



The Estey Centre Journal of **International Law and Trade Policy**

Negotiating in Disequilibrium: Can a Trans-Pacific Partnership be Achieved as Potential Partners Proliferate?

William A. Kerr

*Senior Associate, Estey Centre for Law and Economics in International Trade
Saskatoon, Canada*

The Trans-Pacific Partnership (TPP) is being negotiated in a radically different way than is normally the case with trade agreements. Trade negotiations usually take place among a set number of interested countries and within a pre-agreed agenda. In the case of the TPP the number of countries in the negotiations continues to expand, and each new country brings additional issues and concerns to the table. Can such an unorthodox approach succeed? The history and the dynamics of the TPP are examined to gain insights into the process, the motivations of the countries involved and the likelihood of a successful agreement being achieved.

Keywords: agenda, membership, motives, Trans-Pacific, trade negotiations

Introduction

It is axiomatic that as the number of parties to a negotiation increases arithmetically, the difficulty of reaching an agreement increases exponentially.

G. F. Will, 2004

The expanding TPP is an historic endeavor that embodies the Obama Administration's vision for the American economy, the future of trade, and the United States' central role in the Asia-Pacific. This agreement will unlock significant new opportunities to increase exports that support higher-paying jobs here at home. The Asia-Pacific includes some of the world's most dynamic economies, representing more than forty percent of global trade.

Ambassador Demetrios J. Marantis,
2012

Opposition to an FTA involving New Zealand has already been signalled from various US agricultural (particularly dairy) lobbies. Other areas where the United States' position differs from New Zealand and other TPP partners include pharmaceuticals (where the US has concerns about aspects of New Zealand's pharmaceutical management regime) and intellectual property rights. Civil society stakeholders in New Zealand have also identified concern with other aspects of TPP including investor/state dispute settlement and proposals relating to state owned enterprises. It is important to remember that nothing has yet been agreed in the context of TPP and nothing will be agreed until everything is agreed.

NZUS Council

The trade negotiations surrounding the proposed Trans-Pacific Partnership need to be watched closely, not simply for the trade liberalization results that may ultimately be achieved, but also due to the unique institutional arrangements that are being devised as the negotiations progress. New institutional arrangements are required because, as the negotiations have progressed, the number of potential partner countries has been increasing as new countries are allowed to join the negotiations. The countries that have joined the negotiations have historically had very different objectives for their trade policies, and accommodating these diverse economic and political objectives must present challenges for those undertaking the negotiations. Instead of converging to an agreement (or not) among a set number of participants on a pre-agreed agenda as is typical in trade negotiations, the Trans-Pacific Partnership (TPP) negotiations have been taking place in a situation where the number of potential partners is in disequilibrium.

The TPP case is also very different from, for example, the various expansions of the European Union, where the countries joining are acceding to a previously agreed arrangement and the formal negotiations will not fundamentally alter what had gone before (Gaisford, Kerr and Perdakis, 2003). In the case of the North American Free Trade Agreement (NAFTA), Canada and the US had already negotiated the Canada-US Trade Agreement (CUSTA) a few years previously. The reconstituting of the existing institutional arrangements for trade led to only minor changes to the CUSTA provisions (Kerr, 1997). As the addition of Mexico required different forms of trading arrangements than were needed for commerce between the US and Canada, the NAFTA is actually three separate agreements – US-Canada, US-Mexico and Canada-Mexico (Clement et al., 1999). At the World Trade Organization new countries accede to existing agreements and join already constituted negotiating agendas if a round is underway (Kerr, 2010). Even trade arrangements like the oft expanded Zollverein have added to their memberships in successive, concluded steps. The TPP is more like a poker game which is joined by new players with different resource endowments as pots expand.¹

The TPP began as the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP) of 2005, which had four members – Brunei, Chile, New Zealand and Singapore. The countries were known as the Pacific Four or P4. Each of these countries is dynamic in its own way – Brunei has a high per capita income due to extensive petroleum reserves; Chile is an export oriented, pro-market economy; New Zealand is an efficient agricultural producer and exporter and a poster-boy for economic deregulation; and Singapore is a successful and dynamic city-state. Each is relatively rich, with per capita GDP's estimated at purchasing power parity ranging from \$18,500 (Chile) to \$61,000 (Singapore).² It is an interesting group of countries to have concluded a trade pact, but there are no obvious market matchings where trade liberalization would yield significant benefits. In any case, their total combined market is less than 30 million people. The agreement covers far more than trade in goods – the full gamut of WTO topics³ as well as government procurement and competition policy. Tariffs among the P4 are to be removed in stages, with 90 percent removal achieved by 2006 and full removal by 2015.

The TPSEP Agreement seemed set to join the myriad of other preferential trade initiatives that have been signed in recent years – yielding limited liberalization over sets of relatively small economies (Kerr, 2011). The TPSEP did, however, have two characteristics that caught the attention of others: (1) it did extend from one shore of the Pacific Ocean to the other, and (2) it was open to new members. Small though the TPSEP is, it is the only true trade agreement to span the Pacific.⁴ As a result, it

presented itself as an already cemented first step upon which to build a larger trans-Pacific institution. It was also explicitly open to accession. Article 20.6 of the TPSEP deals with accession.

Article 26.1 states,

This Agreement is open to accession on terms to be agreed among the Parties, by any APEC Economy or other State. The terms of such accession shall take into account the circumstances of that APEC Economy or other State, in particular with respect to timetables for liberalisation.

By specifying only that accession terms be agreed and allowing for the *circumstances* of a country wishing to accede to be taken into account, the agreement imposes no pre-conditions for accession – thus encouraging other countries to join. Expansion of membership was a specific goal set out in the preamble of the TPSEP. The final resolution of the preamble sets out the broader goals of the agreement to

PROMOTE common frameworks within the Asia – Pacific region, and affirm their commitment to encourage the accession to this Agreement by other economies.

Just because an agreement is open to accession under relatively easy terms does not mean that other countries would wish to join. Between 2005 and 2008 there was little interest in the TPSEP among APEC members or other countries. While the Trans-Pacific Partnership is often associated with the administration of President Obama, in fact the original contacts and negotiations were undertaken under the administration of President George Bush. In early 2008 the US began talks with the P4 regarding the narrow topic of financial services. In September 2008 the US announced it was entering into negotiations with the existing members of the TPSEP to join the re-named Trans-Pacific Partnership. The goal of the US was clear as articulated by then US Trade Representative Susan C. Schwab:

The United States is pleased to stand with this group of like-minded countries, whose vision for trade liberalization and Trans-Pacific economic integration we share. We are particularly interested in this high-standard agreement potentially serving as a vehicle for advancing trade and investment liberalization and integration across the Trans-Pacific region and perhaps beyond. Ultimately, the objective is to expand the membership of the Agreement to other nations that share our vision of free and fair trade.

and

While the United States is the first additional country to seek to join the four original members of the Trans-Pacific Strategic Economic Partnership, we are confident that other countries in the region will ultimately embrace the benefits of participation. This high-standard

regional agreement will enhance the competitiveness of the countries that are part of it and help promote and facilitate trade and investment among them, increasing their economic growth and development (Schwab, 2008).

The US was clearly interested not so much in the relatively small markets of the P4, but rather in using the TPP as a platform to *lure in bigger fish* from around the Pacific Rim. It is less clear what the P4 expected to gain from agreeing to the accession of the US. The P4 had to unanimously agree that the US could accede. Chile and Singapore already had free trade agreements with the US so, presumably, any expected gains from negotiations with the US would be marginal at best. Singapore and Chile must have also hoped that major Asian economies would join. Brunei, whose exports are concentrated in the petroleum sector, would have had little to gain from either negotiations with the US or even a broader partnership.

New Zealand was the one country of the P4 that could gain from negotiating with the US. New Zealand could benefit considerably from reductions in the barriers to U.S. market access for its internationally competitive dairy and meat products. Of course, those lobbies are very strong in the US, so achieving increased market access for New Zealand agricultural products is far from a certainty. New Zealand trade officials have, however, been very adept at inserting themselves at the heart of multilateral institutions where they can have influence far beyond their economic importance. New Zealand, which has a trade agreement with Australia, and is a great rival in third agricultural markets, felt particularly *left out* when Australia was able to negotiate a trade agreement with the US.⁵

The TPP negotiations are being undertaken in strict secrecy. This is a major departure from the WTO negotiations and, for example, those associated with the Canada-US Trade Agreement (CUSTA) and the North American Free Trade Agreement, where detailed drafts of the agreements are made available to the public, with yet to be negotiated wording bracketed.⁶ In the case of the TPP, negotiating member governments have signed a wide ranging confidentiality agreement. This has led to criticism by members of the US Congress and a degree of frustration with the office of the United States Trade Representative (Sager, 2012). Thus, it is not possible to know exactly what each member wishes to have on the negotiating agenda; however, it is clear that countries like the US will not simply be accepting the TPSEP arrangements but rather will be bringing their own agendas into the negotiations. In other words, the negotiating agenda must be fluid and changing with every new entrant. Countries such as Japan will have a considerably different agenda from that of the US and some other countries now in the TPP negotiations. This fluid negotiating agenda is, as suggested above, a radical departure from the norm in international trade negotiations.

Once the US was committed to the TPP negotiations, other countries began to join the negotiations. In short order, Peru and Vietnam joined the TPP process. This was hardly unexpected. Ever since the US moved from a policy of multilateral, WTO, exclusivity in regard to improved trade access to the US market in the latter days of the Clinton administration to a triple strategy of multilateral, regional and bilateral avenues of trade liberalization, there has been considerable jockeying for position in the queue for negotiations with the United States (Kerr, 2005). This is because there is considerable benefit to being early in the queue. If a country obtains preferred access to the US market, there is not only the immediate benefit but also the gains associated with improving their competitive position relative to their rivals in the US market. Thus, by joining the TPP negotiations, Peru and Vietnam were able to jump the queue for negotiating access to the US market.

For similar reasons, Malaysia joined the TPP negotiations in October 2010. In part, this was also an attempt to prevent Vietnam from eroding its competitiveness in the US market. The addition of the two relatively large Asian markets fit within the trade objectives of the original P4, while Peru's joining solidified the Trans-Pacific optics of the potential partnership.

Australia also joined the TPP negotiations. While Vietnam and Malaysia would represent increased export opportunities for Australia, it already had a trade agreement with the US. Thus, better access to the US market could not have been a major motivation. Having said that, however, Australia's agreement with the US did not yield much in the way of improved access for agricultural products – particularly beef (Kerr and Hobbs, 2006). As New Zealand was in the TPP negotiations and would be seeking improved access to the US market for its agricultural products, Australia may have perceived a chance to achieve what it could not achieve in its bilateral negotiations. There is some evidence that the uneven bargaining power associated with bilateral negotiations with the US has influenced the outcomes in ways not particularly favourable to the smaller trade partner (Kerr and Hobbs, 2006).

At this point, the potential TPP market had expanded approximately 20-fold, from less than 30 million people to in excess of half a billion people. A range of additional Asian countries began to express their interest in joining – Thailand, South Korea, the Philippines, Taiwan, Laos, Cambodia.

The next to join, however, were Mexico and Canada in October 2012. Admitting these two countries to the TPP negotiations was more difficult because some existing TPP members – all of whom had to agree – had conditions that needed to be met before these two countries could be admitted. Mexico was able to satisfy the pre-conditions. For Canada, patent protection – a US issue – and highly protected dairy

and poultry sectors – an issue for the US and particularly New Zealand – were central issues in the negotiations over being allowed into the TPP process. For Canada, the issue of membership had considerable political ramifications as the Conservative government of Stephen Harper was pro-trade but had little to show for it. They were under some pressure to have a trade result, particularly in Asia. Of course, the US had gotten ahead of (some claimed had outmaneuvered) Canada by joining the TPP and negotiating a trade agreement with South Korea. In the end, the issue of patent protection was solved to US satisfaction and the Canadian government agreed that its protected agricultural sectors would be *on the table* in the TPP negotiations.⁷

Beyond the need to be part of something dynamic which seemed to be happening in Pacific trade, Mexico and Canada likely had additional motives. Due to NAFTA, they have preferred access to the US market. Mexico, in particular, has felt it has benefitted from its access to US markets relative to its competitors among developing countries. It has seen the benefits of that preferred access eroded. It keenly felt the new competition in the US from China after the accession of that country to the WTO in 2001. Vietnam and Malaysia are potential competitors in the US market. Thus, Mexico has an interest in protecting its preferred access, and what better way than to be part of the negotiations. It may not be so much what Mexico brings to the table in terms of liberalization requests but rather what it will ultimately agree to that will change the shape of the agreement.

Canada will be interested in obtaining the same improvements to market access that the US is able to achieve in the larger Asian markets like Vietnam and Malaysia, as well as any additional countries that may join the partnership in future. For some products, Canada may also be interested in protecting its preferred access under NAFTA. One example is beef, where Canada has seen unprecedented growth in the US market since NAFTA (Brocklebank, Hobbs and Kerr, 2008). Australia and New Zealand have long been cost competitive in the US beef market but excluded, to a considerable degree, by US trade barriers (Kerr and McGivern, 1991). Unfettered access for beef from Australia and New Zealand would threaten Canada's hard-won share of the US beef market. Thus, both Canada and Mexico have mixed interests in joining the TPP.

There was some discussion of how new members could join the negotiations at the time Canada and Mexico wished to join. The negotiations have been ongoing since the US joined. By the time Mexico and Canada joined the negotiations in December 2012 there had already been 14 formal negotiating sessions. According to official reports considerable progress had been made in a number of areas. The question of how the new countries would be fitted into these partially completed

arrangements was broached. In the end it was decided that new entrants would have to accept only what had already been agreed – and at that point only the sections dealing with small businesses had, apparently, been finalized (Dawson, 2012). Thus, Canada and Mexico could bring their particular interests and have them incorporated in the negotiating agenda.

Joining the TPP was not tantamount to re-opening NAFTA for Canada and Mexico (and the US).⁸ Thus, they did not risk what had been achieved in NAFTA but which the US might wish to re-negotiate. Article 18.2 of the TPSEP dealing with relationships with other international agreements states,

Nothing in this Agreement shall derogate from the existing rights and obligations of a Party under the WTO Agreement or any other multilateral or bilateral agreement to which it is a party.

Thus, while NAFTA provisions are safe from any changes in the TPP, there are a number of features of the NAFTA that are out of date or where new issues have subsequently arisen pertaining to areas such as computer/communications technology and intellectual property protection that the NAFTA parties may wish to update. As these issues might not be achievable bilaterally (trilaterally) without re-opening NAFTA, the TPP may provide a mechanism to accomplish this updating. Of course, all potential TPP partners would also have to agree. Given the degree of integration between the US, Mexico and Canada that already exists, this may be more than other potential partners are willing to accept.

Once the US was in the TPP negotiations, the next big economy to bring to the table was Japan. After some hesitation, Japan is expected to become a full negotiating member of the TPP in August 2013. Two major economies will now anchor the TPP, one on each side of the Pacific. Japan, however, will bring a new set of its own issues to the negotiations. Agricultural protection is one of Japan's major issues, with the US, Canada, Australia and New Zealand all hoping for improved market access. This will change the negotiating dynamics again. As a major economy, Japan's concerns will have to be accommodated or the entire TPP enterprise will face an early failure. With no transparency in the negotiations, it is not possible to determine to what extent the negotiations have to be *re-set* when a new and important economy joins the negotiations. It is truly new territory in international trade negotiations.

With both Japan and the US part of the TPP, more countries are likely to wish to join. South Korea has been asked to join but, as yet, has not agreed. This may be because of its recently signed trade agreement with the US, which it may wish to adjust to before embarking on new trade deals. As time passes, however, additional segments of the TPP may be finalized, raising again the question of what new entrants

will be willing to accept when they were not part of the negotiations. Based on its trade negotiating record to date, it would seem unlikely for South Korea to be willing to accept what others have agreed. Similar questions can be asked of other potential members of the TPP.

The official line of the TPP countries is that they want an agreement wrapped up by the end of 2013. While target end dates often slip in trade negotiations, and hence they are not taken particularly seriously, the eventual end to the negotiations would appear to mean that any new members would have to sign up to an existing agreement. This would make acceding to the TPP similar to joining the WTO or the EU – with not much to negotiate (Gaisford, Kerr and Perdakis, 2003). This would run contrary to what has made the TPP successful in attracting new members. China, a potential member, remembers bitterly its long and, from its perspective, unfair WTO accession process. It may not look favourably on a similar process for the TPP.

Given its unique approach to trade negotiations, the TPP bears watching closely, not just for the economic benefits that may ultimately arise but because of the process itself. Can trade policy be made and trade liberalization advanced without a fixed number of parties and a pre-determined negotiating agenda? Conventional wisdom and existing negotiation models suggest otherwise. Still, the TPP has grown from a group of four relatively small economies to one encompassing well over 600 million people and including both the US and Japan. Given that the Doha Round remains stalled, with little likelihood of further progress, alternative models deserve serious consideration. The TPP is clearly an alternative model; whether it can deliver remains to be seen – but keeping close tabs on its deliberations may provide valuable insights.

References

- Brocklebank, A.M., J.E. Hobbs and W.A. Kerr (2008) *The North American Beef Industry in Transition*. New York: Nova Science Publishers.
- Clement, N.C., G. del Castillo Vera, J. Gerber, W.A. Kerr, A.J. MacFadyen, S. Shedd, E. Zepeda and D. Alarcon (1999) *North American Economic Integration – Theory and Practice*. Cheltenham: Edward Elgar Press.
- Dawson, L. (2012) TPP: Now the Hard Part. *Financial Post*, June 21.
- Gaisford, J.D., W.A. Kerr and N. Perdakis (2003) *Economic Analysis for EU Accession Negotiations*. Cheltenham: Edward Elgar Press.
- Kerr, W.A. (2011) The Preference for New Preferential Trade Agreements: Does it Lead to a Good Use of Scarce Resources? *Journal of International Law and Trade Policy* 12(1): 1-11.
- Kerr, W.A. (2010) GATT-1947: A Living Legacy Fostering the Liberalization of International Trade. *Journal of International Law and Trade Policy* 11(1): 1-11.
- Kerr, W.A. (2005) Vested Interests in Queuing and the Loss of the WTO's Club Good: The Long-run Costs of US Bilateralism. *Journal of International Law and Trade Policy* 6(1): 1-10.
- Kerr, W.A. (1997) Removing Health, Sanitary and Technical Non-Tariff Barriers in NAFTA. *Journal of World Trade* 31(5): 57-73.
- Kerr, W.A. and J.E. Hobbs (2006) Bilateralism – A Radical Shift in US Trade Policy: What Will it Mean for Agricultural Trade? *Journal of World Trade* 40(6): 1049-1058.
- Kerr, W.A. and D.B. McGivern (1991) A Problem of Multiple Displacements – Canadian Concerns over the Importation of Irish Beef. *Irish Journal of Agricultural Economics and Rural Sociology* 14: 49-65.
- Marantis, D.J. (2012) Remarks by Ambassador Demetrios J. Marantis on the Obama Administration's Asia-Pacific Trade Policy, to The Washington Council on International Trade, Seattle, July 19, <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2012/july/marantis-WCIT-obama-asia-pacific-trade>.
- NZUS Council (n.d.) Negotiating the Trans Pacific Partnership, http://www.nzuscouncil.com/index.php/section/free_trade_agreement
- Sager, C.E. (2012) 130 Members of Congress Speak Out Against Secrecy in TPP Negotiations, Public Knowledge, June 27, <http://publicknowledge.org/blog/130-members-congress-speak-out-against-secrecy>.
- Schwab, S.C. (2008) Schwab Statement on Launch of the U.S. Negotiations to Join the Trans-Pacific Strategic Economic Partnership Agreement. Press Release. Washington: Office of the US Trade Representative, September 22.
- Viju, C. and W.A. Kerr (2011) Agriculture in the Canada-EU Economic and Trade Agreement. *International Journal* 76(3): 677-694.

- Viju, C., W.A. Kerr and C. Mekkaoui (2010) *Everything is on the Table: Agriculture in the Canada-EU Trade Agreement*. CATPRN Commissioned Paper, No. 2010-01, Canadian Agricultural Trade and Competitiveness Research Network, http://www.uoguelph.ca/~catprn/PDF/Commissioned_Paper_2010-03_Viju-Kerr-Mekkaoui.pdf.
- Will, G.F. (2004) A Fighter for Free Trade. *Washington Post*, August 15, p. B07, <http://www.washingtonpost.com/wp-dyn/articles/A64015-2004Aug13.html>.
- Yeung, M.T. and W.A. Kerr (2004). *Canada and the Australia-US Free Trade Agreement: Enhanced Opportunities of Loss of Special Status*. Saskatoon: Estey Centre for Law and Economics in International Trade.

Endnotes

1. Of course, in a poker game participants may leave the game when the stakes get too high – as yet no one has left the TPP negotiations.
2. New Zealand's is US\$27,500 and Brunei's US\$55,000.
3. Services, intellectual property, sanitary and phytosanitary measures, technical barriers to trade, contingent protection and rules of origin.
4. While the Asia Pacific Economic Cooperation (APEC) institution spans the Pacific, it falls short of being a trade agreement as it lacks specific commitments on major trade liberalization topics.
5. The US-Australia agreement came into force on January 1, 2005. Australia, however, did not receive significant market access to the United States for its agricultural products (Yeung and Kerr, 2004).
6. Secret trade negotiations, however, tend to be standard operating procedure for the European Union. Its negotiations with Canada for a Comprehensive Economic and Trade Agreement have been undertaken in secret (Viju, Kerr and Mekkaoui, 2010). While this may make life easier for the negotiators (and their political masters) it eliminates the ability of interested parties to scrutinise and comment on the direction of the negotiations.
7. Previously the Canadian government had refused to have the protection provided to the dairy and poultry sectors included in negotiating agendas. International pressure has continued to mount, however, and those sectors were put on the table for the ongoing negotiations of the CETA between Canada and the EU (Viju and Kerr, 2011). Of course, agreeing to *put something on the table* does not mean that any trade concessions have to be made. The Canadian government stoutly affirms its commitment to support the dairy and poultry sectors.
8. This is also true for Australia, Singapore and Chile, which have bilateral trade agreements with the US.