

# Introduction: The Essence, Significance, and Problems of the Trans-Pacific Partnership

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The Trans-Pacific Partnership (TPP) and its controversies are significant not only for the eleven participating states and their peoples in the Asia-Pacific area and those trading with them, but more fundamentally as the sole operational test case of “megaregulation” as a once and prospective future model in global economic ordering, which the chapters in this book variously analyze and critique. This is at once a book about TPP and a book about both the phenomenon of megaregulation as a response to globalization, and the grounds for its contestation. The geographical locus of the book is greater Asia, the Pacific, and the Americas—a zone embodied inclusively in the Asia-Pacific Economic Cooperation (APEC), in club terms in TPP, and in more oppositional ways in the Trump-era shift to “Indo-Pacific” security. The framing of the book and its chapters, however, are designed to offer insights with general implications going well beyond the Asia-Pacific.

TPP is a monumental undertaking with three distinct identities. Its primary legal identity is as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)—in this book usually referred to as “TPP11”—a treaty among eleven countries, led by Japan, that entered into force in December 2018.<sup>1</sup> Its second identity is as a transformative and potentially precedent-setting US-led politico-legal ordering project (TPP12), which came to textual fruition when signed by twelve countries in February 2016, but ceased to progress once the incoming US President withdrew the United States from it in January 2017. Its third identity is futuristic, as numerous countries ranging from the United Kingdom and Colombia to South Korea and Indonesia consider joining TPP11 on accession terms (that is, with some additional terms of agreement in each case).<sup>2</sup> A latent possibility is that some future US administration might seek to bring the United States into TPP11. Partly to leave the maximum political space for the United States eventually to re-join, TPP11 incorporates nearly all of the provisions of the original TPP12, but suspends

<sup>1</sup> TPP11 (ie CPTPP) was signed by the eleven parties on March 8, 2018 in Santiago, Chile. The government of New Zealand is the treaty depository and maintains the definitive text of the treaty together with ratification information and other materials on its website (<https://www.mfat.govt.nz/cptpp>). The provisions of TPP12, which had been signed by twelve states on February 4, 2016, were incorporated (excluding those pertaining to accession, entry into force, withdrawal, and authentic texts) into CPTPP by operation of its Article 1.1. Some of the incorporated provisions are in turn suspended by operation of Article 2 CPTPP in conjunction with the Annex of CPTPP (CPTPP Annex), which lists the suspended provisions. A compiled full text of CPTPP showing the variations from TPP12, prepared by the MegaReg Project of the NYU Law School Institute for International Law and Justice, is available at [www.iilj.org/megareg](http://www.iilj.org/megareg).

<sup>2</sup> The CPTPP signatories agreed on procedural rules and substantive guidelines for the accession of further economies at the first meeting of the CPTPP Commission in January 2019: <https://perma.cc/8TX7-UXDF>.

some for which only the United States was enthusiastic, and for pragmatic reasons modifies a small set of others.<sup>3</sup> Finally, the text and ambition of TPP influences other negotiations for agreements on comparable topics.

While there are many historical<sup>4</sup> and contemporary examples of phenomena that overlap in part with megaregulation, the specific combination of scale, prescriptive coverage, and techniques for national regulatory alignment is novel, and TPP12 was the first and quintessential example of a completed treaty undertaking megaregulation. TPP11 brings into active operation almost the full legal and policy apparatus of this undertaking, albeit on a reduced scale of economic reach and political heft without the United States. The US national regulatory system is already aligned with TPP11, as the United States had been able to influence the TPP12 terms toward a US model to such an extent that almost no regulatory changes within the United States would have been needed, other than those specifically to implement the market access elements (such as implementing tariff reductions for goods from other TPP countries). Thus, with regard to regulatory alignment (but not market access), national regulation in the United States and TPP11 countries may de facto gravitate toward the same situation as if TPP12 had been endorsed.

The book as a whole seeks to show that, in any of its three identities, TPP represents the apotheosis of what we term *megaregulation*, a novel form of inter-state economic ordering and regulatory governance on an extensive substantive and trans-regional scale. This showing builds on six core claims. First, TPP is simultaneously an *economic megaregulation agreement* and a *project of international political ordering*, embedded in geopolitics and specifically related to re-balancing in light of the spectacular growth in the economy, power, and outward impact of China. Second, as TPP in its three different identities has been and will be a lightning rod for sometimes-intense *contestation*, sustained reflection on different aspects of this contestation both situates TPP and other megaregulatory projects in the long arc of ordo-liberal or neoliberal international economics, and illuminates major contemporary critiques of such projects and proposals for improvements or alternative pathways.<sup>5</sup> The design of the book is animated by the reality that different people experience and

<sup>3</sup> See CPTPP, Annex. In total, the Annex suspends elements of twenty-six provisions of TPP. These suspensions are in the chapters on Customs Administration and Trade Facilitation (1 suspension), Investment (5 suspensions, including 1 Annex), Cross-Border Trade in Services (suspension of 1 Annex), Financial Services (2 suspensions, including 1 Annex), Government Procurement (2 suspensions), Intellectual Property (13 suspensions, including 2 Annexes), Environment (1 suspension), Transparency and Anti-Corruption (suspension of 1 Annex). CPTPP also suspends one obligation each specific to Brunei Darussalam and Malaysia included in the Annexes of TPP. Suspended intellectual property protections include those requiring patent protections for new uses of known products, patent term adjustment for delays, data exclusivity guarantees for firms developing biologics (a category of medicines), and copyright protection extended to author's life plus seventy years. Moreover, extended operational freedoms for express delivery services were dropped as were additional procedural rights for carriers in the resolution of telecommunications disputes. In the area of investment protection, the jurisdiction of arbitral tribunals was withdrawn from certain disputes arising under investment agreements between investors and the state and from legal challenges to a state's investment authorization determinations.

<sup>4</sup> Megaregional ambition might be discerned in projects for pan-Africanism and pan-Arabism from the late 19th century onward; the Japanese-led Greater East-Asia Co-Prosperty Sphere 1937–45; and the US Marshall Plan for European economic reconstruction 1948–52. Cemil Aydin, *The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought* (Columbia University Press 2007); Eri Hotta, *Pan-Asianism and Japan's War, 1931–1945* (Palgrave Macmillan 2007); Alan Milward, *The Reconstruction of Western Europe 1945–51* (University of California Press 2006). A skeptical view of any such prospects for the Commonwealth is Philip Murphy, *The Empire's New Clothes: The Myth of the Commonwealth* (Hurst 2018).

<sup>5</sup> The intellectual lineage of one particular Hayekian strand of globally-integrated neoliberalism is traced from the end of the Austro-Hungarian empire through to the creation of the World Trade Organization in Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018). The present book shows both that there were many more influences on TPP than simply this neoliberal lineage, but also that this line of thought and policy is to a large extent continued in TPP.

understand the “global,” and “globalization,” including its costs and benefits, in dramatically different ways, with fissures by location, opportunity-structure, age, education, class, biography, and demography.

Third, megaregulation in general and TPP in particular can be understood only in the context of *the political economy of new market forms and technologies* precipitating changed regulatory needs, changes in business organizational forms, and highly uneven corporate lobbying power and capacities to influence and benefit from megaregulation. Fourth, a central feature of TPP—partly attributable to US influence—is its *strong prescription of particular relations between the state and the market*, pursued through direct TPP rules and through indirect influences or pressures on third states on matters ranging from intellectual property to state-owned enterprises (SOEs) to exchange rates. Fifth, TPP is only *thinly institutionalized*—this is a characteristic of what had been US-style megaregulation—and most institutional action other than investor–state and state–state dispute settlement can be blocked by a single state. Sixth, megaregulatory initiatives are intricately bound up with *national politics* including sharp cleavages and two-level game strategies, and with national preferences on matters such as developmental state models and policy autonomy.

These are the six parts into which the volume’s thirty-one chapters are divided. In the remainder of this Introduction we briefly introduce the overarching theme of megaregulation, and then discuss the core ideas animating the six different parts of the volume.

## I. Megaregulation, Geopolitics, and Ordering Projects

The concept of “megaregulation”—fully adumbrated in the next chapter which frames this volume<sup>6</sup>—was coined in this research project<sup>7</sup> to capture the combined presence of five features: extended but non-universal geographical and substantial economic *scale*; deep and extensive *prescriptive coverage* with regard to the substance and processes of national regulatory governance; the movement toward a *generalized freedom to operate* for large corporations and their contractors or supply chains; pursuit of economic connectivity through *regulatory alignment* among the participating states; and use of the *treaty-institutional* form. The extended trans-oceanic scale and the inclusion of two (Japan and the United States) of the world’s four major economies plus numerous other countries in TPP12 were unique,<sup>8</sup> and distinguished TPP from all existing bilateral and contiguous-regional preferential trade agreements (PTAs). The prescriptive coverage of TPP, while in large part an amalgam of recent PTAs, went beyond any of them in its inclusion of new rules for the digital economy and on SOEs. Such demanding rules on these topics are not emulated in the Japan–EU Economic Partnership Agreement (JEEPA) or in any other existing transregional or global agreement, although the United States–Mexico–Canada Agreement signed in 2018 (USMCA) took a similar approach in North America. The technique of pursuing regulatory alignment, rather than convergence or harmonization or strict mutual recognition, among regulatory regimes of the different participating countries is comparable to that in some PTAs, but distinguishes TPP from more explicitly integrative agreements such as those

<sup>6</sup> Benedict Kingsbury and others, “The Trans-Pacific Partnership as Megaregulation,” ch. 2 in this volume.

<sup>7</sup> The MegaReg project at NYU School of Law’s Institute for International Law and Justice, [www.iilj.org/megareg](http://www.iilj.org/megareg).

<sup>8</sup> The Japan–EU Economic Partnership Agreement (JEEPA) was finalized later, in early 2018.

constituting the European Union. In aggregate, the scaling up from PTAs and regional agreements, the extensive and demanding set of prescriptive rules going well beyond those of the WTO, and the use at scale of the technique of regulatory alignment, all combine to produce the unique phenomenon of selective-global economic governance which we characterize as “megaregulation.”

The first efflorescence of practical projects of megaregulation (as we have defined it) lasted from roughly 2008 to 2016. It may be said to have begun in 2008–2009 in the flow of decisions from the George W. Bush administration that the United States should join the TPP negotiations through to the incoming Obama administration’s embrace of this and receptivity to launching comparable negotiations for other partnerships.<sup>9</sup> The EU, which after a few years hesitation about moving trade negotiations outside the WTO had by then emulated the US turn to PTAs, saw risks that a US-led TPP might divert US focus away from the European relationship. The United States saw major advantages in a regulation-focused agreement with the EU which would anchor new trade rules globally. Negotiations thus began in 2013 for an EU–US Transatlantic Trade and Investment Partnership (TTIP). In the same year, a group including the eight non-ASEAN TPP countries plus the EU, South Korea, and others inaugurated within the WTO negotiations for a trade in services agreement (TiSA), intended to help build a governing script for wider liberalization of transnational services markets covering air and maritime transport, telecommunications, computer services, express delivery, retail distribution, financial services, energy and environmental services, traditional professional services (accounting, law, etc.), and a host of other lucrative sectors. Other treaty projects of this period with some hints of megaregulation in substantive coverage or scale include the completed EU–Canada agreement (CETA), the negotiations of the China–Japan–South Korea FTA (ongoing since 2012), and EU–MERCOSUR (given a renewed push from 2016). Each of the projects involving the United States—TPP12, TTIP, and TiSA—were put into hibernation following the US 2016 elections, when this globally ambitious phase of megaregulation projects involving the United States was abruptly terminated. The Trump administration rapidly ended TPP12 and the impetus in negotiations for TTIP, and effectively dimmed, for the time being, the anyhow-uncertain prospects for TiSA. A barrage of mixed signals followed, as the US White House appeared to try to return to an older strain of US trade policy that favors an open trading economy but without multilateral constraints and based on fluctuating bilateral calculations.

Faced with the dramatic reversal in the posture of the United States with regard to international trade and investment governance, and with the turbulence in the EU precipitated by Brexit (from the 2016 UK referendum vote onward), a more modest but nonetheless important second wave of megaregulation began as other countries breathed life into megaregulatory projects pursued in the absence of the United States. The EU and Japan made haste with the finalization of JEEPA. Also with leadership from Japan, TPP11 was finalized. New impetus was given to long-running negotiations (launched in 2012) for a regional comprehensive economic partnership (RCEP) among the ten ASEAN countries together with Australia, China, India, Japan, New Zealand, and South Korea, states with which ASEAN already has economic partnership agreements. If an agreement can be reached it is likely to

<sup>9</sup> TPP’s antecedents lie in the Trans-Pacific Strategic and Economic Partnership, also known as “P4,” which was concluded in 2006 between Singapore, Brunei, Chile, and New Zealand. The transformative shift toward TPP came when the United States joined the negotiations in 2008. Canada and Mexico entered the negotiations in 2012, when the broad framework of the text was already quite developed. Japan joined in 2013.

be modest substantively compared to TPP,<sup>10</sup> but RCEP would greatly exceed TPP<sup>11</sup> in terms of collective resident population (with more than 3.5 billion if India and China both join), economic activity, and aggregate economic growth in the covered countries.). After a hiatus, the United States began to engage in much blunter and more traditional economic negotiations with China and with the EU and other trading counterparties, and also completed the USMCA with Mexico and Canada, which, as an intended successor to NAFTA, had some megaregulatory aspects but these owed much more to inheritance than to grand intent.

The politico-economic demand for TPP's model of megaregulation is driven by large corporations pressuring governments to improve the alignment of regulatory practices in ways expected to help their profitability. They seek a generalized freedom to operate and trade across numerous countries, asset security, and measures to facilitate value-chain production, trade in services and digital markets, and related investment, intellectual property rights creation and extension, as well as unencumbered data flows.<sup>11</sup> Megaregulation seeks to provide these benefits through disciplines on the parties' governments, encompassing both core substantive rules for liberalized market ordering and procedural requirements and principles for regulatory decision-making and administration. Particular corporations and their owners (including shareholders), and some particular industries or sectors, have been able to anticipate large gains from particular provisions or liberalizations. Some likely losers from particular provisions—including some farmers, workers, small businesses, and internationally non-competitive industries—have also been able to foresee damage they will suffer. At a wider scale, however, calculating the economic effects of megaregulatory agreements is extremely difficult.<sup>12</sup> The prevailing economic models capture the effects of tariff reductions, and deal with regulatory changes as having effects approximable (with qualifications) to tariff changes. The most reliable figures generally relate to trade in goods. Ex ante estimates of effects on transborder flows of services (including services fused to goods), or of investment, are highly speculative. Very little is known about effects on data flows or valuing these. Assessing effects over time of institutional reforms and of administrative procedures for transparency, participation, reason giving, and review is a very inexact enterprise. The in-country distribution of economic impacts is also poorly understood. Confident prognostications about the likely economic impacts of future agreements circulate widely but must be viewed with severe circumspection. Nonetheless, it appears that at the scale of countries, the measurable overall net gains from TPP in most cases are not enormous—indeed, they may often be quite slight.

Given this background, it is unsurprising that some key motivations for TPP—and the arguments for TPP that had the most traction in the last years of the Obama administration—were geopolitical.<sup>13</sup> The rise of China, and the diffusion of significant economic momentum and power beyond the G7, had begun to unsettle the dominance of North Atlantic-led patterns of authority, legitimacy, and ideas. The Obama administration and several of the Asian and Oceanic negotiating states broadly shared a geopolitical interest in enmeshing the United States in countering, balancing, or blending China's influence in Asia and the Pacific, using the framework of treaty commitment, but focused on economic integration and regulatory alignment rather than

<sup>10</sup> Pasha L Hsieh, "The RCEP, New Asian Regionalism and the Global South" (2017) IILJ Working Paper 2017/4 (MegaReg Series) <https://perma.cc/7F5D-83VV>.

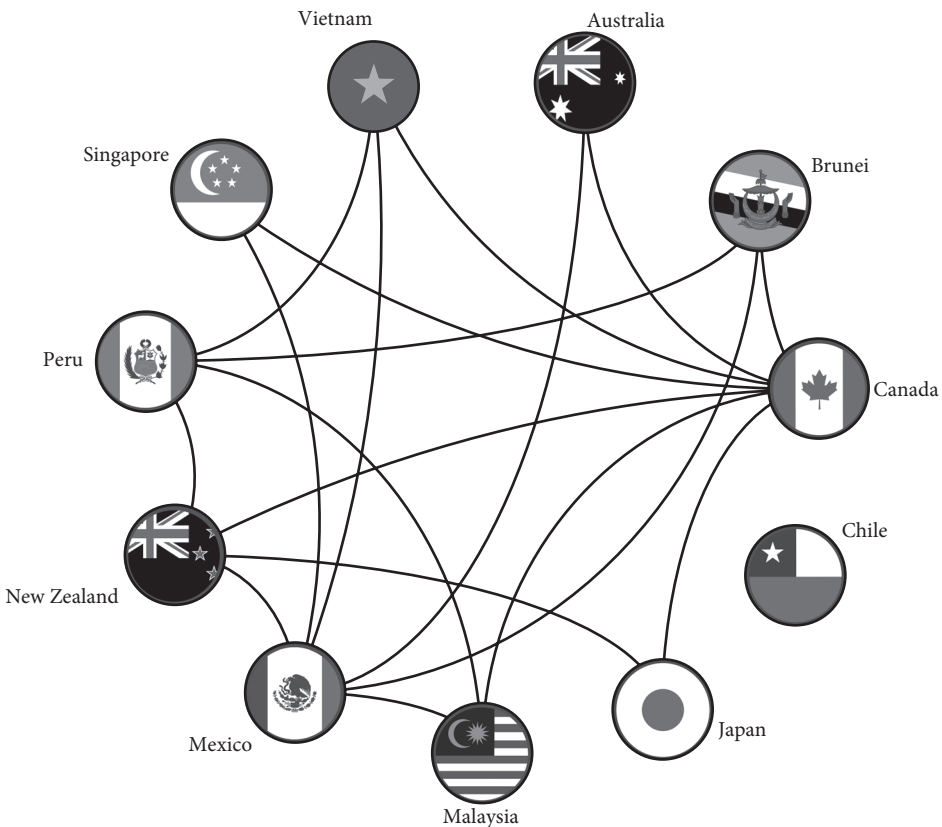
<sup>11</sup> Dan Ciuriak, "Generalized Freedom to Operate" (2016) IILJ Megareg Forum Paper 2016/3.

<sup>12</sup> Atsushi Sunami and others, "Japan: Leveraging National Regulatory Reform and the Economic Modeling of Trade Agreements," ch. 20 in this volume.

<sup>13</sup> David M. Malone, "The Uncertain Geo-Strategic Outlook for the US in Asia: The Pivot, the Re-Balance, TPP, and Now What?" ch. 3 in this volume.

deepened military ties. Assertion of the value of the agreement as part of a geopolitical strategy was essential to Japanese parliamentary and wider support of TPP12, because foreign policy interests (primarily interests in good relations with the United States) were invoked to aid in overcoming domestic obstacles to liberalization (such as strong resistance from farm groups and other traditionally protected interests).<sup>14</sup>

The abrupt shifts in aspects of the substance and style of US foreign economic and security policy from 2017 onward precipitated TPP11 but also a possible new geopolitical positioning. Japan's championing of TPP11 indicates that the role of geopolitics in Japanese trade policy has moved beyond reaction to US pressure for liberalization. In the proactive use of economic statecraft, Japan seeks to deepen regional integration in East Asia to its benefit and balance against China by strategically exploiting the variable geometry of TPP11, RCEP, and the trilateral summits with China and Korea. TPP11 increases connections (shown in Figure 1.1) that may aid the participating countries in managing their relations with the United States and, particularly for the Asian and Oceanic members, may be important in their maneuvering between the large forcefields of the United States and China.



**Figure 1.1** New economic treaty relations between TPP11 members that were added by TPP11

Source: Based on Nick Phillips, *Preexisting Economic Treaty Relations Among TPP11 Members*, NYU IILJ MegaReg (Mar. 15, 2019), available at [iilj.org/megareg](http://iilj.org/megareg)

<sup>14</sup> Christina L. Davis, "Japan: Interest Group Politics, Foreign Policy Linkages, and TPP," ch. 26 in this volume.

Pursuit of some military and security projects in parallel to TPP has thus far not been viable for Japan given strong hesitancy over any Japanese deployments abroad, but it was part of US strategy. Indeed, TPP was not the right constellation for some key security initiatives. For example, India has been more attracted to “variable geometry” defense and foreign policy cooperation with countries such as Japan, the USA, and Australia, as part of the “Quad” or otherwise, than to binding and intrusive trade agreements.

TPP under US leadership can readily be understood as an ordering project. TPP’s megaregulatory program—largely intact in CPTPP—is a model for internal economic ordering consciously erected in contradistinction with China’s strongly state-based capitalism. TPP promotes a particular US-inspired conception of the regulatory state that embraces anti-corruption, competitive bidding for government procurement, SOEs’ adherence to market principles and pressures, rationalized regulatory processes, some transparency and due process, and untrammelled commercial data flows across borders with little state interference. Some provisions in TPP are antithetical to current directions of China’s economy and preferences for international ordering, which rely heavily on very big SOEs and government-directed investment. Chinese political elites struggled in the 1990s and 2000s over what ideal model China should to aspire to. Influential supporters in China of liberal reforms initially envisaged TPP might create conditions—similar to China’s accession to the WTO—for once again “making use of ‘opening’ to force ‘reform.’”<sup>15</sup> This view was eclipsed, however, by increasingly strong assertion of, and confidence in, the success of China’s own development strategy, of which large SOEs are an integral part. China’s framing from 2013 of the Belt and Road Initiative (BRI) inaugurated a new phase of China-led ordering, organizing connectivity and flows not through TPP-style regulatory alignment but through physical infrastructure, often financed by debt incurred by the borrowing country or its entities, with an overlay also of digital infrastructure and connectivity enabled by Chinese companies.

Ordering projects provoke resistance, and counter-projects.<sup>16</sup> Some governments or legislatures steer their state away from joining big ordering projects in which the dominance of the leading state or the risks of overindebtedness or dependence or economic disruption or even long term forces for regime change are calculated to exceed the gains from joining. This volume discusses policy choices made in several states that have (at least initially) stayed outside megaregulatory ordering—China and ultimately the United States, but also Brazil, India, Indonesia, and Thailand are discussed *in extenso*.

A missing element of TPP’s ordering project—one that would notionally have been compatible with it, but has not been pursued so far—would be the purposive effort to achieve some form of shared regional-type identity across the sprawling TPP space. As this space is not yet a region, it might perhaps be dubbed, in what is at most a barely embryonic form, a “proto-region” with vast geographic scope encompassing extremely heterogeneous and non-contiguous states. Efforts to build such a region and to generate shared aspirations and identity within it can be termed megaregionalism. In a strong version, such a project might involve large scale student and cultural exchanges, facilitation of movement of persons including for business and tourism, and symbolic forms of identity promotion tending to convey some sense of a community of shared fate. That the prospects of such an enterprise

<sup>15</sup> Jing Tao, “TPP and China: A Tale of Two Economic Orderings?” ch. 4 in this volume.

<sup>16</sup> Priya Chacko and Kanishka Jayasuriya, “A Capitalising Foreign Policy: Regulatory Geographies and Transnationalised State Projects” (2018) 24 *Eur J Intl Rel* 82–105.

being pursued—let alone having a notable impact—are so dim, is an indication that TPP as megaregulation is unlikely to move beyond economic flows and connectedness to even the most modest level of proto-megaregionalism. For some other large-region economic integration projects—including the African Continental Free Trade Area—an element of megaregionalism has been one of the drivers, and potentially appeals to shared histories (including of colonialism and decolonization) and to a shared political project, in ways that TPP cannot.

## II. Contesting Megaregulation: Distribution, Inequality, and Development

Contestation, whether reformist, rejectionist, or revolutionist, has marched with (and against) international trade agreements throughout their lengthy history. Many of the objections to the modern megaregulatory projects, particularly TPP and TTIP, have echoed longstanding opposition to governments committing to economic opening and liberalized market ordering as means of engaging with globalization. Other objections relate to newer features specific to the contemporary megaregulatory agenda. These megaregional treaty negotiations were conducted by government representatives on the basis of drafts that were largely kept secret from publics and from legislatures, although in many cases (certainly in the United States) details were made available to interested corporations and their lobbyists as part of the government's consultation processes.

This secrecy of text and process spurred suspicion and hostility in many of the negotiating democracies. In parallel, the secrecy had its intended effect of blunting some of the contestatory mobilization by special interest groups (including non-governmental organizations (NGOs)) who lacked details of any of the proposed provisions, although on some contentious topics (particularly in the United States, labor and environment) some major NGOs and labor representatives were consulted. In Europe, the large mobilization against TTIP was precipitated by the system of investor–state arbitral tribunals, which the EU consequently abandoned mid-stream in favor of a proposed investment court. In relation to TPP, local opposition crystallized on a diverse assortment of specific issues (such as protecting tobacco regulation in Australia, or agricultural regulation in Japan), but overall opposition to the entire pro-capital project of megaregulation, while appreciable, never in this period attained the mass engagement that characterized, for example, the Seattle protests against the WTO in 1999.

Once negotiations were completed and the whole TPP text became publicly available in early 2016, by far the most massive and intense opposition mobilized in the United States. The critique from the left, led politically by Bernie Sanders in his ultimately unsuccessful campaign to win the Democratic nomination in 2015–16, emphasized inequalitarian intra-US distributional outcomes and injustices of US participation in international trade regimes, linked to perceptions that the policy process and most of the benefits were captured by large corporate economic interests. From the right, Donald Trump articulated fears of erosion of national and sub-national sovereignty and policy autonomy, seemingly outsourced to transnational authorities perceived as shadowy and contrary to existing national constitutional roles. Both sides converged on dissatisfaction with losses of US manufacturing jobs associated with past trade liberalization, which had strong effects in



specific localities and was measurable particularly from China's entry into the WTO from 2000. The Trump campaign pointed blame also at the WTO, NAFTA, and bilateral PTAs, and broadly associated negative imbalances in trade in goods with injustice to the United States and US workers. The elites who produced or supported these trade agreement initiatives had come to be viewed with suspicion, particularly after the 2007–2008 financial crisis, and democratic populism thrived by making them a target. This is thought to have been nurtured by displacement and a sense of disempowerment or decline, associated at least in public perception with the rapidity of changes in technology and economy, as well as flows of people, data, raw materials, goods, and services, and the explicit policies associated with globalization. This period has thus been characterized, in the North Atlantic and in some other areas, by high political and economic volatility.

Once in office, President Trump and a carousel of advisers were able to turn some of their protectionist or populist views into US policy, including insisting on renegotiation of NAFTA, imposition in 2018 of tariffs on aluminum and steel and on many goods from China, intensified national security controls on incoming investment and on the domestic activities of Chinese technology firms, and pressure on and in the WTO. Not all of this was new; and some actions, particularly with regard to investment and market access relations with China, had strong bi-partisan support. Nonetheless, the US turn away from multilateral and megaregulatory endeavors, while popular, was not perceived by most of the US politico-economic elite as being consistent with US interests. The assertive “America First” stance had the general result that long-standing US support for WTO rules—and certainly support for their extension in megaregional agreements—was upended. “America First” also tended to increase tensions with US allies and weaken the US option for third countries, prompting them to make strategic responses or navigate different courses. The EU, for instance, confronted also by Brexit, responded by accelerating its agreement-making efforts with others.

The focus of the Trump administration on trade in manufactured and agricultural goods was not out of line with imagery used by many politicians in TPP countries, and much bargaining during the negotiations was in traditional trade-diplomacy style focused on offensive and defensive interests of each country's particular industries with regard to market access, related both to tariff reductions and to non-tariff barriers. Although not inapposite, this imagery left aside what the trade negotiations had assumed was a major driver for TPP, namely the transformation that had already occurred in much manufacturing to supply-chain trade, as part of what Richard Baldwin has called the “second unbundling.” Many goods are not simply manufactured in X and exported to be sold in Y. They are instead the outcome of highly dispersed value-chain production and intra-industry trade (components and part-finished articles going back and forward across borders repeatedly as the final product is compiled and assembled) that relies on services inputs (that is, not just trade in goods) and in which owners of intellectual property and leading firms in the chain often capture most of the generated value. This shift was enabled by newer infrastructures for large-scale, tightly managed logistical operations (electronically and through new ways of managing shipping and land transportation, for example) and the technological revolution providing cheap, reliable, and near-instant global communication, rapid knowledge transfer, and more widely practiced professional travel. Rapid advances in information and communications technologies also facilitated new patterns of global financial intermediation (and structures) and investment flows as well as the growth in traded services

and the booming digital economy.<sup>17</sup> TPP addresses all of this—and the bodies of national government regulation which bear on it—but the contestatory political rhetoric in the United States mainly evoked a much older style of production, trade, and value creation and distribution.

Objections to trade and megaregulatory agreements from left or social-democratic perspectives in many cases are critiques of “disembedded globalization.”<sup>18</sup> From 1945 the disruption caused to some families, communities and economic sectors by economic liberalization in the form of market-opening to international competition was in the North Atlantic countries backstopped by national matrices of social protection structures, such as universal welfare states, collective labor bargaining, and large state employers. Trade-burdening economic distortions through subsidies, quotas, and regulations also remained part of the accepted toolkit to shield select domestic groups from liberalization-induced dislocations.

By the 1980s the national bargains providing those distributional elements were being eroded. In high-income countries, in post-communist countries which privatized rapidly, and in many developing countries which privatized assets and opened extractive industries to foreign ownership or national agricultural and consumer markets to imports, small slivers of national society and transnational capital and mobile elites were seen as capturing nearly all the benefits, and global free trade and investor rights agreements came to be associated with the acute rise in inequality and the eroding of national regulatory autonomy. For those with a job or hoping to get one, employment prospects may be threatened by plant relocation, price undercutting from lower-wage economies, new technologies, and robotics and artificial intelligence. Local factors in different societies inflect the forms of dissatisfaction, and its targets. Transmission of contra-globalization sentiments into political positions varies in different countries, although suspicion of migration and hostility to migrants is a widespread manifestation. The political mobilization of these sentiments overlaps with rising nationalism and heightened tensions among major powers. Some of the resulting policy is likely to be far removed from the material interests of the voters or the publics whose sentiments it addresses.

Part II of the book examines the foundations of some of the major critiques of megaregulation as currently pursued, and charts some possible new directions. The critiques include intensification of inequality through uneven distribution between categories of employees and other beneficiaries of economic activity, notably investors, lack of regard for the welfare and incomes of both home-country and distant-country workers, rapid

<sup>17</sup> The growth of these flows has accelerated beyond the capacity of such well-funded and often well-organized actors as the US and the EU to monitor and control the transactions involved. The difficulty of monitoring nationally and internationally banking transactions affected by national and international sanctions has illustrated the extent to which even the largest national and regional actors are perceived to have “lost control” of international economic transactions, reduced very often to imposing not always convincing fines and other forms or retribution after the act (although EU and US regulators increasingly assess hefty penalties against each other’s economic actors in certain sectors, including banking and information technologies, seen by some as necessary and by others as disguised protectionism).

<sup>18</sup> For the original idea of the post-War economic protecting an “embedded liberalism” on the national plane, see John G. Ruggie, “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order” (1982) 36 *Intl Org* 379. On the idea of an increasingly disembedded liberalism governing global markets, see Rawi Abdelal and John G. Ruggie, “The Principles of Embedded Liberalism: Social Legitimacy in Global Capitalism” in Davis Moss and John Cisterno (eds.), *New Perspectives on Regulation* (The Tobin Project 2009) 153 (“What is important is recognizing that our current era of globalization and its neoliberal paradigm have reached the point themselves of suffering from a profound crisis of legitimacy. If that crisis is not resolved by deft policymaking in the United States and around the world, globalization is likely to be undone by national policy reactions driven by societies that have grown increasingly skeptical of newly disembedded global markets”).

disappearance through automation and other processes of employment from broad swathes of professional occupations that until recently swelled the employment rolls, privileging of capital over other factors of economic activity, and in many places declining support for and viability of smaller businesses. Lack of a societal-scale development agenda within the megaregulatory program correlates with a weakening (other than in Davos pieties) of wider “international development” agendas, evident for example in declining official development assistance budgets, displacement under these budgets of development by humanitarian spending, and the instrumentalization of industrialized country aid programs to commercial objectives. Gender impacts of megaregulation and trade and capital flows liberalization have become increasingly salient. These include activism by women’s groups protesting at RCEP and other negotiations, highlighting concerns about low wages and poor labor and family-protection conditions in sectors with predominantly female workforces.

The broadened substantive subject matter of megaregulatory programs reinforces the need to assess, and think beyond, the limitations of expert rule in global economic governance. The collapse of support for TPP in the United States as well as strong misgivings about the management of economic globalization there and elsewhere are linked to a crisis of trust in experts—the officials, lawyers, and analysts who facilitate the workings of globalization. Similar distrust was manifest in other countries, although there are large variations in the political, cultural, and socio-demographic contexts in and through which different governments engage the regulation of economic globalization. A forward-looking quest is to find or create deliberative spaces for engaged transnational conversation between experts and different publics about the normative ambitions of economic globalization, and how trade and investment can help and hurt them.<sup>19</sup>

Among the critical questions for contemporary globalization is the management and distribution of income, rents, and profits in the face of stark global, national, and local inequalities. TPP’s model of megaregulation includes what amounts to regulation that expands market opportunities and asset protections—owners of capital are strengthened in their ability to freely organize and allocate their resources, and to extract and keep rents.<sup>20</sup> In contrast, TPP does nothing to regulate the relative share of gains that accrues to labor rather than capital. The overall assessment that TPP privileges capital animates some neo-Marxist and class-based critiques. One such account contrasts the usefulness of TPP to members of the “transnational capitalist class” with its disutility to the “global marginal and oppressed classes,” and in doing so challenges the obfuscating analytical framing in terms of states, inter-state negotiations, and national economies which dominates trade and international legal debates.<sup>21</sup> Coalitions of capital owners with strong influence on their respective governments have been able to exert disproportionate influence over the institutions that seek to steer the course of globalization.

Inter-country inequalities are made part of megaregulatory negotiations through the bargaining among different states, but the resulting bargains hardly address in-country distributional issues. Lifelong economic prospects are still vastly different based on ranges of countries in which people are born; but as between rising middle income and high income

<sup>19</sup> Annelise Riles, “The Politics of Expertise in Transnational Economic Governance: Breaking the Cycle,” ch. 5 in this volume.

<sup>20</sup> Dan Ciuriak, “A New Name for Modern Trade Deals: Asset Value Protection Agreements” in Rohinton Medhora (ed.), *New Thinking on Innovation* (Centre for International Governance Innovation 2017) 121–25.

<sup>21</sup> B. S. Chimni, “Power and Inequality in Megaregulation: The TPP Model,” ch. 6 in this volume.

countries these differences have become less and less stark with the inter-generational elevation of hundreds of millions of people out of poverty.

In-country inequalities have not usually been very much of a focus in trade and investment agreements. An early exception among PTAs in the early 1990s was the late incorporation of an agreement on labor relations in the North American Free Trade Agreement (NAFTA). Pressured by influential parts of the coalition which carried him to power, newly elected President Clinton negotiated further tack-on agreements regarding labor and the environment with Mexico and Canada. The lengthy history of labor provisions in US trade agreements has been one of modest concessions by the US trade elite to try to attract at least tepid acceptance from leading US trade unions (which are today much less powerful than they used to be, although a potent force still in several electorally critical states). The US Trade Representative also pursued this strategy in TPP negotiations and leveraged some promised and potentially significant reforms in Brunei, Malaysia, and Vietnam.<sup>22</sup>

The TPP labor chapter is predominantly driven by the domestic politics in rich countries to temper low-wage competition from TPP's poorer countries by requiring them to empower workers and their organizations. More direct levers, however, are policies to soften the impact of job dislocation and churn in generally high-income economies. For these workers, the fault line may lie more in slower or stagnant wage growth as capital owners receive a growing share of revenues. The deep transformation of economies entailed by the "second unbundling" calls for new development strategies, which trade policy elites have done little to develop, as for example in the case of Mexico.<sup>23</sup>

Environmental provisions in trade agreements have largely been weak. Even though the US-Peru trade agreement offered significant innovations as a result of focusing on deforestation, TPP reverted to a weaker model. Innovations on shark finning, fishing subsidies, illegal, unregulated, and unreported fishing, and wildlife conservation were widely seen as only moderately consequential. TPP11 suspended a TPP12 provision that had explicitly authorized countries to enforce the environmental laws of other parties (as the United States does to a limited extent with the Logan Act). TPP's environmental chapter does nothing to address climate change or ocean acidification, even though it clearly makes links between trade governance and the environment.<sup>24</sup>

TPP's trade facilitation commitments can be regarded as a missed opportunity to further the development objectives of less affluent countries and expand business opportunities for less well-connected traders.<sup>25</sup> Each of the following facilitation measures encouraged by TPP is expected to produce significant trade-competitiveness and anti-corruption gains at modest cost and with few downsides: simplification and transparency of customs administration in the interests of traders (especially for multi-country supply chains); improvements in design and operation of ports; and provisions on regulation of stevedoring, transport, and other trade logistics. These reforms do very little, however, to actively include new economic actors into flows of global commerce, and are instead likely to benefit

<sup>22</sup> Alvaro Santos, "The Lessons of TPP and the Future of Labor Chapters in Trade Agreements," ch. 7 in this volume.

<sup>23</sup> Alejandro Rodiles, "After TPP is Before TPP: Mexican Politics for Economic Globalization and the Lost Chance for Reflection," ch. 28 in this volume.

<sup>24</sup> Errol Meidinger, "TPP and Environmental Regulation," ch. 8 in this volume.

<sup>25</sup> Antonia Eliason, "Customs Administration and Trade Facilitation in TPP: The Missing Development Agenda," ch. 9 in this volume.

those firms that already make use of these infrastructures. But for many countries all of these TPP items need to be pursued as part of a wider national development agenda, requiring technical assistance, capacity building, and in some cases financial assistance. The WTO has proven a more sympathetic venue for such developmentally sensitive priorities in its 2013 Bali agreement than has TPP.

### III. Transnational Business: Global Value Chains and the Digital Economy

The long-heralded development of global value chains (GVCs) that unbundle goods and service production and distribution among multiple jurisdictions<sup>26</sup> have changed the structure of international trade, industrial organization and, consequently, the substantive demands for trade agreements to act in effect as “production sharing agreements” which encourage trade not to sell but to “make things.”<sup>27</sup> GVC-linked trade “denationalizes” comparative advantage since “the competitiveness of GVC-produced goods depends on a multinational bundle of labour, capital and technology.”<sup>28</sup> International production benefits from decreases in the costs abroad and from coordinating facilities across states. Relevant treaty-based disciplines for these goals include tariffs on intermediate goods, telecommunications, transportation, customs clearance, short-term visits by key personnel, investment and intellectual property protection.<sup>29</sup> Empirical evidence suggests that the effects of these types of obligations on supply chain trade can be quite large.<sup>30</sup> This development in global production may also alter the former discriminatory logic of trade agreements, since new trade agreements are mainly about “underpinning international production networks” and not about creating or diverting trade.<sup>31</sup> Firms’ incentives to promote discriminatory policies as part of trade agreements may abate, because they might hurt their own value chains that lie partly outside the agreement’s reach. To the extent that some value chains lie completely within the purview of an agreement (as may be true for TPP which combines high-technology with low-cost jurisdictions) the discriminatory logic may however still persist and is reflected in restrictive bargains regarding rules of origin. Transnational business has been pushing for reforms to regulatory processes of states and among them to take into account these technological changes.

Whereas urgings from transnational business for treaty-based promotion of facilitative regulatory approaches have been quite focused, much less has been done to update regulatory approaches in other ways, and in this respect TPP does not transcend 20th century approaches. The pace of technological change and the complexity of sourcing and designs in modern complex products mean that *ex ante* product regulation and traditional official inspection systems may have to be superseded by meta-regulation (principle-based)

<sup>26</sup> Gary Gereffi, John Humphrey, and Timothy Sturgeon, “The Governance of Global Value Chains” (2005) 12 *Rev Intl Pol Econ* 78–104.

<sup>27</sup> Richard Baldwin, *Multilateralising 21st Century Regionalism*, OECD Global Forum on Trade (Feb. 2014) 5.

<sup>28</sup> *ibid* 17 (“In its most direct form, 21st century trade involves high-tech firms from high-wage nations that combine their managerial, marketing and technical know-how with low-wage labour in developing countries”).

<sup>29</sup> *ibid* 9–10.

<sup>30</sup> Gianluca Orefice and Nadia Rocha, “Deep Integration and Production Networks: An Empirical Analysis” (2014) *The World Economy* 106–36 (finding that signing deeper agreements increases production networks trade between member countries by almost 12 percentage points).

<sup>31</sup> *ibid*.

combined with incident reporting obligations, continuous adaptation and ex post supervision of regulations, and new levels of trans-state regulatory cooperation that have barely been achieved anywhere.<sup>32</sup> The track record of success on such matters even in not sharply disparate dyads such as US–Canada or US–EU regulatory cooperation has been modest despite years of effort, as national regulatory and political constituencies in powerful countries have tended to be quite unbending and to cherish their belief in the superiority of their own standards and practices.<sup>33</sup>

The unified label “global value chains” masks a myriad of different business structures and legal and regulatory arrangements. While global production of goods creates demand for some forms of regulatory facilitation, other demands arise from substantially transnationalized services and financial flows, exemplified by the several different structures utilized by different major credit cards and other payment systems.<sup>34</sup> To a large extent these can function through private master agreements and chains of contracts, coupled with private industry standards and reliable national law enforcement of contracts and intellectual property. However, effective consumer protection, anti-money laundering measures, and antitrust regulation depend on inter-state regulatory coordination. Transparency and practices of good administration in government can facilitate rationalization and in some technical areas a degree of regulatory convergence without impairment of wider societal interests.

Governments urging support for megaregulatory trade agreements like TPP11 characteristically proclaim their value and appeal to small and medium-sized enterprises (SMEs). Outwardly, the wide availability of Internet-based sales of goods and global payment system creates the preconditions for SMEs to be able to benefit from the promises of megaregulation such as improved logistics, tariff cuts, and reductions in regulatory red tape in different countries. In reality, SMEs in the main make little direct use of trade agreements, or of government advisory services designed to assist them, because of unfamiliarity with them but also because of numerous remaining obstacles and compliance costs that can only be overcome at scale.<sup>35</sup> By contrast, multi-national corporations (MNCs) benefit hugely from the larger freedom to operate that megaregionals are designed to provide for them, and from appreciation in their valuation based on the present value of future returns from long-term economic agreements.

That multi-national corporations stand to gain disproportionately from TPP’s style of megaregulatory ordering is in part the natural outcome of a negotiation process, which privileges access to trade policy officials for powerful lobbying groups and delays wider public engagement, if any occurs, to a time when most substantive decisions are already made.<sup>36</sup> Using the case of US corporate lobbying on TPP, it is possible to document the rich and versatile array of political activities undertaken by corporate America during the Obama period in support of the agreement, and the broad set of topics and interests

<sup>32</sup> Bernard Hoekman and Charles F. Sabel, “In a World of Value Chains: What Space for Regulatory Coherence and Cooperation in Trade Agreements?” ch. 10 in this volume.

<sup>33</sup> *ibid.*; Michael Livermore and Jason Schwartz, “Regulating Regulation: Impact Assessment and Trade,” ch. 21 in this volume.

<sup>34</sup> Donald Robertson, “The Regulation of Firms in Globally Intertwined Markets: the Case of Payment Systems,” ch. 11 in this volume.

<sup>35</sup> Dan Ciuriak, “TPP’s Business Asymmetries: Megaregulation and the Conditions of Competition between MNCs and SMEs,” ch. 12 in this volume.

<sup>36</sup> Robert Gulotty, “Structuring Participation: Public Comments and the Dynamics of US Trade Negotiations,” ch. 27 in this volume.

discussed by these large firms and associations.<sup>37</sup> Interests in sales, sourcing, data flows, and regulation all correlated with corporate support for TPP. This contradicts a skeptical view that trade agreements serve only a small, select set of the large multinationals that are focused on a narrow set of interests, primarily to erode state sovereignty. Instead, support for these agreements was evident among highly heterogeneous firms and trade groups, albeit the support was wide rather than intense. Yet, these actors had far more influence over the negotiations than did NGOs, labor representatives, and more diffuse social and economic interests, illustrating the thesis of Downs and Benvenisti that the shift of political decisions from the domestic to the international level, and the corresponding increase in the relative power of the executive in relation to legislatures and courts, enables multinational business interests to exercise greater influence over government decisions.<sup>38</sup>

The globalization of the knowledge economy through the second unbundling has been made possible by information and communication technologies that have also spawned the digital economy. For this rapidly growing area of economic activity, TPP established a new template, which the Obama administration also began to advocate in the WTO and which the Trump administration was largely successful in bringing into the USMCA that resulted from the renegotiation of NAFTA. This template was kept intact in TPP11—its major active support was from US “Internet economy” companies and their affiliates or business partners in many TPP countries. Businesses engaged in the construction and governance of global value chains (digitally facilitated production), and in the sale of (physical) goods and services via online platforms (electronic commerce) similarly cheered it on. TPP characterized impediments to these activities as “barriers to digital trade” and presses in varying ways for restrictions on states’ ability to regulate this space. In particular, it restricts limitations on the free flow of data and data/server-localization requirements—challenging China’s (and in the future, India’s) insistence on data localization and government imposed limits on transnational flows of data and information. Whether the full implications of this act of law-making have been adequately assessed in each of the participating countries, and whether it was far-sighted or precipitous to lock in such important rules in a difficult-to-amend treaty at a relatively early stage in the growth of the global digital economy, are fundamental questions.<sup>39</sup> TPP does not enunciate human rights of access to information or control of personal information and privacy. Its provisions on transnational consumer protection and cybersecurity are also generally weak. The quest for global consensus on rules for the digital economy will continue, but a mix of intra-company, inter-company, multi-stakeholder, and currently irreconcilable national regulations seems likely to prevail, at least for some time.<sup>40</sup>

#### IV. Megaregulation, the Regulatory State, and the Market

A major aim of several major powers (especially the United States until 2016) in the most far-reaching megaregulatory treaties was to define for states an approach to their regulation

<sup>37</sup> Iain Osgood, “Sales, Sourcing, or Regulation? Evidence from TPP on What Drives Corporate Support for Trade.” ch. 13 in this volume.

<sup>38</sup> Eyal Benvenisti and George Downs, “The Emperor’s New Clothes, Between Fragmentation and Democracy” (2007) 60 *Stan L Rev* 595.

<sup>39</sup> Dan Ciuriak, *Digital Trade: Is Data Treaty-Ready?* (2018) CIGI Paper No. 162.

<sup>40</sup> Thomas Streinz, “Digital Megaregulation Uncontested? TPP’s Model for the Global Digital Economy,” ch. 14 in this volume.

of markets. In TPP, this megaregulatory program included detailed substantive and process rules in areas such as: intellectual property; some looser principles on techniques of regulation such as regulatory impact assessments; a set of important general norms about government procurement; competition (rather modest provisions); commercial market-principles for SOEs, and anti-corruption policy and measures.

Knowledge and innovation are at the center of economic globalization. Capital is in large part stored in intangibles. Research and development, software, designs, and brands are major sources of value creation. The ease with which they can move across jurisdictions and be combined with other factors of production in distant locations is a major explanation of the second unbundling. This technological reality has created new, and amplified existing, legal methods to protect such capital. At the same time, the potential of (re-)distribution by relaxing norms of knowledge and technology protection has marked international law in a variety of fields. TPP takes pro-IP rightsholder stances on most issues, with qualifications, and in several respects TPP12 in particular prescribed obligations going well beyond the WTO's TRIPS agreement and previous FTA practice. This in turn means TPP is likely to have significant effects on third countries and businesses or innovators in them, partly due to the intangible and non-localized nature of its subject matter and the imperfect match between "trade patterns in information products, the structures of creative communities, and cultural relationships" and the neat division of insiders and outsiders which treaty law presupposes.<sup>41</sup>

The incongruity between standardized megaregulatory IP commitments and diverse national constellations for the production and distribution of medicines is on full display in a case study on how Thai public health officials, notwithstanding their country not being involved in the negotiations, still reacted strongly to TPP's megaregulatory approach in this area.<sup>42</sup> Officials were concerned that Thailand's Government Pharmaceutical Organization (GPO), which produces and imports generic medicines for national use, would not be able to continue with business as usual if Thailand joined TPP. This was due not only to some restrictions in the IP chapter but also to the controversial chapter for the regulation of SOEs, which might have applied to the GPO. Even without Thailand's formal participation in the treaty regime and negotiations, TPP's script for the access to medicines affected the domestic policy discourse.

Provisions favoring access to information, notice-and-comment, participation, reasoning, or review mechanisms in national regulation recur throughout TPP. The close relationship between megaregulation and (global) administrative law is part of the power and technique of megaregulation and has become one of its pillars. These procedures enable transnational private actors, and especially business firms, to learn about a country's existing and proposed regulations and administration, and use the procedures to vindicate their substantive rights under the treaty, as well to as influence administrative decision-makers to adopt measures favoring their interests. TPP's procedural requirements build on but go beyond the substantial administrative law disciplines in the WTO agreements, and subsequent FTAs. Among the objectives is to counter the advantages of domestic business "insiders" in informally influencing administrators' decisions. Regulators' compliance with both substantive and procedural requirements can be sought from domestic courts,

<sup>41</sup> Rochelle Cooper Dreyfuss, "Harmonization: Top Down, Bottom Up—and Now Sideways? The Impact of the IP Provisions of Megaregional Agreements on Third Party States," ch. 15 in this volume.

<sup>42</sup> Kiyoshi Adachi, "Thailand and Public Health: Looking Beyond the Intellectual Property Chapter of the TPP," ch. 16 in this volume.



through intergovernmental pressures, and through investor–state dispute settlement. Thus, TPP’s procedural provisions mobilize private actors to enforce the parties’ treaty obligations, thus serving as a mechanism of transnational political control.<sup>43</sup> Moreover, multinational firms based in the United States and other non-party countries will be able to take advantage of these procedures, either through subsidiaries in party countries or, depending on the wording of TPP’s various procedural provisions, in their own right. TPP’s model of proceduralized megaregulation is marked by significant variation in the clarity and strength of procedural obligations as between different regulatory domains. Strict procedural obligations in the area of medicines and financial services, for example, stand in contrast to those with largely hortatory and perhaps even deliberately inadequate provisions in areas of labor and the environment.

Among the most fundamentally important chapters of TPP in terms of global rivalries about state-market relations is that on SOEs. TPP11 (like TPP12) restricts government provision of support for SOEs on other than commercial terms, and places restrictions on non-commercially justifiable decisions of SOEs affecting foreign businesses or competitors. These provisions move far beyond the existing baseline of the WTO and beyond previous free trade agreements, while nonetheless limiting the set of SOEs and the government conduct these provisions reach through the use of scope restrictions. In addition to the core commitments to nudge SOEs toward private-firm behavior, TPP includes further regulatory requirements for these types of companies, such as being subject to national court jurisdiction on the same terms as domestic businesses, equal treatment from regulators, and commitment to abstain from delegating the exercise of public powers to SOEs.<sup>44</sup> Parties furthermore agree to notify each other regularly about the evolving role of SOEs in their economies.

In part due to long-standing US reticence to commit its own competition law and policy to far-reaching international legal obligations, the competition law provisions of TPP are largely restricted to requiring each state to have such law and to prohibit hard-core cartels, plus important procedural protections for business entities subject to competition proceedings. But a blend of network governance and firmer institutions built into treaties had seemed to be a likely path of megaregulation in an area that has generally been marked by deadlock. On this view, TPP failed to find a way forward, because its initial project was too ambitious in light of the diversity of its members. More flexible institutional designs among coalitions of like-minded states—not necessarily bound together by the formal strictures of a treaty—may hold more promise.<sup>45</sup>

TPP11 (largely identical in this regard to TPP12) requires states parties to liberalize government procurement. TPP’s government procurement chapter largely has the effect of extending the WTO government procurement agreement to states which had not otherwise been willing to accept it but could be leveraged to do so, in effect, through TPP’s market access, strategic, and symbolic attractions. These provisions are one of the obstacles raised within Indonesia in debates about joining TPP. Some argue that Indonesia should use international economic agreements such as TPP to help pave the way toward internal reforms, as the Abe administration sought to do in Japan. But the balance and distribution of costs

<sup>43</sup> Paul Mertenskötter and Richard B. Stewart, “Remote Control: TPP’s Administrative Law Requirements as Megaregulation,” ch. 17 in this volume.

<sup>44</sup> Daniel Francis, “Choices and Consequences: Internationalizing Competition Policy After TPP” ch. 18 in this volume.

<sup>45</sup> *ibid.*

and benefits from any such reforms are vigorously contested in Indonesia.<sup>46</sup> Moving government procurement policy away from current preoccupations with social benefit (often vulnerable to corruption) and toward openness to international competition might lead to more efficient allocations of resources, but such a shift might lead to local companies gaining little benefit from procurement contracts, and overall it might well prove socially and politically costly.

Indonesia and Thailand each have highly specific sets of factors to weigh.<sup>47</sup> They each may make some gains, but also feel some pressures, from their third-party status relative to CPTPP. Joining such agreements after finalization entails also the disadvantage of having a weaker bargaining position in contrast to original members. By contrast, Japan joined TPP negotiations late, but was an original party to TPP12, and subsequently became the most important champion of the TPP11 project. TPP was key to the Abe administration's economic development program. Endorsing TPP's program of megaregulation was seen as a necessary prerequisite to reform "entrenched regulations" in traditionally protected sectors such as agriculture and medical services. While the direct economic gains from market access are modest for Japan in TPP11, in conditions of long-term economic stagnation or low growth, as Japan has faced, any significant gain is attractive, and the cumulative yearly return from purely intra-Japan regulatory reforms and liberalization are likely to be appreciable and durable, if very difficult to quantify in GDP terms.<sup>48</sup>

An abstract national (de-)regulatory approach that TPP seeks (with extensive provisions but modest force) to advance at a wholesale level, is that of regulatory impact assessment (calculation of costs and benefits of proposed or existing regulations for the regulator, the regulated, and the public). These assessments have become a central feature of US regulatory processes that Washington has sought to export through FTAs and pushed hard in negotiations of TPP and TTIP. But significant questions persist about how useful or exportable this approach is likely to be.<sup>49</sup>

A further innovation in international trade law and policy was the original TPP's attempt to curb use of currency manipulations (including devaluations) to gain trade advantages.<sup>50</sup> A side declaration would have required retrospective disclosure of central bank interventions in foreign exchange markets. This would potentially have enabled other states to scrutinize such measures for evidence they were intended to affect exchange rates, thus discouraging flagrant rate manipulation. The initiative was backed in practice by economic models intended to establish what the value of a currency should be, and supposed a norm in which deviations of more than 10% might spark scrutiny. But TPP12's experiment presented a set of problems, including inability to sift a multiplicity of proper reasons for central bank intervention from less admirable ones, and the enormous variations between countries in their economic and currency situations. Its future relevance may well lie in being the first to make this more formal link between trade concessions and exchange

<sup>46</sup> Joseph Koesnandi and Wahyuni Bahar, "How Ready Is Indonesia to Open Government Procurement à la TPP?," ch. 19 in this volume.

<sup>47</sup> *ibid*; see also Kiyoshi Adachi, "Thailand and Public Health: Looking Beyond the Intellectual Property Chapter of the TPP," ch. 16 in this volume.

<sup>48</sup> Sunami and others, "Japan: Leveraging National Regulatory Reform and the Economic Modeling of Trade Agreements," ch. 20 in this volume.

<sup>49</sup> Livermore and Schwartz, "Regulating Regulation: Impact Assessment and Trade," ch. 21 in this volume.

<sup>50</sup> Naoyuki Yoshino, Pornipum Chantapacdepong, and Matthias Helble, "Trade and Exchange Rates: The Joint Declaration of the Macroeconomic Policy Authorities of TPP Countries," ch. 22 in this volume.

rate policies and practices. Whether similar linkages will become a further staple of trade treaties remains to be seen.

## V. Megaregulatory Treaty Institutions

Whereas the substantive coverage of TPP is wide, its formal institutional structures are quite modest: an overarching inter-governmental TPP Commission, a large number of field-specific committees which consist primarily of governmental representatives that may or may not meet more than rarely, state-to-state dispute settlement on an ad hoc basis, and ad hoc investor–state arbitral tribunals. There is no secretariat with an enduring status and presence, no court or similar standing body, no parliamentary assembly of any sort, and only limited provisions on coordination with other institutions and forums or with existing international trade and investment law jurisprudence. The transformation of Europe was substantially shaped by the European Court of Justice and associated work of national courts, but TPP is much more dependent on inter-governmentalism.<sup>51</sup> This is not surprising: of the world’s largest countries by population few are ready to embrace compulsory jurisdiction of international courts or tribunals other than on the already hard-wired WTO model, the difficult-to-avoid Law of the Sea Convention, or the special remit of regional human rights courts which do not operate anywhere in Asia, the South Pacific area, or in the US–Canada sphere. Moreover, in a world already densely populated with relevant international economic institutions, avoiding propelling into the mix a new set based on closed-membership club-model principles reduces problems of pile-up and incompatibility of approaches. The capacities of the TPP Commission and TPP Committees for (non-judicial) review and to “nudge” participating states in economic-regulatory areas are potentially quite strong, although they are likely to be used much less for such purposes with the United States not participating. It is theoretically quite possible that TPP could spawn further frameworks for producing agreements on specific regulatory arrangements, such as mutual recognition of laboratory certifications or agreement on the equivalence of standards used by different countries, as the negotiating parties had envisaged for TTIP. However, negotiations in innumerable committees under existing free trade agreements have produced little regulatory alignment, let alone harmonization. Where strong regulatory cooperation exists, as for example in prudential supervision of banks or anti-money laundering efforts, it has been achieved through other structures including intergovernmental networks and coalitions led and leveraged by powerful countries, often without a treaty basis. Those forms of cooperation are likely to persist for some time.

TPP’s program of megaregulation was not generally designed to create (strategic) treaty conflict with the WTO. Exceptions to this proposition are the non-extension of benefits accruing from regulatory alignment to third parties, in tension with WTO most-favored nation obligations, and some conflicts with WTO rules on intellectual property.<sup>52</sup> The WTO Dispute Settlement Body is much more likely than the TPP institutions to play major legal-institutional roles in dispute settlement regarding the terms of economic globalization.<sup>53</sup>

<sup>51</sup> Robert Howse, “The Institutions of TPP11: Back to the Future?,” ch. 23 in this volume.

<sup>52</sup> Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP, Cambridge 2014).

<sup>53</sup> Donald McRae, “State-to-State Dispute Settlement in Megaregionals,” ch. 24 in this volume.

Key functions of the WTO operational system include containing unilateralism in trade adjudication and remedies, and supplying workable interpretations and new jurisprudence on contested and evolving issues in a unified way for all states. While similar functions could be envisaged for state–state dispute settlement mechanisms in FTAs and in megaregulatory agreements, in the case of TPP it seems more likely that its state-to-state dispute settlement provisions will initially receive little use unless disputes arise under the chapters concerning data flows, SOEs, labor, and the environment, and others for which WTO proceedings are not available. In regard to such matters, the new scope and scale of TPP12 would have been enough to potentially spawn a significant line of jurisprudence that might ultimately be referenced also in disputes in other agreements, but this is less likely with TPP11 absent some enlargement.

Considerable effort went into the crafting of TPP’s investment chapter and the negotiation of exceptions and possibilities of state opt-out. It continued the traditional and much-criticized arbitral model, but created scope for new weighting of public and investor interests, both through explicit textual provisions and by providing wide scope for tribunals to strike the desirable balance between the two in particular contexts. The somewhat heavy-handed Tobacco carve-out shows, however, that such re-balancing by itself does little to assuage the systemic concerns over tribunals’ (over)reach into states’ regulatory politics. The TPP12 provisions thus represented the state of the art on these issues, at least in the Asia-Pacific area, but they were dominated by the US model. The suspension of some of these provisions through the TPP11 agreement shows that while the conflictual politics around investor–state dispute settlement continue, it is not clear what will emerge as an alternative model, if any. This is happening at a time when many countries (including Indonesia, South Africa, and India) are radically reforming their earlier investment treaty models and are seeking revisions to existing investment treaties or their abrogation.<sup>54</sup> But TPP’s facelift for investor–state dispute settlement is much less ambitious than the EU’s investment court proposal, advanced in the Canada–EU and EU–Vietnam agreements and which the EU had forlornly hoped to introduce into TTIP. This will bring to investor claims a dispute settlement system that partly resembles what the WTO already provides for state–state claims under trade law.

## VI. National Politics of Megaregulatory Agreements

The political justifications offered by national leaders for TPP, TTIP, RCEP, and TiSA have varied greatly. TTIP envisaged much deeper cross-acceptance and perhaps even harmonization of intra-economy regulations than did other megaregulatory agreements of such a scale, in part because of the aspiration through 2016 to maintain the unity and values of the North-Atlantic “West.” By contrast, TPP12 could have operated as an early step in establishing a formalized liberal-economic area across a socio-culturally unintegrated space. This may theoretically remain a conceivable goal for TPP11, but any impact it has in this respect is likely to be weak.

Japan had been late to start negotiating free trade agreements at all, and even the thirteen agreements that it had concluded since the year 2000 were with smaller partners and

<sup>54</sup> C. L. Lim, “Finding a Workable Balance Between Investor Protection and the Public Interest in the Trans-Pacific Partnership,” ch. 25 in this volume.

covered only 19% of Japan's exports. TPP represents one of the most ambitious free trade agreements undertaken by Japan, only rivaled by its Economic Partnership Agreement with the EU (JEEPA). Japan became one of the first members to go forward with ratification of the original TPP text even as US support for the agreement wavered during a fraught presidential campaign. After the US exit, Japan emerged as the main driver behind the agreement's revival as TPP11.<sup>55</sup> This was an unusual situation in the history of Japan's international economic diplomacy, made possible and propelled by unusual circumstances not only in international politics, but in domestic politics which gave Prime Minister Abe both major reasons to seek economic liberalization and deregulation, and a political window in which to do so through international agreements.

A persistent motif in the political critique of trade agreements has been demand for greater participation by the public and by potentially negatively affected groups during negotiations. The dynamics in the United States, where the USTR operated a system inviting public comments during the TPP negotiations, illustrates the current limits and flaws of participation mechanisms.<sup>56</sup> Over 4,000 comments were submitted by businesses, individuals, governments, and activist groups to the US Trade Representative during the course of the negotiations. These comments address various aspects of the treaty, and offer a disaggregated baseline of different interest group activity surrounding TPP. Once negotiations were complete, official publication of the TPP text enabled mass participation and engagement on topics that undercut the US public posture on TPP. The official publication of the text elicited vocal opposition, particularly from critics of the balance between corporate interests and national sovereignty. But this opposition could only find a powerful outlet in domestic electoral and ratification politics, as negotiations for the actual treaty text had already been concluded.

Mexico is acutely affected by almost every kind of issue arising in Mexican relations with the United States. On international economic as well as security issues, Mexican federal elites attach much importance to formal law and institutions as safeguards against deformed law and coalitions of the willing, strategies pursued by very powerful states (above all the United States), with which Mexico has to contend. Mexican elites have developed sophisticated heuristics to confront the challenges posed by post-2017 positions and rhetoric from Washington DC, and navigated the USMCA negotiations with finesse, but even the transformation of Mexico's historic pattern of two-party rule and the 2018 election of President Andrés Manuel López Obrador did not precipitate fundamental national debate about Mexico's role in the re-configuration of the global trade and economic order.<sup>57</sup>

Across Latin America, several different pathways and strategies for managing globalization can be discerned, each of which sustained some perturbation with uncertainty about US trade politics and with regional and global pressures affecting the Western hemisphere. Among these pathways can be identified a "Pacific" style, practiced by TPP members Peru, Chile, and Mexico as well as their Pacific Alliance partner Colombia, aiming for more open and liberalized markets and enthusiastic about locking such arrangements into international treaties. This can be contrasted with an "Atlantic" style, in which economic policies and globalization are seen as fully woven into deeply political choices, and economic

<sup>55</sup> Davis, "Japan: Interest Group Politics, Foreign Policy Linkages, and TPP," ch. 26 in this volume.

<sup>56</sup> Robert Gulotty, "Structuring Participation," ch. 27 in this volume.

<sup>57</sup> Rodiles, "After TPP is Before TPP," ch. 28 in this volume.

treaties are scrutinized with apprehension as placing at risk national autonomy over social policy.<sup>58</sup>

Brazil, whose social policy experiments of the kinetic Lula presidency (2003–2011) were much admired and to a degree emulated in Latin America, later entered into economic downturn and deep political crisis. Economic revival was urgently required in order to sustain the social model Brazil had developed, but all participants perceived it would be difficult to formulate a plan to engineer such a revival with a sufficient degree of public support. The program of megaregulation in TPP opened room for debate on this—at least in the policy circles shielded from the political fallout of sweeping graft allegations. The inauguration of the Bolsonaro administration marked a large change in domestic economic and social policies, but the debate over ideas about global economic ordering initially occupied a less central position. While the neoliberal strand of the administration strongly favored opening (the *Abertura*) of the economy, the long-established and sovereignty-conscious developmentalism in Brazil continued to be influential.<sup>59</sup>

India is characterized by immense policy and economic inertia and a political suspicion of the kinds of deep policy treaties represented by TPP. For India, RCEP's and TPP's models of megaregulation might serve as two playbooks for possible directions of internal economic reforms. They also provide menus of legal tools to craft agreements with the flexibilities necessary to make international commitments while retaining enough space for slow, sequenced, and maneuverable reforms.<sup>60</sup>

## VII. The Future of Global Economic Ordering

TPP11, like TPP12, represents what proponents and especially the negotiating governments have eulogized as “21st century trade agreements.” But behind the façade lie fundamental decisions about how to organize economic activities within a substantially transnationalized global market place—and with what consequences for whom. Reacting to US allegations that China had not become a “free market economy” made during the sharp conflict about China's market economy status for purposes of the WTO's anti-dumping proceedings, Chinese ambassador Zhang Xiangchen asked “what is a market? I think everyone can agree that a market is a place where supply and demand interplays. Beyond this, there can be no pre-defined, one-size-fits-all standard or criteria . . .”<sup>61</sup> The struggles over the contours of global, megaregional, national, and sub-national economies and how they interact are fundamental and increasingly visible. It is almost universally recognized that no one single 21st-century model of economic organization and management or single model of international economic, trade and regulatory rule- and decision-making is likely to be advanced successfully. Pluralism and disagreement also come with challenges, however., The

<sup>58</sup> Rodrigo Polanco Lazo, “Regional and Preferential Agreements: The ‘Pacific’ and ‘Atlantic’ Styles in Latin America,” ch. 29 in this volume.

<sup>59</sup> David M. Trubek, Fabio Morosini, and Michelle Sanchez Badin, “Brazil in the Shadow of Megaregional Trade and Investment Standards: Beyond the Grand Debate, Pragmatic Responses,” ch. 30 in this volume.

<sup>60</sup> Harsha Vardhana Singh, “TPP and India: Inspirations for Sequenced Reforms,” ch. 31 in this volume.

<sup>61</sup> Permanent Mission of the People's Republic of China to the World Trade Organization, “Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the Dispute: European Union – Measures Related to Price Comparison Methodologies” (DS516) (Dec. 6, 2017) <<https://perma.cc/8RCG-X6NA>> para. 14.

underlying demand for at least an implicit decision, even without express agreement, on overarching economic ordering remains strong.

How important is TPP? Trade and investment have thrived in the Asia-Pacific without TPP or similar agreements. Development of instant data-rich communications, legal intellectual property protection for brands and knowhow, robust logistics, sophisticated and generally safe payment systems, fast and vast shipping capacity, mobile and expert human capital in goods and services, and cross-border investment, have not needed megaregionals. Yet they have collectively underpinned complex and sophisticated value chains in vertically integrated companies, and among potentially competing producers governed by long-term contractual arrangements. Existing WTO rules, permissive national regulation and financial markets, and private entrepreneurship backed by sometimes concerted assertions for unencumbered operation by the United States and others seem to have been enough for the “second unbundling” to unfold. Digital economy companies have flourished in near worldwide operations, and these and many other global business sectors are difficult for any but the most powerful governments to regulate effectively.<sup>62</sup> Businesses lobbied for TPP in the United States but support for the agreement was never all that strong.<sup>63</sup>

Economic models of the country-scale benefits of TPP showed major gains for some countries (for example, Vietnam through market access and favorable rules of origin for its textile industry), but mainly modest gains for most countries. However staying out of the agreements was usually a worse strategy.<sup>64</sup> This is in line with the outcomes of many previous trade agreements, seen more as bulwarks against the ravages of 1930s-style protectionism than as major producers of public revenue or societal affluence for participating countries.

Even while the exact economic effects are beyond the reach of models, the net gains are generally not vast. Stronger political, economic and socio-cultural explanations must exist for the turn to megaregulation, and indeed TPP is characteristic in having been an economic agreements accompanied by an explicit political justification. The revival of TPP in the form of TPP11 attests that megaregulation appears to governments to offer some continuing attractions, including in its methodical role for law and national regulatory institutions. In this respect it offers a counterweight to the pattern of regulation and governance drifting into a complex admixture of national and extra-territorial regulatory assertion by powerful states, private governance led by corporate and financial interests, and some public-private or multi-stakeholder initiatives. Whether any of this admixture will or could adequately take account fully of distributional, social, ecological, and public interests is highly doubtful. With the economics of production overpoweringly pointing into the direction of further globalization, the stakes in the future structures and strategies of global economic ordering, including with respect to megaregulation, are high. Relatively small changes in regulatory understandings between countries or within groups of countries may scale to produce very different outcomes.

<sup>62</sup> Thomas Streinz, “Digital Megaregulation Uncontested? TPP’s Model for the Global Digital Economy,” ch. 14 in this volume.

<sup>63</sup> Iain Osgood, “Sales, Sourcing, or Regulation? Evidence from TPP on What Drives Corporate Support for Trade,” ch. 13 in this volume.

<sup>64</sup> Sunami and others, “Japan: Leveraging National Regulatory Reform and the Economic Modeling of Trade Agreements,” ch. 20 in this volume; Ciuriak, “TPP’s Business Asymmetries: Megaregulation and the Conditions of Competition Between MNCs and SMEs,” ch. 12 in this volume.

TPP is influential as a source of model text for other agreements on particular issues. As a treaty, it could come to hold a power of attraction to third states. More abstractly, the approaches and techniques of regulation with which TPP now experiments will be available as a resource and even a template in other contexts. Most importantly, the deficiencies and shortcomings of TPP and of earlier trade and investment agreements, including their alienating characteristics of social and political disembeddedness as well as their secretive processes and mostly elite constituencies, provide a reference point. New and better thinking about the regulation and the politics of globalization has been spurred in a political environment that has opened a large space for such creative thinking and analysis. This volume seeks to contribute to such thinking.