

## The Origins and Evolution of the Trans-Pacific Partnership Trade Negotiations

### ABSTRACT

The text of the Trans-Pacific Partnership agreement and more than 5,000 pages of individual country schedules were released in October 2015 after five years of negotiations. Its transformation from a small agreement to one of the deepest and broadest trade deals ever, with 12 members, highlights the challenges of negotiating modern comprehensive trade agreements.

**KEYWORDS:** mega-FTAs, Trans-Pacific Partnership, TPP, Asia-Pacific, trade, negotiation

### IN THE BEGINNING

The Trans-Pacific Partnership (TPP) trade negotiations began life as a different trade agreement. The official name of the agreement, as announced at the Asia-Pacific Economic Cooperation (APEC) Trade Ministers meeting in June 2005, was the Trans-Pacific Strategic Economic Partnership Agreement.<sup>1</sup> It became better known as the P4 or Pacific Four, linking Brunei Darussalam, Chile, New Zealand, and Singapore. The accord grew out of attempts within APEC in the late 1990s to create a larger economic free trade area. When these talks foundered, the leaders of the P4 countries pressed ahead with plans to demonstrate how small, largely open economies could still benefit from trade liberalization.<sup>2</sup> However, given the modest levels of

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1. For a fuller account of the early evolution of the TPP and a review of the contents of the P4, see C. L. Lim, Deborah Elms, and Patrick Low (eds.), *The Trans-Pacific Partnership: A Quest for a 21st Century Trade Agreement* (Cambridge: Cambridge University Press, 2012).

2. Technically, it was three countries, as Brunei joined very late in the process.

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trade among them, the P4 came into force in 2006 with very little attention paid to it.<sup>3</sup>

The original P4 agreement was concluded without resolving two difficult areas of negotiation—chapters on financial services and investment. The four country leaders elected to finish the deal and to then relaunch discussions on these outstanding issues within two years. When the negotiations started in February 2008 over the two unfinished chapters, the United States also began to participate in the discussions.<sup>4</sup> In September, American participation deepened with the announcement that the US would seek to join the agreement in its entirety. When this happened, the P4 moved from being a small experiment into something larger and much more interesting. Australia, Peru and Vietnam also joined the talks.<sup>5</sup> By 2008, the P4 agreement had morphed into the TPP, with eight members.

US involvement with the P4 was an important decision given the accord's relatively small number of trade deals. The US opted to join the agreement in the twilight days of the George W. Bush administration: the announcement was made in September 2008, with an election looming in November.

To make such a pronouncement ahead of a tight election might seem especially odd. At a minimum, the decision could have easily been postponed until after the election so that a new administration could decide whether to be involved in the trade arrangement. Instead, United States Trade Representative (USTR) Susan Schwab chose to ensure American participation regardless of which party won control of the government.<sup>6</sup>

3. Deborah Elms and C. L. Lim, "An Overview and Snapshot of the TPP Negotiations," in Lim, Elms and Low, *Trans-Pacific Partnership*, pp. 23–24.

4. US Trade Representative Susan Schwab reportedly said, "Participation could provide a pathway to broader Asia-Pacific regional economic integration with like minded countries committed to high-standard agreements" ("NZ Welcomes US Entering Trade Talks," *Business Day*, February 5, 2008, <<http://www.stuff.co.nz/business/253540/NZ-welcomes-US-entering-P4-trade-talks>>, accessed August 29, 2014).

5. Given some domestic issues, Vietnam is often described as being an "observer" at the outset while it sorted out the details at home. However, from the beginning, Vietnamese officials participated as full members. The TPP never had an "observer" or "associate" category of membership. Thus, from the earliest days of the agreement, potential member countries had to decide whether or not to participate, without the option of merely observing. This point became important later in the negotiations since countries like Japan and South Korea, who were hesitant about getting in, were not able to transition from observer to full member (something that is possible in many other international negotiating forums).

6. Of course, if the incoming team had really found participation objectionable, they could have found some way to get out of it or kept the American role limited to observing the missing two chapters, rather than expanding the entire agreement.

This decision came about because when senior Bush administration officials looked at the world in mid-2008, they became concerned about the growing discussions in Asia about the creation of new trade arrangements in the region that might exclude the US.<sup>7</sup> The Doha negotiations at the World Trade Organization (WTO) had collapsed over the summer. Options to anchor the US firmly in Asia were limited. For example, the Bush team judged that APEC alone would not be sufficient to keep the US engaged in the region. Creating a new trade agreement would require complicated and difficult negotiations domestically.<sup>8</sup> Hence, joining an existing, small-scale agreement like the P4 appeared to be an attractive option.

New Zealand was keen to have the Americans participate. The two sides lacked an existing free trade agreement (FTA), largely because of fallout over the country's ban on American nuclear ship refueling and the size and composition of the New Zealand market. The domestic market was small, with just four million citizens, but the country was famous for having a competitive agricultural sector, led by the dairy industry. Given the sensitivity of dairy and beef industries in the US, bilateral negotiations were likely to be difficult. A TPP agreement would be the best hope for New Zealand firms to gain additional access to the US market.

Neither Brunei nor Vietnam had existing access to the American market via an FTA. The TPP represented an excellent way for both to ensure preferential access for their exporters to the largest global market. More critical for both was the opportunity to use the TPP as a mechanism for pushing through necessary—but politically and potentially economically painful—economic reforms at the domestic level. Brunei, for example, had been trying unsuccessfully for years to diversify its economy away from oil and gas. Vietnam's leadership had made the bold decision to open up the economy through its January 2007 membership in the WTO, joining the TPP, and using trade agreements with the EU and a host of smaller bilateral partners.

7. Susan Schwab, remarks at the Lee Kwan Yew School of Public Policy, Singapore, November 10, 2009. At the time, the Japanese were promoting a plan to integrate Asian trade (the grouping later became the ASEAN+6, now known as the Regional Comprehensive Economic Partnership). Australia's leader Kevin Rudd was pushing for an Asia-wide agreement as well, the Asia Pacific Community, which had an economic or trade component (although the first articulation of this plan included the US in June 2008).

8. The administration was already facing an uphill battle to get the existing FTA agreements with South Korea, Colombia, and Peru through Congress.

Many of the existing and incoming TPP members in 2008 were already linked together by a dense web of existing FTAs.<sup>9</sup> For some members, like Chile or Peru, this new agreement was less about offering new market access to the US or others. Chile, after all, had trade agreements with all parties while Singapore had three separate deals linking its market with New Zealand.

Instead, these members looked to the opportunity to engage further with different regions. Another key objective was to craft a deal that would knit together overlapping, preexisting FTA provisions in innovative ways. Australia, for example, had been a party to discussions in the late 1990s in APEC with the US, Chile, New Zealand, and Singapore. It had not moved ahead with the P4 countries, but once the US announced in 2008 its intention to join the expanded chapters, Australia quickly said it would too. For Australia, the primary motivation was not so much trade expansion, given the country's links with every potential member except for Peru. Instead, it was largely about having Australian voices at the negotiating table when what were already seen as the "new rules of the trade game" were being drafted.<sup>10</sup>

#### GETTING STARTED WITH THE TPP

Negotiations did not begin for more than year, however, as the US switched administrations and the incoming Obama White House decided how to proceed. In fact, it was not until November 2009, when the president was on his way to an APEC leaders' summit, that he made his first public pronouncements about the deal. In a speech in Tokyo, President Obama declared that the US would "engage with" the TPP countries.

He continued:

I know that the United States has been disengaged from these [multilateral] organizations in recent years. So let me be clear: those days have passed. As an Asia-Pacific nation, the United States expects to be involved in the discussions that shape the future of this region and to participate fully in appropriate organizations as they are established and evolve.<sup>11</sup>

9. For the overlapping FTAs in member countries, see Elms and Lim, "Overview and Snapshot," table 2.2, pp. 33–34.

10. For more on Australia's motivations, see Ann Capling and John Ravenhill, *The Trans-Pacific Partnership: The Australian Perspective*, 2012, <<http://alliance.usc.edu.au/wp-content/uploads/2015/07/alliance-21-report-united-states-capling-and-ravenhill.pdf>>.

11. President Barack Obama at Suntory Hall, Tokyo, November 14, 2009.

As Obama's statement suggests, the White House spent time in 2009 carefully considering the motivations for American participation in the TPP. In particular, the Obama administration moved to fold the trade agreement into a larger "pivot" or "rebalance" to Asia. The Obama team came into office determined to shift attention away from the Middle East. Then-Secretary of State Hillary Clinton penned an article for *Foreign Policy* in 2011 that outlined the policy in greater detail, as she became the chief spokesperson for the concept.<sup>12</sup>

Kirk Campbell, US assistant secretary of state for East Asian and Pacific affairs, later defined the pivot as

premised on a desire for a peaceful, stable and economically prosperous region—a vision shared with America's Asian partners. . . . From friends in Asia, the United States seeks nothing less than their active commitment to building and sustaining this effort on all fronts, so that all countries in the Asia-Pacific region play their part in finding and implementing solutions to shared regional and global challenges, from the proliferation of dangerous weapons to the impacts of climate change.<sup>13</sup>

Although the pivot was just about economics, for the Obama administration, markets mattered in crafting its foreign, economic, and security policy. In 2009, the economic center of gravity was clearly to be found in Asia, with 60% of global GDP and nearly half the world's international trade there.<sup>14</sup> USTR Ron Kirk noted that the US was not a party to the proliferating trade agreements in Asia. As a result, he wrote, "these agreements, as well as other economic developments, have led to a significant decline in the US share of key Asia-Pacific markets over the past decade."<sup>15</sup> The TPP, Kirk promised, was one way to help reverse these trends.

12. Hillary Clinton, "America's Pacific Century," *Foreign Policy*, October 11, 2011, pp. 56–63.

13. Kirk Campbell and Brian Andrews, "Explaining the U.S. 'Pivot' to Asia," *Americas* 2013/01, Chatham House, August 2013, <[http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Americas/0813pp\\_pivottoasia.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Americas/0813pp_pivottoasia.pdf)>, accessed August 19, 2014.

14. Ian F. Fergusson and Bruce Vaughn, "The Trans-Pacific Partnership Agreement," Congressional Research Service, December 12, 2011, <<http://www.fas.org/sgp/crs/row/R40502.pdf>>.

15. "Text of USTR Letters to Congressional Leaders," United States Trade Representative, December 14, 2009, <<https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/TPP%20Congressional%20Notification.pdf>>.

## THE USTR NOTIFIES CONGRESS

Kirk formally notified Congress of the administration's intention to enter into negotiations with the TPP countries on December 14, 2009.<sup>16</sup> Kirk took this step because the White House was following a domestic policy procedure known as trade promotion authority (TPA). TPA, which used to be called "fast track," authorizes the executive branch to negotiate trade deals on behalf of Congress.<sup>17</sup>

This formal notification was not technically required, as TPA had expired in 2007 and had not been renewed.<sup>18</sup> However, from the beginning, the USTR chose to negotiate the TPP agreement "as if" TPA rules were in effect. The White House intended to push Congress to renew TPA prior to the closure of the final deal.<sup>19</sup>

There were four key elements of the provision for officials. First, each time the bill was authorized, Congress had spelled out the broad trade negotiating mandates to be followed and outlined the procedures for consultation. Second, under TPA, negotiations could not begin with a new partner in a trade agreement until 90 days had passed. This allowed time for Congress, companies, and the general public to comment on the proposed negotiations. Third, TPA required the executive branch (in practice, the Office of the Trade Representative) to regularly report back to Congress on the progress of the negotiations. This was necessary because the final requirement of TPA has been that Congress "vote" the entire agreement up or down in the end, without amendment, under expedited terms.<sup>20</sup> When the original authorization was given for TPA in 1974, members of Congress argued that they could only agree to such a law if members believed they had been sufficiently consulted and their input was sought along the way. Congress retains the

16. Fergusson and Vaughn, "Trans-Pacific Partnership Agreement."

17. For a history of TPA, see I. M. Destler, *American Trade Politics*, 4th ed. (Washington, DC: International Institute of Economics, 2005).

18. The last time legislation was passed on TPA was in 2002.

19. After a deeply contested debate, both houses of Congress did finally renew TPA. It was signed by President Obama and passed into law on June 29, 2015. For more information on TPA, see Ian Ferguson and Richard Beth, "Trade Promotion Authority: Frequently Asked Questions," July 2, 2015, Congressional Research Service, <<https://fas.org/sgp/crs/misc/R43491.pdf>>, accessed September 1, 2015.

20. Technically, Congress is voting on the implementing legislation to bring domestic laws into compliance with the trade agreement. Trade agreements like the TPP are not considered treaties and require only simple-majority (51%) approval from both houses of Congress.

right and responsibility to implement any negotiated trade agreement. The fight over the reauthorization of TPA resurfaced later in the negotiations. At the time of Kirk's notification of entry into the TPP bargaining, however, Congressional comment was muted.<sup>21</sup>

## LAUNCHING THE TPP TALKS WITH NEW NEGOTIATING TEMPLATES

It was not until March 2010, after the 90-day comment period had concluded in the US, that the first round of negotiations started, in Melbourne, Australia. Although the original intention of the P4 countries was to lay a foundation for future expansion of the agreement by way of an accession clause, when delegates met in Melbourne, officials quickly discarded the P4 as a negotiating template. Instead, they decided to start again with a new agreement and spent roughly the first half-dozen rounds discussing different approaches to the negotiations.<sup>22</sup>

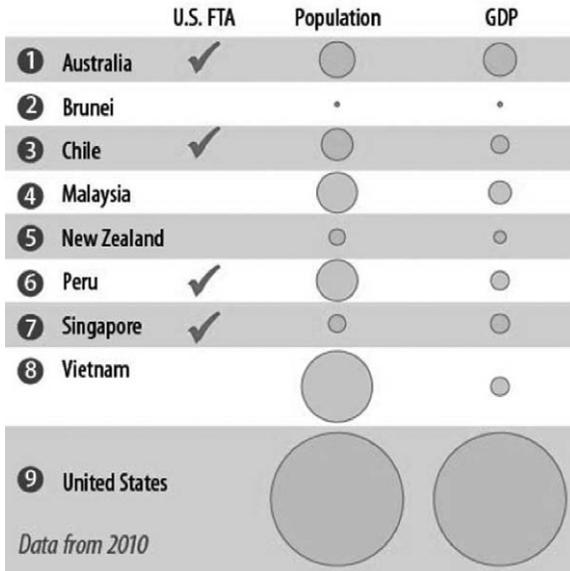
What remained in place between the P4 and TPP was a commitment to crafting a high-quality, ambitious trade agreement. Deciding what this meant in practice was difficult. Each country delegation—and perhaps even each individual negotiator—may have chosen to define the terms differently. Despite endless hours spent holed up in hotel and conference rooms around the world, officials never really tried to define either “high-quality” or “ambitious” and instead left each team to decide what sort of outcomes in each sector might fit the bill.

The P4 itself contains many similarities to American FTA agreements. This is because Singapore and Chile had gone through the (sometimes painful) process of negotiating with the US in their respective bilateral agreements. These deals represented some of the most comprehensive agreements

21. Ways and Means ranking member Dave Camp (R-MI) and Trade Subcommittee ranking member Kevin Brady (R-TX) made a statement in June 2009 noting the lack of TPA authority overall, on the second anniversary of the expiry of the agreement. Both men asked the administration to renew the bill. Camp wrote, “It is past time for Congress to give the President TPA and put back in play one of our best weapons to create economic opportunity for American workers. Just as I supported TPA for Presidents Clinton and Bush, I support TPA for President Obama” (“Camp, Brady Statement on the Second Anniversary of the Expiration of Trade Promotion Authority,” June 30, 2009, <<http://waysandmeans.house.gov/camp-brady-statement-on-the-second-anniversary-of-the-expiration-of-trade-promotion-authority/>>).

22. Deborah Elms, “The Trans-Pacific Partnership: The Challenges of Unraveling the Noodle Bowl,” *International Negotiation* 18 (2013), pp. 25–47.

FIGURE 1. The Original Nine Trans-Pacific Partnership Countries (Trade Data in Billions of US dollars, 2010)



SOURCE: Analysis by Congressional Research Service. Free trade agreement (FTA) data from the United States Trade Representative. Population and GDP data from IMF (World Economic Outlook, September 2011). Trade data from the US International Trade Commission. Shown in Brock Williams, “TPP Countries: Comparative Trade and Economic Analysis,” Congressional Research Service CRS7-5700, February 8, 2012.

either country had signed. To use Singapore as an example, all subsequent, post-2004 Singaporean FTAs contain language drawn from the US–Singapore FTA. Using overlapping language and provisions across multiple trade agreements can minimize the difficulties faced by firms in using the deals. Thus, when the countries sat down to craft the original P4 agreement, some of the text was similar to the US–Singapore FTA as well as the US–Chile FTA.

Once the Americans were at the table, however, US influence in drafting new language for the TPP increased. This was partly a matter of the size and weight of the economic partners. The US was simply the 800-pound gorilla in the negotiations on nearly every economic measure (Figure 1).

The American team also faced domestic challenges related to the final passage of the agreement that were particularly daunting. If the text of the TPP ran contrary to the desires of the US Congress, the final deal would not

be ratified. Although, of course, the final TPP agreement needed to satisfy domestic constituents in every member country, the specific voting requirements of the Americans were different. Other members could more easily count on party control of the legislature, for instance, to ensure agreement at the domestic level in the end; some were not required to submit the final deal to any review body before implementation.

Finally, on a practical level, many TPP member officials outside the US recognized that the Americans were likely to rewrite draft texts in their own image anyway, thus dramatically reducing the incentives to prepare early drafts.<sup>23</sup> This meant that, as the TPP negotiations proceeded, the final deal continued to closely resemble existing American FTAs (and especially the US–Korea FTA known as KORUS, since it was the most recent and most advanced agreement).

### ASPIRATIONAL GOALS

Some early elements of the high-quality nature of the deal remained unchanged. The TPP was always intended to be both broader and deeper than other FTAs. This meant the agreement would include significant commitments in what are often called “behind-the-border” issues, and would focus attention on trying to harmonize regulations (or at least minimize divergence). The depth of the deal meant that nearly all issues were on the table.

Officially, “all” issues were on the table. By this, officials generally meant that market liberalization for goods was to include zero tariffs for all products. But some issues that might plausibly have been considered as part of the agenda were never opened for discussion at all. For instance, the US refused to discuss changes to a domestic law called the Jones Act, which prevents foreign-built or foreign-flagged vessels from moving cargo or people within US borders. The law was originally passed in 1920 to encourage the maintenance of an American merchant marine fleet. Many now view it as an impediment to trade, since it prevents cabotage, the transshipment of cargo through US ports by foreigners.<sup>24</sup>

23. Interviews with TPP officials by the author over the course of the negotiations.

24. See e.g. Brian Slattery, Bryan Riley, and Nicolas Loris, “Sink the Jones Act: Restoring America’s Competitive Advantage in Maritime-Related Industries,” Backgrounder no. 2886, Heritage Foundation, May 22, 2014.

From the beginning, however, such exceptions to market opening were quite modest. Instead, members were expected to fully open their markets for goods, services, and investments to one another. Also on the agenda were items like the opening of government procurement markets and the expansion of intellectual property rights. These areas had been covered previously in some agreements, but many existing FTAs either skipped over the topics (like procurement) or did not go beyond commitments in other arenas (like intellectual property promises made at the WTO).

Finally, the early talks included hopeful conversations about “twenty-first century new issues.” This included the idea that regulations could be coordinated among members—not with the goal of writing one set of standards or rules, but to minimize divergence or slowly bring about convergence or coherence. Another new notion was to foster the involvement of small and medium enterprises, since small and medium enterprises formed the backbone of enterprise in nearly all TPP member countries.

The TPP member countries at the outset, as noted above, were well linked by existing FTAs. However, these agreements were mostly bilateral. In a world of supply chains, such connections are less helpful to business than deals that hook together members across a wider set of countries. Companies participating in supply chains wanted the ability to ship goods and services across borders with no impediments. Firms hoped to remove not just tariffs, but also various non-tariff barriers such as incompatible standards and duplicative regulatory testing. They also wanted to be able to count on similar rules for competition, customs procedures, logistics and delivery company guidelines, and e-commerce. Many of these issues, however, fall in between traditional FTA chapters (and government ministry mandates). Therefore, the TPP originally tried to tackle supply chains in a comprehensive manner, without splitting the topic into constituent parts.<sup>25</sup>

Finally, the TPP was a unique agreement that brought together members at differing levels of economic development. Often, in deals that include such a disparity of country participants, the agreement includes something called “special and differential treatment” (S&D). This concept, drawn from the General Agreement on Tariffs and Trade / WTO, gives developing-country members additional flexibility. Provisions may have different, often less

25. In the end, officials with experience negotiating other agreements won out, and most of the TPP follows “traditional” chapters.

ambitious, commitments or longer timelines for implementation. S&D may include capacity-building funding and training for the hard and soft infrastructure needed to enact the provisions of the agreement.

But from the earliest days, the members ruled out S&D for the TPP. Every member would be subject to the same rules and regulations as every other member.<sup>26</sup> Developing-country participants would have additional time (and even this concession was limited in scope) and a very modest amount of external support for capacity building.

### GETTING DOWN TO BUSINESS

After the initial meeting in March 2010, members held three additional rounds of negotiations in the first year: in San Francisco in June, Brunei in October, and Auckland in December. Members mostly spent time strategizing on how to add value by creating a larger agreement rather than beginning the arduous task of drafting texts.

Of particular note was the addition of Malaysia to the TPP during the Brunei meetings. Although the original P4 included a clause to add new members, it did not stipulate *how* they were to be added. When Malaysia expressed an interest in joining, members crafted an informal set of procedures. First, the prospective member had to indicate to the collective grouping its desire to join. The group could decide to let the discussions proceed (or not).

Then, the potential member had to start scheduling bilateral consultations with existing members. This allowed the two sides to discuss any long-standing bilateral irritants that were likely to interfere with the smooth integration of the new member into the larger setting. The extent to which the new member was required to resolve these issues varied—it was possible to argue that unilateral moves to address issues were not appropriate, since many problems might reasonably be expected to be part of the larger negotiation and the give-and-take of bargaining. By taking them off the table ahead of joining, prospective members would be removing their own bargaining chips. But leaving obvious problems unaddressed also risked derailing the entire negotiations over known challenges.<sup>27</sup>

26. The TPP, after all, is a voluntary agreement. Potential members that were uncomfortable with such a requirement could stay out of the deal.

27. The method of adding new members was not well clarified at the conclusion of TPP negotiations either, potentially giving rise to new disagreements as the agreement expands in the

In any case, each existing member had the ability to decide whether the new entrant had made a reasonable case for admission and had been sufficiently persuasive in arguing that it would fulfill the high-quality aspirations of the group as a whole. If the new applicant survived this set of challenges, the issue of membership had to be taken up again by the group. Finally, if the TPP membership agreed, domestic procedures in the member countries had to be completed before the new country could sit at the table.<sup>28</sup>

The nine initial TPP members first exchanged market-access offers in January 2011. Six sessions were held afterward: in Santiago, Chile, in February; Singapore in April; Hanoi in June; Chicago in September; Lima in October; and round 10 in Kuala Lumpur in December. TPP gatherings of one sort or another were also always held on the sidelines of APEC meetings (trade ministers and often chief negotiators meeting at senior officials meetings and TPP leaders meeting at the end-of-year summits). In addition, many chapter teams held intercessional meetings, separate from full negotiating rounds, where only some subset of officials got together. Finally, various officials held discussions of the TPP as a whole, as well as specific issues during bilateral visits.

The 2011 meetings were heavily focused on substance, driven by the first important self-imposed deadline for completion of the APEC Leaders' Meeting in November in Honolulu. Despite a grueling negotiating calendar that saw thousands of officials flying around the world, it was not possible to reach a complete agreement by November; officials were left to issue the "broad outlines" of the agreement instead.<sup>29</sup>

The outlines noted the sweeping nature of the TPP agreement. In addition to market access for goods and services, the FTA would cover telecommunications, sanitary and phytosanitary rules (covering food and food safety

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future. While the first 12 members could negotiate solutions to a wide range of problems, future members are meant to take the TPP "rule book" as a given, with more limited scope for change. This also reduces the opportunity to address variation from the existing TPP commitments for new members during the course of accession.

28. In practice, this largely meant waiting for the 90-day window to close for the US to complete the "as if" conditions of TPA. However, for Malaysian entry into the TPP, the wait was not necessary. Instead, USTR argued that Congress had already granted permission for trade negotiations with Kuala Lumpur under an existing, but dormant, bilateral FTA authorization.

29. Office of the United States Trade Representative, "Outlines of the Trans-Pacific Partnership Agreement," November 2011, <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>>.

regulations), technical barriers to trade, government procurement, labor rights, legal issues, environment, e-commerce, customs, and competition. This short document was carefully crafted to explain what was under negotiation and to give some hint about the content of the agreement in certain areas.

The outlines were shaped, in part, by something innovative in the TPP negotiations. Starting in round 6, in Singapore, officials began to schedule parallel “stakeholder” meetings. Informal outreach and communication with the business and NGO communities had been held earlier, but this was formalized and extended through subsequent rounds. Registered stakeholders were given the opportunity to present to officials at each meeting. In later rounds, stakeholders were encouraged to stand beside tables to facilitate more intimate discussions with negotiators. Some delegations also met privately with stakeholders to discuss specific issues and possible solutions.

The stakeholder input process was especially important for briefing officials on issues that cut across multiple chapters of the accord. It also allowed business leaders, NGOs, and some academics to meet with country officials where the regular process of soliciting feedback on proposed trade agreements was weak. For example, one firm discussed the different regulations in the Americas and in Asia for measuring truck length. Given quite different procedures for meeting length standards, semi-tractor truck cabs certified for use in one market would not be feasible to use in different markets. In another meeting, a developing-country company highlighted mobile phone connectivity and asked for specific changes in regulatory policy among some of the TPP members to bring down mobile roaming rates for members. Some stakeholders participated in every round, and others attended only one.

The stakeholder process was especially critical in the TPP given the paucity of information leaking in and out of the negotiations. From the beginning, officials opted to keep tight control over information. In a large, complex, multiparty negotiation, keeping specific negotiating positions from being leaked is important. If a country were to have its high or low offers revealed prematurely, for example, it could dramatically squeeze the range of options on the table for resolving any given issue because it could lock officials into taking such positions. The “core” contents of trade negotiations in the past have nearly always been conducted in secret, without public comment on offers or draft texts. In addition, officials were initially working toward having the entire agreement concluded within the first two years. This ambitious and

unrealistic goal may have made it easier to keep information tightly circumscribed, as it appeared that everyone would know all the details in relatively short order.

However, as the negotiations stretched past the third, fourth, and fifth years, keeping tight rein over information became more problematic. Rather than respond by relaxing the rules and letting (at least some) knowledge flow out, officials seemed to get less talkative.<sup>30</sup> The five-page “broad outlines” agreement issued in November 2011 represented the most comprehensive release of details on the talks in nearly two years. The stakeholder process was even discontinued at the end of 2013 when members stopped holding “rounds” and began hosting “informal rounds” or “check-in sessions” instead.<sup>31</sup>

#### THE LONG MIDDLE SLOG

When the first deadline passed without completion, a bit of air went out of the TPP balloon. Officials had been working at a breakneck pace. As the end of the 2011 loomed, most delegates were exhausted. The only chapter that was concluded covered small and medium enterprises. Since this was basically a commitment to open a website to encourage small and medium enterprise participation in member countries, this was not a significant accomplishment. The rest of the deal was still subject to deep disagreements. And the TPP followed “single undertaking” rules, drawn from the WTO, that largely prevented countries from agreeing to “close” (i.e., conclude) any chapter until everything in the entire agreement was completed.<sup>32</sup>

30. The lack of information on the content and scope of the talks came back to haunt officials in the run up to ratification and implementation in many countries, since there was limited public or even business support for the TPP when no one knew much (or anything) about it. In a knowledge vacuum, opponents of the agreement had near-free rein to set the narrative and even make up whatever “facts” they wanted to about the presumed contents. The release of the texts came too late to reset the context for many.

31. Stakeholders and media continued to travel to TPP “informal” rounds anyway, but in fewer numbers. If anyone had kept track, the record would likely show that the later meetings were mostly attended by the largest multinational firms, with deep enough pockets to justify the expense even without a formal presentation. Officials said they discontinued stakeholder meetings because they had “learned everything they needed” by the end of more than a dozen such meetings.

32. This “rule” was reinforced by another convention that prevented newly admitted members from discussing any text that had been “closed” or taken out of brackets (where the use of brackets indicated continuing disagreement among delegates about the exact wording of the text).

Countries were not eager to host negotiating rounds, an expensive, time-consuming proposition. It meant finding a venue not just for all the officials from each of the negotiating chapters from nine participants, but also many other officials. For instance, embassy officials often turned up to join their colleagues in specific rounds. Plus, the stakeholders had to be accommodated. In 2012, many of the rounds were held in the US.

One of the most notable changes in 2012 was the addition of two new members: Canada and Mexico. Canada had expressed interest in joining the agreement much earlier but was rebuffed, largely out of concerns about whether it would open its dairy and poultry supply management systems to greater competition.<sup>33</sup> In June, however, the TPP members reversed course and agreed to consider Canadian membership. Mexico immediately argued that admitting Canada but not Mexico would be problematic given the tight integration of the North American markets under the North American Free Trade Agreement (NAFTA).

The 90-day comment period in the US meant that the two neighboring countries did not join the talks until the 15th round of negotiations, in New Zealand in December 2012. Their addition complicated the resolution of the agreement. Although Mexico, for example, had signed many FTAs, not all TPP members had experience working with Mexico. Because Mexico (and Canada) had preferential access to the US market under NAFTA, some of the issues under discussion in the TPP became more sensitive. Granting preferences to TPP members could undermine existing NAFTA preferences. As one example, textiles market access became considerably more fraught, and resolution of remaining issues slowed. Japan had been widely expected to join the TPP at the same time as Canada and Mexico. Multiple Japanese prime ministers had announced plans to enter into the talks. But as 2012 transitioned to 2013, Japan remained on the sidelines.

## **JAPAN JOINS, AND ANOTHER DEADLINE IS MISSED**

The Obama administration announced its intentions to wrap up talks by the end of 2013. This put pressure back on the negotiating teams to quickly

33. A concern that turned out to be prophetic, as dairy and supply management issues continued to dog negotiations through 2015 as officials approached the finish line. The final TPP schedules showed that Canadian officials had managed to preserve much of their existing systems.

absorb the two new entrants while working through the more controversial issues on the agenda.<sup>34</sup>

The last three official rounds for the agreement were held in Singapore in March 2013; in Lima in May; and in Kota Kinabalu, Malaysia, in July. After this, “formal” negotiating rounds were discontinued. In part, this was because many agreement chapters, such as telecommunications, had either been finished or had reached the limits of what the country delegations could accomplish. Any remaining sticking points could be resolved only at a higher level of authority. As previously noted, the end of formal rounds also meant the end of stakeholder meetings. It was getting difficult to explain why the agreement was not yet finished, as the round count rapidly headed past 20.

Also seriously complicating the ability of officials to complete the negotiations was the accession of Japan for the final hours of the last round in Malaysia in July 2013. Japan had finally moved to the formal stages of TPP entry early in the year, but had to wait for the comment period to finish in the US before it could participate. The July meetings had been set for Malaysia, and apparently the dates could not be pushed out to allow the Japanese to participate. Instead, officials were briefed extensively on the status of various chapters in the agreement.

As the USTR press briefing issued at the end of the round (in July 2013) noted, with Japan’s entry, TPP countries accounted for nearly 40% of global GDP and about one-third of all world trade.<sup>35</sup> There had been no agreement between the world’s largest and second-largest markets, the US and Japan, before, and folding the two together might have been time-consuming. TPP procedures, of course, called for all existing “closed” areas of the texts to remain off limits for new negotiations. This might have sped things up, but given the single-undertaking nature of the TPP, many square brackets were penned across different chapters as various countries held out on different issues, pending final compromises.

Despite Japan’s late entry, the Americans continued to press for conclusion by the end of 2013. Although formal rounds of negotiations had been

34. For an update on the sticking points in the agenda at that point in the talks, see Deborah Elms, “The Trans-Pacific Partnership Negotiations: Some Outstanding Issues for the Final Stretch,” *Asian Journal of WTO and International Health Law and Policy* 8, no. 2 (2013).

35. United States Trade Representative, “Statement on the 18th Round of Trans-Pacific Partnership Negotiations in Kota Kinabalu, Malaysia,” <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/round-18-malaysia>>.

discontinued, “informal” rounds went ahead. Two were held under the title of TPP Chief Negotiators’ Meetings, in Washington, DC, in September and in Salt Lake City, Utah, in November. All these activities culminated in the first lengthy meeting of TPP trade ministers, in Singapore in December 2013. Despite the ministers’ being locked in rooms across two days in sets of bilateral and plenary sessions designed to break through the remaining sensitive issues, at the conclusion of the meeting, officials could report progress only on defining “landing zones” for the agreement overall.<sup>36</sup>

### RAMPING UP POLITICAL ENGAGEMENT

The TPP ministers urged their negotiating delegates to redouble their efforts to resolve outstanding issues in rules and texts. In conjunction with increased political scrutiny, trade ministers held two additional meetings in Singapore in February and May 2014. Neither resulted in the breakthrough necessary to close the agreement.<sup>37</sup>

In the US political calendar, however, the window for conclusion of the TPP agreement was rapidly closing. If the leaders hoped to finish the deal in time for a congressional vote in the US before Barack Obama left office in January 2017, the time remaining was very tight. Members of Congress could not be expected to vote on a trade bill during a presidential election cycle, as there was no upside for individual members to vote on trade deals. In contrast, the potential to lose an election based in part on a trade vote was seen as high.

With US elections approaching in November 2016, the TPP vote would have been easiest to obtain if done prior to mid-2015.<sup>38</sup> This would have put the trade vote after the midterm elections of November 2014, but early

36. See the extraordinarily brief “Statement of the Ministers and Heads of Delegation for the Trans-Pacific Partnership Countries,” New Zealand Ministry of Foreign Affairs and Trade, December 10, 2013, <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/December/TPP-Ministers-Statement>>.

37. And Singapore was left with unfortunate headlines that read, “Singapore Hosts Failed Ministerials.” See e.g. Siti Rahil and Kayo Mimizuka, “Singapore TPP Talks Fail to Reach a Deal,” *Japan Times*, February 25, 2014; “TPP Ministers Chart ‘Pathway’ Forward, but Show Few Signs of Progress,” *Inside US Trade*, May 23, 2014.

38. This is a testament to the length of the US presidential race. During every election, the entire US House of Representatives is also running for office, as well as a third of Senate members. For these members of Congress, a trade vote too close to the election could be very problematic.

enough in the electoral cycle to make members more comfortable with voting on potentially controversial bills.

Working backwards from this calendar, the “informal” rounds in Ho Chi Minh City in May 2014, in Ottawa in July, and in Hanoi in September assumed greater importance. In order to properly tee up the agreement for political decisions, the remaining negotiating teams and chief negotiators needed to be able to deliver a comprehensive set of options to political leaders.

Leaders were scheduled to meet at the APEC summit in Beijing, November 10–11, 2014. This “decision-forcing event” became the backdrop of ongoing negotiations. In Hanoi, officials worked to conclude the last textual issues, putting together various options and policy packages for the remaining sensitive issues. Chief negotiators tried to whittle down the list of problematic areas for ministerial intervention by settling on as many outcomes as possible across the entire agreement as directed by leaders.

#### LANDING ZONES AND FINAL PACKAGES

The TPP agreement contains 30 chapters. Attempting to get closure was like attempting to solve a 12-sided Rubik’s Cube. The agreement was interlocking, with someone’s provisional acceptance of one area often dependent on their receiving a set of benefits elsewhere. Multiplied by 12 participating countries, getting a deal done was difficult. The advantage of such complicated talks, however, was that the final agreement should have had plenty of “winning” outcomes for each participant.

Chapters were never “closed.”<sup>39</sup> Instead, everything remained in play until the final agreement was ready for signature. Officials trying to craft the deal were left with the language of “narrowing landing zones” and creating “final packages” for review by ministers and leaders. What this meant in practice was that chief negotiators had to write up sets of options for consideration by leaders and let them make political decisions on outstanding sensitive issues.

The most problematic issues, as the agreement headed toward the fifth year of negotiations, were mostly items that had been seen as sensitive from

39. Except for the chapter on small and medium enterprises, as noted earlier. This made it difficult for many people to judge how close to or far from completion the TPP might be and complicated life for reporters, who wanted a simple metric to assess progress with each round.

the earliest days of the deal.<sup>40</sup> One of the most difficult areas remained market access for goods. Because the TPP was intended to cover all goods without exception at a high level of ambition, countries could not shield sensitive items from market opening in some way to other TPP partners. For most of 2014, the US and Japan negotiated regularly around tariff reductions on a limited number of agricultural products (the five “sacred” items: dairy, rice, beef/pork, wheat, and sugar), as well as tariffs and rules around autos.<sup>41</sup> Until the other TPP members could see what Japan was willing or allowed to do on these items, they too were reluctant to put their own sensitive market-access issues on the table. If Japan, for example, were allowed minimal market opening on beef, other members could ask for similar treatment on their issues.

The negotiations on rules of origin (ROOs) continued to take significant time. These rules are designed to allow the goods only from TPP member countries to be eligible for preferences such as lower tariff rates. If non-member goods could sneak in somehow, it would undermine the market-access provisions of the deal. Therefore, ROOs are quite important. They also interact with tariff concessions. It is theoretically possible to create a completely open, zero-tariff world but to craft such difficult ROOs that no products actually qualify. In other words, a product may be eligible for zero tariffs, but in order to meet the ROO criteria, a company might for example have to get 60% of the product’s content from member countries. Worse yet, the procedures necessary to prove that the product meets the 60% originating criteria might be so onerous that most firms would just give up and use the most favored nation tariff rates, available to all WTO member companies, instead (even if the most favored nation tariff is not zero). Alternatively, easier ROOs (specifying lower content, for example) can make even relatively higher tariffs less of a problem for firms.

The TPP negotiations on ROOs dragged on for the entire duration of the overall negotiations. Because officials opted for product-specific rules, every

40. See e.g. Lim, Elms, and Low’s *Trans-Pacific Partnership*, which highlighted all the problematic issue areas except for state-owned enterprises, even though it was written in late 2011 / early 2012.

41. The agreement was largely conducted plurilaterally (i.e. among all 12 members), except for the market-access provisions for goods, which used a mix of bilateral and plurilateral negotiating approaches. For details, see Elms, “The Trans-Pacific Partnership: The Challenges of Unraveling the Noodle Bowl.”

single tariff line of the schedules had to be checked for matching ROOs.<sup>42</sup> With product-specific ROOs in place, developing cumulation rules was even more problematic.<sup>43</sup> Under cumulation, firms are encouraged to “add up” the member content in products toward meeting the overall content required by ROO provisions. In a world of value or supply chains, companies rarely source all the materials and inputs they need from one country alone. Instead, they may source from a large variety of regional or global suppliers. Agreements like the TPP are intended in part to provide additional benefits to firms that buy inputs from other TPP member countries. But the specific provisions of the TPP may make this process challenging, since a firm manufacturing a complex item will potentially need to check the specific ROO in place for each and every component in the final product before satisfying the overall ROO across TPP originating goods. This was especially problematic for items like textiles and footwear, which can combine many input items—each with different rules to determine whether the item can “count” toward TPP content and obtain lower tariff rates on the final product in TPP member countries.

Other sensitive issues still unresolved as talks continued in early 2015 included the extent of intellectual property rights provisions, scheduling of exceptions for state-owned enterprises, scheduling of exceptions to services and investment liberalization, concluding the environment chapter, and discussing the reach of dispute settlement. Many items in these chapters and others had to be narrowed down to a small number of options for political intervention, as officials simply could not close out many topics on their own.

#### THE NEAR-MISS IN HAWAII

Ministers arrived in Hawaii in July 2015 for what most expected to be the final session devoted to TPP closure. This meeting represented their first gathering after President Obama had finally been granted TPA. The Americans were in a position at last to put final offers on the table, secure in the knowledge that Congress would not pick apart individual aspects of the agreement. One of

42. An alternative approach would have been to specify rules for all classes of goods or to allow very minimal sets of rules (e.g. for all chemicals, or all textiles, or all electronic items).

43. For more details on the complex structural nature of the TPP negotiations, with multiple schedules for different member countries, see Elms, “The Trans-Pacific Partnership: The Challenges of Unraveling the Noodle Bowl.”

the most difficult and controversial elements of the agreement—bilateral talks between the US and Japan over the sensitive subjects of agricultural items and autos—appeared to be resolved.

Ministers, delegates, a large media contingent, and even a rather sizable band of stakeholders stalked the lobby and corridors of the meeting venue. All were anticipating an announcement of closure at a press conference at 1:30 on Friday afternoon, July 31. The press conference was postponed until 4 p.m., but most officials involved in the negotiations remained extremely confident that a slight delay was all that was necessary to wrap up the agreement.

However, with only minutes to go before the press conference, the negotiations came to an abrupt and unexpected end. USTR Michael Froman announced the conclusion of the ministerial round but did not say anything about the conclusion of talks. The meetings were not extended, and delegates were left stunned.

Whole books will likely be written in the future about what led to the collapse of negotiations in Hawaii. But in brief, officials were unable to overcome several significant obstacles and resolve festering issues. For example, the high-risk strategy of waiting until the last moment to reach a deal on dairy products turned out to be problematic. While Canadian officials appear to have hoped that other members would be so eager to get an agreement that they would accept whatever was on the table, this was not the case. A similar dynamic held in several other high-profile sectors—but a TPP agreement could only be reached and hold if *all* 12 members were willing and able to participate. This was not the case in Hawaii. Some of the participants were simply unable to agree to proposed compromises. Negotiations were halted. Ministers left Hawaii to regroup, consult again with domestic stakeholders, and refocus, with the hope of settling the last items relatively quickly.

#### GETTING IT DONE AT LAST

After Hawaii's near-miss, officials continued to insist that their focus remained on concluding the agreement at optimal quality without worrying about specific timelines or ratification and implementation. The quest for a perfect agreement was always likely to prove quixotic. Concluding an excellent deal that would never see the light of day because members would shy away from implementing the provisions was also clearly not helpful.

Unfortunately, in any negotiation and especially in multiparty talks, individual members have an incentive to stall final concessions as long as possible in the hope that a race to the finish line will encourage some members to relax their standards and accept the deal on the table, rather than risk the collapse of the entire agreement. But such a strategy is perilous. If every member opts to hold out on the most sensitive issues and refuses to compromise, the deal will never get done. If concessions are granted too late, there literally may not be enough time to pull together the final deal (when, for example, the TPP leaders are scheduled for a press conference). Last minute deal-making is common in trade agreements, but can be very tricky to implement in a large, complicated negotiation.

The TPP finally came together on October 5, 2015, at a meeting in Atlanta. It was attended by a very small band of officials. After the Hawaii debacle, only a few members of the press and a tiny pool of business persons and NGOs bothered to show up. The exhausted delegates held a press conference and issued a short statement announcing the conclusion of the agreement.<sup>44</sup>

#### FROM AGREEMENT TO RATIFICATION

The first drafts of the texts were released to the public one month later. The agreement spanned more than 600 pages, with thousands more pages of country-specific commitments. Lawyers from across the 12 member countries were busily engaged in final legal reviews of the draft texts to ensure that all the provisions of the agreement were consistent and enforceable. The official language of the TPP is English, but the documents were also translated into French and Spanish, and all documents were posted on the websites of all members.<sup>45</sup> More than 100 side letters contain additional bilateral commitments between specific pairs of TPP member countries.

The final texts were released on January 26, 2016. Ministers from all 12 TPP countries met on February 5 for the formal signing ceremony. This date officially marked the transition from the negotiation of the TPP to the

44. Office of the United States Trade Representative, "Trans-Pacific Partnership Ministers' Statement," October 2015, <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/trans-pacific-partnership-ministers>>.

45. New Zealand is the official repository country for the Trans-Pacific Partnership, however, so the primary website for TPP texts is hosted by the New Zealand Ministry of Foreign Affairs and Trade: <<https://mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership-annexes/>>.

ratification and, eventually, implementation phase. It also marked the culmination of years of very hard work to put together one of the deepest and broadest trade agreements ever negotiated.<sup>46</sup> The 30 chapters will fundamentally restructure trade and supply chains in and across TPP member states. Most of the agreement takes effect on the very first day of entry into force, including tariff cuts to zero for nearly 90% of all tariff lines; the opening of services, investment, and government procurement markets; and a host of new rules. Getting the final deal done across such a diverse group of countries was not easy. The origin and evolution of the TPP agreement illustrates the difficulty of negotiating substantial, meaningful, legally binding commitments, even among countries that have voluntarily come together with a shared vision for the future.

46. Outside of the European Union.