

Marketplace Rules and International Deal Making: Some thoughts about the implications of the TPP¹

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The Trans-Pacific Partnership, TPP, is not strictly a trade and investment deal. Of course, TPP is a strategic bargain and not just a political economy arrangement. More importantly though, it is ultimately a broadly gauged bargain about critical rules of the market. These include rules, as examples, for information technology, Intellectual Property, and the environment. As international trade deals increasingly become entangled with the domestic regulation of the economy, although they always were, the treaty implications for market rules must be considered - what the rules are, how they will be adjudicated, and who makes them. A central question raised by TPP is, then, whether we want critical marketplace rules to be determined and adjudicated through treaty or by more transparent domestic political processes.

Are treaties the best way to set market rules?

We need treaties setting rules for global trade and investment. We want other countries to treat our firms and products fairly. Some agreement about market rules is necessary for trade and investment to proceed, and agreement requires international give and take. A real question, however, is which market rules should be settled and adjudicated by international treaty and which rules should be settled by domestic politics.²

¹ This memo is part of an ongoing research agenda on trade with Richard Steinberg and Melissa K Griffith. See Griffith, Melissa K, Richard Steinberg, and John Zysman, "*Great Power Politics in A Global Economy*". This paper was prepared for presentation at a conference entitled "The Political Economy of the Transatlantic Trade and Investment Partnership (TTIP): Origins, Evolution, and Implications" at UC Berkeley on April 11, 2015 and revised for "Unpacking the Transatlantic Trade and Investment Partnership (TTIP) Negotiations" at *Université Libre de Bruxelles* (ULB) on October 17, 2015.

<http://www.brie.berkeley.edu/wp-content/uploads/2015/02/Great-Power-Politics-in-a-Global-Economy-Origins-and-Consequences-of-the-TPP-and-TTIP.pdf>

² Cynically, one might say it is a question of whether your country is an advanced market economy or playing to become one, but it is not that simple.

Your answer to that question will differ by whether you are comfortable with your country making the rules internally, whether you want to pressure other countries to adopt different rules – usually ones closer to your own, or whether you want to use the treaty process to alter the rules in your own country because you don't like the existing policy outcomes. Of course, in negotiations we may accept some rules we don't like in order to have a broader marketplace with rules, which on balance, we do like. You may argue that the TPP, like all trade and investment negotiations, is built with give and take. Perhaps, but as the reach of trade/investment deals extends, we need to focus on the differences between domestic policy processes and trade/investment-negotiated processes for creating market rules. Domestic political settlements are expected to be transparent and public, at least in broadly pluralist liberal democracies. International trade negotiations are, and need to be, significantly different, negotiated in privacy, indeed secrecy.

Trade negotiations are by their very nature and by necessity secret and at least principally private amongst the negotiators. And in the US, the final agreed upon deal needs to be voted up or down by Congress, to avoid renegotiation and the re-jiggering of bargains by particular interests. With Fast Track Authority, there is no room for real consideration of and debate about market rules set in the treaty. In today's market rule heavy negotiations, the implications of this process in treaty making - private and secret in international discussion then fast-tracked in domestic decisions – significantly differs from traditional domestic policy dealmaking.

Consider traditional tariff negotiations. Governments are balancing the interests of some economic groups against those of others. Take the following example. Perhaps we reduce the tariff levels on scotch imported by the barrel. Domestic bottlers of scotch, those who import Scotch by the barrel and then in the United States put it into bottles, have an advantage over those Scottish Scotch producers who bottle and label in Scotland. The tariff reduction put the domestic bottlers into direct competition with traditional producers in Scotland. But in exchange, we receive support, say, to pursue lower tariffs on semiconductor exports. From a national basis, that is probably a good idea, certainly for California semiconductor producers. From the vantage of barrel scotch importers in, let us imagine South Carolina, that is a net loss. If that trade-off is publicly on the table, the reduction in scotch tariffs may not last.

However, the issues and trade-offs about marketplace rules are quite different from trade-offs over quantitative restrictions or direct financial supports. Patent or copyright rules that benefit particular industries, or industry segments, have larger implications for the economy as a whole. It is no longer simply a matter of a trade-off between different narrowly defined economic interests. Those rules IP directly influence the innovation dynamics of the economy as a whole. Patent rules that may benefit particular sectors or firms in international competition, may not be the best arrangement for sustained innovation in the rest of the domestic economy.

This leads to several questions. First, who is involved in settling the rules? That will be very different in trade deals than in domestic policy

making and, of course, directly affects what the rules will be. Certainly, private interests dominate rule setting in their particular domains in the American model, but the possibility does exist for a broader and more significant debate in domestic legislation. The political trick in domestic debate is to break dealmaking loose from its narrowest moorings. That is not possible through international treaties like TPP, which are negotiated privately and grouped into packages to be handled by fast track decisions. In international trade negotiations, only those groups with the closest, narrowest interests related to particular negotiations will be involved. Their interests will be represented; other interests will find it hard to be expressed.

This will differ by issue area. Environmental groups, for example, had some representation in the American discussions. Perhaps for that reason the outcomes were more satisfactory to some in the environmental movement than they had feared. However, there is no question that the agreed upon rules in the digital domain have changed when rule making moved to the international trade arena. The DMCA (Digital Millennium Copyright Act) is such an example. Ultimately, across domains, moving rule setting to treaties restricts the public debate and the array of potential views heard. This venue change, consequently, will change outcomes.

Second and equally important, we must ask to what extent an agreement like TPP locks-in existing arrangements through treaty obligations, making it difficult to reform or evolve domestic rules? For example, many believe, and I share their concerns, that the American copyright/patent regime has deep flaws. Will a process of policy revision and reform be harder or easier inside TPP's framework? My colleague, Brad de Long has observed in conversation that if the IMF and World Bank had been embedded in treaties, rather than established as institutions, they would have failed. I do not pretend to know the answer to my questions, but the issue concerns me. Does this treaty preclude needed flexibility, both domestic and international? What then, however, are alternative approaches for creating global marketplace rules? Could existing institutions serve? Should new ones be created?

Third, the significance of any market rules or laws depends on how they are governed and administered. There is the apocryphal comment that "you make the rules, I pick the judge". What will be the implication of moving decision-making about many matters to international courts, such as ISDS? Who will be the judges? What are their backgrounds and inclinations? Will outcomes be changed by this shift?

Now, it is correct to argue that TPP is not the first agreement that bites deeply into domestic rule making. That, of course, does not answer the question of whether we should agree to this instance. One might observe that with the rapidly evolving global economy the matter of treaties establishing marketplace rules becomes all the more significant.

The Importance of the Specifics

The importance of how rules are set is all the more significant when we consider some of the specifics in the treaty. Consider, as examples already

mentioned, IT and IP rules and issues concerning the environment and climate. Certainly there are significant questions, and many have significant even intense reservations about particular segments of the deal.

Consider the Intellectual Property domain. Most importantly, TPP seems to redefine what can be patented and the circumstances under which patents can be issued. More specifically, the IP protections, and I speak as an American here, extend the protections on copyright, for example, beyond what is currently available in American law. Why, we must ask, do we, other than Disney, want those extensions? Similarly, I note that rights holders may prohibit even temporary, ephemeral, copies or reproductions under the language of this treaty. Indeed, even the somewhat controversial DMCA permitted temporary, ephemeral, copies as a compromise between content producers and computer firms since computer firms noted that the very nature of computer operations generate “temporary” ephemeral copies. Why has that compromise been changed in TPP?

I certainly understand the desire to forbid governments from compelling firms to provide source code as a condition to allow market access; This compulsion amounts to a Government forcing transfer of core intellectual property and was controversial in the US/Japan Trade Wars back when. And, it is a tactic used in various forms over many years. However, the Electronic Frontier Foundation on its website argues that the treaty would prohibit open source mandates.

With no good rationale, the agreement would outlaw a country from adopting rules for the sale of software that include mandatory code review or the release of source code. This could inhibit countries from addressing pressing information security problems, such as widespread and massive vulnerability in closed-source home routers.

Whether they are right or wrong about the treaty’s implications and whether they are right or wrong about the policy choice, this issue is something that should be more widely discussed. Indeed, generally, we would want to ask whether the current IP regime is satisfactory, whether it really provides the basis for an economy based on innovation, or whether it provides undue protection for incumbents and those who cleverly understate the logic of the system. In any case and as noted, if embedded in treaty, can the IP regime if embedded in a treaty context such as TPP appropriately evolve over time?

However, many concerns about TPP are, I fear, exaggerated. My environmental law friends at Berkeley suggest that on balance the consequences for climate and environment are probably neutral or close to neutral, not the basis for necessarily rejecting a treaty. But the Sierra Club argues the following:

The TPP will include provisions that give corporations the right to sue a government for unlimited cash compensation — in private and non-transparent tribunals — over nearly any law or policy that a corporation alleges will reduce its profits. Using similar rules in other free trade agreements, corporations such as Exxon Mobil and Dow Chemical have launched over 600 cases against more than 100 governments.

Like the Sierra Club, parts of the specific deals in the treaty leave me uncomfortable, perhaps because I do not adequately understand them. However, the balance of specifics, the particular rules, is not my core concern. Rather, they highlight the problem that deals struck in treaties truly matter to the operation of the domestic economy. The specifics domains mentioned here emphasize how treaty making affects domestic regulation and rule-making.

TPP and Strategic Political Economy

Before concluding, let us return to the basics and ask, what does TPP hope to accomplish?³ The deal has many faces. Certainly frustration with deadlock in the WTO contributed to the TPP treaty and the Trans-Atlantic Trade and Investment Partnership (TTIP) discussions. “In part, it [TPP and TTIP] has been an effort to continue a US-led program of trade liberalization that began with the GATT, and was continued by the WTO and in that sense to unravel the spaghetti bowl of the 500 free trade agreements that have recently emerged in the face of WTO deadlock. In part it is a US geo-economic move, intended to establish a powerful liberalizing template that would eventually compel adherence by excluded countries. The combined power of TPP and TTIP might be seen as holding potential for setting the ‘rules for the road’ for international trade. Together these mega-FTAs may represent an opportunity to create and/or sustain a Western template for liberal economies in a transforming global system. Recall, the WTO was created when Europe and the US constructed a new trade regime from which other countries felt they could not afford to be excluded. In addition, TPP is now, if not at its origin, a geo-strategic undertaking [...] quite apart from the potential gains from trade and investment that these agreements may provide.”⁴ It is certainly intended to anchor the American position in Asia, to draw our partners into an American centric trade world even as China rises. Note, of course, that China and India are not included.

Geo-economy has become Geo-politics. Quite apart from the specifics of the deal, it is clearly China’s intent to try to define its own template and provide its own leadership for trade and investment, certainly in its own region. The issues this raises cannot be ignored. However, is the specific content in TPP the best way to settle domestic US arrangements around issues such as IP or the environment? Should those concerns defer to geo-strategic objectives? Can geo-strategic moves in this epoch take a different form? Historically, US trade policy championed a neoliberal economic agenda. Or put more cynically by some, the US pursued a remaking of the rules of the global economy, and the domestic structures and dynamics of those party to it, to fit American and secondarily European visions. We used international trade negotiations to force others to reshape their domestic rules. This was, principally, a one-way bargain. The US intended to set the global

³ These arguments and some of the language are drawn from Op.Cit. Griffith, Melissa K, Richard Steinberg, and John Zysman, “Great Power Politics in A Global Economy”.
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⁴ The language here is almost directly from “Great Power Politics in A Global Economy”.

rules, and have others adjust. This time around, the tables risk being turned. Are we willing to open ourselves to the reverse process?

Some Conclusions

In sum, what do we have? TPP is a deal with some particular, clearly problematic segments. Of course, all international deals have segments that are problematic. But fundamentally, it involves further moves toward setting domestic marketplace rules by treaty rather than domestic processes. TPP is clearly, at the same time, a geo-economic tool used to extend the domain of the market economy and some basic principles that in advanced economies most would agree to. And it is a geo-strategic tool to orchestrate our partners and engage, if possible, with our rivals. Where, on balance, does that leave us? Well, it depends on how you evaluate each of these elements.

For myself, I would observe that the international trade and investment frameworks and institutions that have been most satisfactory for both the US and Canada – the GATT, WTO, and IMF - all began as European/US bargains. They, unlike TPP, were bargains of relatively like-minded political economies seeking to entrench democratic market systems. That strategy has worked. So, maybe, we should reconsider the problematic segments of TPP and the broader mechanisms of marketplace rule making by looking to the Transatlantic Trade and Investment Partnership discussions (TTIP). There we can start with an equal partner in terms of market size, wealth, and technological sophistication.⁵ We should, therefore, keep the TPP discussion alive, open out the conversation with the Chinese, and settle our structures with Europe.

⁵ Though, I note since it will be pointed out in any case, they are not equal in military or IcT expertise.