (Ministry of Environment, Ministry of Sports and the National Council for Culture and the Arts), because they did not exist at the time of signature of that PTA. Chile also added two exclusions: preferences to benefit micro and small and medium-sized enterprises.⁶⁵

Malaysia is the only *TPP* signatory that did not have previous procurement commitments with any of the other negotiating countries. Probably for that reason, it was able to secure an extended transition period for decreasing contract value thresholds up to 21 years.⁶⁶

Mexico would have basically incorporated its *NAFTA* coverage into the *TPP*,⁶⁷ including only Central Government Entities, and opening its procurement market for Australia, Brunei, Malaysia, New Zealand, Singapore and Viet Nam.

Peru would have opened its procurement market for the first time to the majority of the *TPP* signatories, with the exception of Canada, Chile, Mexico, Singapore and the US, with whom it had previous agreements. In fact, the *TPP* would not have meant a major improvement for Peru, as, for example, it covered less central government entities in the *TPP* than in its FTA with the US (a total of 32 in the *TPP* instead of 67 in the *Peru-US FTA*), notably 31 universities listed in that PTA. Regarding its coverage, Peru would have expanded it to three services that were excluded under the FTA with the US (architectural services;

⁶² *TPP* annex 15-A ('Australia') s B. Although Australia is in the process of accession to the *GPA*, it is not yet a party to that agreement.

⁶³ Lena Chapple et al, *The Trans-Pacific Partnership Series Navigating a New Era of Trade in the Pacific Rim* (July 2016) DLA Piper 6
<https://www.dlapiper.com/~media/Files/Insights/Publications/2016/07/DLAPiper_TPPar_t2_July2016.pdf>, archived at <<https://perma.cc/HUB3-6MVB>>.

⁶⁴ *TPP* annex 15-A ('Brunei Darussalam') s B.

⁶⁵ *Ibid* annex 15-A ('Chile') ss A, G.

⁶⁶ *Ibid* annex 15-A ('Malaysia') s A.

⁶⁷ Grier, above n 54.

engineering and design services; and engineering services during construction and installation phase).⁶⁸

The *TPP* could have been the second time that Viet Nam opened the procurement market in a PTA, becoming a novelty for almost all its signatories (except for Australia and New Zealand that benefit from the prior FTA with ASEAN). Like Malaysia, Viet Nam was able to secure a long transition period of decreasing contract value thresholds up to 26 years.⁶⁹

In conclusion, the *TPP* chapter on government procurement largely replicated the *GPA* on this discipline — even for non-*GPA* parties, with a modest improvement in existing coverage under prior agreements. For Jędrzej Górski, major deficiencies of the *TPP* procurement chapter's coverage are the refusal to cover sub-central procurement in Malaysia, Mexico, New Zealand, the US and Viet Nam, the exclusion of utilities services in the case of Canada, Mexico, and Viet Nam as well as a long transition period for thresholds in the case of Malaysia and Viet Nam.⁷⁰

C *TPP and Regulatory Coherence*

One part of the *TPP* that differed from what can be found in previous PTAs is the inclusion of a new discipline in the chapter on regulatory coherence (ch 25). In fact, the *TPP* was the first PTA with a dedicated chapter on this discipline that was negotiated, although in the end both the *Comprehensive Economic and Trade Agreement* ('*CETA*') and the *Pacific Alliance Additional Protocol* ('*PAAP*'), were concluded before the *TPP*, also including a chapter on this discipline but with a different nomenclature ('regulatory cooperation' in the case of *CETA*, and 'regulatory improvement' for the *PAAP*).

The stated regulatory convergence goals of the *TPP* were crucial in its signatories deciding to take a bolder step to eliminate unnecessary regulatory barriers, creating a novel regulatory coherence chapter with the aim to make the regulatory systems of member countries more compatible and transparent.⁷¹ The *TPP* included mechanisms to achieve greater domestic coordination of regulations, increase transparency and stakeholder engagement, and improve competitiveness and the ability of SMEs to engage in international trade.⁷²

The main objective of regulatory coherence is the harmonisation or, alternatively, the mutual recognition of regulatory measures that exert a major influence on international trade.⁷³ The *TPP* took a broader scope in this regard, including rules on transparency (public notice and prior consultation for new

⁶⁸ Ibid.

⁶⁹ *TPP* annex 15-A ('*Viet Nam*') s A.

⁷⁰ Gorski, above n 52, 67

⁷¹ Ian F Fergusson and Bruce Vaughn, 'The *Trans-Pacific Partnership Agreement*' (Report, Congressional Research Service, 12 December 2011) 8 <<https://www.fas.org/sgp/crs/row/R40502.pdf>>, archived at <<https://perma.cc/8MGE-DJW9>>.

⁷² Thomas Bollyky, 'Regulatory Coherence in the *TPP* Talks' in C L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge University Press, 2012) 171, 171.

⁷³ Claude Barfield, *The TPP: A Model for 21st Century Trade Agreements?* (25 July 2011) East Asia Forum <<http://www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements>>, archived at <<https://perma.cc/73L3-Q2EB>>.

regulations); the elimination of duplicative and overlapping regulations; rules against anticompetitive practices, particularly for government monopolies and state owned enterprises; greater use of mutual recognition agreements for services and health and safety regulation; and clear lines of administrative and judicial appeal.⁷⁴ However, there appears to be a predominant emphasis on convergence in procedural requirements rather than on convergence on the substantive content of the regulations.

TPP ch 25 started with general provisions recalling the importance of regulation and regulatory processes. Articles 25.1 and 25.3 of the chapter confirmed that the obligation of regulatory coherence is limited to certain regulatory measures ('covered regulatory measures') as defined by each country. For those purposes, each party should have promptly, and no later than one year after the date of entry into force of the *TPP*, determined and made publicly available the scope of its covered regulatory measures, aiming to achieve a 'significant coverage'.

In order to achieve regulatory coherence, *TPP* signatories committed to centralised or coordinated process in the elaboration of regulations. The treaty did not impose one specific formula in this regard, allowing countries to choose between establishing mechanisms, processes or a central body for coordination at the national or central level, including effective inter-agency consultation coordination among regulators, opportunities for stakeholder input, and fact-based regulatory decisions. However, certain minimum elements were established for such coordination procedures, like to strengthen coordination and consultation between government agencies, promote regulatory improvement and public information on measures reviewed.

The *TPP* also envisaged other internal and external mechanisms of regulatory coherence. Internal mechanisms included the encouragement of core good regulatory practices, like regulatory impact assessments ('RIAs')⁷⁵ and provisions on transparency and public information.⁷⁶ External mechanisms included points of contact to provide information at the request of another party, and a Committee on Regulatory Coherence, consisting of representatives from parties' governments to assess the implementation of the chapter and regulatory cooperation activities, including exchange of information with *TPP* signatories, dialogues with 'interested persons' — including SMEs and civil society — and training and cooperation between regulatory authorities of other parties.⁷⁷

The *TPP* chapter on regulatory coherence should be read together with numerous transparency articles existing in other chapters of the agreement (briefly examined in the different sections of this article), and most importantly in ch 26 s B on transparency, which included provisions on public transparency, communications around regulations and public notice of government measures (including opportunities for stakeholder comment on measures before they are adopted and finalised), review and appeal, which are also present in PTAs previously concluded by *TPP* signatories, notably by the US.

⁷⁴ Ibid.

⁷⁵ *TPP* art 25.1.

⁷⁶ *TPP* art 25.5(5).

⁷⁷ *TPP* art 25.6.

The *PAAP*'s new chapter on regulatory improvement (included as an amendment to the *PAAP* signed on 3 July 2015)⁷⁸ seemed to have influenced the final contours of the *TPP* text on regulatory coherence. Almost six months before the closing of the *TPP* text, the *PAAP* considered very similar provisions to the ones found in the *TPP*; probably due to the fact that three of its members were at the same time negotiating the *TPP* (Chile, Mexico and Peru). For example, the definition of regulatory improvement in the *PAAP* (art 15*bis* 2.1) and regulatory coherence in the *TPP* (art 25.2.1) is basically the same, with one telling difference: while the *TPP* refers to the use of 'good regulatory practices', for the *Additional Protocol*, regulatory improvement refers to the use of 'good international regulatory practices', almost unconsciously acknowledging that practices should come from elsewhere and not arise from the Alliance's member countries. The *PAAP* also includes a chapter on transparency which, as with *TPP* ch 26, includes commitments on points of contacts to facilitate communication between the parties, publication of laws and regulations and advanced publication of proposed laws and regulations, with detailed commitments on provision of information, administrative proceedings, review and appeal.⁷⁹

Although the *TPP* delivered a new take in the novel discipline of regulatory coherence, it also did it with shortcomings. Limitations on the scope of the regulatory coherence could have undermined the basic goals of the chapter, as cross-country differences in the agreed scope of 'covered measures' could lead to great divergence, as several measures were excluded from the Regulatory Coherence Chapter. Similarly, if commitments were not implemented in the same way across *TPP* member states, this could foster further regulatory divergence within the regional compact.

Besides, in the case of conflict with other chapters of the *TPP*, those chapters would have taken precedence over the chapter on regulatory coherence, de facto excluding them from the obligations under the Regulatory Coherence Chapter. In the same line, divergences arising on the implementation of the regulatory coherence commitments were excluded from the *TPP* interstate dispute settlement system.

D *TPP and Sustainable Development*

1 *TPP and Environment*

As a '21st century' agreement,⁸⁰ the *TPP* claimed to adequately deal with the relationship between trade, investment and the environment. Chapter 20 'Environment', composed of 23 articles, addressed issues like trade and biodiversity, environmental protection, multilateral environmental agreements ('MEAs'), CSR, climate change and sustainable development, among others. As stated by Errol Meidinger, the *TPP* Environment Chapter offered some 'environmental benefits by: (1) directly linking trade to numerous environmental concerns, thereby injecting environmental considerations into trade policy; (2)

⁷⁸ *Primer Protocolo Modificadorio del Protocolo Adicional al Acuerdo Marco de la Alianza del Pacífico* (2015) <<https://alianzapacifico.net/?wpdmdl=4580>>, archived at <<https://perma.cc/Z5HX-J6K5>>.

⁷⁹ Compare *TPP* arts 26.2–26.5 with *PAAP* arts 15.2–15.6.

⁸⁰ Kawase, above n 20.

committing member countries to enact, upgrade, and enforce environmental laws; (3) providing dispute settlement mechanisms for situations where countries may not do so; and (4) creating linkages to environmental governance initiatives of non-state actors'.⁸¹

Including environmental commitments in PTAs is not something new for *TPP* signatories. Currently, there are 19 PTAs between *TPP* countries covering environmental issues. Four of them contain a special chapter on environment, all of them with the US as one of the parties. The most recent agreement with a special chapter on environment is the 2009 *US–Peru Trade Promotion Agreement* ('*TPA*'). Regarding PTAs with a side agreement on environment, there are four as well, as seen in the table below. The most recent PTA with a side agreement is the *New Zealand–Malaysia FTA* (2010). The rest of the PTAs between *TPP* signatories only include cooperation provisions, best endeavour provisions, side letters and joint statements. Only Brunei, Japan and Viet Nam did not have PTA environmental provisions with *TPP* signatories.

PTAs with environment as chapter or side agreement	Entry into Force	Mode of inclusion
<i>US–Peru TPA</i>	1 February 2009	Special chapter
<i>US–Australia FTA</i>	1 January 2005	Special chapter
<i>US–Singapore FTA</i>	1 January 2004	Special chapter
<i>US–Chile FTA</i>	1 January 2004	Special chapter
<i>New Zealand–Malaysia FTA</i>	1 August 2010	Side agreement
<i>Canada–Peru FTA</i>	1 August 2009	Side agreement
<i>Canada–Chile FTA</i>	5 July 1997	Side agreement
<i>NAFTA</i> (Canada, Mexico and the United States of America)	1 January 1994	Side agreement

The *TPP*'s Environment Chapter had a mixed reception among the environmental community. While the Sierra Club considered that the agreement fails to protect our environment and threatens our air, water, and climate,⁸² the World Wildlife Fund welcomed the environment chapter pointing out that no major trade agreement before the *TPP* has gone so far to address growing pressures on natural resources.⁸³

TPP ch 20 began defining environmental law as a statute or regulation of a party, or provision thereof, including any that implements the party's obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or

⁸¹ Errol Meidinger, 'Mega-Regional Trade Agreements and Global Environmental Governance: The Case of the *Trans-Pacific Partnership Agreement*' (Research Paper No 2016-038, University at Buffalo School of Law Legal Studies Research Paper Series, 1 March 2017) 1.

⁸² Sierra Club, *TPP Text Analysis: Environment Chapter Fails to Protect the Environment* (November 2015) <<https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/TPPanalysis.pdf>>, archived at <<https://perma.cc/ZE4M-EKMP>>.

⁸³ Carter Roberts, *WWF Statement on the Close of the Trans-Pacific Partnership Negotiations* (October 2015) World Wildlife Fund <<http://www.worldwildlife.org/press-releases/wwf-statement-on-the-close-of-the-trans-pacific-partnership-negotiations>>, archived at <<https://perma.cc/N4PV-6FGV>>.

health, through (a) the prevention, abatement or control of: the release, discharge or emission of pollutants or environmental contaminants; (b) the control of environmentally hazardous or toxic chemicals, substances, materials or wastes, and the dissemination of information related thereto; or (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.⁸⁴

Although it seems to be a broad and encompassing definition, some scholars pointed out the absence of important topics, like the ‘sensible management of existing natural resources and aboriginal management of resources, including traditional knowledge, culture and genetic resources’.⁸⁵

Notwithstanding the conspicuous fact that the agreement does not mention ‘climate change’, the *TPP* did acknowledge that a ‘transition to a low emissions economy should reflect domestic circumstances and capabilities’ and that parties shall cooperate to address matters of joint or common interest.⁸⁶ Article 20.15 mentioned areas of cooperation like energy efficiency; development of cost effective, low emissions technologies and alternative, clean and renewable energy sources; sustainable transport and sustainable urban infrastructure development; addressing deforestation and forest degradation; emissions monitoring; market and non-market mechanisms; low emissions, resilient development and sharing of information and experiences in addressing this issue.

Compared to other PTAs between *TPP* signatories, the agreement was more ambitious in terms of goals of its environment chapter. The *TPP* highlighted as objectives the ‘effective enforcement of environmental laws’ to ‘enhance the capacities of the Parties to address trade-related environmental issues’,⁸⁷ and added in art 20.2.3 that ‘it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties’. Although this could be interpreted as economic growth cannot be hampered by environmental protection,⁸⁸ because the wording resembles the chapeau of art XX of the *General Agreement on Tariffs and Trade* (*GATT*), it could be said that the main aim of art 20.3 was to achieve a balance between trade, investment and environmental protection.

With respect to the levels of environmental protection, the *TPP* recognised the right of its parties to set their own levels of protection and to enact or amend their environmental legislation.⁸⁹ This wording is similar to the one found in the latest PTA signed by the US with another *TPP* party, the *US–Peru TPA* (2009),⁹⁰ but the *TPP* simplifies the language, and merely considers the issue as part of the ‘General Commitments’.

⁸⁴ *TPP* art 20.1.

⁸⁵ Rafael Leal Arcas, ‘Mega-Regionals and Sustainable Development’ (2016) 6(4) *Renewable Energy Law and Policy Review* 236, 257.

⁸⁶ *TPP* art 20.15.

⁸⁷ *Ibid* art 20.2(1).

⁸⁸ Arcas, above n 85, 258.

⁸⁹ *TPP* art 20.3.

⁹⁰ *Peru–United States Trade Promotion Agreement*, signed 12 April 2006 (entered into force 1 February 2009) art 18.1 (*Peru–US TPA*).

The *TPP*, as with the *US–Peru TPA*, seemed to follow the European Union sectoral approach to environmental commitments.⁹¹ This is evidenced in the reiteration of several international commitments found in MEAs from which *TPP* countries are signatories: the *Montreal Protocol on Ozone Depleting Substances*, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (*‘CITES’*) and the *International Convention for the Prevention of Pollution from Ships* (*‘MARPOL’*). However, the chapter did not have an explicit list of ‘covered agreements’ as the *US–Peru TPA* did,⁹² presumably ‘because several MEAs are not common to the *TPP* signatories’.⁹³

Yet, quite remarkably, the *TPP* had binding obligations regarding *CITES*, as it mandated each party to ‘adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations’⁹⁴ under the cited MEA. As stated by Jeffrey Schott and Julia Muir, the illegal trade in wildlife generates roughly US\$10 to US\$20 billion in revenue annually, thus requiring *TPP* members to bring their regulations and laws into compliance with *CITES* ‘is a feasible and desirable objective’.⁹⁵ According to the *CITES* website, all *TPP* signatories are considered to be in category 1 (requirements fully met),⁹⁶ although it must be noted that the *TPP* was not conceived as a self-executing international agreement.

The *TPP* also had ‘broad commitments to combat wildlife trafficking beyond *CITES*’,⁹⁷ by limiting subsidies on marine fishing, and also recognised the importance of an unsustainable exploitation of fish stocks,⁹⁸ while addressing illegal and unregulated fishing.⁹⁹ For some, the *TPP* took a significant step towards implementing binding subsidies disciplines in relation to overfished stocks, whereas WTO members had previously been unable to agree on them, drawing on the expertise of relevant international bodies and regimes, such as the Food and Agriculture Organisation and *United Nations Convention on the Law of the Sea* (*‘UNCLOS’*), promoting information sharing and learning and a role for a wider group of interested parties.¹⁰⁰ Yet, for others, these advancements

⁹¹ Jean Frédéric Morin and Guillaume Beaumier, *TPP Environmental Commitments: Combining the US Legalistic and the EU Sectoral Approaches* (29 April 2016) International Centre for Trade and Sustainable Development (*‘ICTSD’*) <<http://www.ictsd.org/bridges-news/biores/news/tpp-environmental-commitments-combining-the-us-legalistic-and-the-eu>>, archived at <<https://perma.cc/7QFS-XEJP>>.

⁹² *Peru–US TPA* art 18.2.

⁹³ USTR, *Environment* (November 2015) Summary of the *Trans-Pacific Partnership Agreement* <<https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Environment.pdf>>, archived at <<https://perma.cc/99DG-ZWUR>>.

⁹⁴ *TPP* art 20.17(2).

⁹⁵ Jeffrey J Schott and Julia Muir, ‘Environmental Issues in the *TPP*’ in C L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge University Press, 2012) 187, 195.

⁹⁶ *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (*‘CITES’*), *Status of Legislative Progress for Implementing CITES* (2016), <<https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-22-A3-R1.pdf>>, archived at <<https://perma.cc/Q2B6-EZLS>>.

⁹⁷ USTR, *Environment*, above n 93.

⁹⁸ *TPP* art 20.16(2).

⁹⁹ *Ibid.*

¹⁰⁰ Amanda Rologas Tsangalis, ‘Fisheries Subsidies under the *Trans-Pacific Partnership*: Towards Positive Outcomes for Global Fisheries Sustainability and Regime Interaction under International Law’ (2016) 17 *Melbourne Journal of International Law* 445, 475–6.

were not enough, as it only prohibited or restrained those that affect ‘overfished’ stocks (art 20.16.5), diminishing the potential of the *TPP* on disciplining marine fisheries subsidies, as it did not cover those targeting stocks which were not overfished.¹⁰¹

According to the *TPP*, signatories had to promote public awareness of its environmental laws and policies,¹⁰² including also procedures for compliance and enforcement, empowering civil society and other stakeholders to denounce violations of environmental law. The *TPP* also innovated by limiting the investigation of alleged violations of environmental law to established or residing persons in the territory of the *TPP* party suspected of a violation, as opposed to the *US–Peru TPA* which allows any interested person to request an investigation.¹⁰³

Chapter 20 refined what was done in previous PTAs between *TPP* countries relating to public participation. In addition to establishing a procedure for public submissions denouncing a violation of environmental law, the *TPP* mandated parties to ‘make its procedures for the receipt and consideration of written submissions readily accessible and publicly available’, suggesting those procedures to be posted on ‘an appropriate public website’.¹⁰⁴ Also, the *TPP* innovated by mandating its parties to elaborate a written report on the implementation ‘no later than three years after the ... entry into force of the Agreement’.¹⁰⁵

Cooperation, promotion and encouragement of environmental laws and regulations were extensively found in ch 20, specifically on topics such as CSR, biological biodiversity and invasive alien species. The *TPP* dealt with CSR,¹⁰⁶ requiring its parties to encourage enterprises to voluntarily adopt principles of CSR. It also mandated parties to ‘promote and encourage the conservation and sustainable use of biological biodiversity’.¹⁰⁷ Additionally, the *TPP* directed its Environment Committee ‘to identify cooperative opportunities to share information and management experiences’¹⁰⁸ on invasive alien species.

Furthermore, the *TPP* contained a best endeavour provision to address any ‘potential non-tariff barriers’¹⁰⁹ on environmental goods and services and to consider any issues that can be raised on this aspect by any *TPP* party.¹¹⁰ However, the agreement missed the opportunity to do more in liberalising trade in environmental goods and services, by lowering existing tariff and non-tariff

¹⁰¹ Arcas, above n 85, 260.

¹⁰² *TPP* art 20.7(1).

¹⁰³ *Ibid* art 20.7(2).

¹⁰⁴ *Ibid* art 20.9(1)–(2).

¹⁰⁵ *Ibid* art 20.9(6).

¹⁰⁶ *Ibid* art 20.10.

¹⁰⁷ *Ibid* art 20.13(2).

¹⁰⁸ *Ibid* art 20.14(2).

¹⁰⁹ *Ibid* art 20.18(3).

¹¹⁰ The inclusion of environmental goods and services is not a surprise as Australia, Canada, Japan, New Zealand, Singapore and the United States are participants on the negotiations of the Environmental Goods Agreement at the WTO and are currently pushing for an ‘ambitious agreement in a timely manner’: World Trade Organization, ‘Several WTO Members Call for Further Work on Trade and Climate Policy Coherence’ (Media Release, 30 June 2016) <https://www.wto.org/english/news_e/news16_e/envir_30jun16_e.htm>, archived at <<https://perma.cc/JW2E-RVS5>>.

barriers affecting them. As stated by Gary Hufbauer, Jeffrey Schott and Woan Wong (2010), eliminating tariffs in environmental goods would cause global trade gains of around US\$5.9 billion in exports.¹¹¹ Additionally, lowering trade barriers to environmental goods allows developing countries to improve their access to environmentally protective technologies. In this regard, *TPP* art 20.19.3 only mandated the Committee on Environment to address this issue, leaving for future negotiations among *TPP* signatories any relevant progress on environmental goods and services liberalisation.¹¹²

Dispute settlement procedures and enforcing mechanisms were applicable to the *TPP* Environment Chapter. Following consultations (environment, senior representative and ministerial consultations)¹¹³ it allowed for interstate dispute resolution through the request of a panel.¹¹⁴ The panel should consider requests from non-governmental entities located in the territory of a disputing party, to provide written statements that may assist the panel in evaluating the submissions and arguments of the disputing parties.¹¹⁵

The framework of environmental disputes closely followed the model of the *US–Peru TPA*. The *TPP* refined such dispute settlement procedure, including the role of experts in a dispute and by allowing parties to seek advice or assistance from an entity authorised by *CITES* when the disagreement is about conservation and trade (art 20.23.2). Yet, some commentators raised concerns about the possible impact of the *TPP* on the evolution of international environmental law, as some panellists may not be experts in interpreting MEAs.¹¹⁶

Although it was undoubtedly an achievement to have an environmental chapter subject to dispute settlement in an agreement signed between 12 countries, the *TPP* did not innovate substantially with respect to enforcement provisions. For some, the *TPP* failed to provide an effective enforcement mechanism, as the panel report would be ‘merely recommendatory in value’.¹¹⁷ Others found disturbing that the agreement provides for no independent oversight or enforcement mechanisms.¹¹⁸ The *TPP* only covered the enforcement of environmental laws affecting ‘trade or investment’ between the parties,¹¹⁹ following the trend of the other PTAs between *TPP* countries with a limited scope of the enforcing mechanism for environmental issues. Certain NGOs recalled that past US PTAs ‘have contained similar enforcement provisions for the environmental chapter, no party has ever brought a formal case based on the

¹¹¹ Gary Clyde Hufbauer, Jeffrey J Schott and Woan Foong Wong, *Figuring Out the Doha Round* (Peterson Institute for International Economics, 2010) 17, 50.

¹¹² Meidinger, above n 81, 9.

¹¹³ *TPP* arts 20.20–20.22.

¹¹⁴ *Ibid* art 28.7

¹¹⁵ *Ibid* art 28.13(e).

¹¹⁶ Joshua P Meltzer, ‘The *Trans-Pacific Partnership Agreement*, the Environment and Climate Change’ in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2014) 207, 211.

¹¹⁷ Arcas, above n 85, 262.

¹¹⁸ Tsangalis, above n 100, 27.

¹¹⁹ *TPP* art 20.3(4).

environmental provisions'.¹²⁰ Generally, the Environment Chapter of the *TPP* innovated in some aspects with respect to prior agreements concluded by *TPP* signatories, but fell short on others. The *TPP* innovated on CSR, by encouraging enterprises to adopt values linked to the environment voluntarily.¹²¹ Also, the *TPP* included provisions on trade and biodiversity, encouraging and promoting a sustainable use of biological diversity.¹²² Although violations of the environment chapter could trigger dispute settlement procedures, the *TPP* could have gone further on enforcement mechanisms, as well as binding obligations regarding MEAs, expanding restrictions on fisheries subsidies to all stocks of fish, and providing a broader scope to the notion of 'environmental'. A possible explanation for this mixed approach would be the different environmental commitments contained in laws, treaties and regulations of *TPP* signatories.

2 *TPP and Labour*

The *TPP* Labour Chapter (ch 19) must be examined as part of a larger trend, having in mind that agreements with provisions on labour issues have been gradually included in PTAs, especially during the last decade, not only in North–South agreements but also in South–South treaties.¹²³ But such generalisations need to be approached with care, as there is no uniformity of approach in terms of whether to include labour clauses into PTAs, or the content of these clauses.¹²⁴ Yet, the *TPP* labour chapter is among the most innovative ones of the agreement for the breadth of its commitments and its enforcement mechanism.

Some authors considered the *TPP* to be a 'game changer' (especially for Asian *TPP* countries) and part of a "new generation" of social dimension labour provisions of FTAs'.¹²⁵ Chapter 19 recognised International Labour Organization ('ILO') fundamental rights, notably with regard to child labour, the right to collective bargaining, forced labour, freedom of association and employment discrimination. Moreover, it had commitments on laws governing minimum wages, hours of work, and occupational safety and health,¹²⁶ and included measures to prevent the degradation of labour protections in export processing zones.¹²⁷ The *TPP* also established specific institutional mechanisms

¹²⁰ Centre for International Environmental Law, *The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement* (November 2015) <http://www.ciel.org/reports/tpp_enforcement_nov2015/>, archived at <<https://perma.cc/99PS-YWCN>>.

¹²¹ *TPP* art 20.10.

¹²² Arcas, above n 85, 259.

¹²³ Anne Posthuma and Franz Ebert, 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives' (Discussion Paper No 205, International Institute for Labour Studies, 2011) 19–20 <https://www.researchgate.net/profile/Anne_Posthuma/publication/263734653_Labour_provisions_in_trade_arrangements_current_trends_and_perspectives/links/54bd6f840cf218d4a16a28cc.pdf>.

¹²⁴ Joo Cheong Tham and K D Ewing, 'Labour Clauses in the *TPP* and *TTIP*: A Comparison without a Difference?' (2016) 17 *Melbourne Journal of International Law* 369, 372.

¹²⁵ Ronald C Brown, *Labor Implications of TPP: A Game Changer?* University of Hawai'i Law School (10 May 2016) East West Centre, 1, 19 <http://www.eastwestcenter.org/sites/default/files/filemanager/pubs/pdfs/7-5Brown_rev20160510.pdf>, archived at <<https://perma.cc/S9EL-5FP4>>.

¹²⁶ *TPP* art 19.1.

¹²⁷ *Ibid* art 19.4.

to assist in its implementation (a labour council of senior governmental representatives).¹²⁸

Including a labour chapter in a PTA was a novelty for many *TPP* countries, as their preferred approach had been to cover labour in a side agreement (five agreements), or less binding documents, like side letters or memoranda of understanding. Only four previous PTAs between *TPP* signatories dealt with labour in a special chapter (all of them with the United States as a party). Thus, it is not strange that Allee and Lugg, have concluded that the US is the prominent country in terms of the source of texts for the *TPP* in this topic, with 32.2 per cent of the *TPP* Labour Chapter text taken from previous PTAs with that country.¹²⁹

Special chapter on labour	Entry into force
<i>US–Peru TPA</i>	1 February 2009
<i>US–Australia FTA</i>	1 January 2005
<i>US–Chile FTA</i>	1 January 2004
<i>US–Singapore FTA</i>	1 January 2004
Side agreement	
<i>Canada–Chile FTA</i>	5 July 1997
<i>Peru–Canada FTA</i>	1 August 2009
<i>Chile–Peru FTA</i>	1 March 2009
<i>Malaysia–New Zealand FTA</i>	1 August 2010
<i>NAFTA</i> (Canada, Mexico and the United States of America)	1 January 1994
Side letter	
<i>Australia–Malaysia FTA</i>	1 January 2013
Memorandum of understanding	
<i>P4</i> (Chile, New Zealand, Singapore and Brunei Darussalam)	8 November 2006

The *TPP* Labour Chapter was complemented with side agreements that the US signed with Brunei, Malaysia and Viet Nam (countries with poor levels of

¹²⁸ Ibid art 19.12.

¹²⁹ Allee and Lugg, above n 24, 7.

ratification of the ILO's fundamental conventions).¹³⁰ These agreements stipulated that labour laws 'must be newly established, changed and improved to allow independent labour unions, strikes, proper treatment of immigrants, anti-discrimination provisions, labour inspections and other basic labour standards'.¹³¹ Moreover, Brunei, Malaysia and Viet Nam had to implement their respective side agreements 'before they are allowed to export duty free goods to the US and otherwise use the provisions of the TPP'.¹³²

Although cooperation and consultation were strongly encouraged, the commitments in the *TPP* Labour Chapter were enforceable through dispute settlement procedures, stipulating the public availability of the final report. The provisions on dispute settlement also contemplated labour dialogues, cooperation mechanisms and allowing stakeholders and civil society to participate.¹³³ As opposed to the Environment Chapter, labour provisions had an effective enforcement mechanism because trade sanctions are permitted. More specifically, ch 19 allowed trade sanctions if a *TPP* member failed to comply with its obligations,¹³⁴ as it contemplates full recourse to all the provisions of the Dispute Settlement Chapter after the establishment of a panel.¹³⁵

Nonetheless, the requirement to adopt regulations and practices governing acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health were 'softer' obligations, as they are determined by each party.¹³⁶ Violation of this obligation and of that imposed by art 19.3.1 in relation to the 1998 *ILO Declaration on Fundamental Principles and Rights at Work* only occurred when a party 'has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties'.¹³⁷

In sum, the *TPP* Labour Chapter included enforceable obligations on issues like child and forced labour, the right to collective bargaining and freedom of association. The *TPP*'s three labour side agreements with Brunei, Malaysia and Viet Nam, aimed to improve workers' conditions in developing countries with a large labour-intensive industry, showing efforts which are certainly welcomed. The dispute settlement provisions were overall clear and went further than any US-negotiated trade agreement including labour provisions.

E *TPP and Intellectual Property*

TPP treatment of intellectual property is informed by existing multilateral agreements on the issue (particularly the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* — '*TRIPS*'), and the large number of PTAs concluded between *TPP* signatories.

¹³⁰ International Labour Organization ('ILO'), *Conventions and Recommendations* (2016) <<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>>, archived at <<https://perma.cc/D7GX-8LSJ>>.

¹³¹ Brown, above n 125, 10.

¹³² *Ibid.*

¹³³ *TPP* arts 19.10, 19.11, 19.15(11), 19.15(12).

¹³⁴ Brown, above n 125, 13–14.

¹³⁵ *TPP* art 19.15(12).

¹³⁶ Tham and Ewing, above n 124, 18.

¹³⁷ *TPP* ch 19 n 4.

Currently, there are 25 agreements between *TPP* countries dealing with intellectual property in a special chapter, notably concluded by the US and Australia:

Agreements with an Intellectual Property Chapter	Entry into Force
<i>Australia–Japan EPA</i>	15 January 2015
<i>Australia–Malaysia FTA</i>	1 January 2013
<i>Australia–New Zealand CERTA</i>	1 January 1983
<i>Australia–US FTA</i>	1 January 2005
<i>ASEAN (Brunei Darussalam, Malaysia, Singapore, Viet Nam)–Australia–New Zealand Free Trade Agreement ('AANZFTA')</i>	1 January 2010
<i>Australia–Chile FTA</i>	6 March 2009
<i>Australia–Singapore FTA</i>	28 July 2003
<i>ASEAN (including Viet Nam)–Australia–New Zealand ('AANZFTA')</i>	1 January 2010
<i>P4 (Chile, New Zealand, Singapore and Brunei Darussalam)</i>	8 November 2006
<i>NAFTA (Canada, Mexico and the United States of America)</i>	1 January 1994
<i>US–Chile FTA</i>	1 January 2004
<i>Japan–Chile SEP</i>	3 September 2007
<i>Australia–Chile FTA</i>	6 March 2009
<i>Mexico–Chile FTA</i>	31 July 1999
<i>Chile–Peru ECA</i>	1 March 2009
<i>Malaysia–Japan EPA</i>	13 July 2006
<i>ASEAN (including Malaysia)–Japan CEP</i>	31 October 2008
<i>Japan–Viet Nam EPÁ</i>	1 October 2009
<i>Japan–Singapore EPA</i>	30 November 2002
<i>Peru–Japan EPA</i>	1 March 2012
<i>Malaysia–New Zealand FTA</i>	1 August 2010
<i>Peru–US TPA</i>	1 February 2009
<i>Peru–Mexico TIA</i>	1 February 2012

<i>US–Singapore FTA</i>	1 January 2004
<i>Viet Nam–US Agreement on Trade Relations</i>	13 July 2000

The *TPP* Intellectual Property Chapter (ch 18), like the vast majority of PTAs concluded by *TPP* members, largely followed the legal rights and obligations included in *TRIPS*. However, the *TPP* included commitments that expanded *TRIPS* commitments in issues such as geographical indications (‘GIs’), wines and distilled spirits, copyright and related rights and biological products.

Under the *TPP*, GIs¹³⁸ were eligible for protection as trademarks. This was an important departure from *TRIPS*, which deals with GIs separately from trademarks, becoming closer to the treatment that the US gives to geographical indications. Chapter 18 also required more stringent requirements with respect to the protection of new GIs, including provisions on transparency, due process, as well as safeguards regarding the use of terms that are customary in the common language. However, existing GIs pursuant to an international agreement were effectively grandfathered.¹³⁹ Special provisions on wine certification and analysis were included, basically eliminating these procedures as a general rule, which could be ordered only in cases of suspicion.

The *TPP* also marked the first time that a trade agreement signed by the US included annexes on specific products. *TPP* ch 18 included an Annex 8A on wines and distilled spirits that create common definitions of ‘wine’ and ‘distilled spirits’ to facilitate trade in these products. At the same time, the Annex established parameters for labelling and certification of wine products, while preserving the ability of regulators to ensure consumer protection.

The *TPP* also increased the terms of protection of copyright to be protected during the lifetime of authors and even 70 years after their death (art 18.63). Although some *TPP* signatories already have such protection (after amendments to its *Federal Copyright Law* in 2003, Mexico had set the standard to 100 years), some critics pointed out that if in the future these countries were to seek to reduce the time of protection, the *TPP* would have made this impossible.¹⁴⁰ But then again, these commitments were already locked out in other PTAs concluded by the same countries, like the *US–Peru TPA* (art 16.5.5) and the *US–Chile FTA* (art 17.5) that provide the same 70 years of protection, although some older treaties like *NAFTA* (art 1705) still include a shorter period of 50 years. Aiming to strike a balance between private protection and public interest, *TPP* arts 18.65 and 18.66 stipulated that each country shall give due consideration to legitimate purposes such as, ‘criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes’.

Another ‘new’ and contested issue in the *TPP* was the protection of test data or other undisclosed data from the sanitary registration of pharmaceutical

¹³⁸ Geographical indicators were defined as ‘indications that identify a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin’: *TPP* art 18.1.

¹³⁹ *Ibid* arts 18.31, 18.36.

¹⁴⁰ Gisela Pérez de Acha, *TPP: La Lucha Recién Comienza* (4 February 2016) *Derechos Digitales* <<https://derechosdigitales.org/9709/tpp-la-lucha-recien-comienza>>, archived at <<https://perma.cc/3HJP-ZCEH>>.

products, both for products of chemical synthesis and for biological products, for a number of years.¹⁴¹ However, the issue was also not so new, as the US had negotiated this protection before. For example, in the *US–Chile FTA*, both countries recognised and guaranteed a period of protection of test data or other undisclosed data of five years from the sanitary registration of pharmaceutical product (both for products of chemical synthesis and for biological products). In principle, the *TPP* would have extended this protection to eight years, yet arts 18.50 and 18.51 of the agreement allowed an ‘alternative’ performance that does not involve the extension of three years but to ‘other measures, to provide a comparable result in the market’ — whatever that meant.

In sum, with respect to intellectual property, the *TPP* largely restated previous commitments undertaken by its signatories under *TRIPS* and prior PTAs, with more detailed provisions on controversial issues, especially on biological products, copyright and related rights.

F TPP and Services

The *TPP* followed the latest US model for services negotiations, diverting from the *GATS*. It considered services through six different chapters, namely: Investment, Cross-Border Trade in Services, Financial Services, Temporary Entry of Business Persons, Telecommunications and Electronic Commerce.¹⁴² As a result, commercial presence or ‘Mode 3’ was treated in the Investment Chapter and movement of natural persons or ‘Mode 4’, in the Temporary Entry of Business Persons Chapter.

TPP signatories have included trade in services in almost all their existing FTAs, with the exception of Chilean PTAs with Malaysia and Viet Nam, the *AANZFTA* (including Brunei Darussalam, Singapore, Malaysia and Viet Nam),¹⁴³ and the *Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations*.¹⁴⁴

1 Cross-Border Trade in Services

There are 28 PTAs between *TPP* signatories which cover cross-border trade in services. Of them, 19 are PTAs with a ‘negative list’ approach for market access services liberalisation, mainly following the *NAFTA* model. The remaining nine PTAs follow the ‘positive list’ approach of *GATS*, as seen in the table below:

PTAs with ‘negative list’ approach for market access	Entry into Force
<i>Australia–New Zealand Closer Economic Relations Services Protocol</i>	1 January 1989

¹⁴¹ Brook K Baker, ‘*Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere*’ (2016) 13(3) *PLoS Med* 1, 2–3.

¹⁴² *TPP* chs 9, 14.

¹⁴³ Although trade in services is covered in the *ASEAN Framework Agreement on Services of 1995*.

¹⁴⁴ *Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations*, signed 14 April 2008 (entered into force 1 December 2008).

<i>Australia–Chile FTA</i>	30 July 2008
<i>P4 Agreement</i> (Brunei Darussalam, Chile, New Zealand, Singapore)	3 June 2005
<i>Peru–Singapore EPA</i>	29 May 2009
<i>Chile–Peru FTA</i>	22 August 2006
<i>Singapore–Australia FTA</i>	28 July 2003
<i>US–Australia FTA</i>	1 January 2005
<i>US–Chile FTA</i>	1 January 2004
<i>US–Peru TPA</i>	1 January 2009
<i>US–Singapore FTA</i>	1 January 2004
<i>Australia–Japan FTA</i>	15 January 2015
<i>Canada–Chile FTA</i>	5 July 1997
<i>Canada–Peru FTA</i>	1 August 2009
<i>Mexico–Chile FTA</i>	17 April 1998
<i>Chile–Japan FTA</i>	3 September 2007
<i>Peru–Japan FTA</i>	1 March 2012
<i>Mexico–Peru FTA</i>	6 April 2011
<i>NAFTA</i> (Canada, Mexico and the United States of America)	1 January 1994
<i>Peru–Singapore FTA</i>	29 May 2008
PTAs with ‘positive list’ approach for market access	Entry into Force
<i>AANZFTA</i> (ASEAN, Australia and New Zealand)	1 January 2010
<i>Australia–Malaysia FTA</i>	1 January 2013
<i>Brunei–Japan EPA</i>	31 July 2008
<i>Malaysia–Japan FTA</i>	13 July 2006
<i>Mexico–Japan EPA</i>	1 April 2005
<i>Singapore–Japan EPA</i>	30 November 2002
<i>Viet Nam–Japan EPA</i>	1 October 2009
<i>Malaysia–New Zealand FTA</i>	26 October 2009
<i>New Zealand–Singapore CEP</i>	14 November 2000

Chapter 10 of the *TPP* consolidated the FTAs between its parties on cross-border trade in services by including standard provisions in national treatment, MFN treatment, market access and particularly prohibiting local presence requirements. The *TPP* prohibited any local presence requirements in art 10.6, stipulating that parties cannot require a service supplier of another party to have an office or ‘be resident in its territory as a condition for the cross-border supply of a service’.¹⁴⁵ This provision is commonly found in FTAs regulating services,

¹⁴⁵ *TPP* art 10.6.

and in the case of *TPP* countries, is present in FTAs such as *Canada–Chile*¹⁴⁶ or *Australia–US*.¹⁴⁷

The chosen approach for trade in services liberalisation in the *TPP* was the negative list approach, by which parties fully liberalise all sectors and subsectors except for those excluded by each party in their respective schedule or list of non-conforming measures. These exemptions are set out in Annexes I and II of the Chapter. Annex I contains the standard list of exemptions with static commitments. Annex II comprises a list of reservations which are dynamic, as it gives *TPP* signatories full autonomy in regulating the inscribed services in the future. As may be seen in the table above, only three countries had never concluded a PTA by the negative list approach for services liberalisation with another *TPP* signatory: Brunei, Malaysia and Viet Nam.

In terms of market access, the *TPP* expanded the coverage to new markets for Japan, Malaysia, New Zealand and Viet Nam. These countries lack an FTA with the US. While a negative list approach has proven to expand further liberalisation in services compared to a positive list approach, what really makes the difference are the key sectors opened.¹⁴⁸ In general, compared to the Doha offers made by *TPP* members, the agreement improved on an average of around 40 per cent. This was particularly significant for *TPP* signatories like Brunei, Chile, Mexico, Peru and Singapore, while Australia, New Zealand and Viet Nam made small improvements.¹⁴⁹ According to Batshur Gootiiz and Aaditya Mattoo, for sectors like express delivery, portfolio management, energy and mining related services, the *TPP* would have made an impact,¹⁵⁰ while services commitments in basic telecommunications, financial services, professional services, retail distribution and transport suggested a limited level of liberalisation and only for a few countries (Malaysia in financial, legal and telecommunications services; Mexico in road freight transport services; and Viet Nam in retail and telecommunication services).¹⁵¹

In some cases, market liberalisation is not immediate. For example, Viet Nam's commitments in retail distribution, were postponed by five years after the entry into force of the *TPP*. In a similar case, Malaysia's commitments in financial services were deferred five years on certain cross-border direct insurance of risks linked to directors' and officers' liability.

However, the *TPP* also delivered some innovation in trade in services, expanding the scope of air transportation services (by adding specialty

¹⁴⁶ *Canada–Chile Free Trade Agreement*, signed 5 December 1996 (entered into force 5 July 1997) art H 05.

¹⁴⁷ *Australia–United States Free Trade Agreement*, signed 18 May 2004 (entered into force 1 January 2005) art 10.5.

¹⁴⁸ Stuart Harbinson and Aik Hoe Lim, 'Trade in Services' in C L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (Cambridge University Press, 2012) 133, 135.

¹⁴⁹ Batshur Gootiiz and Aaditya Mattoo, 'Services in the *Trans-Pacific Partnership*: What Would Be Lost?' (Policy Research Working Paper No 7964, Development Research Group, World Bank, February 2017) 10
<<http://documents.worldbank.org/curated/en/512711486497950394/pdf/WPS7964.pdf>>, archived at <<https://perma.cc/T88V-WZ6N>>.

¹⁵⁰ *Ibid* 23.

¹⁵¹ *Ibid* 2–3.

services,¹⁵² airport operation services and ground handling services),¹⁵³ including a framework to negotiate mutual recognition agreements ('MRAs'), commitments to liberalise professional services¹⁵⁴ and provisions on domestic regulation, ensuring 'that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner'.¹⁵⁵ Another novel aspect is the inclusion of an annex on express delivery services, aimed to balance the situation between private and state postal monopoly companies.¹⁵⁶ It is highly likely that *TPP* did not innovate in other issues, because of the then ongoing *Trade in Services Agreement* ('*TiSA*') negotiations, which involved several *TPP* parties (Australia, Canada, Chile, Japan, Mexico, New Zealand, Peru and the US).

2 *Financial Services*

As with cross-border trade in services, the *TPP*'s regulation of financial services cannot be examined in isolation. Currently, there are 19 PTAs between *TPP* signatories with a chapter on financial services:

PTAs covering financial services in a special chapter	Entry into Force
<i>Australia–Japan FTA</i>	15 January 2015
<i>Australia–Malaysia FTA</i>	1 January 2013
<i>Peru–Japan FTA</i>	1 March 2012
<i>ASEAN</i> (including Viet Nam)– <i>Australia–New Zealand</i>	1 January 2010
<i>Viet Nam–Japan EPA</i>	1 October 2009
<i>Canada–Peru FTA</i>	1 August 2009
<i>Peru–Singapore FTA</i>	29 May 2009
<i>Australia–Chile FTA</i>	6 March 2009
<i>US–Peru TPA</i>	1 February 2009
<i>Brunei–Japan EPA</i>	31 July 2008
<i>Chile–Japan FTA</i>	3 September 2007
<i>Malaysia–Japan FTA</i>	13 July 2006

¹⁵² *TPP* art 10.1. According to this article, specialty services are 'any specialised commercial operation using an aircraft whose primary purpose is not the transportation of goods or passengers' (eg aerial fire fighting, flight training, sightseeing, spraying, surveying, mapping, photography, parachute jumping).

¹⁵³ *Ibid* art 10.2(5).

¹⁵⁴ *Ibid* annex 10-A ('*Professional Services*').

¹⁵⁵ *Ibid* art 10.8. The *TPP* chapter on cross-border services added three elements not commonly covering the authorisation for the supply of a service: (1) an indicative timeframe for the application process; (2) opportunity to correct minor errors and omissions in the application; and (3) accept copies of documents authenticated in accordance with the applicant's country domestic law. Moreover, *TPP* contained an obligation to ensure that any authorisation fee charged was reasonable, transparent and did not intrinsically restrict the supply of the relevant service. In other words, *TPP* countries could not use an expensive or non-transparent authorisation fee to deter service suppliers to enter a specific market.

¹⁵⁶ Government of Canada, *Trans-Pacific Partnership (TPP) – Cross-Border Trade in Services Chapter* (2015) <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/10.aspx?lang=eng>>, archived at <<https://perma.cc/CXH8-A22H>>.

<i>Mexico–Japan EPA</i>	1 April 2005
<i>US–Australia FTA</i>	1 January 2005
<i>US–Chile FTA</i>	1 January 2004
<i>US–Singapore FTA</i>	1 January 2004
<i>Australia–Singapore FTA</i>	28 July 2003
<i>Singapore–Japan EPA</i>	30 November 2002
<i>NAFTA</i> (Canada, Mexico and the United States of America)	1 January 1994

The *TPP* closely followed the treatment of this issue as considered in prior PTAs. Yet, the Financial Services Chapter (ch 11) innovated in three important topics,¹⁵⁷ as it contained specific commitments on the cross-border delivery of electronic payment card services, postal entities selling insurance to the general public¹⁵⁸ and on prudential regulations¹⁵⁹ of financial services.

The list of specific commitments on electronic payment card services reveals that not all countries fully liberalised this subsector. For instance, Malaysia excluded ‘the supply of electronic payment services for payment card transactions’.¹⁶⁰ Section D of Annex 11-B of the chapter governed the aforesaid services, mandating the parties to allow the supply of the service across territories. However, s D provided for public policy measures to protect personal data, regulation of fees, among other policy objectives that parties may have in this sense.

With regard to postal entities supplying insurance services, Annex 11-B also stipulated that parties shall not adopt or maintain measures that create more favourable competition conditions to a postal insurance entity as compared to a private supplier of like insurance services.¹⁶¹

The *TPP*’s provisions on exceptions considered that ‘prudential reasons’ comprehended the ‘maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers as well as the safety, and financial and operational integrity of payment and clearing systems’.¹⁶² This ‘prudential carve out’ would have allowed *TPP* countries to prevent or limit transfers by financial institutions. Moreover, it provided that no provision in the chapter was construed to prevent any party from adopting or enforcing necessary compliance measures with laws and regulations relating to the prevention of fraud, deceptive practices or those dealing with a default on financial services contracts.¹⁶³

Lastly, with regard to cross-border financial data flows, ch 11 allowed *TPP* countries to transfer and process financial data from another party’s financial

¹⁵⁷ USTR, *Financial Services* (November 2015) <<https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Financial-Services.pdf>>, archived at <<https://perma.cc/K4FY-WQR4>>.

¹⁵⁸ *TPP* annex 11-B (‘*Specific Commitments*’) s C.

¹⁵⁹ *Ibid* art 11.11.

¹⁶⁰ *Ibid* annex 11-A (‘*Malaysia*’) [3].

¹⁶¹ *Ibid* annex 11-B (‘*Specific Commitments*’) s C [2].

¹⁶² *Ibid* art 11.11 n 10.

¹⁶³ *Ibid* art 11.11(3).

service suppliers.¹⁶⁴ Nevertheless, in Annex 11-A, several *TPP* countries added stipulations referring to the requirement of authorisation from the relevant regulator, a local agent and records in national territory, or determining if the country's privacy laws will apply to a specific transaction when personal data is involved. The countries that did not add any stipulations were Australia, Brunei Darussalam, Japan, New Zealand and the US.¹⁶⁵

3 Telecommunications

The *TPP* Telecommunications Chapter recognised the importance of a pro-competitive telecommunications framework, and this is reflected in its text. However, in general, the chapter largely follows previous PTAs by *TPP* partners. There are 15 PTAs with a special chapter on telecommunications between *TPP* signatories:¹⁶⁶

Agreements with special chapter on telecommunications	Entry into Force
<i>Australia–Japan EPA</i>	15 January 2015
<i>Australia–Malaysia FTA</i>	1 January 2013
<i>Peru–Japan EPA</i>	1 March 2012
<i>ASEAN (including Viet Nam)–Australia–New Zealand</i>	1 January 2010
<i>Canada–Peru FTA</i>	1 August 2009
<i>Australia–Chile FTA</i>	6 March 2009
<i>US–Peru TPA</i>	1 February 2009
<i>US–Australia FTA</i>	1 January 2005
<i>US–Chile FTA</i>	1 January 2004
<i>US–Singapore FTA</i>	1 January 2004
<i>Australia–Singapore FTA</i>	28 July 2003
<i>Singapore–Japan EPA</i>	30 November 2002
<i>Mexico–Chile FTA</i>	31 July 1999
<i>Chile–Canada FTA</i>	5 July 1997
<i>NAFTA (Canada, Mexico and the United States of America)</i>	1 January 1994

The key innovative element in this chapter¹⁶⁷ is the extension of competition rules to mobile suppliers through an endeavour to cooperate on lowering

¹⁶⁴ Sam Klein, 'The Data Is in the Details: Cross-Border Data Flows and the *Trans-Pacific Partnership*', *The Diplomat* (online), 23 November 2015 <<https://thediplomat.com/2015/11/the-data-is-in-the-details-cross-border-data-flows-and-the-trans-pacific-partnership/>>, archived at <<https://perma.cc/L3WS-YMGT>>.

¹⁶⁵ *Ibid.*

¹⁶⁶ In the *Australia–New Zealand Closer Economic Relations Trade Agreement* there is not a special chapter on telecommunications but is also not an excluded service. Similarly, in the *New Zealand–Singapore Closer Economic Partnership*, telecommunications is covered under the agreement's commitments on trade in services, without a dedicated chapter.

¹⁶⁷ USTR, *Telecommunications* (2015) Summary of the *Trans-Pacific Partnership Agreement* 3 <<https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Telecommunications.pdf>>, archived at <<https://perma.cc/L4MT-C52C>>.

roaming rates for international mobile roaming ('IMR') services.¹⁶⁸ In addition, the chapter expanded cross-border data flows through provisions that aim to increase access to and use of any public telecommunication services on a non-discriminatory basis, as well as to ensure that suppliers are permitted to purchase or lease telecommunications equipment interfaced to a public telecommunications network.¹⁶⁹ Another significant element of this chapter was art 13.5, relating to number portability in public telecommunication services suppliers. This provision also deals with access to numbers and interconnection, both relevant to broaden the networks between the *TPP* countries, leading to faster and better exchange of data and connectivity.¹⁷⁰

Yet after a close examination of the detailed roaming provisions in the *TPP*, Danny Kotlowicz and Tania Voon have raised a number of questions about provisions for reaching bilateral roaming arrangements among *TPP* parties, which are considered difficult to understand and harder to implement. In their view, while the *TPP* may have delivered improvements on transparency and cooperation, the mechanisms for the reciprocal lowering of roaming rates could be challenged in the context of a WTO dispute and even superseded by technological and commercial developments.¹⁷¹

4 *Electronic Commerce*

Some authors have declared that the *TPP* was 'the first multilateral trade pact to contain provisions stipulating how digital information should be handled'.¹⁷² In the same line, the United States Trade Representative ('USTR') stated that the agreement was 'designed to preserve the single, global, digital marketplace to ensure the free flow of global information and data that drive the digital economy'.¹⁷³ However, this chapter also cannot be analysed in isolation, as there are already 11 PTAs between *TPP* countries covering e-commerce.¹⁷⁴

PTAs with e-commerce on a special chapter	Entry into Force
<i>Australia–Japan FTA</i>	15 January 2015
<i>Australia–Malaysia FTA</i>	1 January 2013
<i>ASEAN (including Viet Nam)–Australia–New Zealand</i>	1 January 2010
<i>Australia–Chile FTA</i>	6 March 2009

¹⁶⁸ *TPP* ch 13 art 13.6 (International Mobile Roaming).

¹⁶⁹ *Ibid* ch 13, art 13.4(1)–(2)(a) (Access to and Use of Public Telecommunications Services).

¹⁷⁰ Klein, above n 164.

¹⁷¹ Danny Kotlowitz and Tania Voon, 'Telecommunications Services in the *Trans-Pacific Partnership*: Will the Mobile Roaming Provisions Benefit Tourists and Traders?' (2016) 17 *Melbourne Journal of International Law* 404, 441.

¹⁷² Yasu Ota, 'TPP: Trade Pact's E-Commerce Clauses Are a Game Changer', *Nikkei Asian Review* (online), 23 February 2016 <<https://asia.nikkei.com/Politics-Economy/Economy/Trade-pact-s-e-commerce-clauses-are-a-game-changer>>, archived at <<https://perma.cc/3T2B-DE2B>>.

¹⁷³ USTR, *E-Commerce and Telecommunications* (October 2015) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-6>>, archived at <<https://perma.cc/MX2K-5FP2>>.

¹⁷⁴ For Mexico, it would have been the first time that e-commerce was regulated on a PTA.

<i>Canada–Peru FTA</i>	1 August 2009
<i>Peru–Singapore FTA</i>	29 May 2009
<i>US–Peru TPA</i>	1 February 2009
<i>US–Australia FTA</i>	1 January 2005
<i>US–Chile FTA</i>	1 January 2004
<i>US–Singapore FTA</i>	1 January 2004
<i>Australia–Singapore FTA</i>	28 July 2003

The scope of application of the *TPP*'s Electronic Commerce Chapter (ch 14) included measures affecting trade by electronic means, except for government procurement and information collected or processes on behalf of a state party ('information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection').¹⁷⁵ It prohibited all *TPP* signatories from imposing customs duties on electronic transmissions,¹⁷⁶ and also introduced non-discriminatory treatment of digital products, with the notable exceptions of subsidies, broadcasting and intellectual property rights.¹⁷⁷ The Chapter also included best endeavours and cooperation provisions with regard to paperless trading, cybersecurity, e-government, consumer access to online services and products, electronic authentication and electronic signatures, and to overcome obstacles to the use of internet by SMEs.¹⁷⁸

But the *TPP* aimed to regulate digital trade in the Asia-Pacific region with novel features. Chapter 14 contained 'first ever commitments'¹⁷⁹ on locally stored data requirements and prohibitions on data flows across the borders;¹⁸⁰ enforceable measures on consumer protection in issues like unsolicited commercial e-messages (spam)¹⁸¹ and online privacy, such as requiring the source code of software as a condition 'for the import, distribution, sale or use of such software'.¹⁸²

It has been pointed out that the *TPP* prohibition on data flows across borders was far-reaching. According to Gootiiz and Mattoo, although this issue has been covered in previous PTAs and in commitments in *GATS*, 'the remarkable innovation in the *TPP* is that, even though there is an exceptions provision similar to that in the *GATS* (*TPP* art 14.11.3), the *TPP* breaks new grounds in creating obligations on exporting countries to prevent fraud and deception and protect personal information'.¹⁸³

On consumer protection, the Chapter mandated *TPP* signatories to adopt or maintain laws banning fraudulent and deceptive commercial activities causing or threatening to cause harm to consumers engaged in online commercial

¹⁷⁵ *TPP* art 14.2(3).

¹⁷⁶ *Ibid* art 14.3.

¹⁷⁷ *Ibid* art 14.4.

¹⁷⁸ *Ibid* arts 14.7, 14.9, 14.15, 14.16.

¹⁷⁹ USTR, *Electronic Commerce* (November 2015) 2 <<https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Electronic-Commerce.pdf>>, archived at <<https://perma.cc/PW8B-GU4R>>.

¹⁸⁰ *TPP* art 14.13(2).

¹⁸¹ *Ibid* art 14.14.

¹⁸² *Ibid* art 14.17.

¹⁸³ Gootiiz and Mattoo, above n 149, 21.

activities.¹⁸⁴ Compared to other PTAs, the *TPP* included stronger wording in this regard, without qualifiers found in other agreements like the *AANZFTA* and the *US–Peru TPA* (‘where possible’). Regarding personal data protection, the *TPP* dictated that parties ‘shall adopt or maintain a legal framework which provides protection of personal information of all users of e-commerce’.¹⁸⁵

Chapter 14 also innovated in subjecting its provisions to dispute settlement, which is a novelty compared to other trade agreements between *TPP* countries. However, Malaysia and Viet Nam deferred the application of dispute settlement provisions to its obligations under *TPP* on the non-discriminatory treatment of digital products and cross-border transfer of information by electronic means, for a period of two years after the date of entry into force of the agreement.¹⁸⁶

It is almost without question that the *TPP* effectively innovated on e-commerce, and contained several provisions aiming at reducing trade barriers for services providers. The liberalisation design proposed by this chapter would surely benefit businesses using digital platforms, and it has been praised by some authors, as ‘an important baseline for future international law and custom’ on e-commerce.¹⁸⁷

However, concerns about how well the *TPP* addressed public interest on e-commerce have been raised since the agreement was negotiated, notably on network neutrality (‘net neutrality’), as we will examine in the next section.

5 Net Neutrality

An essential pillar of a free and open Internet is net neutrality. It allows and empowers users to choose and access any services, content and applications available on the web.¹⁸⁸ The concept of net neutrality is a broad one, often encompassing freedom of expression, user choice and competition or non-discrimination in traffic management.¹⁸⁹

With respect to e-commerce regulation, net neutrality principles can guarantee non-discriminatory access to the content and services consumers wish to use and an equal footing on competition for e-commerce service providers. Nowadays, the demand for internet access is growing exponentially, and some internet service providers limit bandwidth and control traffic (‘traffic shaping’) to ensure a smooth service. There are growing concerns that these traffic management mechanisms may be used to give preferential treatment only to some websites and data streams, to the harm of users.¹⁹⁰

¹⁸⁴ *TPP* art 14.7.

¹⁸⁵ *Ibid* art 14.8.

¹⁸⁶ *Ibid* art 14.18(1)–(2).

¹⁸⁷ Claude Barfield, *US Trade Commission: TPP E-Commerce Rules “Template” for Future Global Agreements* (25 May 2016) American Enterprise Institute (‘AEI’), <<https://www.aei.org/publication/us-trade-commission-tpp-e-commerce-rules-template-for-future-global-agreements/>>.

¹⁸⁸ Internet Society, *Network Neutrality* (Policy Brief, 30 October 2015) <<https://www.internetsociety.org/policybriefs/networkneutrality/>>, archived at <<https://perma.cc/973Q-7A5A>>.

¹⁸⁹ Burcu Kilic and Tamir Israel, *The Highlights of the Trans-Pacific Partnership E-Commerce Chapter* (5 November 2015) Public Citizen, 6 <<https://www.citizen.org/sites/default/files/tpp-e-commerce-chapter-analysis.pdf>>, archived at <<https://perma.cc/T6R3-ZCKX>>.

¹⁹⁰ *Ibid* 7.

The *TPP* negotiations raised important concerns with regard to net neutrality. Some critics pointed out that there were several provisions on ch 14 that would threaten net neutrality and affect the right to privacy. For example, art 14.11 stated that each party would allow the cross-border transfer of information by electronic means, including personal information, ‘when this activity is for the conduct of the business of a covered person’. Meanwhile, art 14.10 established various rights for consumers, including access and use services and applications of their choice available on the Internet for e-commerce, subject to ‘reasonable network management’. Yet, n 7 of the same article recognised that ‘an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle’, a declaration that can be considered a glaring exception to the neutral character of the Internet.¹⁹¹ At the same time, the ‘reasonable network management standard’ is rather vague, and deals primarily with the blocking of content, which is generally forbidden in many jurisdictions.¹⁹² Moreover, activities like filtering, internet fast lanes, throttling, zero-rated services and market competition were not addressed by *TPP* art 14.11.¹⁹³ It has been reported that these controversial provisions would have originated during *TiSA* negotiations, according to a leaked text of the Annex on Electronic Commerce.¹⁹⁴

The *TPP* fell short on regulating the evolving principle of net neutrality and just focused on the most basic violations of it: the blocking of content. It did not regulate more ‘refined’ breaches such as throttling or zero-rated services, or even downgrading bandwidth when accessing certain data flows (a practice many consumers endure every day, most of the time without even knowing). These deficiencies fuel the debate about whether the Electronic Commerce Chapter of the *TPP* tilts the scale towards investors and private interest or to consumers and public interest,¹⁹⁵ an issue future PTAs should take into consideration.

G *TPP and Competition*

Although it is a topic largely absent in multilateral agreements, PTAs often contain competition-related provisions,¹⁹⁶ as many of the benefits of such agreements could be undermined if competition is not free and fair, in both

¹⁹¹ De Acha, above n 140.

¹⁹² Kilic and Israel, above n 189, 6.

¹⁹³ Internet Society, above n 188, 2–3.

¹⁹⁴ Trade in Services Agreement (*TiSA*) Annex on Electronic Commerce (5 May 2016) WikiLeaks <<https://wikileaks.org/tisa/ecommerce/>>.

¹⁹⁵ David Fidler, *The TPP’s Electronic Commerce Chapter: Strategic, Political, and Legal Implications Council on Foreign Relations Net Politics* (9 November 2015) <<http://blogs.cfr.org/cyber/2015/11/09/the-tpps-electronic-commerce-chapter-strategic-political-and-legal-implications/>>, archived at <<https://perma.cc/6YMM-V635>>.

¹⁹⁶ 88 per cent of the agreements in force until 2015 devoted specific provisions or even entire chapters to competition related matters. François Charles Laprévôte, Sven Frisch and Burcu Can, *Competition Policy within the Context of Free Trade Agreements* (Report, International Centre for Trade and Sustainable Development, September 2015) 2 <<http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf>>, archived at <<https://perma.cc/PA6A-7LJ4>>.

goods and services.¹⁹⁷ Other bases for the inclusion of these provisions in PTAs is to prevent ‘strategic enforcement of anti-trust’ (meaning used for protectionist purposes that ultimately restrict trade), and to preserve broader economic objectives such as consumer protection and welfare.¹⁹⁸

Currently, there are 24 PTAs between *TPP* countries that include rules on competition as a specific chapter or containing competition related provisions:

Agreements with competition-related provisions	Entry into Force
<i>Australia–Japan FTA</i>	15 January 2015
<i>Australia–Malaysia FTA</i>	1 January 2013
<i>Peru–Japan FTA</i>	1 March 2012
<i>New Zealand–Malaysia FTA</i>	1 August 2010
<i>ASEAN (including Viet Nam)–Australia–New Zealand</i>	1 January 2010
<i>Viet Nam–Japan EPA</i>	1 October 2009
<i>Canada–Peru FTA</i>	1 August 2009
<i>Peru–Singapore FTA</i>	29 May 2009
<i>Australia–Chile FTA</i>	6 March 2009
<i>Peru–Chile ECA</i>	1 March 2009
<i>US–Peru TPA</i>	1 February 2009
<i>Brunei–Japan EPA</i>	31 July 2008
<i>Chile–Japan FTA</i>	3 September 2007
<i>P4 (Brunei Darussalam, Chile, New Zealand, Singapore)</i>	8 November 2006
<i>Malaysia–Japan FTA</i>	13 July 2006
<i>Mexico–Japan EPA</i>	1 April 2005
<i>US–Australia FTA</i>	1 January 2005
<i>US–Chile FTA</i>	1 January 2004
<i>US–Singapore FTA</i>	1 January 2004
<i>Australia–Singapore FTA</i>	28 July 2003
<i>Singapore–Japan EPA</i>	30 November 2002
<i>Mexico–Chile FTA</i>	31 July 1999
<i>Canada–Chile FTA</i>	5 July 1997
<i>NAFTA (Canada, Mexico and the US)</i>	1 January 1994

The *TPP* addressed competition in ch 16, which contained rules ensuring that fair competition is promoted through principles of non-discrimination, transparency and due process,¹⁹⁹ rather similarly to what can be found in previous PTAs between *TPP* signatories, with the exception of new provisions

¹⁹⁷ Deborah Elms, *TPP Impressions: Competition and State Owned Enterprises (SOEs)* (17 November 2015) Asian Trade Centre <<http://www.asiantradecentre.org/talkingtrade/2015/11/17/tpp-impressions-competition-and-state-owned-enterprises-soes>>, archived at <<https://perma.cc/3A2C-KL4D>>.

¹⁹⁸ Manoj Isuru Kotigala, *Analysing Competition-related Issues in Free Trade Agreements with Emphasis on the Competition Chapter of the Trans-Pacific Partnership* (December 2016) ResearchGate, 7, 11 <https://www.researchgate.net/publication/311377148_Analysing_competition_related_issues_in_Free_Trade_Agreements_with_emphasis_on_the_Competition_Chapter_of_the_Trans_Pacific_Partnership>, archived at <<https://perma.cc/52VQ-88HQ>>.

¹⁹⁹ Elms, above n 197.

regarding competition law enforcement and private rights of action. In addition, this Chapter had a broader scope than prior PTAs, just because of the large number of countries that negotiated the *TPP*. Considering that *TPP* signatories have different backgrounds and ways of dealing with competition, parties were allowed to have exemptions due to public policy or public interest grounds, although cooperation was strongly encouraged to address these issues better in the future.²⁰⁰ This is especially so with respect to state-owned enterprises ('SOEs'), which in fact are even regulated in a different chapter of the agreement (ch 17).

1 *Anticompetitive Practices*

Compared to PTAs previously concluded by *TPP* signatories, the *TPP* went beyond merely promoting competition, as it is considered in Japanese FTAs with Australia and Viet Nam.²⁰¹ Yet, the agreement used an approach that is closer to soft law, through prescribing legal principles which the parties must consider and not directly enforceable obligations.²⁰²

TPP ch 16 established an obligation to the parties to adopt or maintain national competition laws proscribing anticompetitive business conduct, taking into account the APEC Principles to Enhance Competition and Regulatory Reform (1993).²⁰³ This followed a similar provision found in the *Malaysia–Australia FTA* (art 14.4 para 1). *TPP* art 16.1 also added that parties must 'maintain national competition authorities responsible for the enforcement of its national competition laws'.²⁰⁴ In the same line, *TPP* art 16.5 stipulated that parties shall undertake technical cooperation on competition advocacy by an exchange of information and experiences. It is worth mentioning that only a small number of FTAs (approximately two per cent)²⁰⁵ contain provisions referring to competition advocacy so to promote competition.

Another novel feature of *TPP* ch 16 was the establishment of provisions on procedural fairness in competition law enforcement, as each party was obliged to ensure a basic 'due process' before imposing a sanction or remedy against a person for violating its national competition laws.²⁰⁶ The *TPP* also emphasised the value of making enforcement policies as transparent as possible (art 16.7), and each party was required to ensure that a final decision finding a violation of its national competition laws was made in writing and set out findings of fact and the reasoning, including legal and, if applicable, economic analysis, to arrive at the decision.

The chapter also innovated on private rights of action (art 16.3), defined as 'the right of a person to seek redress, including injunctive, monetary or other remedies, from a court or other independent tribunal for injury to that person's

²⁰⁰ *TPP* art 16.1(2).

²⁰¹ *Japan–Australia Economic Partnership Agreement*, signed 8 July 2014 (entered into force 15 January 2015) art 15.1; *Japan–Viet Nam Economic Partnership Agreement* (signed and entered into force 1 October 2009) art 100.

²⁰² Kotigala, above n 198, 8.

²⁰³ *TPP* art 16.1.

²⁰⁴ *Ibid.*

²⁰⁵ Laprévotte, Frisch and Can, above n 196, 3.

²⁰⁶ *TPP* art 16.2.

business or property caused by a violation of national competition laws, either independently or following a finding of violation by a national competition authority'.²⁰⁷ However, this right had a limited scope, as it was applied only to the request for an investigation.

On consumer protection, art 16.6 addressed deceptive and fraudulent commercial activities, requiring contracting parties to adopt or maintain consumer protection laws proscribing these harmful practices.

However, the Competition Policy Chapter in the *TPP* is not subject to dispute settlement²⁰⁸ (as opposed to the SOEs chapter that we will analyse in the next section). This is mainly due to the fact that some countries do not have strong competition frameworks. For that reason, countries like Brunei were granted a longer time frame to elaborate domestic disciplines on competition in order to comply with the agreement, being subject to consultations on issues related to it.²⁰⁹

Although some innovations are found with regard to procedural fairness, the *TPP* Competition Policy Chapter fell short on ambition and innovation. Topics such as mergers and acquisitions²¹⁰ or abuse of dominance²¹¹ were not covered by the *TPP*. Nevertheless, due to the complexity of the negotiations and the different competition frameworks of each country, it could not be expected that this Chapter would be detailed and ambitious. As Manoj Kotigala has pointed out, there were practical impossibilities with regard to establishment of more substantive tests to curb the strategic use of anti-trust laws, and *TPP* provisions were unlikely to make any changes in nations with advanced competition law regimes like those in Australia, Japan, New Zealand and the US. However, for other countries the *TPP* would have been at least an attempt to bring a degree of uniformity between parties to the agreement.²¹²

2 State-Owned Enterprises

Due to the large number and size of SOEs in some *TPP* countries, it was considered not sufficient just to have a competition chapter. *TPP* was the first agreement of its kind to address SOEs and designated monopolies in a special chapter. Plus, the provisions of this Chapter are enforceable and subject to dispute settlement procedures.²¹³

The definition of SOE is crucial as it determined the scope of the Chapter. According to art 17.1, an SOE is an 'enterprise that is principally engaged in

²⁰⁷ Ibid art 16.3(1).

²⁰⁸ Ibid art 16.9.

²⁰⁹ Ibid art 16.8.

²¹⁰ Mergers and acquisitions are treated in FTAs such as *Australia–Chile Free Trade Agreement*, [1009] ATS 6 (entered into force 6 March 2009) art 14.3; *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) ch 12 art 1.

²¹¹ Abuse of market power is covered in *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) ch 12 art 1.2(b).

²¹² Kotigala, above n 198, 8.

²¹³ USTR, *State Owned Enterprises (SOEs)* (2015) 3 <<https://ustr.gov/sites/default/files/TPP-Chapter-Summary-State-Owned-Enterprises.pdf>>, archived at <<https://perma.cc/89JJ-9JP2>>.

commercial activities',²¹⁴ with either 'direct government ownership of more than 50 per cent of share capital; ownership interests that results in control over more than 50 per cent of voting rights; or where members have the ability to appoint the majority of members of the management body (members of the board or equivalent)'.²¹⁵ For the sake of clarity it is especially declared that the Chapter does not aim to privatise SOEs in *TPP* countries, and also does not forbid parties to create more in the future.²¹⁶

When an SOE is engaged in commercial activities, if not properly disciplined, it will start with an unfair competitive advantage. Chapter 17's main aim is to balance the competition between SOEs and private companies. Article 17.1 defines 'commercial activity' as 'activities which an enterprise undertakes with an orientation toward profit-making and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise'.²¹⁷ Therefore, the scope of the Chapter covers those SOEs which compete directly with private companies in a certain market, automatically excluding SOEs not engaged in commercial activities for profit-making purposes. Although some SOEs have to operate for public interest purposes even if they do not make profits (like a postal service), the phrase 'orientation toward profit-making' would surely inform the interpretation of this definition.

As SOEs can receive non-commercial assistance from the respective government, art 17.6, addresses this issue by providing that parties shall not cause adverse effects to another party's domestic industry through non-commercial assistance, and details thoroughly what is considered to be injury and the procedure to address potential claims of infringement.²¹⁸

Regarding transparency, the Chapter encompasses innovative rules allowing *TPP* signatories in the future to identify SOEs in a given country and its specific programmes of support.²¹⁹ Article 17.10 provides that parties shall create an official website detailing the list of SOEs operating in their countries, no later than six months from the entry into force of the agreement. Interestingly, this may have a positive impact on the negotiations at the WTO on SOEs, subsidies and services subsidies as one of its top issues is the information exchange regarding SOEs and companies subsidised or aided by the state.

But although the scope of the Chapter is broad,²²⁰ it contains several exemptions that limit the scope and reach of the agreement. Some types of SOEs are exempted from the agreement in art 17.2, such as sovereign wealth and pension funds entities in para 6, SOEs related to government procurement in para 7 and central banks in para 2. Several SOEs are excluded from its application, especially those operating at the sub central level of government (Annex 17-D), while Annex 17-C sets the path for future negotiations on this issue. Additionally, art 17.9 provides for party specific annexes which are listed

²¹⁴ *TPP* art 17.1.

²¹⁵ Elms, above n 197.

²¹⁶ *Ibid.*

²¹⁷ *TPP* art 17.1.

²¹⁸ Elms, above n 197.

²¹⁹ *TPP* art 17.10.

²²⁰ *Ibid* art 17.2.

in Annex IV of the agreement, where parties can exclude certain non-conforming activities. Another exemption is the SOEs revenue threshold, which was set at 200 million Special Drawing Rights, a monetary unit fixed by the International Monetary Fund and adjusted every three years.²²¹

Even though ch 17 was innovative and addresses for the first time in a special chapter SOEs, it mainly contained cooperation and best endeavour provisions. In addition, the breadth of exemptions and annexes excluding certain SOEs, effectively limited its scope of application. Nevertheless, it can be considered as the first step towards the elaboration of more detailed and enforceable disciplines those state-owned entities.

H TPP and SMEs

Provisions mentioning explicitly SMEs have been incorporated into an increasing number of PTAs. On the basis of the agreements notified to the WTO, José Monteiro has found that by May 2016, 136 PTAs incorporate at least one provision that mentions explicitly SMEs, although there are heterogeneous and dynamic in terms of structure, location, language and scope. The two most common categories of SMEs related provisions are those promoting cooperation on SMEs, including in the context of e-commerce and government procurement, or actually excluding SMEs and/or programs supporting them from the PTA's coverage.²²²

According to the USTR, the *TPP* would have been the first agreement to include a chapter focusing on issues that create particular challenges for SMEs across the Asia-Pacific region. However, the *TPP*'s dedicated chapter on SMEs (ch 28) only focused on two main issues: information sharing and the establishment of a Committee on SMEs. Yet, arguably other provisions of the *TPP* would benefit SMEs, for example through streamlining customs procedures, the elimination of tariff and non-tariff barriers, promoting e-commerce, and an overall development of more efficient and transparent regulatory regimes.²²³ As Heng Wang has mentioned, the key benefits the *TPP* would have brought for SMEs are enhanced market opening and more predictability, particularly through the reduction of non-tariff barriers.²²⁴

In that context, the *TPP*'s SMEs chapter was innovative, as it introduced more specific and pragmatic commitments on SMEs. *TPP* provisions on information sharing required each party to establish or maintain a publicly accessible website containing information regarding the agreement, including a summary and explanations of key provisions of particular relevance to SMEs.²²⁵ Additionally,

²²¹ Ben Hancock, *Reach of TPP's SOE Disciplines Limited by Definition, Scope, Exceptions* (2015) World Trade Online <<http://www.bilaterals.org/?reach-of-tpp-s-soe-disciplines>>, archived at <<https://perma.cc/D6CR-HK36>>.

²²² José Antonio Monteiro, 'Provisions on Small and Medium-Sized Enterprises in Regional Trade Agreements' (WTO Working Paper ERSD 2016-12, 18 August 2016) 27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825775>, archived at <<https://perma.cc/8YMS-KS9R>>.

²²³ USTR, *Small and Medium-Sized Enterprises* (2015) <<https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Small-and-Medium-Sized-Enterprises.pdf>>, archived at <<https://perma.cc/NV9X-Z7XE>>.

²²⁴ Heng Wang, 'The Implications of the *Trans-Pacific Partnership* for SMEs: Opportunities and Challenges' (2016) 6 *KLRI Journal of Law and Legislation* 45, 75–6.

²²⁵ Monteiro, above n 222, 26.

websites may provide any other information useful to do business, trade or invest in the respective country, including regulations and procedures on customs and intellectual property rights; technical regulations, standards, sanitary and phytosanitary measures relating to importation and exportation; information on taxation, business registration procedures, foreign investment and employment regulations. Acknowledging the character of ‘lingua franca’ of the English language, the Chapter stipulated that when possible, each party shall endeavour to make the information available in English.²²⁶ *TPP* parties shall regularly review the information and links on the website to ensure that both the information and links are up to date and accurate, and linked to the equivalent websites of the other parties and of its government agencies.

TPP art 24.2 established a Committee on SMEs, in charge of various tasks, mainly assisting in the identification of commercial opportunities arising from the *TPP*, including seminars and workshops to inform them of how to benefit from the agreement, and facilitate the participation of SMEs in government procurement and integrate effectively into global supply chains.²²⁷ These activities include exploring opportunities for capacity building to assist the *TPP* parties in developing and enhancing SME export counselling, assistance and training programmes, and exchanging and discussing each party’s experiences and best practices in supporting and assisting SME exporters with respect to training programmes, trade education, trade finance, identifying commercial partners in other parties and establishing good business credentials, among other things.

But the *TPP*’s novelty in this regard is only partial. In fact, one *TPP* signatory — Japan — has been particularly consistent in considering SMEs provisions in recent PTAs, including those concluded with other *TPP* countries like Singapore (2002), Malaysia (2005), Thailand (2007), and Viet Nam (2008). Although from these agreements, only the *Japan–Singapore PTA* (‘*JSEPA*’) has a dedicated chapter on SMEs (ch 18), which already included the creation of a Joint Committee on SMEs, in charge of exchanging views and information on the promotion of SMEs cooperation and identifying and recommending ways of further cooperation between the Parties, with special focus in facilitating of SMEs investment not only in Japan and Singapore, but throughout Southeast Asia (*JSEPA* arts 131–2).

The *PAAP* is another agreement concluded by *TPP* signatories (as include Chile, Mexico and Peru) that considers specific provisions on facilitating the participation of SMEs, not in a special chapter, but in its government procurement chapter. These provisions include endeavours to reduce measures that provide preferential treatment to national SMEs in public procurement, or to ensure that such measures are objective and transparent. *PAAP* Parties are also called upon to provide information to help, promote, encourage or facilitate SMEs’ participation in government procurement, including commitments related

²²⁶ *TPP* art 24.1(3).

²²⁷ Heng Wang, ‘An Asian Perspective on SMEs in International Economic Law: Opportunities and Challenges Arising from the *TPP*’ in Thilo Rensmann (ed), *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press, 2017) 191, 192.

to transparency, such as ensuring procurement documents are available online free of charge, and establishing an electronic procurement portal.²²⁸

It is also important to note that none of the provisions of *TPP* ch 28 gave recourse to the parties of the agreement to the dispute settlement mechanism, for any matter arising with respect to SMEs.

I TPP and Anti-Corruption

The underlying logic behind including provisions against corruption in PTAs is that bribery and other forms of corruption, act as an important trade and investment barrier. Bribes distort free market pricing, increase the cost of investment and could deter foreign investment. Thus, despite the fact that trade agreements are meant to minimise economic barriers to trade, companies that comply with anti-corruption laws, and choose not to bribe, are significantly disadvantaged.²²⁹

While some bilateral PTAs have already included anti-corruption provisions — notably those concluded between the United States and Panama (2007), Colombia (2006), Peru (2006), Oman (2006), Bahrain (2004), *Central Africa Free Trade Agreement–Dominican Republic* ('*CAFTA–DR*') (2004), and Morocco (2004),²³⁰ multilateral or regional agreements have lagged behind. Only the *P4* (as mentioned, involving Brunei Darussalam, Chile, New Zealand and Singapore) has an anti-corruption provision (art 11.19), which focuses on corruption in government procurement alone. A similar provision is also found in the FTAs between US and Panama, Colombia, Peru, Bahrain, *CAFTA–DR*, Morocco and Chile.²³¹

²²⁸ Monteiro, above n 222, 25.

²²⁹ Wendy Wysong, *The Trans-Pacific Partnership Agreement: A Breakthrough in Global Anti-Corruption Efforts* (30 November 2015) Corporate Compliance Insights <<http://www.corporatecomplianceinsights.com/the-trans-pacific-partnership-agreement-a-breakthrough-in-global-anti-corruption-efforts/>>, archived at <<https://perma.cc/Z5EP-SJXW>>.

²³⁰ *United States–Panama Trade Promotion Agreement* (entered into force 31 October 2012) ch 18 s B; *United States–Colombia Trade Promotion Agreement* signed 22 November 2006 (entered into force 15 May 2012) ch 19 s B; *United States–Peru Trade Promotion Agreement*, signed 12 April 2006 (entered into force 1 February 2009) ch 19 s B; *United States–Oman Trade Promotion Agreement*, signed 19 January 2006 (entered into force 1 January 2009) art 18.5; *United States–Bahrain Free Trade Agreement*, signed 14 September 2004 (entered into force 11 January 2006) art 17.5; *The Dominican Republic–Central America Free Trade Agreement*, signed 5 August 2004 (entered into force 1 January 2005) ch 18 s B; *United States–Morocco Free Trade Agreement*, signed 15 June 2004 (entered into force 1 January 2006) art 18.5; *Australia–United States Free Trade Agreement*, signed on 18 May 2004 (entered into force 1 January 2005) art 22.5 and *United States–Singapore Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2004) art 21.5 include softer provisions on corruption, on the basis of co-operation and best efforts, respectively.

²³¹ *United States–Panama Trade Promotion Agreement* (entered into force 31 October 2012) art 9.13; *United States–Colombia Trade Promotion Agreement* signed 22 November 2006 (entered into force 15 May 2012) art 9.10; *United States–Peru Trade Promotion Agreement*, signed 12 April 2006 (entered into force 1 February 2009) art 9.10; *United States–Bahrain Free Trade Agreement*, signed 14 September 2004 (entered into force 11 January 2006) art 9.10; *The Dominican Republic–Central America Free Trade Agreement*, signed 5 August 2004 (entered into force 1 January 2005) art 9.13; *United States–Morocco Free Trade Agreement*, signed 15 June 2004 (entered into force 1 January 2006) art 9.11; *United States–Chile Free Trade Agreement*, signed 6 June 2003 (entered into force 1 January 2004) art 9.12.

According to the USTR, *TPP* was an opportunity to include ‘the strongest anti-corruption and transparency standards of any trade agreement in history’.²³² And seemingly, the *TPP* delivered that promise (at least partially).

TPP ch 26 s C considered a type of provision similarly to those existing in anti-corruption articles found in the PTAs mentioned before, that include the adoption of necessary legislative or other measures to establish that bribery and other advantages given to public officials are a criminal offense under law. In addition, these provisions also recognise the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment.

Bu the *TPP* also added novel commitments discouraging corruption. The *TPP* reinforced international anti-corruption efforts, like the 2000 *United Nations Convention against Transnational Organized Crime* (‘*UNCAC*’), the 1997 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, and 1996 *Inter-American Convention Against Corruption*. In fact, art 26.6 required accession to *UNCAC* for all *TPP* members, something of particular importance to Japan and New Zealand which at the date of *TPP*’s signing had not yet ratified that convention.²³³

Expanding the scope of anti-corruption provisions existing in the aforementioned PTAs, *TPP* art 26.1 defined ‘public official’ in broad terms, also including unpaid and temporary government workers, any person who performs a public function, and any other person defined as a public official in the country’s domestic law. In addition, art 26.7 required countries to take measures to protect whistle blowers and prohibit corruption through bookkeeping and accounting.²³⁴

But maybe most importantly, most of ch 26’s obligations were covered by the *TPP*’s dispute settlement system (with the exception of those relating to the application and enforcement of anti-corruption laws), which can be invoked to enforce that Chapter’s commitments when a party has failed to carry out an obligation or acted in a way inconsistent with an obligation.²³⁵

TPP provisions on anti-corruption have already been taken into consideration in PTAs concluded in its aftermath. The recent *Chile–Uruguay FTA* (2016), also includes a dedicated chapter on these issues (ch 16), which closely follows the wording of the *TPP*, including specific measures to combat corruption in matters that affect international trade or investment, promoting integrity among public officials, as well as the application and enforcement of anti-corruption laws.

²³² USTR, *Transparency and Anticorruption* (2015) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-11>>, archived at <<https://perma.cc/H3PW-U4S7>>.

²³³ Kaitlin Beach, ‘A Trade Anticorruption Breakthrough?: The *Trans-Pacific Partnership*’s Transparency and Anticorruption Chapter’ on *The Global Anticorruption Blog* (23 November 2015) <<https://globalanticorruptionblog.com/2015/11/23/the-trans-pacific-partnerships-transparency-and-anticorruption-chapter/>>, archived at <<https://perma.cc/4F8C-TYMH>>.

²³⁴ Wysong, above n 229. This language is similar to *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) art 12(3) and the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed 17 December 1997, [1999] ATS 21, 37 ILM 1 (entered into force 15 February 1999) art 8.

²³⁵ *TPP* ch 26.

Both agreements also coincide in the promotion of the active participation of individuals and groups outside the public sector (like enterprises, civil society, non-governmental organisations and community based organisations), in the prevention of and the fight against corruption.²³⁶

III CONCLUSION

Traditional trade rules are generally consistent across international agreements, as they tend to follow the template of the WTO's *GATT* and *GATS*, and their principles of non-discrimination and transparency applied through accepted tools like reciprocity and gradual liberalisation.²³⁷ In that context, this article has pondered the usefulness of mourning the failure of the *TPP*, both in terms of political relevancy and the future usage of *TPP* text.

In a world where protectionism and nationalism are making a comeback, even in economies that during past decades were key promoters of free trade and investment, pursuing a *TPP*-like agreement (or the eventual *TPP* 11) is undoubtedly a political sign and a support for inclusive regional or multilateral negotiation, instead of bilateral negotiations where power and economic asymmetries can transform in practice, in unilateral dictates.

What the *TPP* left behind were positive consolidations and innovations in trade and investment disciplines. As explained in the different sections of this article, the *TPP* was an agreement that largely built on existing treaties between the different countries that have negotiated it, like *NAFTA*, the *PAAP*, and the *South Korea–US ('KORUS')* agreement. While in comparison with that legal framework, some parts of the *TPP* are not particularly novel for its negotiating countries, the *TPP* offered an improved and updated consolidation of existing commitments. Certain parts of the treaty clearly reflect this tendency, notably the Investment Chapter, and those on competition, financial services and telecommunications. This conclusion is not surprising, as existing literature has already suggested that the PTAs signed by a country often overlap significantly, as countries frequently use past PTAs as a model for future ones.²³⁸

But, the fact that the *TPP* was built on previous agreements concluded by its signatories can also pose some problems. The intention of the parties was that the *TPP* 'coexist' with existing international agreements and that they would agree to reach a mutually satisfactory solution when the provisions of one agreement were 'inconsistent' with another.²³⁹ But how do we define such inconsistency?²⁴⁰ Moreover, what would have been the real effects of the 'improvements' that the *TPP* was bringing if these parallel agreements were still

²³⁶ Compare *TPP* arts 26.7–26.10 with *Chile–Uruguay Free Trade Agreement*, signed 4 October 2016 (not yet in force) arts 16.7–16.10.

²³⁷ Dawson, above n 18.

²³⁸ Todd Allee and Manfred Elsig, 'Are the Contents of International Treaties Copied-and-Pasted? Evidence from Preferential Trade Agreements' (Paper presented for the 8th Annual Conference on the Political Economy of International Organizations, Berlin, Germany, 12–14 February 2015) 11–12 <https://business.gwu.edu/sites/business.gwu.edu/files/IB_Sem_2015_Contents-of-International-Treaties.pdf>, archived at <<https://perma.cc/2TXF-LWXM>>.

²³⁹ *TPP* art 1.2.

²⁴⁰ Kellie Gryga, *How the TPP Will Affect U.S. Imports Part 2 on Tax & Accounting* (4 December 2015) <<https://tax.thomsonreuters.com/blog/onesource/how-tpp-will-affect-u-s-imports-part-2/>>, archived at <<https://perma.cc/WB74-U4YM>>.

kept in place?²⁴¹ Let us examine the example of the investment chapters. Even if we assume that the *TPP* investment chapter had a more balanced approach to the protection of foreign investors while respecting the policy space of states to regulate, why should investors care and choose *TPP* over *NAFTA* ch 11 protection if that treaty would have continued to be in force even after the *TPP* ratification?²⁴² A different stance has been taken, for example, at *CETA*, where both parties have agreed to terminate existing BITs between Canada and EU member states, once the agreement enters into force, de facto limiting the choices of investors.²⁴³

If the *TPP* aimed to be at least partially a ‘new’, ‘high standard’, ‘21st century’ agreement, the improvements that the treaty introduced should have been clearly implemented in a way that were not bypassed or diluted by commitments previously included in earlier agreements between *TPP* signatories. A broad and comprehensive agreement helps to advance in the improvement of the trade and investment disciplines, only if its scope of application is clear, and not just another addition to the already entangled ‘spaghetti bowl’ of preferential trade agreements.

Nevertheless, the *TPP* also delivered innovation. Certain disciplines that have not been traditionally included in PTAs found a way in this treaty, like regulatory coherence, e-commerce, SOEs, SMEs, and anti-corruption. Others have benefited from a larger development in existing agreements between *TPP* signatories, like intellectual property and sustainable development. The treatment of environmental treaties in *TPP* could inform future PTAs as it recognised the binding nature of MEAs obligations, in addition to the participation of civil society and interested stakeholders in denouncing violation of environmental laws or regulations. Overall, the *TPP*’s innovative features should be retained, honed, and sharpened in future trade deals of all types.

But *TPP* also raised some controversial issues, where advancements are not clear or at least highly questionable, like on net neutrality or the protection of test data or other undisclosed data from the sanitary registration of pharmaceutical products, both for products of chemical synthesis and for biological products. Some had voiced the concern of US importers of clothing items, worried about whether they can still take advantage of duty free entry under *NAFTA* once *TPP* takes effect. This issue arose because under *NAFTA* several items are currently eligible for duty free entry, where the *TPP* did not grant such status and instead gradually reduced the duty rate to zero over a certain number of years.²⁴⁴ The way *TPP* negotiations were conducted were not always in line with aspirations of

²⁴¹ On the problems that overlapping treaties can create with respect to the applicable law on investment disputes, see Jarrod Hepburn, ‘Applicable Law in *TPP* Investment Disputes’ (2016) 17 *Melbourne Journal of International Law* 349.

²⁴² Few *TPP* signatories took the decision of terminating existing agreements if the *TPP* is finally ratified. This is the case of Australia that agreed to terminate its BITs with Mexico (2005), Peru (1995) and Viet Nam (1991), on a side letter to the *TPP*. Department of Foreign Affairs and Trade, Australian Government, *TPP Text and Associated Documents* (4 February 2016) <http://dfat.gov.au/trade/agreements/tpp/official_documents/Pages/official_documents.aspx>.

²⁴³ *Comprehensive and Economic Trade Agreement*, signed 30 October 2016 (not yet in force) annex (‘List of Bilateral Investment Treaties Between Canada and Member States of the European Union’).

²⁴⁴ Gryga, above n 240.

transparency and inclusion by the civil society, that eventually lead to opinionated discussions on the basis of leaked or not definitive texts, that clearly prejudiced the external perception of the agreement, and blinded its improvements and innovations.

The recent announcement made on the *CPTPP* seems to take TPP's innovative and controversial issues into account, keeping the largest part of the agreement and narrowing down some controversial issues in areas like intellectual property (where the extension of copyright protection term to life of the author plus 70 years is suspended) and investment, (seemingly excluding ISDS for investor screenings, investor authorizations and financial services), and both areas account for the majority of TPP's suspended provisions. But, until the actual text of the *CPTPP* becomes available for review, any analysis is merely speculative.²⁴⁵

Finally, we can also conclude that the *TPP* has been largely 'Made in America', as the structure and content of the treaty clearly followed the texts of previous agreements concluded by that country and other *TPP* signatories, like *NAFTA*, the FTAs with Singapore and Chile, and the TPA with Peru. This is also in line with the analysis of other researchers. Allee and Lugg, examining all 74 PTAs signed by *TPP* members since 1995 — and not only those concluded between them, like in this article — conclude that the US had a prevalent influence in the writing of the *TPP*, especially in disciplines seen as of greatest importance to the US political and economic interests, like investment, financial services, general services, telecommunications, and safeguards.²⁴⁶

However, besides with the anecdotal fact that *TPP* uses British — and not American — spelling throughout its text, the influence of other countries like Australia, Canada, Chile, Mexico, Japan and Peru, is also seen in the final text, in specific issues like CSR, regulatory coherence, environment, government procurement, SMEs and e-commerce.

The US approach to CSR seemed to have changed through *TPP* negotiations. The location of the CSR provisions, evolved from side agreements or annexes in prior PTAs concluded with Chile and Peru, towards an approach that fully integrates CSR language into the labour and investment chapter,²⁴⁷ following the Canadian PTAs approach. As mentioned before, the novel *TPP* chapter on regulatory coherence has significant similarities with the chapter on 'regulatory improvement' of the *PAAP* signed months earlier than the *TPP*, although in this case, we are probably in front of the effects of the parallel negotiations of the

²⁴⁵ Deborah Elms, 'CPTPP or TPP11 for Trade Nerds' on *Asian Trade Centre*, 11 November 2017 <<http://www.asiantradecentre.org/talkingtrade/2927pac50b6q5x6iwq4iohqvx8k02>>, archived at <<https://perma.cc/98L4-9REK>>.

²⁴⁶ Allee and Lugg, above n 24, 4, 6. Alschner and Skougarevskiy have arrived before at the same conclusion concerning the *TPP*'s investment chapter, comparing its text in the context of a dataset that involves 1686 international investment agreements. Alschner and Skougarevskiy, above n 29, 347, 353. A similar conclusion is shared by Broude, Haftel and Thompson after comparing the investment provisions of the *TPP* with the existing obligations of the parties to the *TPP*, in all previous treaties in which more than one party is a signatory to the *TPP*, and Model BITs of six *TPP* parties: above n 28, 12–13.

²⁴⁷ Rafael Peels et al, 'Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business, and Workers' (Research Paper No 13, International Labour Office, April 2016) 17 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf>, archived at <<https://perma.cc/6548-8SPW>>.

Pacific Alliance Free Trade Agreement and *TPP* by Chile, Mexico and Peru. The significant influence of previous PTAs concluded by Australia and Peru is traceable in the environment chapter (that follows Australian PTAs) and in public procurement and e-commerce (that follows Peruvian PTAs).²⁴⁸ Japan's influence is also present in the SMEs chapter.

The apparent demise of the *TPP* should help us to draw some lessons, not only on the content of regulations, but also in the political consequences of negotiating — or withdrawing — from this type of agreements. Hopefully, positive consolidation and innovations found in the *TPP* will find a revival in future agreements to come. Only then will we know if the reports of the *TPP*'s death have been greatly exaggerated.

²⁴⁸ Allee and Lugg, above n 24, 6.