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The Trans-Pacific Partnership as Megaregulation

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Abstract: The Trans-Pacific Partnership (TPP) brings into legal effect a new form of inter-governmental economic ordering and regulatory governance on an extended “megaregional” scale. This chapter proposes the concept of “megaregulation” as a way to understand what is distinctive about TPP and about the particular type of governance project which it partly pioneered. Megaregulation as exemplified by TPP is characterized by five features. First, it comprehensively covers commercial flows in goods, services, capital, and data. Second, its broad aim is to create a *generalized freedom to operate* for large corporations and their affiliates across the set of national markets covered by the treaty. Third, as its method, megaregulation employs *regulatory alignment*—nudging and shaping both the substance and the processes of national regulatory systems. Fourth, megaregulation involves a large but not universal (like the WTO) *scale* in volume of covered economic activity and creates significant gravitational pulls and emulatory pressures for third parties. Fifth, megaregulation takes the *treaty-institutional* form which prescribes detailed rules and empowers some inter-governmental or transnational institutions and the communities of practice spawning around them. TPP’s specific version of megaregulation further advances an ordo- or neo-liberal vision of the state and its relation to markets that deliberately builds out contrasts with China’s party-state economic ordering, thereby giving it lasting geopolitical and geoeconomic relevance.

The Trans-Pacific Partnership as Megaregulation

*Benedict Kingsbury, Paul Mertenskötter, Richard B. Stewart,
and Thomas Streinz*

I. Introduction

The Trans-Pacific Partnership (TPP, in its original form here termed TPP12) was the first completed instantiation of a new form of inter-governmental economic ordering and regulatory governance on an extended “megaregional” scale. This new form was brought into legal effect with only minor modifications between all initial negotiating parties, other than the United States, as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP or TPP11). This chapter proposes—and examines some ramifications of—the concept of “megaregulation” as a way of designating and understanding what is distinctive about TPP and about the particular type of extended-scale economic governance which TPP pioneered and exemplifies. The announced aim of megaregulation is to promote transnational commercial flows of goods, services, capital, and data, smoothing the terrain for corporations and investors to operate easily across the set of countries taking part. TPP’s particular model of megaregulation rejects “developmental state” approaches—notwithstanding the economic prominence of China’s model and its exportation westward and southward in Asia through the Belt and Road Initiative and otherwise—instead favoring a more circumspect role of states in privately-dominated markets, broadly consonant with combined liberal or neoliberal and rule-of-law ideologies. This stance on the role of states has been a frequent correlate of megaregulatory projects as actually pursued—but it is not a *necessary* concomitant of the concept of megaregulation as here defined.

By megaregulation we mean inter-governmental economic governance arrangements which have all five of the following features. First, the *coverage* of the commercial flow-promoting provisions of the agreement is quite comprehensive (WTO-“plus plus”). These provisions typically include significant market access for goods, services, and agricultural products, together with rules on subsidies, dumping, trade remedies, government procurement, intellectual property, technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), trade facilitation, some further behind-the-border regulatory measures, and, in most cases provisions on investment, capital flows, data, and business travel. In more politically-freighted forms, megaregulation may extend to such matters as competition, labor, environment, small and medium-sized enterprises, State-owned enterprises (SOEs), and anti-corruption. Second, the broad aim is to create a *generalized freedom to operate* for large corporations and their contractors or supply chains across the set of national markets

covered by the treaty. Third, the treaty employs the method of *regulatory alignment*—nudging and shaping both the substance and the processes of national regulatory systems, in ways that go far beyond the WTO, but differ from EU-style regulatory harmonization and mutual recognition, seeking instead to produce rationalized and cost-benefit informed national regulation enabling smooth flows between different states. Fourth, the *scale* is large in volume of economic activity covered, usually involving at least two of China, the EU, India, Japan, and the United States, and distinctive in being confined to a limited set of parties (so non-universal) but spanning more than one traditional region. Fifth, the form is *treaty-institutional*—the central focus is a comprehensive and detailed treaty which prescribes detailed rules and empowers some inter-governmental or transnational institutions. Several of the five criteria we have outlined are relatively elastic; and different existing or proposed treaties combine them to different extents. Our aim is to indicate the distinctive locus of megaregulatory treaties as a governance form, not to establish sharp conceptual boundaries. We emphasize the focus on *regulation* in these modern economic treaties — these provisions on regulation have become both routine and one of the centers of gravity of these treaties, and often spur harsh political disagreements within and between countries.

This combination of criteria covers a very small number of completed agreements—one of which is TPP—and a larger set of attempted or proposed agreements. This whole set has often been referred to as “megaregional treaties.” In itself, however, the moniker “megaregional treaty” does not articulate much beyond the criteria of treaty-form and scale. It is necessary to consider such matters as: what is distinctive about these megaregional treaties in international law and economic governance, why they have been pursued (and succeeded, stalled, or failed), and what their theoretical and practical importance might be. In this chapter we take some steps toward addressing these questions, using the concept of megaregulation as our organizing idea, and TPP as our specific reference case.

In order to maintain some generality of potential application in our definition of the concept of megaregulation, we do not include as criteria for megaregulation any specification about the understandings it has of the nature of the state and about the relations of states and markets. For TPP as a political and legal project, however, these dimensions may be among its most important features, and we will address them after working through the five more generalizable criteria and the ways in which they appear in TPP.

In the present book on *Megaregulation Contested*, the role of this chapter is to identify, examine, and explain the concept of “megaregulation” as a way to understand the project of TPP and comparable agreements. The chapters in Part II of the book—and several others—undertake sustained critical analysis of TPP from different standpoints; accordingly, we do not seek to do that here. Nor does the available space allow us to engage here with the genealogy or pre-history of megaregulation; instead, we start in the TPP era.

The initial origin of TPP lay in the 2005 Trans-Pacific Strategic Economic Partnership Agreement (P4) among Brunei, Chile, New Zealand, and Singapore, which entered into force in 2006 and which these countries then began negotiations to deepen.¹ The decision of the United States to participate by entering in February 2008 into negotiations of a new agreement with them greatly transformed TPP’s importance and ambition, prompting others to seek to join. Australia, Peru, and Vietnam joined later in 2008, Malaysia in 2010,

¹ Henry Gao, “From the P4 to the TPP” in C. L. Lim, Deborah Elms, and Patrick Low (eds.), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (CUP 2012) 64–81.

Canada and Mexico in 2012, and the escalation culminated in 2013 when Japan joined the negotiations as the last of the twelve participating countries.

The first wave of efforts to conclude megaregulatory treaties crested in 2013–16. During that time, the world's four largest economies, the US, the EU, China, and Japan—plus India, the world's second most populous country and a very large and fast-growing economy—were all involved in negotiating sweeping megaregional economic agreements. The United States, Japan, and the ten other states in Asia, Oceania, and the Americas pressed to completion of the TPP12 agreement, signed in February 2016. The EU and the US in 2013 began negotiating a Transatlantic Trade and Investment Partnership (TTIP), described at the time as the largest (in economic size) bilateral trade and investment negotiation ever undertaken. A different kind of globally diffuse plurilateral negotiation was initiated for a trade in services agreement (TiSA), a WTO spin-off pursued by a disparate group of countries organized as self-proclaimed “really good friends” (of trade in services liberalization).

This first wave ended abruptly with the US exit from these initiatives in 2016–2017. Opposition from the political left (led by Bernie Sanders) and the right (led by Donald Trump) during the 2016 election campaign galvanized public opinion and ended prospects of Congressional ratification of TPP12. The US President withdrew the United States from TPP in early 2017, bringing TPP12 to an end. TTIP negotiations were effectively frozen for similar reasons. The US administration instead embarked on a path focused on reducing US deficits in bilateral trade in goods, featuring unilateral tariff hikes particularly against China (now explicitly portrayed as the US' central geo-economic rival), US-precipitated renegotiation of the 1994 North Atlantic Free Trade Agreement (NAFTA) to produce the US–Mexico–Canada Agreement (UMSCA) in 2018, significant US obstruction of the World Trade Organization (WTO), and criticism by the US President of the EU project along with support of Britain's full exit from it.

The second wave of megaregulatory treaty-making—without the United States, but with heightened activity by Japan and the EU, and eventually by China—began at the end of 2016, substantially in reaction to the unexpected US election results. Although appreciable suspicion of the megaregulatory agreements or negotiations existed among their citizenries, the political leaders of the US' erstwhile counterparts (and allies) in megaregional projects were spurred by the Trump-era reversal to themselves redouble their engagement in trade multilateralism and megaregional negotiations. Led by Japan, the remaining eleven TPP members resuscitated the TPP project and in 2018 adopted the “Comprehensive and Progressive Agreement for Trans-Pacific Partnership” (CPTPP, or TPP11), incorporating most provisions and mechanisms of the original US-led TPP12. TPP11 is not strictly consonant with the megaregional scale we have stipulated because it includes only one of the large economies mentioned; but in its substance it was negotiated with both the United States and Japan able to deploy negotiating power. This is important because free trade agreements (FTAs) involving only one big economy tend to be shaped strongly by the asymmetric negotiating power of the big party, which is not balanced by the interests and agenda of another. Notwithstanding the US withdrawal, TPP11 still bears the stamp of its influence.

Japan and the EU opened negotiations in 2013 on the Japan–EU Economic Partnership Agreement (JEEPA), but from 2017 pushed this forward with much more alacrity, signing and swiftly ratifying the final text in 2018, thereby enabling its entry into force in February 2019.

The US *volte face* initially did not directly affect the Regional Comprehensive Economic Partnership (RCEP) negotiations, which had begun in 2012 between the ten ASEAN

countries and ASEAN's six FTA partners China, India, Japan, South Korea, Australia, and New Zealand. The selection of participants and the amplitude of the agenda for the RCEP negotiations had earlier been the subject of jockeying for position between China and Japan in particular, with each simultaneously making calculations regarding the ongoing TPP project, including Japan's efforts to induce the United States to allow Japan to join.² From 2012 RCEP negotiations proceeded under an outward understanding of ASEAN-centrality and with unflurried but moderate momentum. Tensions between the United States and China, and the challenges posed for Japan, India, and many other states by the need to steer through the inevitable clashes between these giant economies during a period of unpredictability in US policy, precipitated an intensification of RCEP negotiations from 2018 onward. Constraints on what this group is able to agree or implement meant the coverage and demandingness of the obligations were bound to be less than in TPP. Nonetheless, the enormous scale in the total economic and activity and population covered, and the center of gravity in Asia with no Euro-American involvement, made this not only an important but a unique undertaking.³

Megaregulation projects have had several different driving forces. Simple continuation and deepening of the WTO's economic project, and adapting it to the era of supply chains and good-services imbrication and "digital trade," or intensifying its focus on regulatory impediments to trade and also to development, has been a driver of bilateral FTAs and ambitious regional trade agreements (RTAs) such as the African Continental Free Trade Agreement (AfCFTA). In some respects, the turn to restricted-entry megaregulatory agreements has also been a response to difficulties in reaching effective new agreements in the WTO. While such institutional circumstances, changes in technology, and extended forms of economic organization have all been important, a further precipitator of megaregulatory ambitions has been the dramatic economic growth and rising power and influence of China, closing the gap with US power and leading to unsettled and unsettling responses. Layers of megaregional ordering, even if thin in themselves, might have operated like slate roof tiles to provide some stable covering over fissures and accommodate further perturbations in the prevailing structures of politico-economic order. This was a fundamental orientation from the US entry into TPP negotiations in 2008 at the end of the GW Bush administration. Both the United States government and its counterparties saw TPP as a project to enmesh the United States in countering, balancing, or blending China's influence in Asia and the Pacific, by using the formality of treaty commitment but in economic and regulatory rather than military terms.⁴ At the same time, TPP avoided any implication of enmity—indeed, in that early period some thought TPP might be open to China to join.

China has eschewed military alliances, and its economic diplomacy had not given notable priority to megaregulation,⁵ although China has been broadly favorable to initiatives

² Shintaro Hamanaka, "Trans-Pacific Partnership versus Comprehensive Economic Partnership: Control of Membership and Agenda Setting" (2014) Asian Development Bank Working Paper No. 146; Ronglin Li and Yang Hu, "The Regional Comprehensive Economic Partnership, the Trans-Pacific Partnership, and China's Free Trade Agreement Strategies" in Harsha Vardhana Singh (ed.), *TPP and India: Implications of Mega-Regionals for Developing Economies* (Wisdom Tree Press 2016) 199–221.

³ Pasha Hsieh, "The RCEP, New Asian Regionalism and the Global South" IILJ Working Paper 2017/4 (MegaReg Series).

⁴ Ann Capling and John Ravenhill, "The TPP: Multilateralizing Regionalism or the Securitization of Trade Policy?" in C. L. Lim, Deborah Elms, and Patrick Low (eds.), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (CUP 2012) 279–98.

⁵ Evelyn Goh (ed.), *Rising China's Influence in Developing Asia* (OUP 2016).

ranging from Asia-Pacific Economic Cooperation (APEC) to the proposed Free Trade Agreement of the Asia-Pacific (FTAAP). It intensified support for completion of RCEP as the United States became more active in enlisting other governments to push back against some aspects of China's expanding power abroad. China had not sought to be a leader of megaregional treaty-making, putting greater emphasis on bilateral economic agreements or the WTO as frameworks, but China did invest in institutions to balance long-standing Western and Japanese dominance of multilateral development banks. China enterprisingly launched, and enlisted many other members for, the Asia Infrastructure Investment Bank (AIIB) (established in 2015 and with more than USD 90 billion of subscribed capital), and promoted both the BRICS initiative and its New Development Bank (established in 2015 with Brazil, Russia, India, China, and South Africa each subscribing USD 10 billion of founding capital). China's SOEs—greatly strengthened through domestic consolidation and many now global forces in strategic sectors—are fundamental both to China's party-state economic model and to China's external economic influence. Although contested, in many cases their operation has largely been congruent with contemporary rules for global markets—but not with TPP's rules, and indeed TPP deliberately pushes against pursuit of non-commercial state interests by SOEs.⁶

Grosso modo, synergies—as well as trade-offs—between economic and security agendas are inescapable. But at the margins, commensuration between state-economic and geo-political interests is liable to intense contention. What wins or loses in national political assessments engaging mass politics is a narrative, not a fine-grained calculation. This was the aim of Obama's Secretary of Defense Ash Carter in explaining his support for ratification of TPP12 with the comment that TPP was as valuable to the United States as another battleship. President Trump was able to brush this narrative off in rejecting TPP on economic-distributional grounds, without any discussion of US geo-political interests. The "America First" slogan nonetheless carried a foreign and security policy coding, defining US interests in more traditional terms while picking up a long-standing suspicion in American politics of interdependence and entangling alliances, and joining with the belief held across a much wider spectrum among the United States political elite that US power remained sufficient to take on simultaneous challenges to vital US interests anywhere in the world. Once the United States exited TPP, the economic case for the TPP11 countries shrunk in scale while retaining its objectives and approach; but the geo-political calculations changed, even if this could not be articulated in the public political narrative. In East and South-East Asia and the insular Pacific, middle power countries (such as South Korea and Indonesia) had initially been wary of TPP12 entangling them in an alignment against China, but this had already faded by 2015 due partly to China's non-critical stance on TPP. TPP11 has a different posture: a sketchy framework for collectively resisting both dominance by China, and America First protectionism. But its effectiveness for those purposes depends on the continuing availability of a US security umbrella vis-à-vis China; and on solidarity with China and/or the EU in areas of trade policy buffeted by any restrictions imposed on access to US markets. China's Belt and Road Initiative (BRI) for massive infrastructure investment in Asia and beyond promises additional economic benefits—often at the expense of heavy debt burdens—but also promotes its geo-political and even military objectives.

⁶ Mitsuo Matsushita, "State-Owned Enterprises in the TPP Agreement" in Julien Chaisse, Henry Gao, and Chang-Fa Lo (eds.), *Paradigm Shift in International Economic Law Rule-Making: TPP as a New Model for Trade Agreements?* (Springer 2017) 187–204.

That those in control of foreign or trade policy negotiations in each of the participating states have determined that the state's interests are served by the agreements as finalized, is a presumption integral to what legitimacy there is in TPP or other megaregulatory closed multi-year inter-government bargaining processes (setting to one side any cases of subornment or purely opportunistic agendas—or the sheer uninformed commitments made by some developing country governments to earlier bilateral investment treaties). What exactly those interests are in TPP, and how they are calculated and prioritized by each state, is at the heart of interest-based bargaining, but in many aspects is not based on very robust data or framed with full analytical clarity. Economic modeling is well developed for growth and distributional effects of tariff and quota changes on trade in goods and agricultural products, including value chain trade, and for subsidies and dumping, and is gradually becoming better for assessing growth effects of liberalization of trade in services. However, modeling of effects of many other regulatory, property, and process rules in TPP, and modeling of economic effects of the rules on data flows, is still highly speculative. In the case of the United States, while some growth in the United States economy would likely have resulted from membership in TPP, even the generous predictions proffered amounts that were not politically compelling, and certainly not enough to offset public anger about under-acknowledged plant closings and localized job losses attributable especially to changes in trading patterns after China joined the WTO in 2000.⁷ The Obama administration instead came to rest most of its case for megaregulation—particularly TPP12, but also TTIP—on US geo-political interests.⁸ Neither TPP12 nor TPP11 has ever been intended to have military or security provisions. However, the United States has military alliances with Japan and with Australia and New Zealand, and most of the TPP11 countries have depended on the United States global security reach.⁹ The Trump administration did not abandon these commitments with its rejection of TPP, but instead focused more explicitly on geo-strategy relating to China, announcing an Indo-Pacific security framing and joining with Japan, India, and Australia to revive a dormant four-power security cooperation designated by the United States as the Quad (a nomenclature that, however, is contentious in India). This in turn was a response to China's fast-rising capacity to project military power over large marine and air spaces, combined with the major substantive and symbolic effect of China's far-flung infrastructure and investment initiatives under the unifying label of the BRI.¹⁰ TPP11, and several other megaregulatory initiatives involving Europe and/or Japan, are only modest means to manage that influence.¹¹

⁷ Representative literature from this period on localized and aggregate effects in the US of China's economic and trading growth, in particular China's accession to the WTO, are: David H. Autor, David Dorn, and Gordon Hanson, "China Syndrome" (2013) 103(6) *Am Econ Rev* 2121–2168 <https://perma.cc/5C9G-SR9P>; David H. Autor, David Dorn, and Gordon Hanson, "The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade" (2016) 8 *Annual Review of Economics* 205–40; Vicente Donoso, Víctor Martín, and Asier Minondo, "Do Differences in the Exposure to Chinese Imports Lead to Differences in Local Labour Market Outcomes? An Analysis for Spanish Provinces" (2015) 49 *Regional Studies* 1746–64; J. Pierce and P. K. Schott, "The Surprisingly Swift Decline of US Manufacturing Employment" (2016) 106 *Am Econ Rev* 1632–62 <https://perma.cc/UP23-C2TM>.

⁸ For example, The White House, 'Remarks by President Obama and Prime Minister Lee of Singapore in Joint Press Conference' (Aug. 2, 2016) <https://perma.cc/3G3W-C352>.

⁹ In conjunction with its support for TPP, the Obama Administration claimed to have tried to establish a "principled security network" in the Asia-Pacific. See eg 'Remarks by Secretary of Defense Ash Carter at Shangri-La Dialogue' (June 4, 2016) <https://perma.cc/UP23-C2TM>.

¹⁰ Julien Chaisse and Mitsuo Matsushita, "China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications" (2018) 52 *J World Trade* 163–85.

¹¹ Heng Wang, "The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?" (2019) 53 *J World Trade*.

II. Coverage: Facilitating Commercial Flows

The central practical concern of TPP is to facilitate cross-national commercial flows: of goods, services, capital, and data—both among TPP countries and in the world. With the exception of data and SOEs, most of the rest of TPP's range of trade, investment, and regulatory issues have been addressed in numerous bilateral trade/investment agreements, in agreements of regional or sub-regional political organizations such as ASEAN and ASEAN's agreements with other major trading partners, and in multi-country regional agreements such as NAFTA and CAFTA and the Pacific Alliance (Chile, Colombia, Peru, Mexico). All of these include classic trade commitments for opened market access, but these have lost some significance due to both a long history of MFN-extended tariff reductions (sometimes to zero, and frequently to 10% or less) and the baseline market access and non-discrimination rules already in effect through the WTO agreements. At the margin, additional reductions or preferential treatment can nonetheless be important for supply-chain production and cost savings.¹² TPP11 will have some impact in this regard.

A. Goods

The tariff cuts specified in TPP have only limited aggregate impact given the long history of (often unilateral) tariff reductions already in place, but in some sectors they are important. In TPP12, the United States would have made significant concessions on its defensive interests in autos and car parts (fueling US public anxieties about further blue-collar job losses) and textiles (with Vietnam), and gained on its offensive interests in beef and rice with Japan (interests the United States thereafter has pursued bilaterally). TPP11 retained the tariff schedules negotiated as part of TPP12 in place, leading to expansions in the trade of beef (offensive interests of Canada and Australia, defensive interests of Japan) and automotive products (offensive and defensive interests of Japan, Malaysia, and Mexico), as well as machinery and leather products.¹³ Although the political costs are borne by national politicians with regard to specific industries and specific disrupted communities within countries, the economic calculations are clouded by uneven take-up in domestic firms (large firms and small firms may respond differently), the flux of newly competitive value chains for a specific product spread across multiple countries, and conversely the erosion of production processes that are diminished in competitiveness.¹⁴

TPP reforms rules of origin (ROOs) in part by its new measures creating a large economic zone for supply chains, and in part by integrating already existing varied and often underutilized aggregation rules and attendant preferences into a more coherent

¹² Bernard Hoekman, *Supply Chains, Mega-Regionals and Multilateralism: A Road Map for the WTO* (CEPR Press 2014) 21, 34–39 (setting out how even agricultural products are shifting to supply-chain based trade in processed products which are substantially affected by tariff escalation and which organize so as to minimize tariff payments for intermediate inputs).

¹³ Carlo Dade and others, "The Art of the Trade Deal: Quantifying the TPP Without the United States" (June 13, 2017) Canada West Foundation Report <https://perma.cc/AS3W-7AUL>.

¹⁴ In Song Kim and Iain Osgood, "Firms in Trade and Trade Politics" (2019) 22 Annual Review of Political Science

system.¹⁵ These may influence the (re-)location of supply chains within the region and beyond. Rules on regional content value requirements allow the accumulation of value in different TPP countries while retaining the presumably preferable rates of the TPP's tariff schedule. In this respect, large-scale multi-country economic agreements such as TPP have a considerable efficiency advantage over traditional bilateral FTAs. The textile chapter's yarn forward rule, for example, requires businesses intending to benefit from TPP's beneficial tariff treatment to source their yarn in a TPP country.¹⁶ The liberalized ROOs for car production changed the proportion of intra-TPP value content to 45% (compared to 62.5% in the NAFTA, and much more demanding provisions in the 2018 US–Mexico–Canada Agreement (USMCA) including an increase to 75% regional value content and specifying that a proportion of labor inputs meets an average specified floor of wage levels across model, plant, or class in a given country).¹⁷ This might allow increased sourcing of automotive parts from outside the TPP region (especially from China, Germany, Indonesia, and Thailand). Businesses will be able to adapt and possibly reconstruct their value chains within the region while retaining preferential treatment. Provisions on trade facilitation and customs administration favoring single-window and electronic filing are of real practical importance for multi-country value chains and materially influence traders' ability to effectively link up with global production.¹⁸ TPP falls short, however, of the 2013 WTO Trade Facilitation Agreement in terms of capacity building and facilitating implementation in developing countries.¹⁹

B. Services

Service flows are a crucial component of global economic activity. They not only increasingly cross borders to end-consumers (as do the work of call centers or IT helpdesks) but are a growing input into goods production (as for example are transportation services in just-in-time production).²⁰ TPP obligations on services follow the baseline of existing FTAs with core obligations on national treatment, MFN, market access, and local presence.²¹ The immediate impact in many cases is severely limited by (long) negative lists of non-conforming measures which are either subject to standstill and ratchet obligations or may be maintained at full discretion.²² Local levels of government are fully exempted from TPP's obligations under the services chapter, which may put countries with stronger municipalities at comparatively lower levels of coverage.²³

¹⁵ For detailed analysis of the TPP12 ROOs, see Margaret Liang, "Rules of Origin in the Trans Pacific Partnership" in Julien Chaisse, Henry Gao, and Chang-Fa Lo (eds.), *Paradigm Shift in International Economic Law Rule-Making: TPP as a New Model for Trade Agreements?* (Springer 2017) 71–86.

¹⁶ See TPP, ch. 4, "Textile and Apparel Goods"; Annex 4-A "Textile or Apparel Specific Rules of Origin."

¹⁷ TPP, Annex 3-D Product-Specific Rules Of Origin; Annex 3-D, Appendix 1 Provisions Related to the Product-Specific Rules of Origin for Certain Vehicles and Parts of Vehicles.

¹⁸ See eg Bloomberg BNA, "Vietnamese Update to Border Rules Takes Page From NAFTA" (Jan. 31, 2018).

¹⁹ Antonia Eliason, "Customs Administration and Trade Facilitation in TPP: The Missing Development Agenda," ch. 9 in this volume.

²⁰ Bernard Hoekman and Ben Shepherd, "Services Productivity, Trade Policy and Manufacturing Exports" (2017) 40 *World Econ* 499–516.

²¹ TPP, art. 10.6.

²² TPP, Annex I.

²³ TPP, art. 10.7(1)(a)(iii).

TPP parties must allow financial institutions to establish themselves domestically²⁴ and open their markets to transnational service provision²⁵ with access to payment and clearing systems in the host countries.²⁶ Innovative financial services are specifically protected from discriminatory regulations,²⁷ possibly aiding the expansion of services that are already prone to “passive deregulation” as regulators cannot keep up with product innovation.²⁸

C. Capital

TPP addresses capital markets and the vast global movement of assets in provisions on financial services regulation, information transparency, and in investment chapter provisions on movement of investor capital into and out of the host state. TPP permits all transfers relating to a covered investment to be made freely and without delay into and out of the territory of the TPP’s parties.²⁹ The possibilities of state regulators to slow down or even block capital flows are restricted. Temporary safeguards consistent with the IMF’s Articles of Agreement are, however, still permitted, with the exception of foreign direct investment which is totally exempted from states’ balance of payment safeguard measures.³⁰ The fidelity to free capital flows was at odds with a trend of researchers at the IMF, and with many governments expressing doubts about the wisdom of constricting states’ ability to control capital flows if needed.³¹

D. Data

At the time of its signing, TPP was unique among completed treaty texts in the extent to which it sought to establish a legal foundation for data and cyber business. TPP12’s data flow liberalization provisions were consonant with the “Silicon Valley Consensus” and were strongly pushed by the USTR (which also pressed similar rules into the USMCA of 2018, the renegotiated NAFTA). The constraints they put on governments with regard to restriction of data flows were maintained unchanged in TPP11. TPP eliminates customs duties on electronic transmissions (but allows for otherwise TPP-consistent even-handed internal taxes, fees, or other charges),³² requires parties to allow the cross-border transfer of data (including personal information) when this activity is for the conduct of a business granted rights under TPP because of its place of incorporation or principal place of business,³³ and

²⁴ TPP, art. 11.5.

²⁵ TPP, art. 11.6.

²⁶ TPP, art. 11.15.

²⁷ TPP, art. 11.7.

²⁸ Dan Immergluck, “The Local Wreckage of Global Capital: The Subprime Crisis, Federal Policy and High-Foreclosure Neighborhoods in the US” (2010) 35 *International Journal of Urban and Regional Research* 130, 132 (discussing how innovation in the structuring of mortgage securities paired with regulators’ choice not to expand the regulatory system resulted in “passive deregulation” of the mortgage marketplace).

²⁹ TPP, art. 9.9.

³⁰ TPP, art. 29.3.3, 29.3.4.

³¹ TPP, art. 10.12; Olivier Blanchard and others, “Are Capital Inflows Expansionary or Contractionary? Theory, Policy Implications, and Some Evidence” <https://perma.cc/C23V-2PZ5>; Davide Furceri, Prakash Loungani, and Jonathan D. Ostry, “The Aggregate and Distributional Effects of Financial Globalization: Evidence from Macro and Sectoral Data” <https://perma.cc/Q5FJ-6U2D>.

³² TPP, art. 14.3.

³³ TPP, art. 14.11.

imposes conditions on server localization requirements³⁴ (which hamper the use of cloud technology)³⁵—all subject, like most other TPP disciplines on states, to state-to-state dispute settlement.³⁶

These provisions are largely novel and come with important caveats. First, the restriction on covered persons includes investments, investors, and service suppliers but excludes financial services. Second, the guarantees are framed as requiring some kind of business-related activity, implicitly acknowledging that there is no general guarantee of free access to information for non-commercial purposes. In this sense, TPP's data flow facilitation is strictly limited to what is commercially relevant—which considerably limits its appeal to advocates of an open global Internet as an instrument for political and social change. Third, the provision on server localization requirements falls short of a complete ban, casting its effectiveness in doubt as countries might prove to be creative to come up with “legitimate policy objectives” that are pursued in a way that is non-arbitrary, non-discriminatory, and does not amount to a disguised restriction on trade or fail to meet the necessity requirement. Indeed, the true test for this provision will come in the form of server localization *incentives* that stem from stringent data export requirements, such as the data service providers' assurance that exported data is not subject to arbitrary or otherwise unjustified access from the export destination's government.³⁷

III. Generalized Freedom of Firms to Operate

The second feature of megaregulation is a broad aim to create a generalized freedom to operate.³⁸ The deconstruction of production and distribution functions among multiple jurisdictions exacerbates the potential trade impediments posed by different national standards and creates intensified demands for regulatory coordination and coherence. In particular, globally active firms seek commodification and free and easy transactional transfer of all types of assets and production inputs, including land, data, and specialized services; organizational flexibility and locational freedom, including freedom from regulatory impositions that could burden the entire supply chain; and assurances of asset security against the heightened risks of adverse national regulatory and other measures resulting from linked operations in multiple jurisdictions. All of these goals generally require changes in domestic regulatory measures and decision-making procedures. Megaregulation seeks to address these.

Megaregulation has come to be a desideratum of a swathe of large corporations. In sectors with significant existing tariffs, they focused on traditional offensive trade objectives of tariff reductions and favorable market access such as the New Zealand-based agricultural giant Fonterra's interest in the Canadian dairy market (or of maintaining defensive

³⁴ TPP, art. 14.13.

³⁵ See generally Chan-Mo Chung, “Data Localization: The Causes, Evolving International Regimes and Korean Practices” (2018) 52 *J World Trade* 187–208

³⁶ TPP, ch. 28.

³⁷ See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (EU General Data Protection Regulation), OJ L119/1 of 4 May 2016, art. 46.

³⁸ We borrow the phrase “generalized freedom to operate” and the underlying idea from the work of Dan Ciuriak. This phrase is simply figurative—it does not represent a legal concept nor does it distill TPP's legal effects. Dan Ciuriak, “Generalized Freedom to Operate” (2016) NYU IILJ Megareg Forum Paper 2016/3 <https://perma.cc/83AV-YBBP>.

protections against competitors such as the United States car industry with 25% tariffs on highly profitable pick-up trucks like the Ford F150). Service providers sought market access and liberalization or advantageous rules for themselves, sometimes specified in relation to particular sectors such as telecommunications or financial services. Certain high-tech corporations demanded specific intellectual property rules (as for biologics). Those with substantial investment interests sought enforceable arbitral protection against political and regulatory risks.

More novel was the corporate pursuit in TPP of a generalized freedom to operate and trade across numerous countries in ways that align with their supply chains or service delivery structures. Multinational corporate groups with their highly varying structures to achieve intricate allocations of control and resources through internal contracting among numerous entities, are in some cases significantly “deterritorialized” in their functioning. Financialization and the growth in knowledge/branding and data as forms of income-producing capital has led to some large economic interests holding mainly intangible assets, “located” for tax or other jurisdictional reasons rather than substantive affinity, and they may thus have few clear affiliations to any one country and its government.

TPP was held out as a “21st century” agreement partly because it seeks to facilitate value-chain production (particularly through rules of origin encompassing production anywhere within TPP), trade in services and digital markets, and related investment, intellectual property rights creation, extension, and remedial protections, as well as data flows. US corporations largely lobbied for the inclusion in TPP of rules and approaches to regulation already established in the United States, although on a few intellectual property issues they hoped to anchor through TPP favorable domestic rules coming under pressure at home.³⁹ Some local affiliates or allies of these US companies lobbied their own governments to similar effect, as did a few major non-US global corporations whose interests with regard to regulation corresponded with those of the US companies. However, the large exporting corporations in non-US TPP12 countries mainly wanted access to the US market, and thus were much more focused on rules of origin, tariffs, and regulatory constraints that they faced. For large corporations with multinational operations, the value of the agreement (in flows-facilitation but also in asset appreciation) is large enough for them to have lobbied vigorously for it. In a few cases, SOEs or “national champion” corporations also stand to gain in similar ways. However, the interests of large transnational corporations stand in some contrast to the conventional “national income” interests of governments measured in GDP, and the interests of economic actors that can be meaningfully aggregated at the scale of the “national economy.” For them the economic gains of TPP12 were relatively small and are more modest still in TPP11.

Offshoring of more industrial parts of production processes was made possible not only by permissive rules but by technologies—such as reliable global business travel between major hubs, cheap long-distance calls, email, and soon practically free virtual reality meetings—that allow knowledge to cross borders easily. Knowledge could travel to places with much cheaper wages, incentivizing firms in the search for profits to do so. But this dispersion was not free, and there are still costs to innovation, spillovers, frictions of movement and travel, and differences in applicable regulations and administrative and legal systems. As a result, the unbundling has not been random, and clusters—themselves important

³⁹ Burcu Kilic and Courtney Pine, “Inside Views: Decision Time on Biologics Exclusivity: Eight Years is No Compromise” (July 27, 2015) Intellectual Property Watch <https://perma.cc/9ZUC-BAGG>.

sources of innovation—have developed in select places of lower-cost production, including in East and South East Asia.⁴⁰ The value chains created from this profit-driven unbundling are often regional rather than global, as trade patterns are still strongly predicted by “gravity models” which use the distance between two economies as their key variable. The competitiveness of global value chains, moreover, depends on the singular parts of the chain being linked into networks and clusters of innovation. Linkage to these clusters can produce benefits from the accruing positive spillovers of proximity. This goes some way to explain why building up the density of links in TPP which combines high-skill and low-cost spaces of production and unites the different locales in an aligned regulatory framework can hold immense economic promises.

Regulatory rules enable, constrain or steer activities, including those conducted pursuant to transactional arrangements, in order to achieve various societal objectives, such as distributional, environmental health and safety, consumer protection, and other objectives. Many regulations can be understood as welfare enhancing responses to market failures resulting from market power, information asymmetries, or externalities etc. Other regulatory objectives may include distributional goals, the realization of moral principles such as eliminating discrimination, securing societal objectives such as universal medical care, protecting domestic industry, and so on. Some regulatory rules seek to facilitate private economic transactions, for example by developing standard contract terms for specific sectors, and thereby complement the transactional rules by cheaply solving coordination games among private actors. Regulatory rules often require extensive legal infrastructure for implementation and ensuring compliance. Regulations can also be used to protect local firms against competition or favor other powerful interest groups.

The economic logic of market-based private ordering demands scaling of transactions so as to create and realize the advantages of scope and scale. This in turn requires a corresponding broader and deeper scaling of transactional rules. In the nation state, the application of legal rules including transactional rules is presumptively limited to activities within the state territory. The push by economic actors over many decades for wider markets and production arrangements has stimulated the development of legal arrangements that permits transacting parties to choose the contract law (typically that of England or New York) and law of corporations or other business organizations that they wish to use for their transactions, with little to no regard for the physical location of the activities in question. Legal infrastructures, including arbitral tribunals, national courts, and the New York Convention, permit the virtually worldwide recognition and enforcement of arbitral awards rooted in this modern *lex mercatoria*. The result has been a global scaling of transactional rules along with the transactions they govern.

The extensive transnational scaling already in place through use of well-established transactional rules has produced a mismatch in scaling with public regulatory rules. This mismatch in scaling has consequences of several types. Very large corporate groups and their supply chains may operate across many different jurisdictions in ways that elude or inhibit the effective application by most states of their preferred policies, for example with regard to taxation. TPP barely addresses most such problems, except in setting some basic shared policies on matters such as corruption or trade in endangered species.⁴¹ Conversely,

⁴⁰ Richard Baldwin, *The Great Convergence* (Harvard University Press 2017).

⁴¹ TPP, ch. 26 sec. C; art. 20.17.

domestic regulations may impede transnational economic transactions in basic ways that megaregulation attempts to curb. National regulations may restrict or impose costs on goods, services and assets originating elsewhere. These burdens may be justified if the regulation is rationally related to the achievement of socially beneficial objectives, but these conditions may not hold. National regulations and their implementation and enforcement may not be transparent, especially to outsiders, imposing search costs, creating uncertainty regarding regulatory requirements and hence risk, and posing a danger of regulatory favoritism.

The existence of divergent regulations in different jurisdictions limit scale economies in production and distribution and otherwise restrict the benefits of business operating on a global scale. These differences in regulations may reflect differences among countries in circumstances or preferences, and careful calibration to mediate between the national society and transnational economic forces; or they may simply reflect historical pathways, parochial interest group influences, or happenstance.

The mismatch extends to distributional and protective concerns. Transactional rules and facilitative regulatory rules in support of private economic ordering have become global, whereas the most effective measures for regulatory protection are largely national or supra-national. Global economic integration, including the mobility of investment and the emergence of global value chains, has also undermined the ability of states acting unilaterally to protect their citizens. Because of environmental, economic, and other forms of connection and interdependency, the dramatic increase in economic activity, and the resulting scales of externalities, achieving adequate protection often requires coordinated and effective regulation in all major jurisdictions. Regulatory failures in one jurisdiction spill over into others in the form of financial contagion, unsafe products, pollution, climate change, and illicit trans-border activities. Yet in many fields regulatory performance falls far short. Megaregulation's aim to promote a generalized freedom to operate for firms is not accompanied by a comparable "generalized regulatory agenda for social protections" that corresponds in ambition and scale.

IV. Regulatory Alignment

To operationalize the megaregulatory ambition of a generalized freedom to operate, projects of megaregulation include as their third feature an agenda of cross-jurisdictional regulatory alignment. Our analysis of megaregulation in terms of a generalized freedom to operate looked at TPP through the eyes of substantially "deterritorialized" firms operating in the global economy, stepping past the often state-centered trade policy discourse which neglects that it is firms, not governments, that trade. However, trade agreements create obligations for states, and "regulatory alignment" changes the analytic vantage point to focus on the reforms to everyday practices of national economic regulation which form part of a megaregulatory project such as TPP. These two aspects of megaregulation are not neatly substantively distinct but rather two perspectives with varying focus on megaregulation's ends and means.

The primary actors driving the global scaling of commercial transactions and flows are business firms and their law firms, with the assistance of arbitral panels and national courts. They have been supported by specialized global regulatory regimes, often private

or hybrid in character, which have developed to establish specialized transactional rules and transaction supporting regulatory standards in specific fields. Examples of specialized regimes involving transactional rules include SWIFT (bank clearing transfers) and ISDA (swaps and derivatives contracts). Other bodies such as the International Organization for Standardization (ISO) and the International Organization of Securities Commissions facilitate transactions through regulatory standardization and certification programs.

In contrast, public regulation is traditionally state based and territorial, directed at activities within the regulating jurisdiction. Although powerful jurisdictions such as the United States, the EU, and more recently China have begun to regulate activities elsewhere in fields such as antitrust and environment, and much private and hybrid regulation is regional or global, the most powerful and effective protective regulatory programs generally remain national or supranational.

TPP uses the method of *regulatory alignment* to smooth the regulatory space across jurisdictions. In doing so, it relies not on often limited extraterritorial, private, or hybrid regulation but makes direct use of the state's territorial jurisdiction and enforcement powers. Regulatory alignment decreases frictions across a wide range of areas related to regulatory governance between the regulatory institutions and practices among participating states (and possibly third states) and already operative cross-national market structures.

A “smoother continuity” between different regulatory orders may both be hard to establish and extremely valuable for cross-border commercial activity.⁴² TPP's megaregulatory program in our conception is an attempt to lay the groundwork for such eventual “smooth continuity.” This smoothing happens both through regulatory change and through the scaling-up of economic activity which decreases volatility through the law of large numbers. TPP's megaregulatory project has numerous components which can be understood as facilitating the ease for firms of operating across the legal space it creates through such smoothing.

TPP's strategy for regulatory alignment consists of three components. First, it imposes substantive constraints on state regulation on certain subjects to enable cross jurisdictional freedom to operate, as exemplified by prohibiting measures that restrict data flows or require local storage. It also includes complementary measures to protect investment and property rights. Second, TPP provides measures in specific areas to encourage regulatory convergence or recognition. Third, it includes extensive administrative law requirements of transparency, participation, and reason-giving along with measures to promote good regulatory decision-making and administration in order to bring about a more intelligible and coherent regulatory landscape across the parties.

If they come to full fruition in practice, TPP11's region-wide reforms of regulatory rules and their governance could be one part of a broader set of economic and technological changes that enable not only incremental economic growth but a degree of market-scaling, that is, opening new sectors of economic activity to cross-national integration and rapid expansion (in terms of speed, volume, and/or distance), with potentially transformative effects on the organization of businesses, on production or distribution methods, and potentially on the dynamics of the functioning of markets themselves.⁴³

⁴² Bruno Latour, “Networks, Societies, Spheres: Reflections of an Actor-Network Theorist” (2011) 5 Intl J Comm 802 (“[a]s the study of metrology, standards, empires has shown so well, smooth continuity is the hardest thing to get”).

⁴³ Katharina Pistor has convincingly argued that from 1945 onward financial markets were progressively scaled through a creative financial-legal community against the backdrop of permissive choice of law and choice of forum rules in national courts backed up by the 1958 New York Convention. Katharina Pistor, “From Territorial to Monetary Sovereignty” (2017) 18 Theoretical Inquiries in Law 491.

A. Disciplines on State Regulation

Security for investments and other assets wherever a firm carries on activities is a key component of freedom to operate. TPP's investment provisions provide international legal rules and an enforceable arbitration mechanism to establish and protect a wide class of TPP-investor property interests,⁴⁴ and it also seeks to ensure domestic law private rights of action for the holders of property in some circumstances (for example, legal actions for injuries from legally-unfair competition).⁴⁵

TPP12's intellectual property rules and procedural guarantees aiding their enforcement reflected strong pressure from the United States to move far beyond the scope of TRIPS in the interests of IP rights-holders. Several of these provisions were trimmed down in TPP11. Nonetheless, and with strong backing from Japan, TPP11 does much for the interests of global brand name pharmaceuticals, biotech, and content-owning entertainment and information corporations. It extends copyright protection to the author's life plus seventy years,⁴⁶ but also accommodates content using firms like Google and Facebook in its regard for access interests.⁴⁷ The United States' strongest demands in TPP12 such as guaranteed data exclusivity periods for biologics and privileged process and review rights for pharmaceutical companies in states' medicines formularies, were dropped into suspended status by TPP11, but the overall regulatory approach to IP remained intact.

TPP's provisions on free data flows and limitations on server and storage location requirements might prove supportive of market-scaling in the digital economy, particularly as the United States has embraced similar and more expansively specified provisions in the 2018 USMCA.⁴⁸ While digital economy companies have been quite successful in steering through national regulations, they run into limits when governments effectively restrict their data flows or demand storage of data within their jurisdiction. This is especially important in an era of cloud computing and was recognized as such by the TPP11 members. However, CPTPP suspends the limitations on the liabilities of internet service providers for which the United States had fought in TPP12.⁴⁹ The relevant provisions in US law, introduced with the Digital Millennium Copyright Act (DMCA) of 1998, after which the rules in TPP were modeled,⁵⁰ are associated in the Silicon Valley Consensus with enabling a boom in Internet commerce.

B. Convergence and Recognition of Specific Regulations

TPP includes several measures more directly aimed at goals of "regulatory harmonization" or more realistically, regulatory convergence, through for example specific commitments to publishing decisions about procurement contracts, providing pharmaceutical companies

⁴⁴ TPP, art. 9.1 (defining investment broadly to cover various forms of tangible and intangible property).

⁴⁵ TPP, art. 16.3.

⁴⁶ TPP, art. 18.63(a).

⁴⁷ TPP art. 18.66 (reflecting US law on fair use); 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.

⁴⁸ USMCA, art. 19.11, 19.12.

⁴⁹ CPTPP, art. 2, Annex II no. 18. Canada and Chile had secured exceptions for their liability regimes already in TPP, Annex 18-E and 18-F (now also suspended).

⁵⁰ TPP, art. 18.82.

specific procedural rights in health systems' reimbursement decisions (suspended in TPP11), and fixed time limits on customs determinations.⁵¹

Mutual recognition or harmonization of regulatory standards or conformity assessments have been staples of the trade liberalization agenda at least since the Tokyo Round. They were lauded as promising regulatory approaches in the quest for less costly cross-jurisdictional economic activity without having to establish a higher regulatory authority. But experience in reaching the required consensus has been challenging. Even though TPP makes rather modest use of this strategy, it is still partly visible.

TPP encourages its parties to take steps toward unilateral and mutual recognition, including recognition of other parties' conformity assessment methods but falls short of *requiring* recognition of regulatory rules. It is far away from introducing a general (constitutive) mutual recognition rule such as the *Cassis de Dijon* formula, a pillar of EU internal market law and its "negative integration."⁵² Instead, it recognizes the right of parties to take different legal approaches and merely obliges them to endeavor to exchange information and to explore ways to extend suitable arrangements promoting compatibility;⁵³ sets the objective of acquiring confidence in each other's procedures;⁵⁴ acknowledges recognition of equivalence as an important means to facilitate trade;⁵⁵ and encourages the consideration of certain recognition requests and requires reason-giving if such requests are denied.⁵⁶

TPP's TBT chapter is exemplary of this approach. The parties may implement mutual recognition of conformity assessment procedures, may recognize existing mutual recognition arrangements, may use accreditation to qualify conformity assessment bodies or recognize another parties' designation, may unilaterally recognize the results of conformity assessment procedures performed in another party's territory, or may accept a supplier's declaration of conformity—but they are not required to do any of those things.⁵⁷

In recognition arrangements involving compliance determinations, compliance may be determined by an authority of the originating or of the receiving country, or by a private entity. While TTIP, especially in earlier EU draft proposals, was envisaging an intricate and authority-equipped institutional structure for direct exchange between EU and US regulators,⁵⁸ TPP's provisions institutionalizing regulatory coordination are relatively weak. Far from a setting out a detailed structure and lively exchange as it exists with the US–Canada Regulatory Cooperation Council, TPP leaves it up for each party to determine

⁵¹ Government procurement: TPP, art. 15.6-7; 15.16.2 ("Subject to Article 15.17 (Disclosure of Information), a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select the unsuccessful supplier's tender or an explanation of the relative advantages of the successful supplier's tender"); for health systems: TPP, Annex 26-A "Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices"; for customs determinations: TPP, art. 5.10 (Release of Goods).

⁵² Fritz Scharpf, "Negative and Positive Integration in the Political Economy of European Welfare States" in Martin Rhodes and Yves Mény, *The Future of European Welfare* (Palgrave Macmillan 1998) 116–19 (discussing the role of Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42 (*Cassis de Dijon*) in the integration of the European single market).

⁵³ TPP, art. 14.8.5 (protection of personal information).

⁵⁴ TPP, art. 7.7.3 (cooperation on the recognition of pest- or disease free areas).

⁵⁵ TPP, art. 7.8.1 (equivalence of sanitary and phytosanitary measures).

⁵⁶ TPP, Annex 8-G(4) (organic products).

⁵⁷ TPP, art. 8.9(1).

⁵⁸ Joana Mendes, "Participation in a New Regulatory Paradigm: Collaboration and Constraint in TTIP's Regulatory Cooperation," IILJ Working Paper 2016/5 (MegaReg Series).

which regulatory rules are covered by its obligations and makes the adoption of coordination and review processes as well as “good regulatory practices” for regulatory rule-making essentially voluntary.⁵⁹

Another method of regulatory cooperation is to agree on common regulatory rules by way of harmonization. TPP encourages such initiatives especially in its annexes on pharmaceuticals,⁶⁰ cosmetics,⁶¹ and medical devices,⁶² as well as its chapters on services and financial services⁶³ but whether any of these initiatives will lead to future agreement on substantive regulatory rules is unclear. Some harmonization of regulatory rules exists in TPP’s chapters on environmental and labor standards which establish a common set of minimum standards, including the ILO principles and provisions relating to ozone, illegal, unreported, and unregulated (IUU) fishing, and ship pollution.⁶⁴ Notably, labor and environment obligations are also subject to state–state dispute settlement procedures (departing from the NAFTA practice).

TPP employs the broad range of mechanisms that support regulatory cooperation—such as regulatory dialogue, exchange of information, joint problem solving, technical assistance, alignment with relevant international standards—but their commitments remain vague: they shall strengthen their exchange and collaboration on mechanisms to facilitate the acceptance of conformity assessment results and shall encourage cooperation between their respective (public–private) organizations responsible for standardization, conformity assessment, accreditation, and metrology.⁶⁵ The most concrete obligations come in the form of reason-giving: TPP parties must on request give reasons for not accepting a technical regulation as equivalent⁶⁶ and for not entering into negotiations to conclude an agreement for mutual recognition of the results of each other’s conformity assessment procedures.⁶⁷ The financial services chapter goes further by including the positive obligation to provide “adequate opportunity” to other parties to negotiate accession to a recognition agreement or arrangement (or to negotiate a comparable agreement or arrangement of their own).⁶⁸ The extent to which these objectives will be realized in practice will depend on the future actions of the parties and the evolution of the TPP regime.

C. Regulatory Coherence

Regulatory coherence marks the use of reforms to constitutive rules and decision-making procedures to promote a more legible and rational administrative space within states and regions. Obligations to improve the legibility of national administrative practices feature centrally in TPP. These include administrative law processes for transparency, participation, reason-giving and review, and regulatory technologies such as regulatory impact assessment

⁵⁹ See generally TPP, ch. 25.

⁶⁰ TPP, Annex 8-C (pharmaceuticals).

⁶¹ TPP, Annex 8-D (cosmetics).

⁶² TPP, Annex 8-E (medical devices).

⁶³ Cf TPP, art. 10.9 and art. 11.12.

⁶⁴ TPP, art. 19.2–3 (referencing ILO declarations); TPP, art. 20.5 (concerning protection of the ozone layer); TPP, art. 20.6 (concerning protection of marine environment from ship pollution); TPP, art. 20.16.14 (concerning IUU fishing).

⁶⁵ TPP, art. 8.9.4; art. 8.9.7.

⁶⁶ TPP, art. 8.9.6 (re-enforcing art. 2.7 of the WTO TBT agreement).

⁶⁷ TPP, art. 8.6.14 (re-enforcing art. 6.3 of the WTO TBT agreement).

⁶⁸ TPP, art. 11.12.3.

and evidence-based rule-making. Beyond these administrative procedure requirements, TPP promotes regulatory coherence through certain technologies of regulation, in particular regulatory impact assessments (RIAs) and evidence-based methods of regulation including quantitative risk assessment.⁶⁹ It thereby seeks to promote a more intelligible and rational approach to regulation throughout the region that will encourage convergence in approaches to regulatory decision-making and administration that, overall, facilitate firms' freedom to operate. To this end, the TPP text abounds with general commitments, often grouped as "regulatory coherence," including opening regulatory processes and affording stakeholders from other parties rights of participation, entitlements to reasoned decisions, and rights to review on a formally equal footing. The use of decisional methodologies such as cost-benefit analysis is also encouraged. These regulatory coherence techniques combine with TPP's provisions on freedom to operate and those promoting regulatory cooperation on specific measures, to together buttress a particular and distinctive method of regulatory alignment. This method fosters among parties a megaregulatory program which in neutral terms may be described as open and rational administration, but it is also one in which economic interests face fewer domestic constraints and are more easily able to influence domestic decision-making.

The concept of regulatory coherence is often focused only on reforms country by country, with the assumption that this will cumulatively bring development of a more integrated regulatory landscape throughout the region. Such a smoother state regulatory landscape is expected to complement the existing, substantially private global legal infrastructure and to align the participating states' public law institutions with transnational market ordering.⁷⁰ The promotion of 'good regulatory practices' throughout the region is also designed to promote, indirectly, convergence in substantive regulatory standards and arrangements.

The Committee on Regulatory Coherence is mandated to consider the chapter's implementation, identify future priorities, and (if agreed) serve as a venue for cooperation. Each TPP party is required to provide a notice of implementation to the Committee describing how it has established interagency coordination, impact assessment, review, and publication of regulatory materials. Nonetheless, the extent of alignment and resulting reform potential of these notifications and committee processes seems questionable. Chapter 25 is not subject to state-state dispute settlement and its effectiveness will ultimately depend on the energy, resources, and institutional standing of the Committee. The desire of countries to attract foreign investment and participate in regional supply chains may provide an incentive for following TPP's ambition of regulatory alignment. Further leverage may come from assertion of the great variety of procedural rights, including rights of review, which are to be granted to private actors in the domestic legal system—and some private actors are potentially entitled to invoke investor-state dispute settlement provisions to challenge failure to provide procedural rights as a denial of fair and equitable treatment.

⁶⁹ See Michael Livermore and Jason Schwartz, "Regulating Regulation: Impact Assessment and Trade," ch. 21 in this volume.

⁷⁰ For examples of different levels of alignment, compare the areas of shareholder rights protection (relatively high but still limited convergence) and labor protection (relatively low convergence). Compare John Armour and others, "How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection" (2009) 57 *Am J Comp L* 570, with Peter Gahan and others, "Economic Globalization and Convergence in Labour Market Regulation: An Empirical Assessment" (2012) 60 *Am J Comp L* 703.

V. Scale: Gravitational Pulls and Emulatory Pressures

Scale is a differentiating feature of megaregulatory projects. Existing projects of cross-polity deep regulation have long addressed the global regulatory demands associated with innovations in private economic organization. The WTO, bilateral and regional free trade agreements (FTAs), bilateral investment treaties (BITs), intergovernmental organizations, trans-governmental networks, and private and hybrid public-private global regulatory bodies form the baseline to assess if and how megaregulation is different from existing deep regulation projects in other modalities and on other scales, ranging from the EU⁷¹ to specific provisions for the regulation of the timber-trade in the US–Peru FTA.⁷²

The contemporary megaregional agreements all involved in the negotiations at least two of five high-population large economies: China, the EU, India, Japan, and the United States. Prior to the Japan–EU Economic Partnership Agreement (JEEPA), each of these big-five had many or some FTAs, but none with each other. Thus, in their existing FTAs, each of these very large economies has brought disproportionate size to the negotiations it joins; whereas megaregional negotiations bring two or more of these into the same structure. Next to TPP and JEEPA, megaregional projects include RCEP, TTIP, EU–Mercosur, the enlarging Pacific Alliance, and several others.

Like these other megaregional projects, megaregulation as practiced in TPP has significant and directly intended and announced “third party effects.”⁷³ These occur in three ways. First, TPP sets templates or benchmarks with future appeal for trade negotiators, potentially for a wider Free Trade Agreement of the Asia-Pacific (FTAAP) or even the WTO’s multilateral trading system, which itself is inching toward more selective club-like “plurilateral agreements.”⁷⁴ Second, TPP may exert a gravitational pull on non-original states wishing to join, possibly via accession agreements with more demanding terms (“TPP-plus,” similar to China’s accession to the WTO having been WTO-plus). Third, TPP-style agreements create positive externalities (such as non-reciprocated benefits from regulatory improvements or trade facilitation reforms) and impose negative externalities (for example, new and expensive regulatory requirements, or trade diversion) on third states. Negotiating TPP as an agreement among a limited *k-group* enabled deal-making among participants without needing to accommodate third-state interests. The ability of the WTO to protect third parties’ preferences by applying most-favored nation treatments to regulatory disciplines has been limited.⁷⁵

TPP12 included a specific design to draw other countries into its megaregion, thereby further enhancing its megaregulatory potential and economic attractions for global business. Even TPP11 may have sufficient market and political gravitational power to attract

⁷¹ Joseph H. H. Weiler, “The Transformation of Europe” (1991) 100 Yale L J 2403.

⁷² Trade Promotion Agreement, US–Peru, Annex 18.3.4 (Annex on Forest Sector Governance) (Apr. 12, 2006); Environmental Investigation Agency, “The Laundering Machine: How Fraud and Corruption in Peru’s Concession System are Destroying the Future of its Forests” (2012) (making use of some of the US–Peru agreement’s publication requirements to document illegal logging in the Amazon).

⁷³ Benvenisti, “Democracy Captured” 13. See also, Eyal Benvenisti, “Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders” (2013) 107 Am J Intl L 295; Armand de Mestral, “Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties” (2017) Eur Yrbk Intl Econ L 437–55, 446–51.

⁷⁴ Bernard M. Hoekman and Petros C. Mavroidis, “WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements” (2015) 26 European Journal of International Law 319.

⁷⁵ Robert Howse, “The Institutions of TPP11: Back to the Future?” ch. 23 in this volume.

further members—South Korea, Taiwan, Thailand, Indonesia, and the Philippines quickly expressed interest in the new pact.⁷⁶ One element of their decision-making is their calculation of TPP's present and future economic membership benefits versus economic and political costs. This depends in part on the extent to which TPP provides club goods to members that are exclusionary in nature, that is, not practically available to non-members. Market access, pooled rules of origin (in goods and services), and the openness of regulatory processes to non-party countries and private actors are all pertinent, as are calculations about likely restructuring and reorganization of economic production and investment away from non-parties and toward intra-TPP business arrangements and flows. TPP's megaregulatory program is to nurse economic density, connectedness, and a degree of mutual reliance among participating states, as private actors use megaregulation's openings to drive commercial entanglement in the megaregion. By strengthening the agreement's core through these reinforcing processes, TPP may also bolster its gravitational pull.

Given the uncertainty of economic predictions in this field, as well as the geo-political and strategic attractions of TPP, there is some political psychological momentum—perhaps both the fear of being left out and the desire to showcase commitments to open trade in times of growing protectionist sentiment in the US—that pushes governments toward accession to TPP11.

In contrast to TTIP, which was constructed as a closed agreement, TPP is explicitly designed as open to other countries, reflecting a goal of using it as a base for developing an Asia-Pacific FTA.⁷⁷ Latecomers to the agreement may, however, have to join without much special accommodations, flexibilities, and delays, and could conceivably even be subject to stricter requirements.⁷⁸ However, third-parties' inability to exercise sufficient "voice" in TPP's megaregional regulatory governance as it was set-up may be offset by the potential threat of "exit" to alternative regimes such as RCEP.

Even for countries deciding to stay out of TPP11, the agreement's megaregulatory blueprint creates a vision either to mimic or compete against. TPP11 promotes the diffusion of regulations and regulatory technologies to non-member jurisdictions through the attraction of its markets, global supply chain regulation benefiting member state based firms, engagement and influence by the TPP states in international and regional regulatory bodies, and conditions on development grants and capacity building measures. This diffusion is likely to shape the regulatory environment not only for exporting firms, but for local firms, consumers, and civil society more generally.

One example is seizure of goods in transit: TPP authorizes its members to detain goods in transit if they are "suspected of being counterfeit . . . or pirated."⁷⁹ Goods on their way from China to South Africa passing through Singapore could hence be detained by Singaporean authorities acting on a petition from a rights holder in a TPP country. If Singapore interprets

⁷⁶ Editorial Board, "The TPP Shouldn't Stop at 11" *Bloomberg News* (New York NY, Nov. 14, 2017) <https://perma.cc/86B4-6XHW>.

⁷⁷ TPP, preamble, para. 17 (With the parties resolving to "EXPAND their partnership by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration and create the foundation of a Free Trade Area of the Asia Pacific").

⁷⁸ Kiyoshi Adachi, "Thailand and Public Health: Looking Beyond the Intellectual Property Chapter of the TPP," ch. 16 in this volume; Shintaro Hamanaka, "Accession to TPP: Veto Power and 'Opt-Out' Option," in Julien Chaisse, Henry Gao, and Chang-Fa Lo (eds.), *Paradigm Shift in International Economic Law Rule-Making: TPP as a New Model for Trade Agreements?* (Springer 2017) 435–56 (on parameters affecting usage of accession provisions in FTAs); the CPTPP Committee agreed on procedural rules and substantive guidelines ("benchmarks" for the accession process in Annex to CPTPP/COM/2019/D002) <https://perma.cc/8TX7-UXDF>.

⁷⁹ TPP, art. 18.76(5).

TPP as permitting it to apply its own, TPP-inflected, law on the question whether the detained goods are counterfeit or pirated, then buyers and sellers in China and South Africa may be required to adopt an approach to copyright and trademark law dictated by TPP even though neither country is a member of the megaregulatory project.⁸⁰ TPP11 covers important transshipment hubs including not only Singapore, but Port Klang, Tanjung Pelepas, Ho Chi Minh City, and others.

India, for example, may see in TPP's inclusion of countries with very different existing regulatory state and state-market relations such as Malaysia and Vietnam a possible roadmap for some internal regulatory reforms. These reforms would aim to allow Indian businesses to link up to the incipient TPP megaregion by aligning its regulatory approach.⁸¹ China may similarly pick elements worthy of emulation, while simultaneously seeing further need to build out and press for international alignment with the institutional, legal, and market practices of its own model of "China Inc."⁸²

Another option to promote TPP's objectives is to negotiate parallel agreements with nonparty countries (as the United States had done earlier in making an FTA with Chile despite non-inclusion of Chile in the 1994 NAFTA). This might include granting participation rights to non-party countries, such as for example participation in RIA procedures or regulatory cooperation negotiations; these and other mechanisms for participation could also be available to non-governmental organizations (NGOs), business firms and other non-state actors from non-party countries, potentially through two different participation tracks, one for non-party states and the others for non-state actors. These options illustrate some of the ways in which the interests and concerns of nonparties could be addressed—yet TPP fails to address them explicitly except by being open for accession.

The institutional practice of TPP will ultimately determine its openness and inclusion. The alternative for third-parties' inability to exercise "voice" in TPP's megaregional regulatory governance may be to resist TPP's gravitational forces and potentially "exit" to join competing regional regimes such as RCEP.

VI. The Treaty-Institutional Form in Megaregulation

In a period when, particularly outside trade and investment, major multilateral treaties have been difficult to negotiate and bring into force, transgovernmental networks, creating direct contacts between different specialized parts of states' bureaucratic administrations, have been increasingly popular as a path to improved cooperation.⁸³ Today, many specialized networks among regulators work together in areas ranging from money laundering to the hygiene of factories making medicines. The focus of these has been on

⁸⁰ 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.

⁸¹ Harsha Vardhana Singh, "TPP and India: Inspirations for Sequenced Reforms," ch. 31 in this volume.

⁸² Jing Tao, "TPP and China: A Tale of Two Economic Orderings?," ch. 4 in this volume. Mark Wu, "The 'China, Inc.' Challenge to Global Trade Governance" (2016) 57 *Harvard Journal of International Law* 262; Curtis J. Milhaupt and Benjamin Liebman (eds.), *Regulating the Visible Hand? The Institutional Implications of Chinese State Capitalism* (OUP 2016).

⁸³ The foundational analysis was Robert O. Keohane and Joseph S. Nye, "Transgovernmental Relations and International Organizations" (1974) 27 *World Politics* 1, 39–62; Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43 *Virginia J of Intl L* 1–92; Anne-Marie Slaughter, "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks" (2004) 39 *Government and Opposition* 159–90.

coordination of regulatory tasks, knowledge exchanges, and capacity building. The lack of hierarchies and binding commitments, as well as the specific bureaucrats' limited authority over larger regulatory reforms sets limits on their potential for comprehensive cross-polity deep regulation. TPP and other contemporary megaregulation projects seek to overcome this limitation by using a formal treaty form, while also seeking to promote network-form regulatory oversight and affirmative programs through committees. If pursued through a megaregional economic treaty, cross-polity deep regulation commitments can assume a formally binding status under international law which may in turn help their effective implementation in domestic law. With central governments and trade and economy ministries having played a central role in the negotiations, and these institutions' often significant authority in domestic politics and rule-making, there is a higher chance of implementation and effective "on the ground" change. By covering a wide set of substantive areas, trade-offs in bargaining over a variety of issues among participating countries are possible and may allow a consensus not possible in a sector by sector approach.

Megaregulation as pursued in TPP is readily understood as a scale extension from the many existing mainly bilateral free trade agreements (FTAs) that have deepened and proliferated since 2000. With their declining ability to achieve new rule-making serving their interests at the WTO, the United States and the EU, as well as Japan, switched to using FTAs to advance their preferred regulatory rules and practices by inserting them *seriatim* in agreements with economically less powerful jurisdictions. These agreements incorporate and seek to deepen the regulatory aspects of the existing WTO agreements, that is, TBT and SPS commitments, the investment protections of BITs, but expand to include non-tariff aspects such as competition policy, specific sectoral coverage, labor, the environment, administrative procedure and decision-making (including transparency requirements and regulatory impact assessments). Contemporary FTAs also learn from, and try to expand on, the WTO model by pairing the legal commitments with institutions—most commonly a set of committees responsible for elaborating those commitments and promoting their implementation. State-to-state dispute settlement modeled after the WTO system (but without appellate jurisdiction) and investor–state dispute settlement are further staples of these FTAs. TPP includes all of these elements.

Yet, megaregulatory agreements like TPP are different from deep regulation in FTAs because the larger chunk of economic activity covered allows them to carry grander ambitions—economic and geo-political—which they openly announce. FTAs, however modular in their structure, remain separate agreements, curbing their potential for addressing regulatory demands of global and regional value chains such as rules of origin and common institutions. Furthermore, the geographical extension of megaregulation over the baseline of existing FTAs makes a qualitative difference in overcoming fragmentation and creating somewhat unified regulatory approaches and facilitating flows across very large markets.

A further and fundamental difference between ordinary FTAs and megaregulatory agreements is in the degree of influence typically exerted on third party states. Third-party effects have been a staple of trade policy thinking since Jacob Viner's theory of trade diversion was elaborated in 1950,⁸⁴ and are now well recognized in relation to regional regulatory

⁸⁴ Jacob Viner, *The Customs Union Issue* (Carnegie Endowment for Peace 1950).

and customs blocs such as the EU, but megaregional ordering projects have added a new set of issues with regard to intentional, byproduct and inadvertent effects on third parties.

Some goals broadly congruent with megaregulation could be pursued other than through a single big treaty. The Asia-Pacific Economic Cooperation (APEC), for example, has been operating without any treaties since its founding in 1989, and has its own permanent secretariat. What then is important about the formal treaty as an element in megaregulation?

TPP uses the established legal form of an international economic agreement. This form was familiar to all participants, making it reasonably easy to know and agree on its legal status, the meaning of some standard phrases and the apposite methods of interpretation, and what should be provided for in the final clauses (rules for signing, ratification, entry into force, etc.). The US exit before the entry into force of TPP12 could thus be managed legally through the inventive structure used in TPP11 of suspension, modification, and incorporation by reference of the provisions of TPP12. The national processes in each country for debating and approving such a treaty prior to the state's ratification of it are well established and in most participating countries quite extensive. They also provide a stimulus for the state to bring its domestic law largely into line with TPP. Many of these effects could not be achieved by anything other than a treaty.

The legalization of TPP12, making it a formalized (rather than simply political) commitment of the United States in East and South-East Asia would have served some of the signaling, assurance, and connecting functions of military alliances (such as the Cold War-era South-East Asia Treaty Organization) without any military trappings. The use of a purely economic agenda through an agreement open to other members from the megaregion avoided drawing hard lines of exclusion, and would have enabled states parties simultaneously to build deeper economic ties to China. TPP11 does not have any security role comparable to tying the participating countries to the United States. But the binding treaty form, and its domestic legal implementation in each country, does create more durable and dependable entanglements than fluid forms such as coalitions of the willing.

Institutions are key to effectuate regulatory alignment. TPP employs a diverse set of institutional mechanisms to encourage private and government action to implement its substantive vision. Some participants in the US Obama administration sought to combine traditional inter-state politics—including in legal mode its treaty and inter-governmental institutional techniques—with non-formal networks of public and private entities and persons.⁸⁵ TPP instantiates this approach. TPP's procedural methods for promoting regulatory alignment relies on private actors to invoke purposefully the possibilities for change in governmental regulation opened up by TPP's requirements. In most cases, these will be multinational firms or their local affiliates.⁸⁶

⁸⁵ For example, the advocacy of projects to “integrate statecraft with webcraft, the art of designing, building, and managing networks” in Anne-Marie Slaughter, *The Chess-Board and the Web: Strategies of Connection in a Networked World* (Yale University Press 2017).

⁸⁶ This is the experience from US administrative law. Large multi-national firms—or industry associations they support—derive larger benefits and are more able to absorb costs related to government lobbying. They have better access to pertinent information, and the organizational capacity to move in multiple regulatory fora simultaneously. See eg Jason Webb Yackee and Susan Webb Yackee, “A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy” (2018) 68 J Pol 128 (for the United States); Adam William Chalmers, “Trading Information for Access: Informational Lobbying Strategies and Interest Group Access to the European Union” (2013) 20 J Eur Pub Pol 39 (for the European Union). Small and medium-sized enterprises (SMEs) are unlikely to be major actors in the new web of possibilities.

In such a broad-ranging undertaking as TPP, the central government officials responsible for the agreement are very unlikely each to have capacity in their internal hierarchies to bring all parts of the regulatory state into “on the ground” compliance with TPP. Exploiting superior information and economic incentives of private actors, TPP’s regulatory alignment, and the intensification of networks, contacts, social practices and shared understanding so crucial for the megaregulatory project, are left to private actors. In this way, and somewhat counterintuitively, TPP may have features of a “bottom up” approach. Through pre-existing and TPP-inspired procedural rights in domestic regulatory systems—such as entitlements to information, participation, reason-giving, review—private actors have some scope to push to hold states’ regulatory structures to the promises of TPP and promote good regulatory practices across the parties.⁸⁷ Networks of business firms may also play an important role in influencing non-party states toward joining TPP or emulating its practices.

As a matter of treaty law, TPP creates numerous participation mechanisms and in most cases grants rights of access and voice to any “interested person” whatever their status as firm, public-interest organization, or private person, and irrespective of their origin—even from non-party countries. The TBT and Transparency chapters include transparency provisions which require parties to allow “persons” to participate in domestic central government rule-making. The Transparency Chapter further includes commitments about the participation rights of affected persons in domestic administrative proceedings. Parties are to provide “a person of another Party” with notice of administrative proceedings that directly affect it, whenever possible, and the parties are also required to afford such persons “a reasonable opportunity to present facts and arguments.”⁸⁸ In TPP’s SPS Chapter, parties are generally required to notify any proposed SPS Measures and to allow interested persons and other parties to “provide written comments on the proposed measure.”⁸⁹ Comments are to be published and the government has an obligation to respond if prompted. With respect to science based determinations for food and drug safety, regulators are further to provide reasons for finding a non-equivalence of testing procedures. The use of such provisions by an evolving but largely stable coalition of transnationally active firms has potential to create aligning pressure on the parties’ regulatory processes without requiring homogeneity.

Against the larger backdrop, TPP’s administrative participation measures, most of which are based on US precedents, can be conceptualized as tools for economic governance at distance, that is, techniques to influence political and economic orders in the other parties, including by mobilizing and empowering specific domestic and foreign constituencies in national decision-making processes and regulatory practices.

Labor and environmental organizations on the other hand are unlikely to play a major role in shaping the implementation of TPP’s regulatory reform demands. Some of the least expansive participation and review provisions in TPP are in the chapters on environment and labor; in these substantive areas, the space for private initiative is quickly usurped and given back to negotiations between the TPP’s government actors. The privileged access to investor–state dispute settlement (ISDS) given to foreign TPP party-based business firms adds to this asymmetry. Civil society organizations, constituencies with limited access to

⁸⁷ Paul Mertenskötter and Richard B. Stewart, “Remote Control: TPP’s Administrative Law Requirements as Megaregulation,” ch. 17 in this volume.

⁸⁸ TPP, art. 26.3–4.

⁸⁹ TPP, art. 7.13.4.

political actors or TPP's institutions, or generally disenfranchised and disregarded interests will have to adapt to the new procedures and develop extra-institutional venues for engagement, contestation, influence, and possibly resistance.

A. Transnational Committees and Communities

TPP envisages that the parties will interact in different, specialized, and largely trade official and expert-driven, constellations. TPP creates institutions which are designed to fulfill three objectives: they promote the parties' implementation of the agreement,⁹⁰ may channel the parties' discretion in TPP's implementation toward the interests of institutional participants with strong access, networked connections, and authority, and may aid in the development of larger transnational regulatory communities.⁹¹ These communities not only involve trade officials from the parties, but local businesses, regulatory officials, lawyers, economists, risk analysts, and other experts in regulatory procedures and technologies.⁹² The ability of NGOs and other representatives of social interests to participate effectively will, however, be limited. The institutions' goal may be to encumber dialogue and practice that promotes more stable expectations, density, familiarity, and maybe even a certain amount of convergent practices and understandings.⁹³

TPP's central venue for stakeholder participation is the TPP Commission. The Commission is composed of ministers or senior officials⁹⁴ and is to "supervise the work of all committees and working groups established under the agreement."⁹⁵ It takes its decisions by consensus unless otherwise provided for or agreed.⁹⁶ In fulfilling its review function over the agreement it shall take into account, and may seek out, "as appropriate, input from non-governmental persons or groups of the Parties."⁹⁷

TPP's committees are similar in formal function and structure to those established by RTAs in the years just prior to TPP.⁹⁸ The larger membership conceivably offers more scope for the type of community building Karl Deutsch identified as an important aspect of world political ordering.⁹⁹ These institutions might potentially "engineer" conditions, for example,

⁹⁰ See generally Andrew Lang and Joanne Scott, "The Hidden World of WTO Governance" (2009) 20 *Eur J Intl L* 575 (arguing that WTO committees perform important governance functions).

⁹¹ Jacint Jordana, David Levi-Faur, and Xavier Fernandez i Marin, "The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion" (2011) 44 *Comp Pol Stud* 1343, 1360 (providing evidence that at the initial phase of global diffusion of regulatory agencies the strongest channel of institutional transfer is within a specific sector from one state to another).

⁹² See David Kennedy, *World of Struggle* (Princeton University Press 2016) (for an account of the political economy of expertise in legalized institutions of global governance).

⁹³ Julia Black, "Regulatory Conversations" (2002) 29 *Journal of Law and Society* 163.

⁹⁴ TPP, art. 27.1

⁹⁵ TPP, art. 27.2.1(d).

⁹⁶ TPP, art. 27.3.1.

⁹⁷ TPP, art. 27.4(c); TPP, art. 27.2.2(e).

⁹⁸ An example is the Committee on Technical Barriers to Trade (CTBT-TPP, art. 8.11.1) which also features specific Chapter Coordinators (TPP, art. 8.5). The CTBT is to "intensify" the Parties regulatory coordination "with a view to facilitating trade between and among the Parties" (art. 8.11.2), develop common approaches to global rule-making initiatives, and identify needs for technical assistance. The Regulatory Coherence Committee is to "establish appropriate mechanisms to provide continuing opportunities for interested persons of the Parties to provide input on matters relevant to enhancing regulatory coherence" (art. 25.8). The Environment Chapter further requires the Parties to "make use of existing, or establish new, consultative mechanisms, for example national advisory committees, to seek views on matters related to the implementation of this Chapter" (art. 20.8.2).

⁹⁹ Karl Deutsch and others, *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience* (Greenwood Press 1969) 5.

mutual cultural intelligibility among the members, a belief in a common fate, and norms of unilateral self-restraint—that enable such communities to form and deepen.¹⁰⁰ Under current political conditions—and the weight of the USA and China outside the agreement but only limited leadership inside—this seems improbable.

B. Judicial Review and Enforcement

Domestic administrative tribunals and courts play an integral role in contemporary global economic governance.¹⁰¹ While their regulatory power is commonly circumscribed, because national legal systems deny “direct effect” to international trade agreements, there is still ample potential for them as venues for enforcement and development once the agreements have spawned domestic legislation or administrative interpretations and practices. Moreover, some smaller TPP members’ courts are more open to private litigants invoking international treaty obligations directly and may thus be open to basing proceedings directly on TPP once it has entered into force.

Entitlements by private actor to domestic judicial access, review, and remedies are provided in many provisions throughout TPP. Parties are to afford the possibility of judicial enforcement of intellectual property, as well as labor, and environmental laws to persons with recognized legal interest.¹⁰² Companies affected by domestic competition laws are to have access to a domestic court or independent tribunal to review the decision.¹⁰³ Its government procurement chapter requires parties to have an impartial administrative or judicial authority that is independent of the procuring entities and which can review complaints about the party’s compliance with its TPP-based procurement obligations.¹⁰⁴ The labor chapter includes similar provisions requiring the parties to provide for judicial review and enforcement of the parties’ labor laws for persons with a “recognised interest” under its law.¹⁰⁵ TPP’s environment provisions require parties to allow “an interested person residing or established in its territory” to request the party’s competent authorities to investigate alleged violations of environmental law.¹⁰⁶

An active TPP-based state-to-state dispute settlement system may be the most important institution for effective megaregulation. The wide and often intricate set of reforms to regulatory institutions and practices that permeate TPP’s thirty chapters may be relatively difficult to push through against unwilling TPP parties—and their associated political processes—in the absence of pressure from other parties. Much of the TPP’s megaregulation is also left strategically ambiguous in the face of the need to reach consensus,¹⁰⁷ and the development of a significant “TPP jurisprudence” on key questions could conceivably, and with parallels to the WTO, be an important contribution to the contours of TPP’s regulatory program.

¹⁰⁰ Emanuel Adler and Michael Barnett (eds.), *A Framework for the Study of Security Communities in Security Communities* (CUP 1998) 29–66, 43.

¹⁰¹ Christopher A. Whytock, “Domestic Courts and Global Governance” (2009) 84 *Tulane L Rev* 67.

¹⁰² TPP, arts. 18.7.4, 19.8.2, 20.7.2.

¹⁰³ TPP, art. 16.2.4.

¹⁰⁴ TPP, art. 15.19.1.

¹⁰⁵ TPP, art. 19.7.2.

¹⁰⁶ TPP, art. 20.7.2.

¹⁰⁷ An example from TPP concerns the exact meaning of the “comparable outcome in the market” phrasing for biologics data exclusivity period in TPP, art. 18.51.1(b), suspended in TPP11. See generally Cass R. Sunstein, “Incompletely Theorized Agreements” (1995) 108 *Harv L Rev* 1733–72.

The absence of a unified appeals tribunal—akin to the WTO Appellate Body—may lead to jurisprudential dynamics closer to the current state of affairs with respect to awards from investor–state tribunals.

TPP’s investment chapter largely followed the then-existing US standard model for bilateral investment treaties.¹⁰⁸ It provides a potential remedy for investors complaining of denial of substantive and procedural rights granted by the treaty, and the prospect of successful claims creates incentives for parties to comply with their obligations. TPP ISDS may become significant for investor–state claims against certain countries, as it upholds a traditional investor-favoring form at a time when increasing numbers of states are moving away from this model. JEEPA includes no investor–state dispute settlement because of the stand-off between the EU’s shift to only accepting a court-style model and Japan’s preference for a TPP-style arbitration system (although it is very rare for Japanese companies to make investor–state claims against other countries, and Japan itself has never been subject to such a claim in the modern period). The reach of NAFTA’s investment chapter (under which many claims have been brought against Canada and Mexico) will be sharply curtailed if the transition to the 2018 USMCA is finally consummated, leading to increased reliance on TPP by investors planning the structure of their investments to ensure the availability of ISDS.

VII. TPP’s Vision of the State in Relation to Markets

TPP’s implicit ambition to prescribe a vision of the state and state-market relations must be understood against the backdrop of global legal and institutional infrastructures that largely support cross-border transactions and business structures. Megaregulation in TPP 12 was largely reflective of US interests and favored the US model of the regulatory state. The United States would have had to undergo almost no legislative changes to be in compliance with TPP. For Australia, Canada, Chile, New Zealand, and Singapore, the reform needs of TPP are also limited. These states have—with important nuances—relatively (liberal-type) administrative states and practice a variety of capitalism in line with the vision of state market relations reflected in TPP. Peru and Mexico, through the US–Peru agreement and NAFTA, already have treaty commitments in the general direction of TPP. The immediate demand of substantive change is further relaxed by the suspensions adopted in TPP11. The suspended provisions reflected largely US demands that caused significant irritation among the other eleven members.

The Abe government in Japan saw in TPP useful leverage for long-sought domestic regulatory reform. Patterns of cross-ownership and close relationships between economic policy-makers and the private sector are increasingly seen by the government as causes of sustained periods of low growth. Vietnam and Malaysia, and possibly Brunei, may be most affected by this reform program. Vietnam, in the shadow of TPP, is already undertaking some changes to its labor laws, internet regulations, and other areas, and has continued to do so under TPP11. These economies would need to undergo substantial reforms to align with TPP’s vision of state-market relations and liberal regulatory and administrative

¹⁰⁸ José E. Alvarez, “Is the Trans-Pacific Partnership’s Investment Chapter the New ‘Gold Standard?’” (2016) IILJ Working Paper 2016/5. See C. L. Lim, “Finding a Workable Balance Between Investor Protection and the Public Interest in the Trans-Pacific Partnership,” ch. 25 in this volume.

state model. Pressures to change their model of state-market relations may have abated with TPP11, not least because TPP11 suspends some of the more stringent obligations for Malaysia with respect to SOEs, and for Vietnam with respect to tariff snap-backs for violations of its labor obligations.

Smaller businesses (other than in value chains or affiliations with large players) stand to gain little from most of TPP; the same is true for largely rural societies. The aggregate effects of TPP on employment and on wage levels (in purchasing power terms) has not yet been satisfactorily modeled, and the effects are likely anyhow to be swamped by automation.

The long-term potential of TPP is to reform national administrative states and state-market relations. Even without the United States, TPP carries a specific type of capitalist ordering which aims at corporations freely conducting their business throughout regional markets, while the state is constrained as a market actor and regulator.

In this way, TPP nudges its parties toward a specific “view of the state” (where does it regulate, how does it regulate, where does it *not* regulate). It promotes a conception of the state that embraces rationalized regulatory processes, increased transparency and due process, anti-corruption, freedom of location, and market competition through competition policy and disciplines on government procurement and SOEs.¹⁰⁹ TPP’s implicit vision of the state is not one which is to be wholly truncated to give more space to unconstrained market forces, but rather a state which can grow in tandem with the market by regulating to control its failures and externalities. But it is also a vision which constantly demands justification for regulatory activity and seeks to employ the state itself as an instrument of state control.¹¹⁰ It is a state that needs to justify in particular circumstances its “right to regulate.”

A. Taming the Administrative State in TPP

The model promoted by TPP is that of an administrative state operating predictably, differentiating among actors only with justification, and making and implementing decisions in accordance with law.¹¹¹ Norms of non-discrimination familiar from trade law as well as global administrative law disciplines of access to information, reason-giving, and review permeate the agreement. The objective is to channel the discretion of politicians and bureaucrats and to ensure that considerations of efficiency and public reason underlie the state’s own decision-making. The associated increase in the overall predictability of state behavior may allow firms and investors more accurately to calculate and price risk associated with cross-border business operations and investments—thereby encouraging trade and investment. Technologies of regulation promoted by TPP, such as regulatory impact analysis and risk and equivalence assessments, may further nudge states toward regulatory equivalence and administrative rationality.¹¹²

The heart of TPP’s anti-corruption provisions is constituted by obligations to criminalize bribery of national and foreign public officials, provisions drawn largely from the

¹⁰⁹ See section IV.

¹¹⁰ David Levi-Faur, “The Global Diffusion of Regulatory Capitalism” (2005) 598 *Annals of the Am Acad Pol & Soc Sci* 12; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar Publishing 2008); Michael Power, *The Audit Society* (OUP 1997) (for the early development of the self-regulation of state institutions by other state institutions).

¹¹¹ We hesitate to characterize this model “liberal” without further elaboration of a term used in so many widely different ways. ‘Liberal-type’ conveys the general direction of the prescriptions. .

¹¹² See Livermore and Schwartz, “Regulating Regulation,” ch. 21 in this volume.

United Nations Convention Against Corruption (UNCAC) and the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).¹¹³ TPP11 makes such requirements an obligation for some states not party to the OECD Convention in particular. TPP11 also extends the substantive criminalization requirement to "aiding or abetting, or conspiracy in the commission of any of the [TPP11-specified] offences . . ."¹¹⁴ The criminalization of conspiracy to bribe may increase the reach of prosecutors which lack evidence of each individual defendant acting in furtherance of the bribing but have evidence of the defendants' overall agreement to bribe public officials.

In the area of antitrust, TPP provides a general but under-specified and unenforceable commitment by parties to proscribe "anticompetitive business conduct."¹¹⁵ TPP focuses on procedural requirements in the application of national competition law, rather than pushing strongly toward harmonized substantive competition law among the different parties.¹¹⁶ TPP parties are to have a national competition law system (which all TPP parties except Brunei already do) and to incorporate a (US-influenced commitment) to legal due process¹¹⁷ and consensual settlement,¹¹⁸ but beyond an obligation prohibiting hard core cartels it does not address substantive competition law, reflecting reluctance of the United States and others to do so in international agreements.¹¹⁹ TPP emphasizes procedural safeguards for those charged with violating national competition laws,¹²⁰ contains general provisions that aim at principles of fair competition and general norms of consumer protection, and sets up possible pathways for closer institutional cooperation between the parties' agencies.¹²¹

In its largely implicit and perhaps internally inconsistent vision for the state, TPP maintains elements of a receding state rooted in neoliberal ideas of the Washington Consensus. TPP thereby complements international development programs originating with the Bretton Woods institutions and North Atlantic states' aid programs.¹²² Examples of this neoliberal influence in TPP—all still included in TPP11—are commitments to investor-state dispute settlement tribunals that partly privatize the review of state action in the hope that they encourage foreign direct investment and obligations to curb the role of SOEs. But in other areas, TPP signaled a partial disavowal of neoliberal mainstays such as restrictions on capital controls.¹²³

This model of economic ordering in TPP is a contrast and possible counter to other economic orderings, which give a substantial managerial or directive role to the state.¹²⁴

¹¹³ TPP, art. 26.7; UNCAC: Entry into force: Dec. 14, 2005; 186 Parties (all TPP states are Parties to UNCAC—Japan acceded only in July 2017, pursuant to a TPP requirement); OECD Convention: Entry into force: Feb. 15, 1999; 44 Parties (includes the TPP11 Parties except Brunei, Malaysia, Singapore, and Vietnam—Peru acceded in 2018).

¹¹⁴ TPP, art. 26.7.1(d).

¹¹⁵ TPP, art. 16.1.

¹¹⁶ See Daniel Francis, "Choices and Consequences: Internationalizing Competition Policy After TPP" ch. 18 in this volume.

¹¹⁷ TPP, art. 16.2.1.

¹¹⁸ TPP, art. 16.2.5.

¹¹⁹ TPP, art. 16.1.

¹²⁰ TPP, art. 16.2, 16.7.

¹²¹ TPP, art. 16.4–5.

¹²² John Williamson, "What Should the World Bank Think About the Washington Consensus?" (2000) 15 *World Bank Res Obs* 251–64; Dani Rodrik, "Goodbye Washington Consensus, Hello Washington Confusion?" (2006) 44 *J Econ Lit* 973–87.

¹²³ TPP, art. 29.3 (Temporary Safeguard Measures). But TPP allows for ISDS challenges against such measures which allege discriminatory treatment or expropriation. TPP, art. 9.9; TPP, art. 29.3.3.

¹²⁴ See generally Peter A. Hall and David Soskice, "An Introduction to Varieties of Capitalism" in *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (2001) (focusing on differences among

Beyond the coordinated market economy (CME) models prevalent in continental Europe, there are varieties of strong state capitalism as practiced—with different structures and institutions—in China, Russia, South Africa, Brazil, and many other countries.¹²⁵ These countries pursue ambitious and selectively designed programs for industrial policy, redistributive measures pursued through procurement and regulatory policies, targeted financing through development banks, and other economic policy measures in tension with TPP's more liberal model.

B. Disciplining the Commercial State in TPP

The state is not only a market regulator, but an active market participant. With SOEs the state is a producer or investor, in its procurement the state is a consumer, and even corrupt officials can be seen as entangling the state in the market place.¹²⁶ TPP tries to control, channel, and, in the case of corruption, outright prohibit the state's involvement in the market. The emphasis on procedure is remarkable in these provisions, which are designed to mobilize private actors to police disciplines on the participating states.¹²⁷

1. Government Procurement

TPP's provisions on government procurement may serve an important aligning function that opens new commercial opportunities for large companies operating cross-nationally. TPP largely tracks the plurilateral WTO Government Procurement Agreement (GPA) but most TPP11 members are not parties to it (only Canada, Japan, New Zealand, and Singapore are, while Australia is in the process of acceding).¹²⁸ TPP's government procurement provisions could have important implications for Malaysia and Vietnam with patronage-oriented government contracting systems.¹²⁹

Like the GPA, TPP works with a positive-list of sectors and activities that are subject to the procurement requirements. Large parts of government procurement therefore lie beyond TPP's legal scrutiny. However, and in contrast to the GPA, TPP includes a commitment to revisit the parties' individual coverage of the chapter with a view to "achieving expanded coverage, including sub-central coverage."¹³⁰ TPP11 pushed back the initiation of negotiations for expanded coverage from three years to five years after entry into force of the agreement. Nonetheless, over the long run, this procedure may lead to significantly larger coverage than the GPA.

Substantively, the parties are to administer transparently their government procurement from the initial stages up to post-award review, including the provision of relevant

liberal market economies (LMEs) and coordinated market economies (CMEs)); Kathleen Thelen, "Varieties of Capitalism: Trajectories of Liberalization and the New Politics of Social Solidarity" (2012) 15 Annual Rev Pol Sci 137–59.

¹²⁵ See generally Ian Bremmer, "State Capitalism Comes of Age" (2009) 88 Foreign Affairs.

¹²⁶ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (CUP 1999) 113 ("corruption describes a relationship between the state and the private sector").

¹²⁷ Paul Mertenskötter and Richard B. Stewart, "Remote Control: TPP's Administrative Law Requirements as Megaregulation," ch. 17 in this volume.

¹²⁸ The GPA consists of seventeen parties covering forty-five WTO members (counting the European Union and its twenty-eight member states, all of which are covered by the Agreement, as one party). Another thirty WTO members and four international organizations participate in the GPA Committee as observers.

¹²⁹ See Joseph Wira Koesnandi and Wahyuni Bahar, "How Ready Is Indonesia to Open Government Procurement à la TPP?," ch. 19 in this volume.

¹³⁰ TPP, art. 15.24.1.

information to potential and active bidders and the retaining of documentation. This transparency may be important for other bidding companies as well as prosecutors and other interested stakeholders in detecting any bid rigging or kickback schemes. The domestic review procedures, which guarantee access to an impartial and independent authority to review challenges by a co-bidder, may also be instrumental in discovering illicit behavior and may create the needed legal background structure to sufficiently assure and incentivize potential suppliers to participate in the bidding in the first place.¹³¹ The megaregulatory ambition of TPP, made possible through its wide substantive coverage, is illustrated by its linkage between government procurement provisions and concerns about corruption which require states to exclude offenders from this process and to institute policies and procedures addressing conflicts of interest.¹³² This shows how TPP itself integrates the different regulatory provisions and leverages them to discipline the state as market participant.

2. *State-Owned Enterprises*

The appropriate roles (and limits) of SOEs in an economy are viewed differently in different polities and are deeply contested as between different major approaches to economic ordering. At issue are both the overall welfare effects of SOEs as well as the extent to which they are compatible with non-discriminatory openness to competition with foreign firms. TPP includes commitments about curbing non-commercial considerations in SOE operations and support that go beyond previous RTAs and which are subject to SSDS.¹³³ These demands form an important part of TPP's overall megaregulatory agenda and represent core disciplines on the state as a market actor.

Most of the TPP11 parties have some SOEs, but they are most important to the economies of Vietnam, Malaysia, and Mexico.¹³⁴ International economic agreements prior to TPP included only limited obligations relating to SOEs,¹³⁵ whereas TPP clarifies key concepts such as commercial considerations, adverse effects, and injury in more detail than previous agreements.¹³⁶ Collectively framing certain regulatory concerns with respect to SOEs may lead to shared understandings with long-term effects in approaches to regulating SOEs. In its definition of "commercial considerations," TPP, in contrast to previous agreements, references the "normal" behavior of private firms as a baseline and specifies how to establish causation for adverse effects.¹³⁷ This may make it easier for potential complaining parties to meet their evidentiary requirements.

¹³¹ TPP, art. 15.22.1.

¹³² TPP, art. 15.16, 15.18. TPP draws heavily on the GPA in this regard. Compare TPP, art. 15.16 (Post-Award Information) and art. 15.19 (Domestic Review) with Revised Government on Government Procurement (adopted on Mar. 30, 2012, GPA/113) art. XVI (Transparency of Procurement Information) and art. XVIII (Domestic Review Procedures).

¹³³ Ines Willems, "Disciplines on State-Owned Enterprises in TPP: Have Expectations Been Met?" Leuven Centre For Global Governance Studies And Institute For International Law Working Paper No. 16.

¹³⁴ Sean Miner, Commitments on State-Owned Enterprises in Jeffrey J. Schott and Cathleen Cimino-Isaacs (eds.), *Assessing the Trans-Pacific Partnership, Volume 2: Innovations in Trading Rules* (Peterson Institute for International Economics 2016) 92.

¹³⁵ Agreement on Subsidies and Countervailing Measures (SCM Agreement) (left it ambiguous whether SOEs would count as public bodies); GATT art. XVII (key concept of "commercial considerations" undefined); NAFTA 1502, 1503 (but provisions remained general and confined to commercial considerations and non-preferential treatment). The 2003 US–Singapore agreement featured some precursors to the TPP regime. See art. 12.2.

¹³⁶ TPP, art. 17.1.

¹³⁷ TPP, art. 17.4.

In this domain, TPP's megaregulatory program does not stop at regulatory alignment but pushes toward harmonization of substantive standards.¹³⁸ This has potentially significant implications in all places of the SOEs' operations, whether in TPP territory or not, because the non-commercial considerations are unlikely confined to specific places of operation. This is borne out by TPP itself, which applies to parties' SOEs receiving "non-commercial assistance" even when they are operating in non-parties to the extent that their activity injures other parties' domestic industry.¹³⁹ A Malaysian SOE operating in Thailand, for example, which receives assistance from the Malaysian government to offer a product which displaces or impedes a similar product from a Singaporean competitor firm in the Thai market, may expose Malaysia to a potential claim from Singapore pursuant to TPP. For the inverse scenario—a non-party SOE operating within a party—TPP also assumes regulatory force and asks parties to guarantee private parties a forum for judicial redress against these corporations unimpeded by laws of immunity.¹⁴⁰ Chilean courts, for example, would need to allow a claim of a Canadian firm to sue a Chinese SOE with which it competes in the Chilean market.

As is the case with much of TPP's megaregulatory program, significant evolution lies in TPP's procedural alignments for the parties' regulatory institutions. Extensive transparency and response requirements require each party to publish a list of its SOEs and provide (if so requested by a party) even non-public information about their equity positions in an SOE, government officials holding senior positions in the enterprise, annual revenue, exemptions, and immunities applicable to the SOE.¹⁴¹ They further have to provide details about their policy and program for non-commercial assistance, specifying the involved government agencies and SOEs, the policy's legal basis, the amount of assistance, duration and evidence on the policy's effects.¹⁴² This provision may function as a significant information pushing mechanism alleviating potential complainants' difficulties in acquiring evidence necessary for their claim (as was, for example, the case with Article XVII GATT claims). Beyond complaints, the information may also be useful for firms considering market entry as they can better assess their competitiveness.

VIII. Conclusion

The WTO is the baseline and enduring global structure against the backdrop of which all megaregulatory enterprises to date have been pursued. All of the economies involved in any of the megaregulatory agreement negotiations are members of the WTO. TPP can be understood in part as a continuation and expansion of the "deep integration" agenda which the United States, the EU, and some of their allies had earlier pursued through the WTO. The Uruguay Round Agreements of 1994, and the TBT and SPS Agreements in particular, included procedural and substantive disciplines on domestic regulations designed to go beyond non-discrimination norms (embodied in national treatment and most-favored nation (MFN) treatment standards) to embody deeper economic integration, for example

¹³⁸ TPP, art. 17.7.

¹³⁹ TPP, arts. 17.7.1(b)(ii) and 17.7.1(c)(ii).

¹⁴⁰ TPP, art. 17.5.1.

¹⁴¹ TPP, art. 17.10.1 and 3.

¹⁴² TPP, art. 17.10.4.

by encouraging the use of international standards in national regulation. The WTO agreements on services (GATS), intellectual property (TRIPS), and government procurement (the plurilateral GPA) also have significant deep regulation elements. However, the decline in the ability of the United States and the EU to get agreement in the WTO on new rules they want—at least without making concessions on developing countries demands, which in the Doha Round and subsequently they were unwilling to do—has changed their view of the WTO as a major rule-making venue. Equally, developing countries in the WTO are not willing to have it serve as an agent for “deep integration” submersing national regulation, unless they can see tangible benefits. Some indeed argue that faced with sharp divisions among member states, WTO Appellate Body jurisprudence has turned and in some respects cut back on the deep regulation agenda of the Uruguay Round, and that the Appellate Body has instead re-angled its constitutional sensibility back toward norms of non-discrimination.¹⁴³

In this view, the WTO system of negotiations had by the end of the 2000s reached impasse with the rejection of much of the development agenda, the non-incorporation of the “Singapore issues,” and lack of progress on agriculture, subsidies, and unilateral trade remedies. The WTO’s consensus requirements, and anti-*à la carte* constitutional practices, made it highly unlikely an organization of over 164 parties would agree on a new comprehensive set of regulatory rules.

US and EU trade negotiators argued that FTAs, and then by extension the megaregionals, had become a necessary response to blockage in the WTO. Megaregulatory agreements such as TPP were presented as strategies to formulate more “advanced” legal commitments among sets of more like-minded states. A smaller number of purposively-selected parties could reach agreements more easily, and the comprehensive subject matter coverage of megaregulatory agreements allowed many possibilities for cross-issue and cross-sector bargaining and trade-offs. Bilateral FTAs could be negotiated with much smaller countries without making the major concessions demanded by the big developing countries. The United States, EU, and Japan initially envisaged that rules agreed in such negotiations could potentially be brought back into the WTO at a later stage. This fits a pattern in which states unable to advance their agendas and interests sufficiently in the existing multilateral forum create other international institutions or agreements in which they have the necessary combination of negotiating power and support to embody their objectives, and which carry sufficient economic weight to be hard to simply ignore.

This idea of cycling back to the WTO faded with the US turn against multilateralism from 2017, and the WTO faced increasing challenges of marginalization as FTAs and regional agreements were pursued outside, at the same time as bilateral negotiations tended to overshadow WTO dispute settlement processes as means to address US-initiated rounds of tariff escalations, trade restrictions based on national security justifications, and structural changes in world economic ordering related particularly to China’s growth. In the long term, however, it remains possible that the WTO processes, albeit lumbering and internally fraught, will gradually produce the global agreements that are realistically possible given conflicting interests and domestic political considerations. The agreements on information technology (ITA) and trade facilitation (TFA)—and the progress on issues affecting least developed countries which were conspicuously left out of TPP—when weighed in tandem with updates in WTO political norms and processes, point to these more truly global

¹⁴³ Rob Howse, “The World Trade Organization 20 Years On: Global Governance by Judiciary” (2016) 27 *European Journal of International Law* 9–77.

possibilities. Established international organizations are inevitably slow to adjust both to power shifts among member states and to changes in wider environments, including political and social norms and economic and technological change. The inter-state Paris Agreement of 2015 on climate change issues, concluded as an iteration of an immense diplomatic process which also involved thousands of for-profit and non-profit organizations and people not representing governments, was denounced by the United States administration soon after its rejection of TPP. There remain, however, significant underlying drivers for arrangements such as a global climate agreement or a renovated WTO to each embrace a similar model for a substantively non-overreaching and procedurally widely inclusive agreement process which nonetheless produces reasonably effective outcomes, given the circumstances and the constraints that they face.

TPP started off in a new “megaregional” direction, promoting a very modest form of trans-regionalism but with an ambitious megaregulatory agenda. TPP11’s megaregion is dispersed across non-proximate countries and among several distinct traditional political or geographic areas (North America, South America, the South Pacific, South-East Asia, and East Asia). In the Asia-Pacific region, TPP layers onto: APEC, to which all TPP11 states already belong, dozens of FTAs (some of them cross-Pacific such as Japan’s agreements with Chile, Mexico, and Peru), a web of bilateral investment treaties (BITs), and rafts of regional structures within South-East and East Asia (for example ASEAN), the Americas (for example, the Pacific Alliance), and North America (for example, NAFTA/USMCA). All the TPP11 states have strong interests in economic links not only with their close neighbors and with their TPP11 partners, but also (and even more so) with China, Europe, India, and the United States, as well as Brazil, Russia, and potentially Africa and the MENA region as these grow. Any megaregionalization associated with TPP is thus likely to find balancing limits.

Nonetheless, TPP’s megaregulation goes appreciably beyond existing models in economic agreements, and its model of state-economy structures, substantive disciplines, and administrative procedures may prove influential beyond its members. At the same time, it has significant flaws and vulnerabilities. Despite its “21st century” rhetoric, strong focus on regulatory governance, and ambitious procedural and substantive reach, TPP11 (like TPP12, and like the WTO) remains within the trade law orthodoxies of the late 20th century by negotiating the agreement in secret, by largely ignoring and relegating the inevitable distributive questions megaregulation entails to the domestic level, and by furthering the disembodiedness of globalization, without addressing its consequences in terms of inequality, environmental harm, and employment and labor rights. Developing meso-level theory and operable normative criteria to reevaluate megaregulation and economic globalization is necessary. The capabilities approach pioneered by Amartya Sen and Martha C. Nussbaum is one promising foundation for new theorizing of law and institutions. Many of the subsequent chapters in this book address these problems and other features and implications of TPP. In adumbrating the concept of megaregulation and its instantiation in TPP, this chapter has sought to provide a conceptual backdrop for such reconstructive work.