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How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade

Daniel C.K. Chow*

Abstract

The Trans-Pacific Partnership (TPP) was signed on February 5, 2016 by its twelve members and is now open for ratification. If ratified, the TPP will be the largest mega free trade area in history and will encompass forty percent of world trade. The U.S. led the TPP negotiations and deliberately excluded China from the negotiations. This ploy by the U.S. was a calculated effort to contain China and to shift power in trade in the Asia-Pacific from China to the U.S. China now appears to face a difficult choice. China can join the already concluded TPP, with its text largely drafted by the U.S., and submit to terms it had no part in negotiating and to a humiliating process of seeking approval from the U.S. Joining the TPP means accepting a treaty in which every major provision is directed at China in an attempt to contain China's ascendancy in international trade. The other alternative is to ignore the TPP, but this could mean significant losses in trade opportunities right in China's own neighborhood. The battle over the TPP is a major contest between the two countries to determine which will write the rules of international trade for the twenty-first century. On the one hand, the U.S. is determined to write the rules, which will have as their chief aim to contain China. On the other hand, China seeks to write the rules in a way that will benefit China at the expense of the U.S. This Article examines how the TPP is designed specifically to contain China and how China might respond to this challenge over who will write the rules of international trade and gain supremacy in trade in the twenty-first century.

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I. INTRODUCTION

The U.S. achieved an important strategic objective in its efforts to contain the People's Republic of China (China) in global trade when the historic Trans-Pacific Partnership (TPP) was signed on February 5, 2016.¹ The negotiations leading to the TPP have been called the most significant since the Uruguay Round of negotiations that led to the establishment of the World Trade Organization (WTO).² Now open for ratification,³ the TPP is a vast free trade agreement covering the Asia-Pacific region and encompassing forty percent of world trade.⁴ The TPP promises “WTO plus” treatment—that is, trade privileges more favorable than those available under the World Trade Organization for all of TPP members, but not available for non-members, such as China.⁵ The TPP now stands ready for ratification by its twelve members: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the U.S., and Vietnam, with other countries, such as South Korea, expressing interest in joining.⁶ If the TPP gets ratified and becomes legally binding,⁷ it will be an unprecedented mega free trade agreement and could permanently change the course of international trade in Asia by shifting power to the U.S. and away from China.⁸ This possible shift can be seen in the glaring exclusion in the list of TPP members: China—the world's second largest economy located right in the heart of the territory of the TPP—was not invited to join in the TPP negotiations or to sign the agreement.⁹

China's exclusion from the TPP negotiations was no accident, but instead was a deliberate ploy by the U.S. to limit China's growing global trade influence

¹ See Catherine Putz, *TPP: The Ratification Race is On*, THE DIPLOMAT (Feb. 5, 2016), <http://perma.cc/VRU5-ZC7U>; see also Michal Meidan, *The TPP and China: The Elephant That Wasn't in the Room*, THE DIPLOMAT (Oct. 15, 2015), <http://perma.cc/P5TE-4G6N>. For the full text of the TPP, see *TPP Full Text*, Office of the United States Trade Representative, <https://perma.cc/77GY-EY5E> (last visited Oct. 4, 2016).

² See TPP Full Text, *supra* note 1.

³ See *id.* at art. 30(5); see also Rebecca Howard, *Trans-Pacific Partnership trade deal signed, but years of negotiations still to come*, REUTERS (Feb. 4, 2016), <http://perma.cc/5DDA-2Z5B>.

⁴ See Howard, *supra* note 3.

⁵ See *infra* Section II.

⁶ See *supra* note 1.

⁷ The TPP comes into force once it is ratified. See TPP, *supra* note 1, at art. 30(5).

⁸ See *infra* Section IV.

⁹ See *id.* By the time China could have joined in the negotiations, the major provisions of the text affecting China had been completed. New members must accept the text as is and cannot revisit any text that has been completed. Any new member can only participate in negotiations on new text.

starting right in China's own backyard.¹⁰ The U.S. did not want China's input on the terms of the TPP as is; rather, the U.S. wanted to dictate the terms of the TPP on its own, with the cooperation of the other compliant TPP members.¹¹ Now that the negotiations over the TPP text have been formally concluded and the ratification process has begun, China can join the TPP, but only under conditions imposed by the U.S. in the text of the TPP.¹² China will be allowed to join only by accepting all of the terms of the TPP as is, and is without any power to alter, propose revisions, or dilute any of its provisions unless approved by all the TPP countries, including the U.S.¹³ Moreover, in order to join the TPP, China might have to undergo a humiliating process of submitting its terms of admission, essentially an application, to the U.S. Congress for review and approval,¹⁴ a process that could take several years and could expose China to many additional demands by Congress that China must accept as conditions of joining the TPP. Congress might also relish the opportunity to use the approval process to scold and embarrass China in its conduct of international trade.¹⁵

¹⁰ See *infra* Section IV.

¹¹ See *id.*

¹² Since the text of the U.S.-led TPP is final and agreed to by the signature of the TPP parties on Feb. 5, 2016, the only way to change the text is to amend it. Amendments require the consent of all members, including the U.S. See TPP, *supra* note 1, at art. 30(2) (describing amendments as requiring the consent of all members).

¹³ See TPP, *supra* note 1, at art. 30(2).

¹⁴ See TPP, *supra* note 1, at art. 30(4) (describing the accession process as requiring the approval of each TPP member including the U.S. in accordance with applicable legal procedures of each member). If Congress approves the TPP, Congress will also issue a regulation on the approval procedures for new members of the TPP; Congress issued a similar regulation for new WTO members when it approved and implemented the WTO agreements in the Uruguay Round Agreements Act, Pub. L. No. 1-3-465, 108 Stat. 4829 (1994) codified as 19 U.S.C. § 3532 [hereinafter URAA]. Article I, § 8 of the Constitution grants Congress the power to “regulate commerce with foreign nations,” giving Congress the final say on U.S. trade law and policy. Congress could enact legislation requiring congressional approval of all new TPP members, but it is more likely that Congress will follow the model of the URAA. With respect to new members of the WTO, the URAA requires that “the [United States] Trade Representative . . . consult with the appropriate congressional committees before any vote is taken by the Ministerial Conference [of the WTO] . . . relating to . . . the accession of a state.” Implementation of Uruguay Round Agreements, 19 U.S.C.A. § 3532 (1994). If Congress enacts a similar provision related to new members of the TPP, which seems likely, Congress could hold public hearings on China's accession to the TPP.

¹⁵ Congress might criticize China for “cheating” in international trade as there is a commonly held view that China ignores the rules of the WTO. See David Pilling, *It won't be easy to build an 'anyone but China' club*, THE FINANCIAL TIMES (May 22, 2013), <http://perma.cc/MP89-AFMB>. Prior to China's ascension to the WTO, the U.S. Congress held hearings every year to determine whether to extend trade benefits to China under the Most-Favored Nation Principle, which would allow China to enjoy lower tariffs on its imports into the U.S. The U.S. used the annual review process as an opportunity to make threats and lecture China on its deficiencies in its human rights record. See

Creating an “anyone but China club”¹⁶ was an express and aggressive objective of the U.S. in establishing the TPP. Although China was never a party to the TPP negotiations, China played a key role in the positions advocated by the U.S. In the words of one observer, “China is the ultimate target of every major U.S. proposal in the [TPP, a] ‘new generation twenty-first-century agreement.’”¹⁷ One of the motives behind the TPP is to force China into accepting obligations that exceed those of the WTO.¹⁸ Many politicians, trade unions, and businesses believe that China was able to reap the advantages of its WTO membership while paying little in return.¹⁹ In exchange for the benefits of obtaining greater access to foreign markets, WTO members are required to reduce trade barriers in order to open up their own markets to other WTO members.²⁰ After it joined the WTO, however, China allowed many of its trade barriers to persist by ignoring many of the rules of the WTO.²¹ For example, China gained trade advantages by continuing to subsidize its massive state-owned enterprises and by ignoring intellectual property rules.²² In other words, some critics regard China as a free-rider of the WTO, reaping the benefits of the WTO while not playing fair through contributing in kind by following the rules of international trade.²³ The TPP can help to rein in China’s behavior by imposing rules that exceed WTO obligations, backed by the TPP’s own dispute resolution process that will have the bite of trade sanctions for refusing to comply with TPP obligations.²⁴ The TPP itself is compatible with the WTO, which means that TPP countries continue to be bound

Daniel C.K. Chow, *Why China Opposes Human Rights in the World Trade Organization*, 35 U. PENN. J. INT’L L. 61, 77–80 (2013). China found this process to be humiliating and the common perception at the time was that these annual reviews were an opportunity for China “bashing.” *See id.* at 79–80 & n.91.

¹⁶ *See* Pilling, *supra* note 15.

¹⁷ *See* Jane Kelsey, *U.S. China Relations and the Geopolitics of the Trans Pacific Partnership Agreement*, GLOBAL RESEARCH (Nov. 11, 2013), <http://perma.cc/D4EJ-PU4W>; *see also* Nathan Vanderklippe, *TPP deal a way for U.S. to reassert primacy over China*, THE GLOBE AND MAIL (Oct. 5, 2015), <https://perma.cc/L6LM-WXJJ>.

¹⁸ China joined the WTO in 2001. *See Member Information: China and the WTO*, WORLD TRADE ORGANIZATION, <http://perma.cc/R34K-6RUU> (last visited Oct. 9, 2016).

¹⁹ *See* Pilling, *supra* note 15.

²⁰ *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 26 (2d ed. 2012) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW].

²¹ *See* Pilling, *supra* note 15.

²² *See id.*

²³ *See id.*

²⁴ *See infra* Section II.A.

by the WTO²⁵ and that the TPP cannot be challenged by China under the WTO as discriminatory or otherwise unlawful.²⁶

Reining in or constraining China in international trade is achieved by the TPP through a number of specific trade provisions; the major provisions are the subjects of study in this Article. For the U.S. government, these various provisions of the TPP serve three important objectives, set forth below, which both threaten and constrain China. These three features of the TPP seem to put China in a difficult conundrum—China can suffer losses in international trade by refusing to join the TPP, or it can join the TPP and be subject to the humiliation of having to abide by rules written by the U.S. with the express intent of containing China.

First, the threat to China if they refuse to join the TPP is a loss of trade with the U.S. and other TPP members.²⁷ From an economic perspective, the TPP, like all preferential trade agreements (PTAs), is a double-edged sword in that it both creates and diverts trade.²⁸ PTAs increase trade among their members because intra-PTA trade faces fewer trade barriers.²⁹ For example, in the trade of goods, PTA members are allowed to offer “WTO plus” treatment, such as lower tariffs than the WTO rate (and ultimately zero tariffs) for goods traded from other PTA members.³⁰ This helps to increase the trade in goods among PTA members, as imports are less expensive, since, they come in at lower tariffs or even duty free,³¹ than imports from China, which are subject to the regular WTO rate from TPP members.³² Assuming that the quality of the imports is the same or similar, importers from PTA members would prefer to buy goods from other PTA members as opposed to non-PTA members because goods from PTA members are less expensive.³³ Therefore, if China does not join the TPP, China might suffer losses in its trade with the U.S. as well as other TPP members.³⁴ This could lead to the reduction of the record \$365.7 billion trade deficit that the U.S. has with

²⁵ See TPP, *supra* note 1, at art. 1(2) (noting that the TPP is to “coexist with their existing international agreements . . . including the WTO agreement.”).

²⁶ The TPP is authorized by Article XXIV:5 of the General Agreement on Tariffs and Trade, which permits WTO members to form free trade agreements such as the TPP. For a more detailed explanation of this point, see *infra* Section II.A.

²⁷ See *infra* Section II.B.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.*

China as of 2015.³⁵ The ever-expanding U.S. trade deficit with China has proven to be an incendiary and bitter political and business issue in the U.S.,³⁶ fueled by beliefs that China is cheating in international trade.³⁷ The TPP could help to address these grievances by diverting trade away from China and directing trade toward other countries, such as Australia, that enjoy more friendly relations with the U.S.

Second, if China does join the TPP, China will be constrained because the TPP will erode many of the trade advantages that China now enjoys and is able to exploit under the WTO.³⁸ For example, according to many critics, China does not enforce laws relating to workers' rights.³⁹ China has allowed its workers to toil long hours in unsanitary and dangerous working conditions with few rights to demand any changes.⁴⁰ Although China has high-level labor laws dealing with all of these issues, China does not enforce them, thus allowing labor abuses to continue without any consequences.⁴¹ Aside from the social issues of human rights, the non-enforcement of labor laws reduces the costs to the employer of labor in manufacturing. Low labor costs allow China to charge lower prices for its goods that are exported to the U.S. The TPP will impose higher labor standards on China, increasing the protection for China's workers and at the same time increasing the prices of its goods.⁴² The TPP also creates a dispute settlement mechanism that other TPP members can use to compel China to either enforce these obligations or face sanctions under the TPP.⁴³

Similarly, China does not enforce environmental standards in producing its goods, leading to not only the degradation of the environment, but more importantly in the context of trade, to lower-priced goods.⁴⁴ Refusing to follow high-level environmental standards and continuing to use "dirty fuel," such as coal-fired power plants, that pollute the environment, is a serious social issue. From a trade perspective, dirty fuel is a cheaper way to produce goods that can

³⁵ See Kimberly Amadeo, *Why Is The U.S./China Trade Deficit So High?*, THE BALANCE (Sept. 8, 2016), <http://perma.cc/3RN8-7HMH>.

³⁶ See *infra* Section II.C.

³⁷ See, for example, Daniel Mills, *China Cheats While the U.S. Suffers*, ECONOMY IN CRISIS (May 25, 2014), <http://perma.cc/RKQ3-U7AU>.

³⁸ See *infra* Section III.

³⁹ See *infra* Section III.A.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *infra* Section III.A.

⁴⁴ See *infra* Section III.B.

out-compete U.S. produced goods based on price.⁴⁵ The U.S. uses environmentally sustainable sources of power to manufacture goods.⁴⁶ Of course, using environmentally sustainable power involves the use of expensive technologies that result in higher costs that are passed onto the consumer of products in the form of high prices. China can charge lower prices because it does not use more expensive forms of production that are friendly to the environment. The TPP would impose environmental obligations on China that would force China to use manufacturing processes that are more environmentally friendly and expensive. China would need to raise prices for its goods and this obligation would help to even the playing field between the U.S. and China.

Other measures that China currently maintains are financial and regulatory support of China's massive state-owned enterprises (SOEs) that benefit from myriad forms of state assistance and from discrimination against foreign companies located in China.⁴⁷ These SOEs are thus able to lower the cost of their goods or services that are provided in China and abroad and out-compete foreign companies located in China due to favoritism from the Chinese government.⁴⁸ The TPP is designed to neutralize the advantages that China enjoys from its treatment of SOEs.⁴⁹

Third, the TPP is a shot aimed squarely—by the U.S.—at China that lets China know in no uncertain terms that the U.S., not China, intends to write the rules of international trade for Asia and the rest of the world in the twenty-first century.⁵⁰ The U.S., with a few of its close allies in Europe and Japan, has essentially written the rules of international trade for the past seventy years since the end of the Second World War.⁵¹ Recently, however, this paradigm has come under siege from China. In the past decade, China has entered into many free trade agreements that differ in fundamental ways from the U.S.-led rules of international trade.⁵² In contrast with U.S. trade agreements, China's free trade agreements have no meaningful provisions concerning workers' rights, the environment, or SOEs.⁵³ Earlier this year, China established the Asian Infrastructure Investment Bank (AIIB) with a set of rules for international

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See infra* Section III.C.

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See infra* Section IV.

⁵¹ *See* Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 *VAND. J. TRANSNAT'L.L.* (forthcoming 2016).

⁵² *See infra* Section IV.

⁵³ *See id.*

financing that directly challenges the U.S.-dominated World Bank and International Monetary Fund that have controlled international lending for the past seventy years.⁵⁴ The AIIB is a direct challenge to the U.S. in setting investment rules in Asia and other countries.⁵⁵ The TPP is the U.S.'s latest volley in the growing rivalry between the U.S. and China on who will write the rules of international trade for the twenty-first century.⁵⁶ How China responds to the threat and challenge of the TPP is an important development in this growing rivalry between the two largest economies in the world.

This Article will develop the themes set forth above by proceeding in three sections. Section II will discuss the nature of preferential trade agreements and their relationship to the WTO, and detail how PTAs both create and divert trade and the threat this poses to China if China refuses to join the TPP. Section III of this Article will examine how joining the TPP will neutralize key advantages China currently enjoys in international trade, including concerns related to workers' rights, the environment, and state-owned enterprises. Section IV will discuss how the U.S. and China are locked in a fierce battle on who will write the rules for international trade in the twenty-first century and how the TPP appears to be a major victory for the U.S., assuming that the TPP is ratified by the U.S. Congress,⁵⁷ in this ongoing battle. Section V then concludes with some observations about future developments, including how China might respond to the TPP.

II. THE WTO, PREFERENTIAL TRADE AGREEMENTS, AND THE TPP

The TPP is a comprehensive PTA that not only liberalizes the trade in goods,⁵⁸ but also includes trade in services,⁵⁹ financial services,⁶⁰

⁵⁴ See *supra* note 51.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ Factors influencing whether the U.S. Congress will approve the TPP are whether (1) President-Elect Donald Trump will reverse his campaign position opposing the TPP; (2) Trump will renegotiate the TPP and seek Congressional approval of a modified TPP; and (3) the next election cycle in 2020 will result in a new President who supports the TPP. In the author's view, it is possible that President-Elect Trump will reverse candidate Trump's opposition to the current or modified version of the TPP because the TPP is designed to increase U.S. export trade opportunities, increase employment, and reign in China's aggressive trade tactics, a favorite subject of criticism during President-Elect Trump's campaign.

⁵⁸ See TPP, *supra* note 1, at ch. 2 (National Treatment and Market Access).

⁵⁹ See *id.* at ch. 10 (Trade in Services).

⁶⁰ See *id.* at ch. 11 (Financial Services).

telecommunications,⁶¹ foreign direct investment,⁶² government transparency and anti-corruption,⁶³ coherence in government regulation,⁶⁴ and technology transfer (intellectual property).⁶⁵ The TPP also has an effective dispute settlement system, modeled after that of the WTO, that is generally regarded as a great success in enforcing WTO obligations.⁶⁶ Similar to the WTO, the TPP's dispute settlement system can authorize trade sanctions to enforce TPP obligations, which makes the TPP's enforcement mechanism one of its key features.⁶⁷

In order to facilitate an understanding of how the TPP—or any preferential trade agreement—works, the following discussion will focus on the trade in goods because it is still the most fundamental and important channel of trade, far exceeding all other channels of trade (services, investment, and intellectual property) in monetary terms.⁶⁸ In addition, understanding how PTAs liberalize the trade in goods will also help in understanding how the PTA liberalizes trade in services, investment, and technology (intellectual property) as the same basic principles apply (with some variations) in all these channels. This discussion also explains the relationship between the TPP and the WTO, and why the WTO both permits and encourages preferential trade agreements like the TPP.

A. The WTO, the Most-Favored-Nation Principle, and Preferential Trade Areas

The twelve countries that are members of the TPP are also members of the WTO and are subject to the obligations of both organizations.⁶⁹ Established in 1995,⁷⁰ the WTO remains the landmark and fundamental multilateral treaty that

⁶¹ See *id.* at ch. 13 (Telecommunications).

⁶² See *id.* at ch. 9 (Investment).

⁶³ See *id.* at ch. 26 (Transparency and Anti-Corruption).

⁶⁴ See *id.* at ch. 25 (Regulatory Coherence).

⁶⁵ See *id.* at ch. 18 (Intellectual Property).

⁶⁶ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 63.

⁶⁷ See TPP, *supra* note 1, at art. 3–4, 6. The technical term used by the TPP for trade sanctions is the “suspension of benefits.” For example, suppose that Country A, a TPP member, has agreed to zero tariffs for goods from Country B. If Country B fails to comply with the TPP, the TPP can authorize Country A to suspend its zero tariffs for goods from Country B, which would then likely be subject to higher tariffs under Country A’s GATT rate. Country B would suffer a loss in trade due to the higher tariffs. This is what constitutes a trade sanction under the TPP and the WTO.

⁶⁸ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 9, 14–15 (comparing recent figures for trade in goods, services, investment and technology).

⁶⁹ See TPP, *supra* note 1, at art. 1(2) (recognizing that the TPP agreement “co-exists” with the WTO agreements).

⁷⁰ See *What is the WTO?*, World Trade Organization, <http://perma.cc/E3SA-W3LN>, (last visited Oct. 5, 2016).

governs most international trade in the world today.⁷¹ Trade in goods among WTO member nations (currently consisting of 164 nations, including all TPP countries) is governed by the General Agreement on Tariffs and Trade (GATT).⁷² The GATT is one of the three major WTO agreements covering world trade. The other major agreements are the General Agreement on Trade in Services (GATS),⁷³ which covers services trade, and the Agreement on Trade-Related Intellectual Property Rights (TRIPS),⁷⁴ which covers trade in technology or intellectual property.

Of these agreements, the GATT has the longest and most venerable history, beginning in 1947, immediately following the Second World War.⁷⁵ Prior to the GATT's promulgation in 1947, no international discipline existed to curb the power of countries to impose tariffs on imports at the border.⁷⁶ This meant that countries could impose tariffs at any level they pleased without violating any international legal obligations.⁷⁷ In the period prior to the Second World War, many countries imposed draconian tariffs as protectionist and nationalistic sentiments ran high.⁷⁸ In 1930, the U.S. enacted the Smoot-Hawley Tariff Act⁷⁹, which imposed tariffs that averaged over fifty-three percent of the value of the products imported into the U.S.⁸⁰ Other countries also passed similarly draconian tariffs.⁸¹ The purpose of these prohibitively high tariffs was to prevent trade.⁸² Nations refused to trade and viewed each other with mistrust and hostility.⁸³ The protectionist and nationalist sentiments that swept the globe in

⁷¹ The WTO website indicates that the WTO currently has 164 members, including all of the most powerful economies in the world. *See Members and Observers*, World Trade Organization, <http://perma.cc/T848-KV64>, (last visited Oct. 5, 2016).

⁷² *See GATT and the Goods Council*, World Trade Organization, <http://perma.cc/5ZNW-FHYX>, (last visited Oct. 5, 2016).

⁷³ *See General Agreement on Trade in Services*, World Trade Organization, <http://perma.cc/NX48-LIJP>, (last visited Oct. 5, 2016).

⁷⁴ *See TRIPS [trade-related aspects of intellectual property rights] material on the WTO website*, World Trade Organization, <http://perma.cc/AK4M-CGFL>, (last visited Oct. 5, 2016).

⁷⁵ *See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, supra note 20, at 26.*

⁷⁶ *See id.* (describing how the GATT limits the use of tariffs as a trade barrier). Prior to the GATT no such mechanism existed to limit the use of tariffs. This meant that if a nation raised its tariffs other nations could raise theirs in a tit-for-tat response.

⁷⁷ *See id.*

⁷⁸ *See id.* at 18.

⁷⁹ Tariff Act of 1930, 19 U.S.C. §§ 1202–1683 (1930).

⁸⁰ *See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, supra note 20, at 18.*

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.*

the 1930s contributed to the eruption of the Second World War that inflicted catastrophe upon the world.⁸⁴ One lesson from the Second World War is that nations in economic conflict often fall into military conflict.⁸⁵

The GATT (1947) was intended to impose much-needed discipline on the use of tariffs in order to avoid the disastrous use of tariffs to create barriers to trade that engendered suspicion and hostility.⁸⁶ Under GATT Article II(b), each nation, after negotiating and reaching agreement with all other GATT (and now WTO) members, will establish a GATT schedule, that is, a schedule for all tariffs that a GATT/WTO member will impose on imports from all other GATT/WTO countries.⁸⁷ Each nation's tariff schedule is filed with the WTO and is attached to the GATT as an annex.⁸⁸ Under GATT Article II, each nation has an obligation to impose tariffs no higher than the tariffs in its GATT schedule.⁸⁹ In other words, the nation's tariffs are "bound," that is, subject to a ceiling created in its GATT schedule.⁹⁰ A nation that imposes a tariff that exceeds its GATT schedule is in violation of Article II of the GATT/WTO and will have to withdraw the tariff or face consequences under the WTO dispute settlement process,⁹¹ which has proven to be an effective dispute resolution mechanism.⁹² After the initial tariff schedules were established as a result of

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.* at 26.

⁸⁷ *See* General Agreement on Tariffs and Trade, art. II(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at art II:1(a). If a tariff is "unbound" then a WTO member can impose any tariff at any level it sees fit.

⁹¹ Imposing a tariff duty that is above the bound rate is a violation of Article II:1(a)–(b). *See* Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 46–55, WTO Doc. WT/DS56/AB/R (adopted on Apr. 22, 1998). There, the Appellate Body held:

A tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed . . . The principal obligation in the first sentence of Article II:1(b) . . . requires a Member to refrain from imposing ordinary customs duties in excess of those provided for in the Member's Schedule. . . . We conclude that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b) . . . In this case, we find that Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994.

Id.

⁹² WTO disputes are resolved by the WTO Dispute Settlement Body (DSB), which consists of panels that operate as trial courts, and an appellate body that functions as a high court of international trade. Decisions by the panels and the appellate body create institutional pressure on WTO members to correct any WTO violations; the WTO DSB can also authorize the imposition of trade sanctions against a recalcitrant offending member that creates additional pressures to comply. *See*

GATT (1947), GATT nations then engaged in successive rounds of negotiations to further reduce tariffs in order to facilitate international trade.⁹³ The result of these negotiations has been an outstanding success.⁹⁴ Tariffs have been reduced significantly from the pre-GATT era as a result of the promulgation of the GATT and subsequent rounds of negotiations.⁹⁵

Due to common political and economic interests, some nations have sought to reduce tariffs even further than their GATT commitments.⁹⁶ Some nations, such as the U.S., wish to have free trade, that is, zero tariffs, on imports from important allies in order to reward friendly nations and to deepen existing political ties.⁹⁷ The issue that arises with such free trade arrangements is the limits imposed by Article I of the GATT⁹⁸, the most-favored-nation (MFN) principle, a bedrock and sacred pillar of international trade. Article I(1) of the GATT reads in relevant part:

With respect to customs duties and charges of any kind imposed on or in connection with importation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product . . . shall be accorded immediately and unconditionally to the like product originating in . . . the territories of all other contracting parties.⁹⁹

The goal of the MFN principle is to ensure that members do not offer special preferences to some countries while denying the same benefits to other WTO members.¹⁰⁰ In this sense, the MFN principle is really a principle of non-

CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 63–68. Overall, the WTO dispute settlement system is viewed as a great success. *See id.* at 63.

⁹³ *See id.* at 49–51, 180.

⁹⁴ *See id.* at 180.

⁹⁵ *See id.*

⁹⁶ *See id.* at 51.

⁹⁷ For example, under the North American Free Trade Agreement, the three member countries (the U.S., Canada, and Mexico) have agreed to zero tariffs for virtually all goods traded among them. *See id.* at 51, 56.

⁹⁸ *See* GATT, *supra* note 87, at art. I.

⁹⁹ The entire text of GATT Article I:1 reads:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id. at art. I:1.

¹⁰⁰ *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 129.

discrimination, as opposed to a principle of favoritism as the name might suggest.¹⁰¹ A WTO member must extend equal treatment to all other WTO members and cannot discriminate in favor of, or against, any other WTO member.¹⁰² In the context of tariffs, the gist of the MFN principle is that any GATT/WTO member that offers tariff preferences, including zero tariffs, to any other GATT/WTO member must immediately and unconditionally offer the same tariff preferences to every other WTO member.¹⁰³ Under the MFN principle, it becomes impossible to have a preferential trade agreement such as the TPP. The whole point of the TPP is that TPP members receive preferential treatment that is not available to non-TPP members. Under the MFN principle, such preferential treatment is discriminatory and a violation; a nation that extends zero tariffs to goods from another nation must immediately and unconditionally extend zero tariffs to all other WTO members.¹⁰⁴ How, then, is it possible to have preferential trade agreements such as the TPP under the WTO?

The answer lies in GATT Article XXIV:

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area . . .¹⁰⁵

The key language of Article XXIV is the first sentence of Article XXIV(5): “[T]he provisions of this Agreement *shall not prevent* . . . the formation of a customs union or a free trade area.”¹⁰⁶ This language has been read to create an exception

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.* at 130.

¹⁰⁴ See *id.*

¹⁰⁵ See GATT, *supra* note 87, at art. XXIV:4-5.

¹⁰⁶ A free trade area, such as NAFTA, allows for the free movement of goods within the members of the free trade area, but subject goods from non-members of the free trade area to the individual tariffs of each of the members. In the case of NAFTA, goods from the U.S. travel to Mexico and Canada duty free, but goods from a non-NAFTA member are subject to the individual tariff rates of each NAFTA member. For instance, goods from China that enter Canada would be subject to Canadian tariffs, that enter the U.S. would be subject to U.S. tariffs, that enter Mexico would be subject to Mexican tariffs. These tariffs might vary from nation to nation so that the importer might pay a higher tariff in the U.S. than an importer might pay in Mexico. Free trade areas thus encourage forum shopping for the cheapest tariff rate among the members of the free trade area from which the goods can then move around the free trade area duty free. This is why NAFTA has complex rules of origin that are designed to eliminate this type of forum shopping. So under the NAFTA

to the other provisions of the GATT, including the MFN principle in GATT Article I. The result is that under a free trade agreement or a customs union, the MFN principle does not apply because, if it did, it would prevent the formation of a free trade area in contravention of the express language of GATT Article XXIV:5. Under this interpretation, free trade areas such as the North American Free Trade Agreement (NAFTA) and a customs union such as the E.U.—the two most prominent free trade agreements and customs unions—are permitted to exist as exceptions under GATT Article XXIV:5 to the MFN principle contained in GATT Article I. The TPP is also permitted to provide favorable treatment in all areas of trade, including goods, services, foreign investment, and technology trade without extending the same benefits to all other members of the WTO, such as China. Extending favorable treatment to TPP members while excluding benefits to non-members of the TPP, such as China, is perfectly legal under the GATT/WTO. Indeed, as noted earlier, the WTO encourages free trade agreements.¹⁰⁷ So regardless of any argument that China might make to the contrary, the TPP is consistent with the WTO.

B. The Effect of Preferential Trade Agreements in Creating and Diverting Trade

The effect of excluding China from the TPP is that China, unless it joins, will be unable to enjoy the benefits the TPP provides to all of its twelve member states. The short-term goal of the TPP is to reduce tariffs among its members below their current GATT rates and, in the long term, to eliminate all tariffs in order to have a true free trade area.¹⁰⁸ As all TPP tariffs are reduced to below current GATT rates, members of the TPP enjoy “WTO plus” treatment for their goods because imports from TPP countries will enjoy better tariff treatment than they would under the WTO.¹⁰⁹ The economic effect of this preferential treatment

rules of origin if a good from China enters Mexico and then enters the U.S., the U.S. might treat the good as originating from China and impose ordinary tariffs. A customs union, like the E.U., also has free movement of goods among all of its members (that is, duty free treatment) but imposes a single external tariff on non-members of the E.U. Thus, it makes no difference whether goods from China enter the E.U. through Italy, France, Germany, or Belgium; the goods are subject to the same tariff, thus eliminating the incentive to forum shop. Of course, a single external tariff requires greater economic integration than a free trade area. *See* CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 20, at 55–56.

¹⁰⁷ *See* GATT, *supra* note 87, at art. XXIV:4.

¹⁰⁸ TPP, art. 2.4 entitled “Elimination of Customs Duties” states in relevant part: “Unless otherwise provided in this Agreement, each Part shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 2-D (Tariff Commitments).” TPP, *supra* note 1, at art. 2.4(2).

¹⁰⁹ All of the TPP members are also WTO members, which means that they currently maintain WTO tariffs. The concept is to reduce the rates to zero under the TPP. Thus, TPP members receive

is to increase trade and political cooperation among TPP member states.¹¹⁰ This is apparent because imports that are subject to TPP tariffs are less expensive than imports that are subject to WTO tariffs. The lower TPP tariffs on goods from other TPP countries will be less expensive to the importer, which in turn will pass on the savings to the consumer driving up demand for the imports. This will result, in the long term, in an increase in trade among TPP members. This is how PTAs result in increases in trade among their members. Similar arguments can be made for other sectors, such as trade in services, investment, and technology. Although each area differs in some ways from the trade in goods, the basic concept of preferential treatment is the same—all areas of trade will increase between TPP members.¹¹¹

What might be less apparent is that preferential trade agreements also divert trade (and perhaps political cooperation) from non-members.¹¹² To take a concrete example, suppose that after the TPP takes effect, an importer in the U.S. has the choice between importing two substantially similar products either from China, a non-member of the TPP, or from Vietnam, a TPP member. Assume for the purposes of this hypothetical that the U.S. GATT rate for the product is five percent for all imports (including imports from China) but that the TPP rate for the same product from Vietnam is zero. If the products from China and Vietnam

“WTO plus” treatment.

¹¹⁰ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 52.

¹¹¹ Various governmental and non-governmental sources indicate that the U.S. should see an increase in all other areas of trade in addition to the trade in goods. For example, the United States Trade Representative believes that the TPP will increase U.S. exports of services. *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFFICE OF THE U.S. TRADE REP., <https://perma.cc/X6YC-CBQ7> (last visited Oct. 25, 2016) The Trade Representative has stated:

Services industries account for four out of five U.S. jobs and also represent a significant and growing share of jobs in other TPP countries. Securing liberalized and fair access to foreign services markets will help U.S. service suppliers, both small and large, seeking to do business in TPP markets, thereby, supporting jobs at home.

Id. The USTR also believes that the TPP will boost U.S. exports of technology (that is, intellectual property) intensive goods. *Id.* (“In TPP, we are working to advance strong, state-of-the-art, and balanced rules that will protect and promote U.S. exports of IP-intensive products and services throughout the Asia-Pacific region.”). Another institutional study indicates that the TPP will boost outward U.S. technology transfer. See Nam D. Pham et al., NDP Analytics, *The Economic Benefits of Intellectual Property Rights in the Trans-Pacific Partnership* 4 (2014). <https://perma.cc/T422-8GSQ>. Both inward foreign investment from other countries and outward U.S. foreign direct investment in other countries are expected to rise as a result of the TPP. Theodore H. Moran & Lindsay Oldenski, *TPP Will Promote Investment as Well as Trade*, PETERSON INST. FOR INT’L ECON. (Mar. 10, 2015, 11:15 AM), <https://piie.com/blogs/trade-investment-policy-watch/tpp-will-promote-investment-well-trade>. These benefits are reciprocal, that is, U.S. trading partners should be a similar increase in their modes of trade in addition to the trade in goods.

¹¹² See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 52.

are similar in quality, a rational importer will choose to import the product from Vietnam.

Under the hypothetical five percent GATT rate tariff, an imported product from China with a price of \$1 will cost the importer \$1.05 with the tariff included and the importer will then pass the cost onto the consumer in the form of a 5-cent increase in price.¹¹³ This might seem to be a trivial difference, but it is not. Suppose that the importer orders one million units of the product, which would not be unusual for any number of items used regularly by consumers, such as textiles (clothing). At this point, the GATT tariff on goods from China will cost the importer an extra \$50,000 dollars to import as opposed to the products imported from Vietnam. In every highly competitive industry, even slight cost differentials can be decisive. Continuing our hypothetical, assume that the retail price of the product is \$5; at this price point, the consumer will pay \$5 for the import from Vietnam but \$5.25 for the same product from China. This cost difference does not factor in the cost of a sales tax in some states that is usually assessed as a percentage of the retail price of the goods, which will further increase the price of the import from China. (Assuming a six percent retail tax, the import from Vietnam will cost \$5.30 whereas the import from China will cost \$5.67.) Assume further that the items are not sold individually but come in a convenient package of ten at the retail level because few consumers are likely to purchase the particular item one at a time. The consumer will pay \$50 for a package of ten products from Vietnam but \$55.65 dollars for the same package from China (including a six percent sales tax).

Over time, what will occur? As rational economic actors, importers and consumers will prefer to buy the imports from Vietnam, and the imports from China will go unsold. As a result, the importer will stop importing goods from China and import them from Vietnam instead. If we generalize this example to goods across many sectors, including high technology goods, the U.S. might be able to source goods across many industries from TPP countries instead of from China. Recall that Japan and Australia are also members of the TPP and other countries, such as South Korea, have indicated that they wish to join. This could give the U.S. many sources of goods comparable to Chinese goods in all areas, including high technology areas (for example, auto parts) but at a lower price because of the preferential tariff for TPP members. If China does not join the

¹¹³ The importer, usually a distributor, pays the increased tariff in order to clear the goods at customs so that they will be allowed to enter the internal market. What prevents the importer from absorbing the price increase and not passing on the price increase onto the consumer in the form of higher retail prices? The answer is nothing. If the importer does not pass on the increased tariff to the consumer, then the importer simply earns fewer profits. Most importers, however, wish to maximize profits and so for this reason higher tariffs usually mean higher prices for consumers.

TPP, China's trade with the U.S. and other TPP members will be diverted to other TPP countries and China could suffer a loss in trade opportunities.¹¹⁴

C. The Political Benefits of Diverting Trade from China

Diverting trade away from China serves important U.S. interests at the present because of the heated political criticism and vehement populist anger over the ever-mushrooming trade deficit with China, which reached a record \$365.7 billion in 2015.¹¹⁵ The breakdown of this figure indicates that in 2015, the U.S. sold \$116.2 billion in exported goods to China while purchasing \$481.9 billion of imports from China.¹¹⁶ To place the trade deficit with China in historical perspective, in one year from 2014-2015, the U.S. trade deficit grew by almost \$30 billion, a 6.6% increase.¹¹⁷ In 1985, the U.S. trade deficit with China was \$6 million,¹¹⁸ the 2015 figure represents a growth of over 60,000 times in three decades. The U.S. trade deficit with China is much larger (by \$230 billion) than the combined trade deficits of the next four largest U.S. trade deficits with a single country: Germany (\$74 billion), Japan (\$68 billion), Mexico (\$58 billion), and Vietnam (\$30 billion).¹¹⁹ The U.S. trade deficit with China is nearly five times that of the U.S. trade deficit with Germany.

The negative consequences of the U.S. trade deficit with China can be understood through reviewing some basic international economic principles. When a nation experiences a trade deficit, it is buying more goods from its trading partner than it is selling.¹²⁰ In other words, a nation with a trade deficit is spending more than it is earning from international trade.¹²¹ In the case of the U.S., it is spending \$365.7 billion more than it is earning from the trade with China, and China is becoming wealthier by \$365.7 billion per year in its trade with the U.S., with the gap widening with every year. The long-term consequences for a nation with a continuing trade deficit are that unless other growth factors are present (for

¹¹⁴ From a macroeconomic perspective, the balance between trade increases and trade diversion due to free trade areas is the most important question for the multilateral trading system. To the extent that trade increases outweigh trade diversion, the entire multilateral trading system is better off even if some countries lose trade opportunities. To the extent that losses from trade diversion outweigh trade increases, the preferential trade agreement then becomes a net loss for the multilateral trading system.

¹¹⁵ See Terence P. Jeffrey, *\$365,694,500,000: U.S. Merchandise Trade Deficit With China Hit Record in 2015*, CNS NEWS, (Feb. 9, 2016), <https://perma.cc/2LDT-ADRY>.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 30.

¹²¹ See *id.*

example, the sale of services, innovation in technology, the influx of capital through investment from foreign countries) the nation's economy begins to shrink and may become mired in debt.¹²²

On the other hand, the nation enjoying the trade surplus will become flush with cash from revenues earned from trade, its economy will grow quickly and, in the case of China, become a global trading power.¹²³ China could use its earnings to buy more goods from the U.S. and reciprocate in the trade in goods, but China has chosen not to do so.¹²⁴ In China's case, China is "hoarding"¹²⁵ by choosing to save instead of spend its earnings.¹²⁶ China saves its earnings by using those earnings from selling goods to the U.S. to buy more and more of the U.S. economy in the form of U.S. government securities, such as treasury bonds.¹²⁷ The debtor nation is trapped in a never ending cycle of an escalating trade deficit and increasing debt.¹²⁸ This is true for the U.S. as China is lending money to the U.S. by buying U.S. debt instruments (in other words, U.S. treasury bonds that pay interest to China and must pay the principal by a specific due date unless they are renewed).¹²⁹ The extra cash that the U.S. has available by borrowing from China means that the U.S. does not have to raise revenue through other more painful means such as increasing taxes on consumers or cut spending on government services.¹³⁰ The money loaned from China results in more consumer disposable income that is being used by U.S. consumers to buy more cheap goods from China, leading to an increase in the trade deficit.¹³¹ The U.S. then needs to borrow even more (that is, sells more treasury bonds to China) to maintain its increasing levels of consumption and spending on government services. The U.S. seems trapped in a cycle of a spiraling trade deficit and increasing debt with China gaining more and more economic power over the U.S.¹³² One way to deal with this cycle, that is, to reduce the trade deficit, is to buy fewer goods from China and to buy the same goods from another source, such as other countries in the TPP. This will allow the U.S. to reduce the trade deficit with China and still at the same time

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.* at 45.

¹²⁵ This is a term used by critics of China. *See id.* at 46.

¹²⁶ *See id.* at 45.

¹²⁷ *See id.* at 45–46.

¹²⁸ *See id.* at 47.

¹²⁹ *See id.* at 46–48.

¹³⁰ *See id.* at 47.

¹³¹ *See id.*

¹³² *See id.*

maintain or increase its level of consumption in order to satisfy consumer demand and avoid painful austerity measures.

A related hot-button issue that stems from the trade deficit in goods with China is that some U.S. companies are moving their operations overseas.¹³³ Chinese goods are popular with U.S. consumers due to their quality and low cost.¹³⁴ Some U.S. companies are responding by moving their manufacturing operations to China in order to take advantage of the low cost of labor and other lower costs in manufacturing.¹³⁵ These U.S. companies manufacture goods in China and then export them to the U.S.¹³⁶ However, the movement of manufacturing operations from the U.S. to China means that jobs in the U.S. are being lost and replaced by jobs created in China.¹³⁷ This is what is commonly referred to as “outsourcing,” a disliked and politically charged term that seems to immediately incite boiling anger and resentment in many people in the United States.¹³⁸ These negative sentiments towards China are exacerbated by arguments expressed by some politicians that the advantages enjoyed by China are not the result of greater efficiencies but by cheating through currency manipulation and low standards in labor, among other practices.¹³⁹

The virtue of the TPP is that trade will be diverted from China to other TPP countries, reducing the trade deficit with China and the outsourcing of jobs to China that so enrages some U.S. politicians and workers. The TPP countries will need to abide by the high standards set forth in the TPP so they cannot “cheat” in their trade with the U.S. as China currently does, according to China’s critics.¹⁴⁰

While the TPP could result in the diversion of trade from China to the U.S., the same holds true for all members of the TPP. The same arguments made earlier in this section apply to other TPP countries as well. All TPP members, such as Australia and Japan, now have an economic incentive in the form of lower tariffs to buy goods from other TPP members instead of from China. Exclusion from

¹³³ See Katherine Peralta, *Outsourcing to China Cost 3.2 Million Jobs Since 2001*, U.S. NEWS & WORLD REPORT, (Dec. 11, 2014), <https://perma.cc/4BTD-KHL9>.

¹³⁴ See Mark Huffman, *Why Cheap Chinese Products Are About to Get Cheaper*, CONSUMER AFFAIRS (Aug. 11, 2015), <https://perma.cc/K7W5-LDXE>.

¹³⁵ See Kimberly Amadeo, *How Outsourcing Jobs Affects the U.S. Economy*, THE BALANCE, (June 25, 2016), <https://perma.cc/W7UQ-9ZGH>.

¹³⁶ See *id.*

¹³⁷ See HUFFMAN, *supra* note 134.

¹³⁸ Michael Snyder, *Why Are the American People Mad? Maybe It is Because Millions of Their Jobs Have Been Lost to Outsourcing and They Aren't Coming Back*, END OF THE AMERICAN DREAM (July 29, 2010), <https://perma.cc/5YCL-2NHG>.

¹³⁹ See Daniel Mills, *China Cheats While the U.S. Suffers*, ECONOMY IN CRISIS (May 25, 2014), <https://perma.cc/2PEQ-AHPV>.

¹⁴⁰ See *id.*

the TPP means losses of trade opportunities for China, not only with the U.S., but also with the entire membership of the TPP, which currently accounts for forty percent of world trade.¹⁴¹ This creates a serious dilemma for China.

III. HOW JOINING THE TPP WILL NEUTRALIZE MAJOR TRADE ADVANTAGES CHINA CURRENTLY ENJOYS

One alternative for China is to join the TPP and enjoy the advantages of lower tariffs and increased trade with the members of the TPP. This might seem to be an obvious step but here is where the U.S. strategy has created the other prong in the dilemma for China. In order to join the TPP, China must agree to the terms of the TPP, as well as any other terms that the U.S. Congress might demand as a price of admission to the TPP. China would also have to undergo a humiliating process of approval of its TPP entry by the U.S. Congress, which might relish an opportunity to criticize and humiliate China.¹⁴² While it is unclear what demands Congress might place on China, a reading of the TPP illustrates how several key provisions are meant specifically to neutralize the advantages that China currently enjoys outside of the TPP.¹⁴³ Compliance with the terms of the TPP and other demands by Congress is the price of admission for China to get access to the preferential treatment reserved to TPP members.

A. Workers' Rights Under the TPP

One of China's major advantages in trade that the U.S. sought to neutralize is China's comparatively low cost of labor.¹⁴⁴ The average cost of manual labor in China is less than \$1 per hour while the average cost in the U.S. is nearly \$20 per hour.¹⁴⁵ China's low labor costs lead directly to less expensive goods—a key appeal to the U.S. consumer and also a key factor in the growing U.S. trade deficit with China. Critics argue that China's low labor costs are made possible by a disregard

¹⁴¹ See HOWARD, *supra* note 3.

¹⁴² See *supra* note 15.

¹⁴³ There are a number of hot button issues on which Congress might seek concessions from China. For example, Congress might demand that China show greater respect for intellectual property rights by cracking down on trademark counterfeiting and copyright piracy, a major source of contention between the U.S. and China and that China put a stop to its currency manipulation that increases the U.S. trade deficit. For a discussion of counterfeiting, see DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 537–53 (3d ed. 2015). For a discussion of China's currency manipulation, see Daniel C.K. Chow, *Can the United States Impose Trade Sanctions on China for Currency Manipulation?*, 16 WASH. U. GLOBAL STUD. L. REV. (forthcoming 2017) (manuscript on file with the author).

¹⁴⁴ See M. Dana Baldwin, *Addressing the Challenge of China's Labor Cost Advantages*, CENTER FOR SIMPLIFIED STRATEGIC PLANNING, INC. (2016), <https://perma.cc/K4M3-B5VK>.

¹⁴⁵ See *id.*

for workers' rights, subjecting workers to intolerable and dangerous working conditions, long hours, and forms of coerced or forced labor.¹⁴⁶

The following provisions of the TPP related to workers' rights were likely also drafted by the U.S. with China in mind as the main target.¹⁴⁷ Article 19.3 of the TPP provides:

1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder the following rights as stated in the ILO [International Labor Organization] Declaration: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour and . . . a prohibition on the worst forms of child labour; and (d) the elimination of discrimination in respect of employment and occupation.¹⁴⁸

The reference to the standards of the International Labor Organization (ILO), contained in TPP Article 19.3, can be best understood in the context of the long debate about including labor rights in the WTO culminating in the declaration issued by the first WTO Ministerial Conference held in Singapore in December 1996.¹⁴⁹ At the time, a debate raged in the WTO on whether to introduce human rights in the GATT and WTO.¹⁵⁰ Although many attempts were made, none succeeded, due to the controversial nature of the subject of human rights.¹⁵¹ The Singapore Ministerial Declaration ended the controversy once and for all by declaring that the ILO is the competent body to deal with labor standards.¹⁵² The result of this decision is that workers' rights are outside the purview of the WTO and within the jurisdiction of the ILO.¹⁵³

The most important consequence of the Singapore Declaration with relation to workers' rights is that the breach of workers' rights cannot be used to justify a trade restriction under the WTO.¹⁵⁴ Rather, the complaining nation must assert its claims within the ILO.¹⁵⁵ However, the ILO is a toothless organization with no

¹⁴⁶ See David Barboza, *In Chinese Factories, Lost Fingers and Low Pay*, N.Y. TIMES (Jan. 5, 2008), <http://www.nytimes.com/2008/01/05/business/worldbusiness/05sweatshop.html>.

¹⁴⁷ See Kelsey, *supra* note 17 (noting that every major proposal in the TPP is targeted at China). The U.S. considers labor rights and trade to be an important trade issue as evidenced by the inclusion of provisions connecting labor and trade in every recent U.S. free trade agreement. See *infra* Section IV.

¹⁴⁸ TPP, *supra* note 1, at art. 19.3(1).

¹⁴⁹ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 369.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.* at 370.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

real enforcement power.¹⁵⁶ Limiting recourse to the ILO means that breaches of workers' rights in international trade are effectively unenforceable and will go unpunished. The significance of incorporating the ILO's basic principles within the TPP is that the ILO principles become TPP legal obligations that are now subject to the TPP's dispute settlement system. This means that a TPP member may be authorized to impose trade sanctions on another TPP member for breach of workers' rights, now giving teeth to the ILO's principles.¹⁵⁷ The TPP brings the ILO's principles within an international legal regime with effective enforcement powers.

The TPP also adds two other significant provisions regarding workers' rights. Article 19.3(2) states: "[e]ach Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."¹⁵⁸ Article 19.5(1) states: "No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement."¹⁵⁹ The major significance of these two provisions is that they bring domestic labor laws and regulations within the purview of the TPP and its enforcement mechanism. Like many countries, China has effective labor laws on its books,¹⁶⁰ but, according to critics, China fails to enforce these laws in practice.¹⁶¹ Currently, the failure to enforce labor laws within China is subject to recourse within the ILO, an illusory remedy, or within China's own domestic legal system. Within China's domestic legal system, the complaining party lacks any recourse if China's own internal domestic systems fail to enforce its labor laws, a common problem due to a number of systemic weaknesses.¹⁶² Under the TPP, however, the failure of a TPP country to enforce its own labor

¹⁵⁶ See Kimberly Ann Elliot, *The ILO and Enforcement of Core Labor Standards*, INSTITUTE FOR INTERNATIONAL ECONOMICS POLICY BRIEF 00-6 (July 2000), <https://piie.com/publications/pb/pb00-6.pdf> (noting that the ILO relies primarily on "sunshine," that is, exposing illegal labor to public scrutiny and "carrots," that is, technical assistance in helping countries comply). By contrast, the WTO can authorize trade sanctions to enforce its obligations.

¹⁵⁷ See TPP, *supra* note 1, at art. 25.

¹⁵⁸ *Id.* at art. 19.3(2).

¹⁵⁹ *Id.* at art. 19.5(1).

¹⁶⁰ See DANIEL C.K. CHOW & ANNA M. HAN, *DOING BUSINESS IN CHINA: PROBLEMS, CASES, AND MATERIALS* 266-73 (2012).

¹⁶¹ See *id.* at 269.

¹⁶² Yin Lily Zheng, *It's Not What's on Paper, But What is in Practice: China's New Labor Contract Law and the Enforcement Problem*, 8 WASH. U. GLOBAL STUDIES L. REV. 595, 601-12 (2009) (describing the many obstacles to effective enforcement of China's Labor Contract Law).

laws now becomes a violation of the TPP and subject to the TPP's dispute settlement mechanism.

The consequence of the TPP's labor provisions is that once China joins the TPP, China will no longer be able to maintain factories that are dangerous and unsanitary.¹⁶³ Chinese factories can no longer require workers to toil through onerous and unreasonable hours, or subject persons to forms of labor that could be deemed to be coercive.¹⁶⁴ If China does not abide by the TPP standards, the U.S. can challenge China through the TPP dispute settlement system, with trade sanctions as a possible option. Currently, the U.S. and U.S.-based multinational corporations (MNCs) lack the ability to challenge China's workers' rights record in any forum other than the ILO or China's own legal system, a mechanism that is not viewed as independent or impartial.¹⁶⁵

From a competitive standpoint, meeting the TPP's high labor standards should result in an increase in labor costs and a corresponding increase in the price of imports from China. The labor provisions of the TPP were designed by the U.S. to neutralize one of China's major advantages in trade—highly skilled and conscientious but inexpensive manual labor created by substandard working conditions.

B. Environmental Obligations Under the TPP

The TPP incorporates a number of environmental provisions that are not available under the WTO. In the WTO, environmental concerns are linked to trade but only in an indirect and peripheral way by decisions of the WTO Appellate Body, which functions as a high court of international trade.¹⁶⁶ By contrast, the TPP explicitly ties environmental concerns to the trade in goods (as well as in the other channels of trade) in the text of the TPP agreement itself.

The extensive environmental obligations under the TPP are the subject of Article 20, with no parallel in the texts of the WTO. Most salient to the main themes of this work is Article 20.5, Protection of the Ozone Layer, which provides:

1. The Parties recognise that emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment. Accordingly,

¹⁶³ See Barboza, *supra* note 146.

¹⁶⁴ See *id.*

¹⁶⁵ See DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 224–28 (3d ed. 2015).

¹⁶⁶ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 20, at 301–18.

each Party shall take measures to control the production and consumption of, and trade in, such substances.¹⁶⁷

This TPP provision was likely drafted by the U.S. with the specific purpose of reining in China. Why? China is the leading producer of greenhouse gases that directly damage the atmosphere's ozone layer.¹⁶⁸ In other words, China poses the world's single greatest threat to the destruction of the ozone layer, and the key objective of TPP Article 20.5 is the protection of the ozone layer. Ozone depletion leads to global warming that could cause permanent and serious damage to the environment.¹⁶⁹ China continues to use a glut of coal-fired power plants—a source of greenhouse gases—as part of its plan of national development.¹⁷⁰ Not only does China's use of so-called “dirty fuel” harm the environment, but these fuel sources create a competitive advantage. China uses coal-fired power plants because these plants are a cheaper source of energy than other forms that are environmentally sustainable. In the U.S., the use of coal-fired power plants has been replaced in part by different alternatives such as gas, solar, and wind power, but these technologies are generally much more expensive than coal.¹⁷¹ Using cheap sources of energy, such as coal-fired power plants, leads to lower prices for goods produced in such plants and gives China an advantage in its exports. TPP Article 20.5 imposes a mandatory duty to protect the ozone layer through controlling the production of greenhouse gases (parties “*shall* take measures” to control ozone depleting substances).

Article 20.5 is only one example of many provisions in Chapter 20 that create greater obligations concerning environmental obligations. Other TPP provisions require protection of the marine environment from ship pollution,¹⁷² the adoption of corporate social responsibility policies by companies operating domestically with respect to the environment,¹⁷³ the management of fisheries such that fishing

¹⁶⁷ TPP, *supra* note 1, at art. 20.5.

¹⁶⁸ See Edward Wong, *Glut of Coal-Fired Plants Casts Doubt on China's Energy Priorities*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/world/asia/china-coal-power-energy-policy.html?_r=0 (calling into question China's commitment to renewable energy given the continuing building of dirty fuel coal powered plants).

¹⁶⁹ See *The consequences of climate change*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (2016), <https://perma.cc/D2V8-RRJ5>.

¹⁷⁰ See Wong, *supra* note 168.

¹⁷¹ See Christopher Helman, *Solar Power is Booming, But Will Never Replace Coal. Here's Why*, FORBES (Apr. 24, 2014), <https://perma.cc/6B2W-T55N>; see also Matthew Wald, *Cost Works Against Alternative and Renewable Energy Sources in Time of Recession*, N.Y. TIMES (Mar. 28, 2009), <http://www.nytimes.com/2009/03/29/business/energy-environment/29renew.html>.

¹⁷² TPP, *supra* note 1, at art. 20.6.

¹⁷³ TPP, *supra* note 1, at art. 20.10.

does not lead to overconsumption of fish species,¹⁷⁴ and the control of the illegal trade in certain endangered fauna and flora.¹⁷⁵ All of these provisions will involve additional environmental responsibilities (and costs) for China at the international level, but this discussion has focused on Article 20.5 because it is intended to have the most immediate and serious impact on China in the area of environmental sustainability if China chooses to join the TPP.

Aside from the environmental benefits created by the TPP, and more germane to the thesis in this Article,¹⁷⁶ joining the TPP would also dull China's competitive advantages in manufacturing of inexpensive goods. To be consistent with the TPP, China might have to abandon or limit the use of coal-fired power plants and use alternative and more expensive, but environmentally friendly, sources of power instead. Use of these more expensive alternative technologies will increase the cost of producing goods in Chinese factories and neutralize a major advantage that China currently enjoys in trade—cheap goods due to production methods using outdated and highly polluting technologies.

C. Restrictions on China's Support of State-Owned Enterprises

A third set of provisions in the TPP takes direct aim at China's SOEs that receive many forms of financial and non-financial assistance from the State. In its 2015 annual report to Congress, the U.S. Trade Representative stated:

Many of the problems that arise in the U.S.-China trade and investment relationship can be traced to . . . the large role of state-owned enterprises and other national champions in China's economy, which continue to generate significant trade distortions that inevitably give rise to trade frictions.¹⁷⁷

An SOE is a business enterprise that is an administrative unit of the State.¹⁷⁸ The State owns the SOE as opposed to ownership by a private person or group of persons.¹⁷⁹ China has a web of national policies to “incessantly strengthen” the “vitality”¹⁸⁰ of SOEs, considering them to be ingrained in the “lifeline of the

¹⁷⁴ TPP, *supra* note 1, at art. 20.16.

¹⁷⁵ TPP, *supra* note 1, at art. 20.17.

¹⁷⁶ This is not to minimize the beneficial social effects of responsible environmental behavior. The focus on this article is on the economic effects of China's behavior. An examination of the social and ethical issues was the topic of an independent study by the author. See Daniel C.K. Chow, *How China Uses International Trade to Promote its View of Human Rights*, 45 GEO. WASH. INT'L L. REV. 681 (2013).

¹⁷⁷ See Office of the U.S. Trade Representative, *2015 USTR Report to Congress on China's WTO Compliance* (2015), <https://perma.cc/71JE-M28R>.

¹⁷⁸ See CHOW, *supra* note 165 at 22.

¹⁷⁹ See *id.*

¹⁸⁰ Bob Davis & Brian Spegele, *State Companies Emerge as Winners Following Top China Meeting*, WALL ST. J. (Nov. 13, 2013), <http://www.wsj.com/articles/SB1000142405270230355950457919555170452>

economy.”¹⁸¹ China’s plan is to create SOEs that are “national champions” that can dominate international trade.¹⁸² Reflecting the importance of SOEs in China, all of the vital sectors of China’s economy are controlled by SOEs that have monopolies in energy, transportation (including air and rail transport), banking, electricity, water supply, and telecommunications.¹⁸³ Recently, China reported the existence of 144,700 SOEs, excluding banks, with total assets worth \$13.6 trillion.¹⁸⁴ The world’s largest company by capitalization is Petro-China,¹⁸⁵ an SOE that ranks ahead of Exxon-Mobil on the 2015 Fortune 500 list.¹⁸⁶ China has three SOEs among the top ten largest companies in the world.¹⁸⁷ While other TPP countries also have SOEs, China’s SOEs are unique in the role they play in China’s economy, their size and financial strength, and the power they wield in China’s economy. The importance of SOEs to China’s national interests means that the State provides support to SOEs in myriad forms. This state assistance to SOEs comes at the expense of MNCs with operations in China.¹⁸⁸

MNCs doing business in China often claim that the Chinese government discriminates against them in favor of SOEs through three common practices. First, SOEs often prefer purchasing goods and service from other SOEs rather than MNCs.¹⁸⁹ Purchasing agents might prefer to purchase goods from sources they have dealt with in the past or from sales agents in other SOEs with which they have personal or professional relationships.¹⁹⁰ A more nefarious possibility is that purchasing agents working in SOEs may receive a kickback (as in, a bribe) from the sales agent of SOE that sells the product.¹⁹¹

6972.

¹⁸¹ See Anti-Monopoly Law, art. 7 (promulgated by the 29th Session of the Standing Comm. Tenth Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), <https://perma.cc/Q8G4-6C65>.

¹⁸² See *The State Advances*, THE ECONOMIST (Oct. 6, 2012), <https://perma.cc/SM3E-SDHM>.

¹⁸³ See CHOW, *supra* note 51, at 27.

¹⁸⁴ See Wayne Morrison, Cong. Research Serv., RL33536, China-U.S. Trade Issues 8 (2014).

¹⁸⁵ See *PetroChina Becomes World’s Largest Listed Company*, CHINA VIEW (Nov. 6, 2007), http://news.xinhuanet.com/english/2007-11/06/content_7018280.htm.

¹⁸⁶ See Carolyn Davis, *ExxonMobil, Chevron, Phillips 66 in Top 10 of Fortune 500*, NGP’S DAILY GAS PRICE INDEX (Oct. 15, 2015) <https://perma.cc/M3GR-VNT9> (Exxon Mobil ranked No. 2 in 2015 Fortune 500).

¹⁸⁷ See *Global 500 2014*, FORTUNE (2014), <https://perma.cc/2WUD-ZTQM>.

¹⁸⁸ For a general discussion of how China discriminates against MNCs and in favor of its SOEs, see Daniel C.K. Chow, *How China Promotes its State-Owned Enterprises at the Expense of Multinational Companies Doing Business in China and in Other Countries*, 41 N.C. J. INT’L L. 455 (2016).

¹⁸⁹ See Office of the U.S. Trade Representative, *TPP Chapter Summary: State-Owned Enterprises 2*, <https://perma.cc/H2YY-3N7B>.

¹⁹⁰ This observation is based on the author’s own working experience in China.

¹⁹¹ See Daniel C.K. Chow, *Why China’s Crackdown on Commercial Bribery Threatens U.S. Multinational Companies Doing Business in China*, 31 ARIZ. J. INT’L & COMP. L. 512, 528 (2014) (“Most people in

Second, MNCs claim that the Chinese government discriminates against MNCs under important regulatory regimes, such as the Anti-Monopoly Law (AML) and under various anti-bribery laws.¹⁹² For example, MNCs argue that Chinese authorities apply the AML to benefit SOEs by blocking acquisitions of Chinese companies by MNCs or by imposing onerous conditions on MNCs such as requiring the sale of assets to SOEs in order to approve a merger or acquisition by an MNC of a Chinese company.¹⁹³ Chinese authorities use the AML to impose or threaten to impose heavy fines in order to force MNCs to reduce prices on their products while not subjecting SOEs to these pressures.¹⁹⁴ MNCs also argue that Chinese authorities are cracking down on MNCs under anti-bribery laws while ignoring similar conduct by SOEs.¹⁹⁵ Recently, Chinese authorities imposed a record \$500 million fine on GlaxoSmithKline for bribing Chinese doctors and hospitals to prescribe its medications.¹⁹⁶ MNCs note that this record fine was imposed on an MNC while SOEs that engage in far more egregious conduct go unpunished.¹⁹⁷

A third common complaint is that China provides subsidies (financial contributions) to SOEs, a form of financial assistance.¹⁹⁸ The effect of a subsidy is that it lowers the operating costs of SOEs, providing a competitive advantage over MNCs in China. Subsidies to SOEs also provide a competitive price advantage by lowering the cost of the products when they are exported into the U.S. The lower price of Chinese goods provides them a competitive advantage over competing U.S. products.

The WTO has provisions that prohibit discrimination in the purchase of goods,¹⁹⁹ discrimination in the application of internal regulations,²⁰⁰ and the provision of subsidies.²⁰¹ The WTO provisions, however, are general in nature applying to all forms of discrimination and subsidies, whereas the TPP provisions

China are resigned to accept petty corruption by SOEs, that is, the giving of kicks and bribes, as a way of doing business.”).

¹⁹² See *id.* at 517–23.

¹⁹³ See *id.* at 518–19.

¹⁹⁴ See *id.* at 519–21.

¹⁹⁵ See *id.* at 521–22.

¹⁹⁶ See *id.* at 522.

¹⁹⁷ See Chow, *supra* note 188, at 483.

¹⁹⁸ See USTR 2015 Report to Congress on China’s WTO Compliance, *supra* note 177, at 86 (discussing U.S. government’s efforts to press China to remove subsidies to SOEs).

¹⁹⁹ See GATT *supra* note 87, at art. III.1.

²⁰⁰ See *id.* at art. III.4.

²⁰¹ See *id.* at art. XVI. Article XVI is elaborated upon in World Trade Organization, *Agreement Subsidies and Countervailing Measures* (1994), <https://perma.cc/FDJ5-4XNC>.

were drafted specifically with SOEs in mind and directly target illegal conduct by SOEs. The TPP provisions are designed to facilitate enforcement of specific obligations against SOEs.

The TPP addresses all three of these concerns raised by U.S.-based MNCs. Article 17.4 of the TPP requires SOEs to avoid discrimination in the purchase of goods and services by giving treatment to goods and services from other TPP parties treatment no less favorable than that accorded to SOEs.²⁰² Article 17.5 of the TPP prohibits discrimination in favor of SOEs in the exercise of regulatory authority.²⁰³ Article 17.6 prohibits the use of “non-commercial assistance” to any SOEs related to the production of goods or the supply of services. As the context of Article 17.6 set forth below indicates, non-commercial assistance refers to assistance that is not available in the marketplace but is provided only by a government. In this context, assistance refers to:

- i. direct transfers of funds or potential direct transfer of funds or liabilities, such as: A. grants or debt forgiveness; B. loans, loan guarantees or other types of financing on terms more favourable than commercially available to that enterprise; or C. equity capital inconsistent with the usual investment practice, including for the provision of risk capital, of private investors[] (ii) goods or services other than general infrastructure on terms more favourable than those commercially available to that enterprise.²⁰⁴

A comparison of this provision with the provisions in the WTO Agreement on Subsidies and Countervailing Measures (SCM) indicates that the quoted text of the TPP set forth above closely tracks SCM Article 1, which defines a “subsidy” for the purpose of imposing a countervailing duty as an extra tariff imposed by the importing country on a subsidized import to offset the effect of the subsidy.²⁰⁵ TPP Article 17.6 is specifically aimed at subsidies provided by China to SOEs whereas the SCM deals with government subsidies provided to all types of private businesses. The TPP is aimed directly at the type of subsidies that China is

²⁰² TPP, *supra* note 1, at art. 17.4.

²⁰³ TPP, *supra* note 1, at art. 17.5

²⁰⁴ TPP, *supra* note 1, at art. 17.1 (“Definitions”).

²⁰⁵ SCM Article 1 entitled “Definition of a Subsidy” provides in relevant part:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

- (a)(1) There is a financial contribution by a government or any public body within the territory of a Member . . . where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure or purchases goods; [or] (iv) a government body makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

frequently accused of providing to its SOEs.²⁰⁶ The direct consequence of Article 17.6 is that it provides the U.S. with clear authority to impose countervailing duties on subsidized imports from SOEs, neutralizing a major advantage that SOEs have in international trade. The imposition of the countervailing duty will reduce the demand for the imports by increasing their prices (as the importer passes on the increase to the consumer) and will make U.S. products more competitive relative to the now more expensive import. China will then be forced to either accept a reduced demand that leads to fewer imports or remove the subsidy.

Due to the outsized role that SOEs enjoy in China and in global trade, these provisions of the TPP were also likely drafted with China as the target. No other current TPP country has SOEs that approach the size and power of China's SOEs or their dominance in international trade. Joining the TPP will make China's most frequently complained of practices that benefit SOEs illegal and will allow the U.S. to directly challenge these practices in the TPP dispute settlement system.

IV. THE U.S.'S GOAL TO BE THE FINAL ARBITER OF THE RULES OF INTERNATIONAL TRADE

The negotiation process for the TPP, which proceeded without input from China, may become a model for how the U.S. negotiates multilateral treaties in the future. If this appears to be an aggressive tactic by the U.S. to control a rival, this is exactly the intent. Discussing the TPP on May 2, 2016, President Obama stated:

[The TPP] would give us a leg up on our economic competitors, including . . . China. Of course, China's greatest economic opportunities also lie in its own neighborhood, which is why China is not wasting any time. As we speak, China is negotiating a trade deal that would carve up some of the fastest-growing markets in the world at our expense, putting American jobs, business and goods at risk. . . . America should write the rules. America should call the shots. Other countries should play by the rules that America and our partners set, not the other way around. . . . The United States, not . . . China, should write them."²⁰⁷

Attempts by the U.S. to control China have not, of course, escaped China's notice, and they underscore how the relationship between the two countries has increasingly become a fierce rivalry. The U.S. and China take starkly different approaches to international trade treaties, which benefit the interests of each country.

²⁰⁶ See USTR 2015 Report to Congress on China's WTO Compliance, *supra* note 177.

²⁰⁷ Barack Obama, *The TPP Would Let America, not China, Lead the Way on Global Trade*, WASHINGTON POST (May 2, 2016), <https://perma.cc/YW32-TQUT>.

The recent approach of the U.S. in all of its international trade treaties is to link social issues such as workers' rights and the environment to trade. This practice began with the North American Free Trade Agreement, which came into effect in 1994.²⁰⁸ As part of NAFTA, the parties also entered into two side agreements: the North American Agreement on Labor Cooperation, which includes provisions linking trade to workers' rights,²⁰⁹ and the North American Agreement on Environmental Cooperation, which includes obligations linking trade to the environment.²¹⁰ In 2011, the U.S. ratified the U.S. Korea Free Trade Agreement (KORUS).²¹¹ KORUS includes a reciprocal obligation to adopt the four basic principles of the ILO similar to the obligation created by TPP Article 19.3.²¹² The State Department's Model Bilateral Investment Treaty, which serves as a template for all future U.S. investment treaties, also contains provisions related to workers' rights and the environment as well as provisions on transparency in government.²¹³ These developments indicate that the U.S. will link workers' rights and environmental issues to trade in all future trade agreements. None of these U.S. agreements contain any special provisions relating to SOEs, another indication that the SOE chapter in the TPP was aimed directly at China.

By contrast, China's trade agreements reveal a different approach. China has entered into recent bilateral free trade agreements with its partners, including Costa Rica (2011), Pakistan (2009), Peru (2009), Singapore (2009), New Zealand (2008), and Chile (2006).²¹⁴ On November 22, 2015, China signed a Protocol to enhance the China Free Trade Agreement with the Association of Southeast Asian Nations (consisting of Brunei Darussalam, Cambodia, Laos, Indonesia, Malaysia, Philippines, Singapore, Thailand, and Vietnam (collectively ASEAN)).²¹⁵ China is also negotiating the One Belt One Road agreements (so named after the historic Silk Road used in ancient times to trade with Europe) that will create unblocked

²⁰⁸ See Office of the U.S. Trade Representative, *North American Free Trade Agreement*, <https://perma.cc/23HW-3K8E>.

²⁰⁹ See U.S. Department of Labor, *North American Agreement on Labor Cooperation* (1993), <https://perma.cc/RP26-LDB5>.

²¹⁰ See Commission for Environmental Cooperation, *North American Agreement on Environmental Cooperation*, <https://perma.cc/W49S-T5SA>.

²¹¹ See Office of the U.S. Trade Representative, *U.S.-South Korea Free Trade Agreement* (2007), <https://perma.cc/YA5A-724S>.

²¹² See *id.* at art. 19.1.

²¹³ U.S. Department of State, *2012 U.S. Model Bilateral Investment Treaty* (2012), <https://perma.cc/S8YW-83V6>.

²¹⁴ See Chinese Ministry of Foreign Commerce, *China FTA Network*, <https://perma.cc/7D46-3RKD>.

²¹⁵ See World Bank, *Framework Agreement on Comprehensive Economic Co-Operation Between the Association of South East Asian Nations and the People's Republic of China* (Nov. 2, 2002), <https://perma.cc/3X5D-XKAT>.

road and rail access from China to sixty European countries.²¹⁶ China has many more free trade agreements that are being negotiated. The hallmark of all of these agreements is that they contain no provisions linking trade to workers' rights and the environment. China's agreements also contain no provisions that limit the trading rights of SOEs.

These two contrasting approaches concerning the linkage of social issues to trade reflect a fundamental difference in philosophy in the use of trade to create sticks and carrots on social issues and is a topic that is beyond the scope of this Article.²¹⁷ This Article has focused on the trade and economic effects of such provisions. From this perspective, linking trade to workers' rights and the environment increases the costs of trade and is intended to neutralize the competitive advantages (that is, lower prices) that China now currently enjoys in international trade. According to the U.S. government, the TPP "level[s] the playing field for American workers and American businesses . . . [and] will help increase Made-in-America exports, grow the American economy, [and] support well-paying American jobs."²¹⁸

V. CONCLUSION

The U.S.'s attempt to contain China in international trade through the TPP has left China with a dilemma: it can ignore the TPP and risk losses in trade opportunities, or submit to the TPP and the humiliating process of applying to the U.S. Congress to join the TPP.²¹⁹ In the author's view, China is not likely to join the TPP, to surrender itself to a humiliating defeat in international trade, and to acknowledge that China has been outsmarted by the U.S. The other alternative, losing international trade opportunities with nations that account for forty percent of global trade,²²⁰ also does not seem acceptable. What will China do?

China may choose a third alternative—negotiate its own multilateral preferential trade agreements on its own terms with its trading partners in Asia and outside of Asia that will exclude the U.S. Indeed, China is now negotiating a rival preferential trade agreement in Asia called the Regional Comprehensive

²¹⁶ Francis Cheung and Alexious Lee, *A Brilliant Plan: One Belt One Road*, CREDIT LYONNAIS SECURITIES ASIA (2015), <https://perma.cc/FZM8-CRBT>.

²¹⁷ For a discussion of the philosophical differences, see Daniel C.K. Chow, *How China Uses International Trade to Promote its View of Human Rights*, 45 GEO. WASH. INT'L L. REV. 681 (2013).

²¹⁸ Office of the U.S. Trade Representative, *The Trans-Pacific Partnership*, <https://perma.cc/HS9T-MXWF>.

²¹⁹ Whether the TPP will be approved by the U.S. Congress now or eventually depends on a number of political factors. *See supra* note 57.

²²⁰ *See* Howard, *supra* note 3.

Economic Partnership (Regional Partnership).²²¹ By some measures, the Regional Partnership is more impressive than the TPP because the Regional Partnership covers nearly half the world's population and four times the number of workers and consumers covered by the TPP.²²² A major difference between the two is that the Regional Partnership includes China—the world's most populous nation—and India—the world's second most populous nation and a growing economic power in its own right—while the TPP does not.²²³ Countries that wish to preserve a good relationship with both the U.S. and China have joined both the TPP and the Regional Partnership with seven countries overlapping between the two agreements.²²⁴ This overlapping membership will reduce the diversionary trade effect of the TPP if China chooses not to join, because these countries will still purchase Chinese goods, as these goods will still receive “WTO plus” treatment under the Regional Partnership, not the TPP. Just as China was excluded from the TPP negotiations, the U.S. was not invited to the negotiations for the Regional Partnership.²²⁵ In addition to the Regional Partnership, China will undoubtedly continue to negotiate individual free trade agreements with countries that will not contain any of the provisions concerning workers' rights, the environment, and SOEs used by the U.S. to contain China.

These recent developments in the negotiation of trade agreements underscore more clearly than ever that the U.S. and China see themselves as rivals, not allies, in world trade. Given their contrasting approaches to international trade, who writes the rules of international trade becomes paramount in the rivalry. The U.S. will seek to neutralize China's cost advantages in international trade in all of its trade treaties and China will seek to preserve them in its trade treaties. No one should be surprised at this result. It is a political reality that nations enter into trade agreements that are in their best interests at the expense of rivals. The U.S. has entered into trade agreements that promote its best interests at the expense of China, and China has done the same at the expense of the U.S. This Article is a study of how the TPP promotes U.S. interests at the expense of China.

At this moment in history, whether the U.S. or China will write the rules of international trade is an open question. What is not open to question is that the stakes are high: the nation that writes the rules will likely gain supremacy in international trade and will become the leading power in global trade in the twenty-first century.

²²¹ Richard Macauley, *Thought the TPP was a Big Deal? China's Rival Free Trade Pact Covers Half the World's Population*, QUARTZ (Oct. 8, 2015), <https://perma.cc/S4QQ-KCLF>.

²²² *See id.*

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *America's Big Bet*, THE ECONOMIST (Nov. 14, 2015), <https://perma.cc/BDP2-23FJ>.