

# ***TPP Objectively***



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## ***Legal, Economic, and National Security Dimensions of CPTPP***

SECOND EDITION

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*The autonomy to pursue one's passion, not as an avocation, but as an occupation, is an unusual blessing. This book is dedicated to the American and foreign law schools on whose faculties I served full time. Their support helped me flourish in International Trade Law:*

*William & Mary (1993–1998),  
George Washington (1998–2003),  
Kansas (2003–).*

This philosophy of the free market—the wider economic choice for men and nations—is as old as freedom itself. It is not a partisan philosophy. For many years our trade legislation has enjoyed bipartisan backing from those members of both parties who recognized how essential trade is to our basic security abroad and our economic health at home.

*John F. Kennedy*  
(1917–1963, President, 1961–1963)  
January 1962 Special Message to the  
Congress on Foreign Trade Policy

Trade is the greatest weapon in the hands of the diplomat.

*Dwight D. Eisenhower*  
(1890–1969, President, 1953–1961)  
May 1955 White House Press Conference

We have encouraged, by precept and example, the expansion of world trade on a sound and fair basis.

*Harry S. Truman*  
(1884–1972, President, 1945–1953)  
January 1949 Inaugural Address

“These dummies say, *oh, that’s a trade war!* We’re losing \$500 billion in trade with China! Who the hell cares if there’s a trade war?! It’s crazy!”

*Donald J. Trump*  
(1946–, President, 2017–)  
May 2016 Lawrenceville, New Jersey, Campaign Rally, quoted in  
Marlow Stern, “‘The Daily Show’ Trashes Trump on Trade:  
‘You’re F-cking Crazy,’” 23 May 2016, *THE DAILY BEAST*

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# Abbreviations

Acronym	Full Term
AAFA	American Apparel & Footwear Association
AANZFTA	<i>ASEAN-Australia-New Zealand Free Trade Agreement</i>
AAPC	American Automotive Policy Council
ABC	Australian Broadcast Corporation
ACA	<i>Patient Protection and Affordable Care Act of 2010</i>
A\$	Australian Dollar
AD	Antidumping
ADB	Asian Development Bank
<i>AD Agreement</i>	<i>WTO Antidumping Agreement (technically, WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping))</i>
ADIZ	Air Defense Identification Zone
ADNA	Abbreviated New Drug Application
ADR	Alternative Dispute Resolution
AFIRB	Australian Foreign Investment Review Board
AFL-CIO	American Federation of Labor-Congress of Industrial Organizations
AFTINET	Australian Fair Trade & Investment Network Ltd.
AG	Attorney General
AGOA	African Growth and Opportunity Act
AIA	<i>Leahy-Smith America Invents Act of 2011</i>
AIIB	Asian Infrastructure Investment Bank
ALIC	Agriculture and Livestock Industries Corporation
AmCham	American Chamber of Commerce
AMTAC	American Manufacturing Trade Action Coalition
ANDA	Abbreviated New Drug Application
APC	Australian Productivity Commission

<i>APEC</i>	Asia Pacific Economic Cooperation forum
AMTI	Asia Maritime Transparency Institute
ASA	American Sugar Alliance
<i>ASEAN</i>	<i>Association of South East Asian Nations</i>
<i>AUSFTA</i>	<i>Australia-United States FTA</i>
AVE	<i>Ad Valorem</i> Equivalent
BIO	Biotechnology Industry Organization
B.I.S.D.	Basic Instruments and Selected Documents
BIT	Bilateral Investment Treaty
<i>BJP</i>	<i>Bharatiya Janata Party (BJP)</i>
BNA	Bureau of National Affairs
BOJ	Bank of Japan
BOP	Balance of Payments
BOT	Build Operate Transfer
<i>BPCIA</i>	<i>Biologics Price Competition and Innovation Act of 2009</i> (part of <i>ACA</i> )
BPM	Border Protection Measure
Brexit	The withdrawal of the United Kingdom from the EU
BSA	BSA   The Software Alliance (formerly Business-Software Alliance)
BTD	Bipartisan Trade Deal
<i>CAFTA-DR</i>	<i>Central American Free Trade Agreement—Dominican Republic Free Trade Agreement</i>
<i>Canifarma</i>	National Pharmaceutical Industries Chamber (Mexico)
CBC	Canadian Broadcast Corporation
CBP	United States Customs and Border Protection
CCP	Chinese Communist Party
CD \$	Canadian dollar
CEA	Council of Economic Advisors
CEC	Commission on Environmental Cooperation
CEO	Chief Executive Officer
<i>CEPA</i>	<i>Comprehensive Economic Partnership Agreement</i>
<i>CER</i>	<i>Australia-New Zealand Closer Economic Relations Trade Agreement</i>
CET	Common External Tariff

<i>CETA</i>	<i>Comprehensive Economic and Trade Agreement</i>
CFIUS	Committee on Foreign Investment in the United States
CGE	Computable General Equilibrium
CICC	China International Capital Corporation
CITA	Committee for the Implementation of Textile Agreements (United States)
CIWS	Close In Weapons Systems
<i>CITES</i>	<i>Convention on International Trade in Endangered Species of Wild Fauna and Flora</i>
CMT	Cut-Make-Trim
COC	ASEAN Code Of Conduct (COC)
CPC	Central Product Classification (for Services)
<i>CPTPP</i>	<i>Comprehensive and Progressive Agreement for Trans Pacific Partnership</i>
CRS	Congressional Research Service (United States)
CSIS	Center for Strategic and International Studies
CSR	Corporate Social Responsibility
CTC (Tariff Shift)	Change in Tariff Classification
CTH	Change in Tariff Heading (4 digit HS Code)
CTSH	Change in Tariff Sub-Heading (6 digit HS Code)
CU	Customs Union
<i>CUSFTA</i>	<i>Canada-United States Free Trade Agreement</i>
CVD	Countervailing Duty
CVMA	Canadian Vehicle Manufacturers' Association
DEFRA	Department for Environment, Food and Rural Affairs (United Kingdom)
DFAT	Department of Foreign Affairs and Trade (Australia, Canada)
DFQF	Duty Free, Quota Free
DFQF EIF	Duty Free, Quota Free (treatment immediately upon) Entry Into Force
DHS	United States Department of Homeland Security
<i>DMCA</i>	1998 United States <i>Digital Millennium Copyright Act</i>
DOC	United States Department of Commerce
DOD	United States Department of Defense
DOE	United States Department of Energy

DOI	United States Department of the Interior
DOL	United States Department of Labor
DRM	Digital Rights Management
<i>DSU</i>	<i>WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)</i>
EBA	Everything But Arms
ECAT	Emergency Committee for American Trade
e-commerce	electronic commerce
EFF (1st meaning)	Electronic Freedom Foundation
EFF (2nd meaning)	Electronic Frontier Foundation
EIF	Entry Into Force
EPA (1st meaning)	United States Environmental Protection Agency
<i>EPA</i> (2nd meaning)	<i>Economic Partnership Agreement</i>
EPZ	Export Processing Zone
EU	European Union
Ex-Im Bank	Export-Import Bank (United States)
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FAR Council	United States Federal Acquisition Regulation Council
<i>FCPA</i>	<i>United States Foreign Corrupt Practices Act</i>
FDA	United States Food and Drug Administration
FDI	Foreign Direct Investment
FDRA	Footwear Distributors and Retailers of America
<i>FMSA</i>	<i>Food Safety Modernization Act</i>
Forex	Foreign Exchange
<i>FOIA</i>	<i>United States Freedom of Information Act</i>
FSA	Financial Services Agency (Japan)
FTA	Free Trade Agreement
<i>FTAAP</i>	<i>Free Trade Agreement of the Asia Pacific</i>
FWW	Food and Water Watch
FX	Foreign Exchange

FY	Fiscal Year
G-7 (G 7)	Group of Seven major advanced nations (Canada, France, Germany, Italy, Japan, United Kingdom, and the United States)
G-20 (G 20)	Group of 20 (Argentina, Australia, Brazil, Canada, China, European Union, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Spain, Turkey, United Kingdom, and United States)
GAP	Generally Accepted Practice
GATS	WTO <i>General Agreement on Trade in Services</i>
GATT	WTO General Agreement on Tariffs and Trade
GBMA	Generic and Biosimilar Medicines Association (Australia)
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product
<i>Geneva Act</i>	<i>1999 Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs</i>
GI	Geographical Indication
GPA	WTO <i>Agreement on Government Procurement</i>
GPhA	Generic Pharmaceutical Association
GSP	Generalized System of Preferences
GVC	Global Value Chain
HHS	United States Department of Health and Human Services
HPAI	Highly Pathogenic Avian Influenza
HS	Harmonized System
HSI	Humane Society International
HTS	Harmonized Tariff Schedule
HTSUS	Harmonized Tariff Schedule of the United States
HVAC	Heating, Ventilation, and Air Conditioning
IAM	International Association of Machinists
ICANN	Internet Corporation for Assigned Names and Numbers
ICJ	International Court of Justice
ICRIER	Indian Council for Research on International Economic Relations
ICS	Investment Court System
ICSID	International Center for Settlement of Investment Disputes

ICT	Information and Communications Technology
ILAB	DOL Bureau of International Labor Affairs
ILO	International Labor Organization
IMF	International Monetary Fund
IO	International Organization
IP	Intellectual Property
IPO	Initial Public Offering
IPPC	International Plant Protection Convention
IPR	Intellectual Property Right
IPU	Inter-Parliamentary Union
ISDS	Investor State Dispute Settlement
ISP	Internet Service Provider
<i>ITA</i>	<i>WTO Information Technology Agreement</i>
ITAC	Industry Trade Advisory Committees
ITC	United States International Trade Commission
ITIF	Information Technology & Innovation Foundation
IUU	Illegal, Unregulated, and Unreported
JAMA	Japan Automobile Manufacturers Association
<i>JCPOA</i>	<i>Joint Comprehensive Plan of Action</i>
JV	Joint Venture
<i>KAFTA</i>	<i>Korea-Australia FTA</i>
<i>KORUS</i>	<i>Korea-United States Free Trade Agreement</i>
KSA	Kingdom of Saudi Arabia
LAC	Labor Advisory Committee on Trade Negotiations and Trade Policy
LDC	Least Developed Country
LDP	Liberal Democratic Party
LGBT	Lesbian, Gay, Bisexual, and Transgender
LGBTQ	Lesbian, Gay, Bisexual, Transgender, and Questioning (Lesbian, Gay, Bisexual, Transgender, and Queer)
LGBTQ+	Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), and others
LLP	Low Level Presence occurrence
<i>LONIS</i>	<i>Law On Network Information Security (Vietnam)</i>
LTFV	Less Than Fair Value



M&A	Merger and Acquisition
MAD	Mutually Assured Destruction
MAIC	USTR Office of Market Access and Industrial Competitiveness (United States)
<i>MARPOL</i>	<i>International Convention for the Prevention of Pollution from Ships</i> (done at London, 2 November 1973), as modified by the <i>Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships</i> (done at London, 17 February 1978), and the <i>Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973 as Modified by the Protocol of 1978 relating thereto</i> (done at London, 26 September 1997)
MbS	Mohammed bin Salman (Crown Prince, Kingdom of Saudi Arabia)
<i>MEA</i>	<i>Multilateral Environmental Agreement</i>
<i>MEFTA</i>	<i>Middle East Free Trade Agreement</i>
MFAT	Ministry of Foreign Affairs and Trade (New Zealand)
MFN	Most Favored Nation
MNC	Multinational Corporation
MOCI	Ministry of Commerce and Industry (India, Kingdom of Saudi Arabia)
MOF	Indian Ministry of Finance
MOFCOM	Ministry of Commerce (China)
MOTIE	Ministry of Trade, Industry, and Energy (Korea)
MPF	Merchandise Processing Fee
<i>MSF</i>	<i>Médecins Sans Frontières</i>
MST	Minimum Standard of Treatment
MTEM	Malay Economic Action Council
MTN	Multilateral Trade Negotiation
<i>NAFTA</i>	<i>North American Free Trade Agreement</i> (NAFTA 1.0 and/or NAFTA 2.0)
<i>NAFTA 1.0</i>	<i>North American Free Trade Agreement</i> (original FTA that entered into force 1 January 1994)
<i>NAFTA 2.0</i>	<i>North American Free Trade Agreement</i> (revised FTA based on August 2017–September 2018 renegotiations, formally entitled USMCA, signed 30 November 2018)
NAM	National Association of Manufacturers

NAMA	Non-Agricultural Market Access
NASDA	National Association of State Departments of Agriculture
NBA	National Basketball Association
NCM	Non Conforming Measure
NDF	Never Duty Free
NEI	National Export Initiative
NFU	National Farmers Union
NGO	Non-Governmental Organization
NME	Non-Market Economy
NPL	Non-Performing Loan
NRDC	Natural Resources Defense Council
NTB	Non-Tariff Barrier
<i>NTE</i>	<i>National Trade Estimate Report on Foreign Trade Barriers</i>
NTM	Non-Tariff Measure
NWC	National Wage Council (Vietnam)
NZ	New Zealand
NZ \$	New Zealand dollar
NZIER	New Zealand Institute of Economic Research
OECD	Organization for Economic Cooperation and Development
<i>OED</i>	<i>Oxford English Dictionary</i>
OIE	World Organization for Animal Health (French acronym)
OMB	United States Office of Management and Budget
OPIC	Overseas Private Investment Corporation (United States)
<i>OTCA</i>	<i>1988 Omnibus Trade and Competitiveness Act</i>
PAC	Political Action Committee
PACOM	Pacific Command (United States)
<i>Paris Agreement</i>	December 2015 <i>Paris Climate Accord</i> , or <i>Paris Climate Agreement</i> , under UNFCCC
<i>Paris Convention</i>	1979 <i>Paris Convention for the Protection of Industrial Property</i>
Party	A country that is a member of (Party to) <i>TPP</i>
PBOC	People's Bank of China
PBS	Pharmaceutical Benefits Scheme (Australia)
PC	Personal Computer
PCA	Permanent Court of Arbitration (The Hague, Netherlands)

PEC	President's Export Council
PHA	Public Health Association (Australia)
PHARMAC	Pharmaceutical Management Agency (New Zealand)
PHP	Preferential Handling Procedure
PhRMA	Pharmaceutical Research and Manufacturers of America
PIF	Public Investment Fund (Kingdom of Saudi Arabia)
PLA	People's Liberation Army
PSRO	Product Specific Rule of Origin
PTO	United States Patent and Trademark Office
PWC	Price Waterhouse Coopers
R&D	Research and Development
RCC	United States-Canada Regulatory Cooperation Council
<i>RCEP</i>	<i>Regional Comprehensive Economic Partnership</i>
REER	Real Effective Exchange Rate
RILA	Retail Industry Leaders Association
<i>RMB</i>	<i>Ren men bi</i> (people's Money), also called <i> yuan</i>
ROI	Return on Investment
ROO	Rule of Origin
RPT	Reasonable Period of Time
RRM	Rapid Response Mechanism
<i>RSS</i>	<i>Rashtriya Swayamsevak Sangh</i>
RTA	Regional Trade Agreement
RVC	Regional Value Content
S&CD	India-United States Strategic and Commercial Dialogue
S&D	Special and Differential
SAR	Special Administrative Region
Sci Fi	Science Fiction
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAA	<i>Statement of Administrative Action</i>
SBS	Simultaneous Buy-Sell
SC	Staging Category
SCM	Subsidies and Countervailing Measures
<i>SCM Agreement</i>	<i>WTO Agreement on Subsidies and Countervailing Measures</i>

SDR	Special Drawing Right
SEZ	Special Economic Zone
SF	Science Fiction
SFDA	Saudi Food and Drug Administration
SME	Small or Medium Sized Enterprise
SMS	Supply Management System
SMVS	Special Motor Vehicle Safeguard
SOE	State Owned Enterprise
SOF	Special Operations Forces
SOPA	<i>Stop Online Piracy Act</i>
SPS	Sanitary and Phyto-Sanitary
<i>SPS Agreement</i>	<i>WTO Agreement on Sanitary and Phytosanitary Measures</i>
SSG	Special Safeguard
SSM	Special Safeguard Mechanism
STE	State Trading Enterprise
STRI	Services Trade Restrictiveness Index
SUA	Sweetener Users Association
SWF	Sovereign Wealth Fund
T&A	Textiles and Apparel
TAA	Trade Adjustment Assistance
TBT	Technical Barriers to Trade
<i>TBT Agreement</i>	<i>WTO Agreement on Technical Barriers to Trade</i>
TCF	Textiles, Clothing, and Footwear
<i>TFA</i>	<i>December 2015 WTO Bali Ministerial Agreement on Trade Facilitation (Trade Facilitation Agreement)</i>
TFP	Total Factor Productivity
<i>TIFA</i>	<i>Trade and Investment Framework Agreement</i>
TK/GR	Traditional Knowledge associated with Genetic Resources
TOT	Terms Of Trade
<i>TPA</i> (1st meaning)	<i>Trade Promotion Agreement</i>
<i>TPA</i> (2nd meaning)	Trade Promotion Authority (fast track)
TPM	Technological Protection Measure
<i>TPP</i>	<i>Trans Pacific Partnership</i>

TPPC	Trans Pacific Partnership Commission
<i>TRIPs Agreement</i>	WTO Agreement on <i>Trade Related Aspects of Intellectual Property Rights</i>
TRQ	Tariff Rate Quota
TSM	Transitional Safeguard Mechanism
<i>T-TIP</i>	<i>Trans Atlantic Trade and Investment Partnership</i>
TV	Television
TVA	Tennessee Valley Authority
UAW	International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, <i>i.e.</i> , United Auto Workers
UCP	Unified Cargo Processing
UDRP	Uniform Domain Name Dispute Resolution Policy
UMNO	United Malays National Organization
UN	United Nations
UNCITRAL	United Nations Convention on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
UNHRC	United Nations Human Rights Council
U.S.	United States
U.S. \$	United States dollar
USAID	United States Agency for International Development
USCCAN	United States Code Congressional and Administrative News
<i>USMCA</i>	<i>United States-Mexico-Canada Agreement (NAFTA 2.0)</i>
USNS	United States Naval Ship
USSR	Union of Soviet Socialist Republics
USTR	United States Trade Representative
USW	United Steel Workers
UUV	Unmanned Underwater Vehicle
VAT	Value Added Tax
VCCI	Vietnam Chamber of Commerce and Industry
VCOSA	Vietnam Cotton and Spinning Association
VGCL	Vietnam General Confederation of Labor
VRA	Voluntary Restraint Agreement

W120 (W/120, W/120 List)	<i>See</i> CPC
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performers and Phonograms Treaty
WTO	World Trade Organization
WWF	World Wildlife Fund
1MDB	1Malaysia Development Berhad
3Ts (3 T Issues)	Tibet, Tiananmen Square, and Taiwan

# Preface to the Second Edition: Shakespeare and *CPTPP*

Comprised of 240 lines, Act IV, Scene 3 of *Macbeth* is the longest scene of that Shakespearean tragedy.<sup>1</sup> The stage is static, because the discussion is about what the past teaches the characters for their future conduct. What action should they take, given what has happened thus far? Macduff has fled from Scotland to England, where he meets Malcolm, son of the victim of regicide, Duncan. The past is colored black by Macbeth's murderous tyranny: Not only did he have Duncan murdered, but also Fleance, son of Banquo, plus all of Macduff's family. Does this past mean Macduff should grieve indefinitely, and be passive? Or, as Malcolm successfully argues, should grief be turned to revenge?

*TPP* is the longest FTA in human history. Consisting of a core text of 30 Chapters, plus 63 *Annexes* and 61 *Side Letters*, *TPP* spans 6,000 pages.<sup>2</sup> Because the core text of *CPTPP* is identical to that of *TPP*, and the vast majority of its related materials (*i.e.*, *Annexes* and *Side Letters*) also are identical to those of *TPP*, the same is true of *CPTPP*—it is the longest FTA in human history. (As Chapter XIX explains, following America's January 2017 withdrawal from *TPP*, the *TPP* 11 suspended 22 core-text provisions, but added about 30 *Side Letters*.)

So, it is far easier (and more pleasing) to peruse Act IV, Scene 3, or even the entirety of Shakespeare's longest play, *Hamlet*, than it is to read just the text of *CPTPP* or the *Side Letters*. That is true for his poetry, too. Shakespeare wrote 154 sonnets. The core text of the original *TPP* (excluding Chapter-specific *Annexes*) has 506 Articles, and the *Side Letters* run 231 pages. There is little in the way of stylistic grace. After all, a trade rule is neither restricted to 14 lines with an *abab cdcd efef gg* rhyme scheme, nor organized into three quatrains (each a four-line stanza) plus a final couplet in iambic pentameter. Like some sonnets, the theme of a rule is time (*e.g.*, more of it granted to eliminate a trade barrier). Unlike sonnets, love, beauty, and even truth is not usually its concern.

This stylistic contrast also is true regardless of the reader's subjective disposition to contemporary International Trade English (in use since GATT was signed on 30

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1. See SHAKESPEARE'S *MACBETH* (1606), Act IV, Scene 3, and Commentary, 133–143 (Sidney Lamb, ed., commentary by Christopher L. Morrow (2005)).

2. These metrics are apparent from the Tables in the *Annex* hereto.

October 1947) versus Early Modern English (in use from 1450–1690). The vast majority of the words Shakespeare employed are still used, and with the same or similar meaning. But, in writing 37 plays, using roughly 17,000 words, of which the *OED* credits him with inventing about 10%, thankfully Shakespeare eschewed *Annexes* and *Side Letters*. Conversely, turn almost any page of *TPP*, and a word not in common parlance may be discovered, or an odd acronym may be spotted (as the Table of Abbreviations herein attests). The ordinary reader may be forgiven for fleeing back to Shakespeare.

Linguistics aside, substantively, there is a crucial similarity. The debate about what terms *CPTPP* ought or ought not to contain, and whether *CPTPP* ought or ought not to be approved, is a debate about the meaning of the past for the future—as is Act IV, Scene 3 of *Macbeth*. What do *NAFTA* and post-*NAFTA* FTAs, and the Uruguay Round agreements, teach families around the world about trade liberalization? From Kansas City to Kuala Lumpur, this question is being asked. It is being asked in non-*CPTPP* Parties, too, from Bombay to Bordeaux, Rio to Riyadh. The dominant voice in much, if not most, of the public discourse is that akin to Malcolm: People, turn your grief over the adjustment costs from prior trade liberalization deals into revenge: fight *CPTPP*, oppose free trade.<sup>3</sup>

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3. A September 2014 Pew Research Center study of 44 countries showed that voice indeed is the loudest one, especially in developed countries such as France, Italy, Japan, and the United States. See *Faith and Skepticism about Trade, Foreign Investment*, 16 September [www.pewglobal.org/2014/09/16/faith-and-skepticism-about-trade-foreign-investment/](http://www.pewglobal.org/2014/09/16/faith-and-skepticism-about-trade-foreign-investment/). In the United States, only 20% and 17% think trade generates jobs and boosts wages, respectively. Across the world, just 31% of people think trade is “very good” for their country. The figures are higher in developing countries: 66% and 55% say it increases jobs and wages, respectively, and in Vietnam, 53% say it is very good for their country:

Among all countries surveyed, Tunisians (87%), Ugandans (82%) and Vietnamese (78%) are the most likely to say trade creates new employment. Just 5% of Tunisians and Vietnamese fear that trade destroys jobs.

Ugandans (79%), Bangladeshis (78%) and Lebanese (77%) have the greatest faith that trade leads to higher wages. Only 12% of Ugandans, 14% of Bangladeshis and 7% of Lebanese voice the view that growing international business ties undermine domestic incomes.

...

Some of the greatest public skepticism about trade and foreign investment is found in the United States. In 2002, 78% of Americans held the view that growing trade and business ties with other countries was a good thing. This sentiment was roughly comparable to that voiced at the time in the other 14 nations surveyed every year between 2002 and 2014.

But then Americans’ mood began to change. By 2007, before the Great Recession hit, the U.S. public’s belief in the benefit of growing international business ties had fallen 19 percentage points to 59% and would tumble further to 53%, in 2008. Faith in the value of trade remained fairly steady worldwide during this time period. By 2010, global belief in the efficacy of trade was at 84%, while the U.S. number recovered to only 66%. Since then, the global median has slid to 76%, pulled down by eroding confidence in trade in some emerging markets, while views in the U.S. have remained relatively stable at 68% in 2014.

...

... Americans are not alone in voicing doubts about trade and foreign investment. Publics in a number of other advanced economies—in particular France, Italy and Japan—stand out for their skepticism. These nations matter because the four account for nearly a



This book provides an extensive analysis of the evolution and nature of *CPTPP*, particularly from America's exciting entry into *TPP* negotiations in February 2008, through its wrongheaded withdrawal from *TPP* in January 2017, and onward to the courageous continuation by the *TPP* 11 with *CPTPP*.<sup>4</sup> This book does not take the omens from past trade deals as all bad, or adopt a near-paranoid opposition to trade liberalization. Macbeth himself made those mistakes by drawing dreadful inferences from the prophecies of the Three Witches. All died as a result—the worst outcome of any tragedy, a result Macbeth might have avoided with careful, reasoned meditation, deliberation, and consultation about those prophecies and his circumstances. Fortunately for *CPTPP*, it is not yet Act V. Rather, it is Act I, so there is time for critical analysis.

When the first edition of this book appeared in 2016, this remarkable FTA had not (yet) been approved or entered into force.<sup>5</sup> All of the draft provisions of *TPP* remained classified until publication of the final text on 5 November 2015, a month after ne-

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quarter (24%) of world merchandise imports and around a fifth (21%) of world services imports. Protectionist sentiments in any of these societies, if acted upon, can reverberate around the world.

...

Americans and Japanese are far less likely than publics in other *TPP* countries (a median of 55%) to hold the view that growing international business ties will create new employment, a politically sensitive issue in each country.

...

Notably, some of the weakest support for both trade and foreign investment, and some of the greatest skepticism about its impact, exists in Japan and the United States, the two pivotal *TPP* nations that together account for the lion's share of both the economic activity and trade between the dozen countries involved. Just 10% of Japanese and 17% of Americans say trade increases wages. Only 15% of Japanese and 20% of Americans say it grows jobs. And just 17% of Japanese and 28% of Americans favor foreign acquisition of domestic firms. In each of these cases, Japanese and American support is the lowest among the *TPP* nations surveyed.

*Id.* Yet, even among emerging markets, support for free trade (in terms of agreement with the proposition that trade is good for one's country) dropped between 2010 and 2014 from 84% to 77%. See *id.* In general, it seems that the more experience a country has with trade and investment liberalization, the more developed it is, and/or the larger it is in size, the more skeptical it is of the effects of openness on employment and income.

4. Like the first edition of this book, which appeared in 2016, this new edition builds on an earlier article, Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW issue 1, 2–59 (2014), and on an earlier Note, Annex A, Note A-2, *Critical Analysis of TPP* in RAJ BHALA, DICTIONARY OF INTERNATIONAL TRADE LAW (LexisNexis, 3rd ed., 2015).

5. In April 2014, the USTR published a one-page document of changes to United States law necessary for compliance with *TPP*. Only six minor changes were listed, involving matters like CBP fees and penalties, and *TPP* Certificates of Origin. See United States Trade Representative, *Changes to Existing Law Required to Bring the United States into Compliance with Obligations Under the Trans Pacific Partnership Agreement* (1 April 2016), <https://ustr.gov/sites/default/files/TPP-Changes-to-Existing-Law-Report-FINAL.PDF>. Critics charged the USTR was under-stating the effects of *TPP*. See Brian Flood, *White House Releases Proposed Changes to U.S. Law for TPP*, 33 International Trade Reporter (BNA) (7 April 2016).

gotiations finished on 5 October.<sup>6</sup> Formal signing occurred on 4 February 2016, coinciding with the 400th anniversary of Shakespeare's death (1564–1616). On 12 August 2016, President Barack H. Obama (1961–, President, 2009–2017) sent Congress a draft *Statement of Administrative Action (SAA)* for *TPP*.<sup>7</sup> Because of the unique importance of *TPP*—economically and strategically—this accord matters far more than other FTAs in existence or “on the drawing board.” *TPP* deserves special attention for another reason. Several of its innovative legal provisions justifiably have provoked considerable controversy, even outrage. Of course, the same is true of *CPTPP*.

This book plainly suggests a tragic Act V outcome is neither inevitable nor desirable. *Its thesis is TPP merits a preliminary grade of “B,” which is an evenly weighted average of a “C” on economics and “A” on national security.* The importance of the latter grade, though the same 50% weight as economics, should be stressed. That is because the

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6. The New Zealand MFAT, which is the official *TPP* depositary, published the legally verified text on 26 January 2016. This version superseded the November version. MFAT is the official *CPTPP* depositary.

7. See *The Trans Pacific Partnership Implementation Act, Draft Statement of Administrative Action* (12 August 2016), <https://ustr.gov/sites/default/files/DRAFT-Statement-of-Administrative-Action.pdf>.

SAAs are mandated by fast-track trade promotion authority (or other appropriate) legislation, and were presented in 1993 and 1994, respectively, with the implementing legislation for *NAFTA* and the Uruguay Round texts. For *TPP*, Congress mandated submission of an SAA at least 30 days before submission of implementing legislation. See Section 106(a)(1)(E)(ii) of the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* (commonly known by various short-hand expressions, such as the “2015 Act” or the “Trade Priorities Act”). As with all SAAs, the Draft *TPP* SAA proclaimed itself to be:

an authoritative expression by the Administration concerning its views regarding the interpretation and application of the *Agreement [TPP]*, both for purposes of U.S. international obligations and domestic law. The Administration understands that it is the expectation of the Congress that future administrations will observe and apply the interpretations and commitments set out in this Statement. In addition, since Congress will approve this Statement when it approves the implementing bill for the *Agreement*, the interpretation of the *TPP Agreement* included in this Statement carries particular authority.

To be sure, this customary pronouncement does not mean all SAAs are of equal value in understanding the trade agreement to which they relate. The Uruguay Round SAAs are particularly helpful in understanding the GATT-WTO texts, the *NAFTA* SAAs are rather perfunctory, but the Draft *TPP* SAA is perhaps the least helpful among the lot.

Of the 30 Chapters in *TPP*, the Draft SAA—which runs 36 single-spaced pages—essentially says nothing about the content or meaning of 18 Chapters (namely, Chapters 5 (Customs Administration and Trade Facilitation), 7 (Sanitary and Phytosanitary Measures), 8 (Technical Barriers to Trade), 10 (Cross Border Trade in Services), 11 (Financial Services), 12 (Temporary Entry for Business Persons), 13 (Telecommunications), 14 (Electronic Commerce), 16 (Competition Policy), 17 (State Owned Enterprises and Designated Monopolies), 18 (Intellectual Property), 19 (Labor), 20 (Environment), 21 (Cooperation and Capacity Building), 22 (Competitiveness and Business Facilitation), 23 (Development), 24 (Small and Medium Sized Enterprises), 25 (Regulatory Coherence)). For these Chapters, the Draft SAA simply says no changes are required to U.S. law, as that law already conforms with *TPP* obligations. So, for over half of the *TPP* Chapters, the SAA does not explain what those Chapters contain, and why they matter, and what the Administration thinks about them. This failure is a missed opportunity at public education, which would have been useful not only to bolster a sense of transparency and avoid the need for members of the public to have to read the Chapters themselves, but also to generate public support for *TPP*.

connection between trade and national security is not sufficiently appreciated in the academy or practice. (I began writing articles about it in 1997, and since then, have endeavored to see FTAs as more than economic creatures.<sup>8</sup> In its interdisciplinary approach, my textbook also stresses the link.<sup>9</sup>) Here, too, the analogy to Shakespearean drama is worth mentioning. The Acts and scenes in *Macbeth* take place in Scotland, save for Act IV, Scene 3, which occurs in England. On either side of the border, at a macro level, the play is about more than the future economic well-being of Scotland. The security of the Scottish realm is at stake, and what foreign intervention (from England) might do to advance that security is asked (and answered). Much of the drama surrounding *TPP* occurred in America, but with 11 other Parties, definitely not all of it. In this cross-border FTA theater, the macro issues at stake extend beyond economic performance to national security. Whether integration and inter-dependence can help America is at issue.

With this thesis in mind, two features distinguish this book: The seriousness with which it takes *TPP* and, now, *CPTPP*, and the effort it makes to examine this FTA as unbiasedly as possible. First, academic writing about *TPP* and *CPTPP* has been small in volume. The American legal academy was slow to appreciate the paradigmatic shift of *TPP*. The agreement potentially affects every area of law, from Labor and

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8. See, e.g., the “Doha Round Trilogy”:

- (1) *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy—Agricultural Tariffs and Subsidies*, 9 UNIVERSITY OF SAINT THOMAS LAW JOURNAL issue 1, 5–160 (2011, Annual Law Journal Lecture), reviewed in Frank J. Garcia, *Doha, Security, and Justice: A Response to Professor Raj Bhala*, 9 UNIVERSITY OF SAINT THOMAS LAW JOURNAL issue 1, 194–213 (2011), and in Robert J. Delahunty, *Trade, War, and Terror: A Reply to Bhala*, 9 UNIVERSITY OF SAINT THOMAS LAW JOURNAL issue 1, 161–193 (2011).
- (2) *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Two of a Trilogy—Non-Agricultural Market Access and Services Trade*, 44 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW issues 1 & 2, 1–81 (2011, War Crimes Research Symposium on International Law in Crisis).
- (3) *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Three of a Trilogy—Trade Remedies and Facilitation*, 40 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY issues 1–3, 237–320 (2012, 40th Anniversary Symposium *Festschrift* in Honor of Professor Ved P. Nanda, “Perspectives on International Law in an Era of Change”).

See also:

- (1) *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 THE INTERNATIONAL LAWYER 741–812 (Fall 2004).
- (2) *Poverty, Islam, and Doha*, 36 THE INTERNATIONAL LAWYER 159–96 (2002).
- (3) *Fighting Iran with Trade Sanctions*, 31 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW issue 2, 251–356 (spring 2014).
- (4) *MRS. WATU and International Trade Sanctions*, 33 THE INTERNATIONAL LAWYER 1–26 (spring 1999) (lead article).
- (5) *Fighting Bad Guys with International Trade Law*, 31 UNIVERSITY OF CALIFORNIA AT DAVIS LAW REVIEW 1–121 (Fall 1997) (lead article).

9. See RAJ BHALA, *INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK* Volume Three (Customs Law and National Security) (Durham, North Carolina: Carolina Academic Press, 5th ed., 2019).

Environmental Law to Civil Procedure and Torts. Yet, during much of the time America was involved in its negotiations, through to the finalization of its text, *i.e.*, from 2008 to 2015, *TPP* attracted little attention among legal scholars in the United States, at least outside of International Trade Law specialists.<sup>10</sup> (To be fair, interested scholars had to deal with the secrecy of the draft texts.) The failure among many legal educators to spot issues and trends that matter for the future in which law students will practice exists in other areas, such as Islamic Law (*Shari'a*) and the Law of India.

For International Trade Law specialists, among the many features of *CPTPP* that make it exciting is that nearly everything about it is “WTO Plus,” *i.e.*, the accord embodies many rules that go beyond those set out in GATT and WTO texts. Arguably, *TPP* was, and *CPTPP* is, a (if not the) new benchmark for broad, deep trade liberalization, both at the border and far beyond the border. That is no surprise, as America climbed into *TPP* negotiations in 2008 as the WTO Doha Round died. That non-coincidence intimates another reason to take *TPP* seriously: Many proposals considered

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10. Among the early works (from academics and/or practitioners, from the United States and overseas, listed alphabetically) on *TPP* are the following:

Books:

- (1) KELSEY, JANE, ED., *NO ORDINARY DEAL—UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT* (2010).
- (2) VOON, TANIA ED., *TRADE LIBERALIZATION AND INTERNATIONAL COOPERATION—A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT* (2014).

Articles:

- (1) Aitken, Bruce & Ngosong Fonkem, *The Trans-Pacific Partnership: Progress, Challenges, and a Proposal for ASEAN*, INTER-PACIFIC BAR ASSOCIATION (IPBA) JOURNAL Number 76, 32–39 (December 2014).
- (2) Backer, Larry Catá, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of a New World Trade Regulatory Order*, 13 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 49–81 (2014).
- (3) Blakeney, Michael, *Scope of the Intellectual Property Chapter of the Trans-Pacific Partnership Agreement (TPPA)*, 21 INTERNATIONAL TRADE LAW & REGULATION issue 1, 14–20 (2015).
- (4) Fazzone, Patrick B., *The Trans-Pacific Partnership—Towards a Free Trade Agreement of Asia-Pacific?*, 43 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 695–743 (2012).
- (5) Lewis, Meredith Kolsky, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW 27–52 (2011).
- (6) Sell, Susan K., *TRIPs Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 JOURNAL OF INTELLECTUAL PROPERTY 447–478 (2011).
- (7) Tur-Sinai, Ofer, *The Trans-Pacific Partnership: Experimental Use of Patents on the International Agenda*, 16 NORTH CAROLINA JOURNAL OF LAW AND TECHNOLOGY 63–103 (2014).
- (8) Vincent, David P., *The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?*, 23 MINNESOTA JOURNAL OF INTERNATIONAL LAW 1–46 (2014).
- (9) Yu, Peter K., *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INTERNATIONAL LAW JOURNAL 1129–1181 (2014).

Other Materials:

- (1) Fergusson, Ian, William Cooper, Remy Jurenas & Brock Williams, *The Trans-Pacific Partnership Negotiations and Issues for Congress*, Congressional Research Service (15 April 2013).

for inclusion in it reflected directly the American statutory position. Some of those proposals made it into the final text, further suggesting the extent, and limits, of American power and influence in regional trade negotiations.

Second, coverage of *TPP* and *CPTPP* in the media, and discussions of it by governmental entities and NGOs are almost all polarized. Monochromatic characterizations belie the true subtleties of a broad, deep, and complex deal. In a simpler, bygone era, President John F. Kennedy understood the vital link between economic and national security that trade liberalization can express. His statement (quoted at the outset of this book) nowadays would be buried amidst biased rhetoric redolent of stories about fools and knaves: some characterizations about cross-border trade are flatly ignorant, and a few seem false and misleading. Surely, a cooler-headed approach amidst pressure from the extremes exists. Unbiased legal scholarship can occupy the middle ground, or at least try to do so with courage. If even partly successful, then that scholarship can serve not only the academy and practicing community, but also the interested public.

There is a view this FTA is the salvation for a sluggish world economy and a future-oriented modernization of 20th century trade rules. Almost any Press Release from the USTR, or any public presentation, about *TPP* qualifies. The audience is treated to an unqualified encomium of free trade, and by extension, world capitalism. Rarely, if ever, acknowledged are the concessions Adam Smith and David Ricardo made in their classic works, *Wealth of Nations* (1776) and *Principles of Political Economy and Taxation* (1819), respectively: There are “winners” and “losers” from free markets and trade liberalization.<sup>11</sup>

The champion for repeal of Britain’s Corn Laws, which originated in 1815 and lasted until 1846, Sir Robert Peel, granted the same concession. Ironically, high corn tariffs cursed the poor. The Corn Laws barred imports of corn if the domestic corn price was below a set threshold, and thus induced food price rises and diminished demand for manufactured items (as households had to spend more of their disposable income on food).<sup>12</sup> But, in 1846, he intoned: “I wish it were possible to make any change in any great system of law without subjecting some persons to distress.”<sup>13</sup> In modern times, senior officials apply the label “free trader” in a breezy, self-assured way, as did Senator Mitch McConnell (Republican-Kentucky) in February 2016, when he was asked about prospects in Congress for passing *TPP*: “The Speaker’s [Representative Paul Ryan (Republican-Wisconsin) a free trader, I’m a free trader, and obviously the President [Barack H. Obama] is as well.”<sup>14</sup>

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11. See generally LAWRENCE EDWARDS & ROBERT LAWRENCE, *RIISING TIDE: IS GROWTH IN EMERGING ECONOMIES GOOD FOR THE UNITED STATES?* (2013) (concluding, based on a survey and analysis of empirical evidence, that growth in emerging countries, such as in Asia, has net benefits for the United States, but also imposes adjustment costs that need to be addressed).

12. See Marjie Bloy, Ph.D., *The Corn Laws*, THE VICTORIAN WEB (18 November 2010), [www.victorianweb.org/history/cornlaws1.html](http://www.victorianweb.org/history/cornlaws1.html).

13. Quoted in *Open Argument*, THE ECONOMIST, 2 April 2016, at 10.

14. Quoted in Nancy Ognanovich, *Obama Seeks Deals on TPP, Criminal Justice*, 33 International Trade Reporter (BNA) (4 February 2016).

There is a diametrically opposite view that this FTA is a ruthless expression of capitalist corporate greed. Within two months of its publication, the American Farm Bureau, Business Roundtable, NAM, National Cattlemen's Beef Association, and United States Chamber of Commerce endorsed *TPP*.<sup>15</sup> Opposing them were (*inter alia*) the AFL-CIO, UAW, USW, IAM, and NFU. For example:

[In January 2016 testimony,] Celeste Drake, a trade and globalization policy specialist for the AFL-CIO ... urged the ITC panel to take a deeper look at how the proposed trade pact could affect jobs and wages in the U.S. She also urged the ITC to alter its investigation to include more research about inequality in such a trade deal.

"To date, increased trade globalization of the corporate model has led to increasing trade deficits and a corresponding loss of jobs for America's workers..." "Our manufacturing sector has been hollowed out, losing about 5 million jobs and 60,000 factories since 2000." Drake said previous trade policies have "played an enormous role" in such "a decline."

Because the *TPP* repeats too many particulars "from prior trade deals, particularly with respect to labor rights, rules of origin, investment procurement, the environment, and the imbalanced restrictions on allowable legislation and regulations, we conclude that it will repeat the failures of prior deals, costing jobs, harming wages, increasing inequality and enhancing corporate influence here and overseas..."

...

"We find that any benefits to economic growth are more limited, and even negative in some countries such as the United States," according to the report. "More importantly, we find that *TPP* would lead to losses in employment and increases in inequality."<sup>16</sup>

Both sides have a point. Each side takes its point too far, and demonizes the other.

For instance, Nobel-Prize winning economist Joseph Stiglitz writes:

You will hear much about the importance of the *TPP* for "free trade." The reality is that this is an agreement to manage its members' trade and investment relations—and to do so on behalf of each country's most powerful business lobbies. Make no mistake: It is evident from the main outstanding issues, over which negotiators are still haggling, that the *TPP* is not about "free" trade.

New Zealand has threatened to walk away from the agreement over the way Canada and the U.S. manage trade in dairy products. Australia is not

15. See Erik Wasson, *Obama Trade Deal May Hinge on Republican Policy Demands*, 33 International Trade Reporter (BNA) 46 (14 January 2016); Len Bracken, *TPP Passage in 2016 Probable, But Not Inevitable*, 33 International Trade Reporter (BNA) 48 (14 January 2016) (both reporting endorsements as of 6 January 2016; publication was on 5 November 2015).

16. Quoted in Tyrone Richardson, *Unions Tell Panel TPP Deal Will Shed U.S. Jobs*, 33 International Trade Reporter (BNA) 103 (21 January 2016).

happy with how the U.S. and Mexico manage trade in sugar. And the U.S. is not happy with how Japan manages trade in rice. These industries are backed by significant voting blocs in their respective countries.

...

The *TPP* would manage trade in pharmaceuticals through a variety of seemingly arcane rule changes on issues such as “patent linkage,” “data exclusivity,” and “biologics.” The upshot is that pharmaceutical companies would effectively be allowed to extend—sometimes almost indefinitely—their monopolies on patented medicines, keep cheaper generics off the market, and block “biosimilar” competitors from introducing new medicines for years. That is how the *TPP* will manage trade for the pharmaceutical industry if the U.S. gets its way.

Similarly, consider how the U.S. hopes to use the *TPP* to manage trade for the tobacco industry. For decades, U.S.-based tobacco companies have used foreign investor adjudication mechanisms created by agreements like the *TPP* to fight regulations intended to curb the public health scourge of smoking. Under these investor-state dispute settlement (ISDS) systems, foreign investors gain new rights to sue national governments in binding private arbitration for regulations they see as diminishing the expected profitability of their investments.<sup>17</sup>

These observations are correct. But, they are overstated, and they omit countervailing points.

Not all trade is managed. Some goods and services sectors are liberalized completely immediately upon implementation. Moreover, is it correct to hold an FTA to the standard of DFQF treatment on 100% of goods, and full market access and national treatment in all service sectors, upon entry into force in order to say that, FTA is about “free” trade? That would seem to be a dreadfully high threshold for any trade accord to reach, forcing practical deals to be gauged by the free trade theories on the blackboards of economists. It would be equally unreasonable to fault the WTO dispute settlement system for being ineffective, on the ground that occasionally, a losing Member refuses to comply with an adverse Panel or Appellate Body recommendation. Perfect compliance cannot be the test of success of an international treaty, much less a legal paradigm, unless the theoretician is willing to assign an “F” to all candidates.

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17. Joseph Stiglitz & Adam S. Hersh, *The Trans Pacific Free Trade Charade*, NIKKEI ASIAN REVIEW, 3 October 2015, <http://asia.nikkei.com/Features/Trans-Pacific-Partnership/The-trans-Pacific-free-trade-charade>.

The same point may be made in respect of arguments championing the national security benefits of *TPP*, namely, containing China. Arguably, the biggest beneficiary of *TPP* is Australia, which before *TPP* had FTAs with China, Korea, and Japan. China was a vital destination for Australian natural resource exports. Following *TPP*, Australia expanded its pan-Asian market access. The same may be said of *CPTPP*.

The day the text of *TPP* was published, a prominent critic of *TPP* intoned:<sup>18</sup>

“It’s worse than we thought,” Lori Wallach, director of Public Citizen’s Global Trade Watch, told reporters on a conference call after examining the full text of the pact, which was unveiled early on Thursday [5 November 2015].

The next day, this critic elaborated:

“This is opening up an entire box of Pandora’s to expand the scope of the kinds of policies that can be attacked,” Wallach said. “Apparently, the *TPP*’s proponents resorted to such extreme secrecy during negotiations because the text now shows that the *TPP* would offshore more American jobs, would lower our wages, would flood us with unsafe food and expose our laws—more laws—to attack in foreign tribunals.”<sup>19</sup>

Candidates in the 2016 Presidential election were quick to judge, too. Within days of the 5 November 2015 publication, Democrat Senator Bernie Sanders (1941–, Vermont) said: “It’s even worse than I thought.”<sup>20</sup> Republican billionaire Donald J. Trump (1946–, President, 2017) dubbed it “insanity.”<sup>21</sup>

These declarations were implausible. Not even the most brilliant legal counsel can digest a 6,000 page agreement in 24 hours, 24 days, or 24 weeks, and come to a balanced, final judgment about its entirety.<sup>22</sup> Especially in a polarized political and stratified economic climate, it is prudent to downplay, even dismiss, such declarations, as not intended to be level or thorough. Doing so would render a public service, because extremist remarks cannot help restore the historic post-Second World War bipartisan consensus in favor of trade liberalization. A March 2016 Bloomberg Politics poll showed two-thirds of all Americans favoring more rather than less restrictions.<sup>23</sup> Asked whether they were willing to pay “a little bit more” for merchandise “Made in the U.S.A.,” 82% said “yes,” and 75% with annual household incomes under \$50,000

18. Quoted in Krista Hughes & Matt Siegel, *U.S. Unions, Lawmakers Vow Scrutiny of Pacific Trade Pact*, REUTERS, 5 November 2015, <http://mobile.reuters.com/article/idUSKCN0SU0SB20151105>.

19. Quoted in Naureen Khan, *Pacific Trade Pact’s Final Text Reveals “Corporate Agenda,” Critics Say*, AL JAZEERA AMERICA, 6 November 2015, <http://america.aljazeera.com/articles/2015/11/6/critics-trans-pacific-partnership-has-corporate-agenda.html>.

20. Quoted in *Free Exchange—A Serviceable Deal*, THE ECONOMIST, 14 November 2015, at 76.

21. Quoted in *Free Exchange—A Serviceable Deal*, THE ECONOMIST, 14 November 2015, at 76. Democrat Hillary Clinton, “who was for *TPP* before she was against it, once said it set ‘the gold standard,’” in the sense of eliminating tariffs, reducing NTBs, streamlining customs procedures, opening government procurement, disciplining SOEs, liberalizing trade in services, and facilitating regulatory coherence. *Id.*

22. The estimate of 6,000 pages was published in *Free Exchange—A Serviceable Deal*, THE ECONOMIST, 14 November 2015, at 76, and also in Len Bracken, *House Vote on *TPP* Possible in May, June*, 32 International Trade Reporter (BNA) 2097 (3 December 2015). See also the Tables in the Annex hereto.

23. See John McCormick & Terrence Dopp, *Free-Trade Opposition Unites Political Parties in Bloomberg Poll*, BLOOMBERG POLITICS, 24 March 2016, [www.bloomberg.com/politics/articles/2016-03-24/free-trade-opposition-unites-political-parties-in-bloomberg-poll](http://www.bloomberg.com/politics/articles/2016-03-24/free-trade-opposition-unites-political-parties-in-bloomberg-poll); John McCormick & Terrence Dopp, *Free-Trade Opposition Unites Political Parties in Bloomberg Poll*, 33 International Trade Reporter (BNA) (31 March 2016).



said “yes.” Simply put, opposition to free trade “unites the country like few others, across lines of politics, race, gender, education, and income.”<sup>24</sup>

Honesty about *CPTPP*—its pluses and minuses—is a necessary step to restoring a modicum of faith in free trade. (By no means is it sufficient. Multiple factors that account for the consensus breakdown, including a policy failure to deal compassionately with the adjustment costs of previous FTAs and the Uruguay Round agreements, need to be addressed.<sup>25</sup>) Appreciating the weightiness of the words they had to examine, leading Congressmen steeped in trade policy said:

“It is vital that we use this 90-day review period—established for the very purpose of evaluating the agreement before the President signs it [*i.e.*, the number of days allotted under Trade Promotion Authority (TPA) legislation between the publication of the text and the earliest permissible date for Presidential signature]—to dig into the details and engage in a vigorous back-and-forth,” said Representative Sander Levin [Michigan], ranking Democrat on the House Ways and Means Committee, whose support will be vital for ratification.

...

On the other side of the aisle, Paul Ryan, the new Republican Speaker of the House of Representatives, reserved judgment.

“I don’t know the answer to what my position is on a trade agreement I have not even yet read,” he told reporters. “But again, I am pleased with the process we have coming before us.”<sup>26</sup>

The math was daunting: Legislators had an average of about 67 pages of trade treaty language to peruse daily (*i.e.*, 6,000 pages divided by 90 days) before calling upon a vote, with no time off for Christmas.

By no means was political polarization about *TPP* confined to the United States. Malaysia registered the lowest degree of public support among all *TPP* Parties for the deal, but it still was 38%.<sup>27</sup> (America’s was 49%, and Chile’s was the highest with 67%.<sup>28</sup>) On one side were the arguments that Malaysian exports like electronics, palm

24. John McCormick & Terrence Dopp, *Free-Trade Opposition Unites Political Parties in Bloomberg Poll*, BLOOMBERG POLITICS, 24 March 2016, [www.bloomberg.com/politics/articles/2016-03-24/free-trade-opposition-unites-political-parties-in-bloomberg-poll](http://www.bloomberg.com/politics/articles/2016-03-24/free-trade-opposition-unites-political-parties-in-bloomberg-poll). The pollster, J. Ann Selzer, who supervised the survey, added: “Virtually every question of policy has a Republican-Democrat split. On trade, there is unity.” *Id.*

25. See *Open Argument*, THE ECONOMIST, 2 April 2016, at 10; *Trade, At What Price?*, THE ECONOMIST, 2 April 2016, at 27.

26. Quoted in Krista Hughes & Matt Siegel, *U.S. Unions, Lawmakers Vow Scrutiny of Pacific Trade Pact*, REUTERS, 5 November 2015, <http://mobile.reuters.com/article/idUSKCN0SU0SB20151105>.

27. See Lien Hoang, *Malaysia Schedules TPP Debate in Parliament Amid Politics*, 33 International Trade Reporter (BNA) 28 (7 January 2016).

28. That the only *TPP* Party—Chile—with FTAs with all other 11 Parties had the highest support for *TPP* is noteworthy. Arguably, the familiarity and experience of Chileans with FTAs with the other countries reduced their apprehension about *TPP*. The earlier bilateral FTAs effectively paved the path for the mega-regional deal. In contrast to Chile stood Canada: “Among the *TPP* states, Canada does

oil, plastics rubber, T&A, vehicle components, and wood would benefit from increased market access, especially given the weak state of the country's currency, the *ringgit*. Moreover, proponents said Malaysia needed to avoid becoming a second-rate Asian country and remain an attractive FDI destination vis-à-vis its neighbor and *TPP* signatory, Singapore, and similarly Vietnam. On the other side were arguments that foreign competition thanks to *TPP* would harm domestic construction, retail, and oil and gas interests, *TPP* IP rules would raise drug prices, and *TPP* government procurement rules would undermine the country's preferences for Muslim Malays.

Moreover, opponents said Malaysia did not adhere to proper labor standards and had a pathetic record policing human trafficking, and alleged the administration that negotiated *TPP*—that of (now former) Prime Minister Najib Razak—was hopelessly corrupt, as evidenced by a \$700 million financial scandal (from which the Attorney General, Mohamed Apandi Ali, whom he appointed in July 2015, cleared him of wrongdoing in January 2016).<sup>29</sup> They faulted President Obama for overlooking the

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not have bilateral trade accords with Australia, Brunei, Japan, Malaysia, New Zealand, Singapore and Vietnam.” Lien Hoang, *Canada Spots Good Omens Despite Shake-Up of NAFTA, TPP*, 34 International Trade Reporter (BNA) 394 (9 March 2017).

Of course, for the most part, *TPP* Parties (including Canada) had considerable FTA experience. For instance, Mexico (by March 2017) had FTAs with over 40 countries, obviously including with Canada and the United States, both Parties. See Nacha Cattan & Eric Martin, *Mexico Warns U.S. It'll Cut Off NAFTA Talks if Tariffs Proposed*, 34 International Trade Reporter (BNA) 360 (2 March 2017). Australia had bilateral FTAs with all *TPP* countries (including one with Peru signed in February 2018), except Canada and Mexico. See Murray Griffin, *Pacific Pact Side Deals Still Not Final, Australian Official Says*, 35 International Trade Reporter (BNA) 328 (8 March 2018).

29. See Lien Hoang, *Malaysia Schedules TPP Debate in Parliament Amid Politics*, 33 International Trade Reporter (BNA) 28 (7 January 2016).

That clearance did not end the matter. In brief, the previous Attorney General, Gani Patail, “was suddenly retired on grounds of ill health,” along with Deputy Prime Minister Muhyiddin Yassin, who criticized the Prime Minister over the so-called “1MDB affair.” Jeevan Vasagar & Michael Peel, *Najib Stifles Dissent as Public Unrest Grows*, FINANCIAL TIMES, 3 February 2016, at 6. In December 2015, the government “rushed through parliament” legislation granting the Prime Minister “authority to declare a state of emergency without the consent of Malaysia’s King,” citing “growing security and terrorist threats,” but removing what critics describe as a “‘basic check’ on government power.” *Id.*

1MDB (which stands for “1Malaysia Development Berhad”) is a regional SWF launched in 2009 operated by the Malaysian Ministry of Finance and designed to invest in domestic growth-promoting investments. See Michael Peel & Jeevan Vasagar, *The 1MDB Money Trail*, FINANCIAL TIMES, 16 February 2016, at 7. Because (unlike most other SWFs) 1MDB lacked cash when it commenced operations, it needed to raise proceeds to buy assets and invest in projects (e.g., land, power generation, etc.). It did so by turning to Goldman Sachs, which arranged three major bond sales in 2012 and 2013. Goldman Sachs netted \$700 million on one such floatation. Many 1MDB funds transfers involved complex financial structures, and were routed through prominent international banks, prompting Professor Jason Sharman of Griffith University, Australia, to comment: “if the transactions were as suspicious as they look, what the hell were the banks doing accepting the money?” *Quoted in id.* Along with such banks, Swiss authorities (as of February 2016) suspected five companies linked to 1MDB, including Aabar Investments (the Abu Dhabi State Investment fund) and Petro Saudi (an oil company), both of which had JVs with 1MDB, though they denied any wrongdoing. See *id.*

At the heart of the scandal were transfers of \$680 million to the personal account of the Prime Minister. Reportedly, they came from the Saudi Royal family, specifically, personal and state funds and authorized by the late King Abdullah, ostensibly to help the governing UMNO party win the

affair during his November 2015 visit to Malaysia (following a round of golf in Hawaii in December 2014), contending he wanted to secure the Prime Minister's support for TPP.<sup>30</sup> Interestingly, in January 2016, the Malaysian legislature was first to approve the deal.

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2013 elections (especially in Sarawak) against Islamist opposition (namely, the Pan-Malaysian Islamic Party, or PAS) the Saudis feared were backed by the Muslim Brotherhood, which they regard as a terrorist organization, as well as for socioeconomic development projects. See Frank Gardner, *Saudi Gift to Malaysia PM Najib Razak "For Election Campaign,"* BBC NEWS, 27 January 2016, [www.bbc.com/news/world-asia-35409424](http://www.bbc.com/news/world-asia-35409424). The Prime Minister reportedly returned \$620 million in August 2013, still leaving roughly \$60 million unaccounted. Michael Peel, *New Twist in Malaysia Scandal as Saudis Are Said to Have Made \$680m Payment,* FINANCIAL TIMES, 27 January 2016, at 1.

So, the eponym for the scandal is the "debt-laden" 1MDB government investment fund, the advisory board of which the Prime Minister chaired. *Id.* Malaysia's central bank, Bank Negara, recommended prosecution of the fund "for irregularities in the way it had handled more than \$1.8bn of assets held in the Cayman Islands." Michael Peel, *Malaysia Move to Clear Premier Challenged,* FINANCIAL TIMES, 28 January 2016, at 2. The fund "denied wrongdoing." *Id.* Goldman Sachs, specifically its South East Asia Chairman, Tim Leissner, was "the driving force behind high-profile deals" involving 1MDB. In January 2016, he took "personal leave." Michael Peel, *Goldman-1MDB Deal Maker Takes "Personal Leave,"* FINANCIAL TIMES, 28 January 2016, at 2.

In February 2016, the Swiss Attorney General, Michael Lauber, reported that up to \$4 billion may have gone missing from 1MDB accounts. His office began investigating the fund after noticing the fund incurred over \$11 billion in debts and Swiss bank accounts were involved. Officials in Hong Kong, Singapore, and the United States were also investigating the 1MDB, and Singapore seized certain bank accounts allegedly linked to laundering funds for the fund. See *Malaysia Rejects Swiss Allegations Over State Fund 1MDB,* BBC NEWS, 2 February 2016, [www.bbc.com/news/world-asia-35468786](http://www.bbc.com/news/world-asia-35468786).

In March, the entire Board of Directors of 1MDB offered to resign following publication by the Public Accounts Committee, headed by Hasan Arifin, of the Malaysian Parliament of a report that found billions of dollars missing from the fund, but did not specifically mention the Prime Minister by name. See Tom Wright, *Critical Report Spares Malaysia's Najib,* THE WALL STREET JOURNAL, 8 April 2016, at A6. When asked in November why his Committee did not call Mr. Najib as a witness, Mr. Hasan said "I have to earn a living," but later said that answer was a joke. *Id.* The report suggested investigations for possible criminal violations committed by senior managers (such as former Chief Executive Shahrol Azral Ibrahim Halmi), and Mr. Najib issued a statement that it "identified weaknesses in 1MDB's capital structure and management," and pledged to act "if evidence of wrongdoing is found." *Id.* Critics (such as Zaid Ibrahim, an erstwhile Cabinet Minister, and James Chin, head of the University of Tasmania Asia Institute) charged the offer by the Board to resign and the lack of identification of Mr. Najib were orchestrated to protect the Prime Minister, and noted he founded 1MDB in 2009 and heads a separate advisory board. See *id.*

The investigation continued into 2016, with investigators from multiple countries, including Switzerland and the United States, estimating the amount of funds misappropriated through 1MDB could be \$6 billion, and believing some of the diverted money wound up "in the personal bank accounts of Najib Razak," and were spent on both personal items and the 2013 election campaign. *Turning the Screw,* THE ECONOMIST, 23 April 2016, at 63.

Following Mr. Najib's election loss in May 2018, he was put on trial in Kuala Lumpur for several criminal charges. See *Najib 1MDB Trial: Malaysia Ex-PM Faces Court in Global Financial Scandal,* BBC NEWS, 3 April 2019, [www.bbc.com/news/world-asia-47194656](http://www.bbc.com/news/world-asia-47194656).

30. See Michael Peel & Jeevan Vasagar, *The 1MDB Money Trail,* FINANCIAL TIMES, 16 February 2016; Lien Hoang, *Malaysian Parliament Backs Trans-Pacific Trade Pact,* 33 International Trade Reporter (BNA) (4 February 2016).

Static and dynamic explorations are needed, and both need more time than a day. Digesting the breadth and depth of the text is the goal of a static analysis: What does the text of the FTA say, and why? That takes years to answer, just as it did to appreciate the agreements from the Uruguay Round (1986–1994) that established the WTO, and the 1994 *NAFTA*. The dynamic analysis seeks to understand the consequences and externalities—positive and negative, direct and indirect—associated with *TPP* and *CPTPP*. That also takes years. In truth, neither analysis ever ends. Scholars and practitioners will discover new features and meanings, and learn new causal effects, decades from now.

Bowing to this reality, the present book is confessedly preliminary and inchoate. Looking back 50 years from now at this work, perhaps it will be seen as fitting into the early history of *TPP* scholarship. Its coverage begins almost at inception of the negotiations, in 2006, and tracks them through completion in 2015. As far as possible, the book integrates some of the key final legal rules—what *TPP* and *CPTPP* actually say—into its discussion and analysis, typically toward the end of the pertinent section. How and why the legal rules evolved into their final form is emphasized throughout, as that is the heart of the *TPP* story, as it is with all international trade deals.

Having finished the manuscript of the first edition, and having updated parts of it, I am only beginning to learn about this remarkable agreement. One of the most memorable of all Shakespearean lines is spoken by the Three Witches in Act I, Scene 1, of *Macbeth*: “Fair is foul and foul is fair.” What is touted as right may be wrong. What is decried as wrong may be right. What appears to be true, may not be reality. So it is with *CPTPP*. I must look more deeply into its text, motivations, and implications to understand and evaluate it better.

And, I must expect the unexpected, as occurred with the June 2016 vote for Brexit and its implications for both *TPP* and *T-TIP*, and again in November 2016 with the election of Donald J. Trump and his declaration to withdraw from *TPP* on his first day as President.<sup>31</sup> (That YouTube pronouncement was technically a bit off.<sup>32</sup> *TPP*

31. See Ellen Powell, *What Trump’s Vow to Quit TPP Trade Deal Means for Human Rights*, THE CHRISTIAN SCIENCE MONITOR, 22 November 2016, [www.csmonitor.com/USA/Politics/2016/1122/What-Trump-s-vow-to-quit-TPP-trade-deal-means-for-human-rights?cmpid=pushEP](http://www.csmonitor.com/USA/Politics/2016/1122/What-Trump-s-vow-to-quit-TPP-trade-deal-means-for-human-rights?cmpid=pushEP).

32. See *A Message from President-Elect Donald J. Trump*, YOUTUBE (21 November 2016), [www.youtube.com/watch?v=7xX\\_KaStFT8](http://www.youtube.com/watch?v=7xX_KaStFT8).

In response, several *TPP* Parties considered forging ahead, without America. See Murray Griffin, *TPP Plan B? Parties Look for Ways to Move Minus U.S.*, 34 International Trade Reporter (BNA) 117 (19 January 2017). Several of them also doubled down on the importance of trade liberalization, including to America in particular. For example, Kim Beazley, who while Australia’s Ambassador to the United States from 2010–2015 was heavily engaged in *TPP* negotiations, pointed out:

“The grand irony of what we are confronting here now is that if you look objectively at the *TPP*, it’s pretty much all America’s way...”

...

The U.S. would have secured a suite of decent trade practices in the Asia region and an agreement that dealt with the “modern issues” of commerce on terms that were “well-disposed to American concerns about [intellectual property] and the like...” And they would have done so without having to offer anything much at all in the way of tariff movement, he said.

“So the U.S. sacrifices almost nothing in the *TPP*,” he said. “This was the American reward.”

Murray Griffin, *Australia Wary of Post-Pacific Trade Deal Between U.S., Japan*, 33 International Trade Reporter (BNA) 1818 (22 December 2016).

In its 30 November 2016 report, Australia’s Joint Standing Committee on Treaties declared it “is particularly concerned that Australia’s long-term commitment to free trade, from which Australia benefits immensely, is currently at risk from a resurgence of nationalism and isolationism internationally.” *Quoted in* Murray Griffin, *Australian Politicians Reach Bipartisan Consensus on TPP*, International Trade Daily (BNA) (30 November 2016). Both the Australian government and opposition Labor Party endorsed the report and recommended *TPP* ratification. *See* Murray Griffin, *Australian Panel Backs Pacific Trade Pact, Flags Concerns*, 33 International Trade Reporter (BNA) 1742 (8 December 2016). Interestingly, the report concluded *TPP* “represents the best possibility in at least 20 years to develop a *multilateral* free trade agreement.” *Id.* (emphasis added). To be sure, the Labor Party was “disappointed that the *TPP* contains provisions that are well outside the core purpose of achieving fair and free trade, and that some of these provisions are not only extraneous, but risky or harmful to Australia’s interests,” and listed their principal objections as “expanded monopoly rights protection for pharmaceuticals which may impose costs on health consumers or on the public health system” (claims to the contrary were “disingenuous”) and the ISDS mechanism. *Id.* The Green Party dissented from the report, opposing *TPP* ratification and lambasting it as “a deal cobbled together behind closed doors by big business for big business.” *Id.*

As another example, Vietnam continued with a breathtaking array of reforms with a view to *TPP* ratification:

As Donald Trump prepares to kill the *Trans-Pacific Partnership (TPP)*, the 12-nation trade pact is helping to spur the biggest overhaul of Vietnam’s economy in decades.

The Communist government in Hanoi plans to push ahead with more than 30 separate pieces of legislation proposed to comply with the trade deal, including rules on labor, business, foreign trade and small-and-medium enterprises. Since a new constitution was adopted in 2013, Vietnam’s lawmakers have passed more than 100 laws—a scale of change unseen since the nation introduced the market-oriented “*doi moi*” reforms in the 1980s. [In Vietnamese, “*Đời*” means life, and “*Mới*” means “new.” Thus, “*Đời Mới*” connotes new life, in the sense of new attitude and hope.]

...

Vietnam has long been seen as one of the biggest potential winners from the *TPP*, with increased market access for everything from clothing to electronics to footwear. The deal also stood to complement a growing strategic relationship between the U.S. and Vietnam, which opposes China’s territorial claims in the South China Sea.

Yet all isn’t lost: The *TPP* also helped serve as an impetus for long-needed structural changes in a nation with 90 million people that’s forecast to grow more than 6 percent this year—one of the fastest rates in Asia. While Vietnam first announced plans to reform its state-owned enterprises in 2011, progress has been slow, with the stakes sold often too small and many companies pulling back on plans to list on exchanges.

...

... *TPP* also has helped raise awareness among key stakeholders including state officials, employers, trade unions, workers and the general public on the implications of free trade. Vietnamese business leaders also appear keen to maintain the reform momentum generated by the *TPP*.

Alan Pham, chief economist at Vietnam’s largest fund manager VinaCapital Group, says the *TPP* is a kind of road map for Vietnam as it integrates further into the global economy.

“Whether we have *TPP* or not, Vietnam will still have to reform,” Pham said. “The trade pact is really useful for the government and for Vietnamese business to know what are the steps they will need to take to really become part of the global economy.”

Prime Minister Nguyen Xuan Phuc said last month that Vietnam would pursue greater

had not taken effect, so there was [no] treaty from which to withdraw—only a signature to pull off the page.) Of course, the withdrawal occurred, via a 23 January 2017 Memorandum instructing the USTR “to provide written notification to the Parties and to the Depository of the *TPP* [in New Zealand] as appropriate, that the United States withdraws as a signatory of the *TPP* and withdraws from the *TPP* negotiating process.”<sup>33</sup> That notification came a week later, via a letter from the Acting USTR to MFAT in New Zealand declaring the “United States does not intend to be-

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international integration through 12 other free trade agreements it had already signed even if the *TPP* falls through.

“So it’ll be very good to have *TPP*, but if not, we still have other integration plans to go with,” Phuc said.

Ngyuen Kieu Giang, *TPP Changing Vietnam’s Economy, No Matter What Trump Does*, 33 *International Trade Reporter* (BNA) 1698 (1 December 2016).

For its part, Japan ratified *TPP*. Its House of Councillors (the Upper House of the National Diet (Parliament)) approved the deal on 9 December 2016, following the House of Representatives approval on 10 November 2016. See House of Councillors, The National Diet of Japan, [www.sangiin.go.jp/eng/index.htm](http://www.sangiin.go.jp/eng/index.htm); Len Bracken, *Japan Ratifies Trans-Pacific Trade Pact*, 33 *International Trade Reporter* (BNA) 1787 (15 December 2016).

Corporate America furnished yet another example. It feared its interests in China would be prejudiced if the anti-*TPP* rhetoric extended to a Sino-American trade war, complete with a designation by the Department of the Treasury of China as a “currency manipulator,” and imposition of a 45% tariff surcharge on Chinese-originating products:

These [American multinational] companies have more than \$228 billion in China investments at stake in the event of a trade conflict between the world’s two biggest economies. Their track record of pushing back against Washington on trade indicates they’ll back their own interests—and thus China—if enmity erupts.

A trade confrontation between China and the U.S. would ripple across the globe, potentially disrupting China’s vast chain of suppliers throughout Asia along with the price of consumer goods it exports to markets from New York to New Zealand.

...

Business groups have a history of pushing back against Washington on trade issues with China. In the 1990s, companies including Boeing Co., Motorola Inc. and American International Group Inc. were involved in lobbying efforts in the annual battle to renew China’s most-favored nation status that gave its exports low-tariff status in the U.S. In 2011, trade groups representing companies including Microsoft Corp. and Wal-Mart Stores Inc. lobbied against legislation to pressure China to raise the value of its currency.

History is also replete with counter punches from China when punitive actions have been taken.

Bloomberg News, *Trump Confronting China on Trade Risks Corporate Backlash*, 33 *International Trade Reporter* (BNA) 1697 (1 December 2016).

The position of Corporate America, however (or precisely because it was) well-grounded in economic self-interest, was modern-day proof of Thomas Jefferson’s dictum that: “Merchants have no country. The mere spot they stand on does not constitute so strong an attachment as that from which they draw their gains.” BRAINY QUOTE, [www.brainyquote.com/quotes/quotes/t/thomasjeff138493.html](http://www.brainyquote.com/quotes/quotes/t/thomasjeff138493.html).

33. See Memorandum for the United States Trade Representative from Donald J. Trump, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, Re: Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 23 January 2017, [www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific](http://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific).

come a party to the *Trans Pacific Partnership Agreement* ... [and] has no legal obligations arising from its signature on February 4, 2017.”<sup>34</sup>

Within its first week in office, the Trump Administration also scrubbed the *TPP* and accompanying materials, including Chapter Summaries, from the USTR website ([www.ustr.gov](http://www.ustr.gov)), replacing them with an “America First” message. While the National Association of State Departments of Agriculture (NASDA) explained on 30 January that “a ‘much-needed Asia-Pacific trade agreement’ is critical to creating markets and eliminating trade barriers for U.S. agricultural products,” the White House retorted President Trump was “‘fulfilling ... [his] campaign promise to get our country out of unacceptable trade deals that don’t put America’s interests first,’” and that what was needed were “new, better trade agreements that will bring jobs back, increase American wages and reduce our trade deficit.”<sup>35</sup> The Administration later put the text back up, for reference purposes.

The reasons for “withdrawal” were a confused admixture of protectionist ideas. One Presidential advisor stated:

“The administration believes in *free, fair trade*,” Anthony Scaramucci, a member of the presidential transition team’s executive committee [and founder of the Wall Street hedge fund management firm, SkyBridge Capital LLC], said Dec. 1 [2016]. “However, if we’re going to get some contention related to trying to make those deals *fairer*, so that our goods and services can leave the United States *in the same proportion that they’re coming in*, then the *cudgel of a tariff* is something that we on the administration side would be willing to impose as a sort of *negotiating chip*.”<sup>36</sup>

The President himself said:

It is the policy of my Administration to represent the American people and their financial well-being in all negotiations [*sic*], particularly the American worker, and to create *fair* and economically beneficial trade deals that serve their interests. Additionally, in order to ensure these outcomes, it is the intention of my Administration to deal directly with individual countries on a one-on-one (or bilateral) basis in negotiating future trade deals. Trade with other nations is, and always will be, of paramount importance to my Administration and to me, as President of the United States.<sup>37</sup>

34. See Letter from María L. Pagán to Trans Pacific Partnership Depository, 30 January 2017, <http://src.bna.com.www2.lib.ku.edu/IPy>.

35. Len Bracken, *U.S. Officially Withdraws From Trans-Pacific Trade Pact*, 34 International Trade Reporter (BNA) 213 (2 February 2017) (quoting NASDA Statement of Policy Priorities, and Sean Spicer, White House Press Secretary, respectively).

36. Quoted in Michelle Jamrisko & Randall Woods, *Trump Talk of Higher Tariffs Bargaining Chip, Scaramucci Says*, International Trade Daily (BNA) (2 December 2016) (emphasis added).

37. Memorandum for the United States Trade Representative from Donald J. Trump, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, Re: Withdrawal of the United States from the Trans-Pacific Partnership Ne-

In truth, there was no underlying philosophy or definition of free, fair, or managed trade, or mercantilism, in the rhetoric, and if a “cudgel” was a negotiating tactic, then its overuse would condemn it as bluster to be ignored rather than ideas to be weighed. Rightly so, the USTR who negotiated *TPP* replied, “Killing *TPP* on day one is a huge gift to China. There is way too much at stake for this to be killed, economically and strategically,” and added “inherent tension between being tough on China [on trade issues] and killing *TPP*.”<sup>38</sup>

Might the *CPTPP* Parties — that is, the *TPP* 11 — do well to include the land of Shakespeare in *CPTPP*, or at least extend to a post-Brexit United Kingdom an FTA on *TPP*-like terms bilaterally, an idea the new President seemed to like?<sup>39</sup> Perhaps the

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gotiations and Agreement, 23 January 2017, [www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific](http://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific) (emphasis added).

38. Bryce Baschuk, *U.S. Trade Chief Urges Trump to Reconsider TPP Withdrawal*, 33 *International Trade Reporter (BNA)* 1772 (15 December 2016) (quoting Ambassador Michael Froman).

39. See Sara Shepherd, *KU International Trade Law Expert Reacts to Brexit, Says U.S. Should Prioritize Trade Agreement with Britain — “We Should Embrace the UK and Welcome Them In,”* *LAWRENCE JOURNAL-WORLD*, 24 June 2016, [www2.ljworld.com/news/2016/jun/24/ku-international-trade-law-expert-reacts-brexit-sa/](http://www2.ljworld.com/news/2016/jun/24/ku-international-trade-law-expert-reacts-brexit-sa/).

USTR Michael Froman ruled out any early talks with England on the subject of joining *TPP*, until its terms of Brexit were clarified. Would England remain in the CU of the EU, or simply the single market, or neither? Would England have sovereignty over its tariffs, NTBs, and trade-related regulations? In a “hard Brexit” scenario, where England is neither in the CU nor the single market, it will have to renegotiate its trade relationships with all other 27 EU countries, plus 55 other countries with which the EU has an FTA. It had every incentive to do so, because without such arrangements, “the U.K. would be exposed to an average WTO levy of 5.3 percent and more than double that amount for some items including cars, clothes and spirits.” Simon Kennedy, *WTO Economist Says U.K. May Wait Years to Sign New Trade Deals*, *International Trade Daily (BNA)* (18 October 2016).

Renegotiating trade deals would provide an opportunity to join *CPTPP*. While the EU is Britain’s largest trading partner, notably:

Joining the *TPP* could emerge as attractive option for a post-Brexit U.K. as London seeks to reinstate its trade relationships with U.S. and other key nations like Australia, Canada, Japan, Mexico and New Zealand.

Britain is already America’s number one trading partner within Europe and represents nearly a quarter of all U.S. exports to the EU.

Securing better access to the U.K.’s services marketplace could benefit U.S. corporate heavyweights like 21st Century Fox Inc., American International Group Inc., AT&T Inc., Citigroup Inc., Alphabet Inc., International Business Machines Inc., MasterCard Inc., Microsoft Inc., United Parcel Service Inc., Verizon Communications Inc., Visa Inc., Walmart Stores Inc. and the Walt Disney Co., among others.

... [C]ongressional leaders like House Majority Leader Paul Ryan (R-Wis.) have urged the Obama administration to pursue a trade agreement with the U.K. as soon as it is feasible....

Bryce Baschuk, *Too Soon to Add U.K. to the Trans-Pacific Pact, USTR Says*, 33 *International Trade Reporter (BNA)* 1486 (20 October 2016). However, Ambassador Froman’s remark that “[o]bviously it is not an issue that is particularly ripe at the moment, because first and foremost they need to work through what their relationship with the EU is going to be,” seemed rather lethargic, particularly in the context of the Anglo-American Special Relationship and the apparent export interests England has in several *TPP* countries. *Id.* For example:

The U.K. is targeting a 2.9 billion-pound (\$3.5 billion) boost to food exports over the next five years, fueled by demand for British booze from Mexico to Australia.



answer is what Macbeth said (in Act I, Scene 7, Lines 1–7), when he pondered assassinating King Duncan of Scotland:

If it were done, when 'tis done, then 'twere well  
 It were done quickly. If th' assassination  
 Could trammel up [catch in a net] the consequence, and catch  
 With his surcease, success: that but this blow  
 Might be the be-all and the end-all—here,  
 But here, upon this bank and shoal of time,  
 We'd jump [risk] the life to come.

Like killing Duncan, killing (or modifying or expanding) *CPTPP*, is not a simple matter. Whatever move America makes in any dimension of international trade law and policy has “consequences,” some of which it neither can foresee nor steer, in the present (“this bank and shoal of time”) or the future (“the life to come”). Some moves set precedents, too, as Shakespeare did in *Macbeth* with the first recorded use of the word “assassination.”<sup>40</sup> But, even they are not necessarily the end of the matter, the “be all and end all.”

*Raj Bhala*  
*Kansas City, Missouri*  
*July 2019*

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The government will provide business support, mentoring and training to new companies seeking to tap export markets for food and drink, as well as helping existing exporters to beef up their trading operations, the Department for Environment, Food and Rural Affairs [DEFRA] said in a statement on Tuesday as it published an “International Action Plan for Food and Drink.”

As the U.K. prepares to leave the European Union, its biggest trading partner, the ministry is targeting an extra 185 million pounds of exports to Japan, where there’s demand for traditional British products like tea, jam and biscuit, according to DEFRA. It’ll seek an additional 293 million pounds of sales in Australia and New Zealand, where British beers and ciders are proving popular, and Mexico and other parts of Latin America may add another 215 million pounds of sales as products including whisky and gin catch on. . . .

See Alex Morales, *U.K. Targets \$3.5 Billion Beer, Gin-Fueled Boost for Exports*, *International Trade Daily* (BNA) (19 October 2016). See also Bryce Baschuk, “Impossible” to Consider U.K. Trade Deal Until Brexit Complete, 33 *International Trade Reporter* (BNA) 1492 (20 October 2016) (quoting Ambassador Froman as saying “[u]ntil the U.K. ‘sorts through’ the nature of its relationship with the EU, ‘it’s impossible to have a serious conversation’ about other deals,” and reporting that “[t]hrough the U.K. is a WTO Member in its own right, its WTO commitments are prescribed in the European Communities’ 1995 schedule of concessions rather than in an individual U.K. schedule,” and “[i]t also remains uncertain whether and how the U.K. can sort out the tariff rate quotas and agricultural subsidy limits that are now shared with the EU in their joint schedule”).

40. See ENOTES, *The Be All and the End All*, [www.enotes.com/shakespeare-quotes/all-end-all](http://www.enotes.com/shakespeare-quotes/all-end-all).



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## Alex Gilmore

J.D., University of Kansas School of Law, 2016 (Certificate in International Trade and Finance). B.A. (Classical Antiquity, Minors in Philosophy and Art History), University of Kansas.

While at KU Law School, Alex was a Legal Extern at KU's Office of the General Counsel. He worked with the University's Spencer Museum of Art on issues relating to IP, contracts, and museum management. Evidencing his hard work at the Law School, Alex earned a Computer Aided Legal Instruction (CALI) Award for the top performance in the *Advanced International Trade Law* course for his paper analyzing the WTO dispute between America and India relating to solar cells and solar modules. Alex provided a memo on the meaning and implications of plutocracy.

## Eric Witmer

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2017. B.A., Pennsylvania State University, 2005 (Film).

Eric served in the United States Army in Bosnia, Germany, and briefly in Korea. Eric switched from active Army to National Guard so he could attend Pennsylvania State University, where he completed his Bachelor's degree in two years. Eric taught English in Los Angeles, learned Old English at UMKC, and landed at KU Law School. He served as a Staff Editor on the *Journal of Law and Public Policy*, and interned at Immigration & Customs Enforcement (ICE). Having served as a Judicial Clerk in the Missouri Court System, Eric is a Research Attorney to the Chief Justice (Lawton Nuss) of the Kansas Supreme Court. Eric patiently read through the entire book manuscript twice, providing many helpful corrections on style and substance.

## Cody Wood

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Cody became interested in International Trade Law through his fascination with how transnational networks form and influence the development of global society.

He earned his undergraduate degrees at KU in Economics and Philosophy. While at KU Law, Cody worked not only as an RA, but also in Ulaanbaatar at the National Legal Institute of the Government of Mongolia. There, interested in novel solutions to legal conflicts that inevitably arise when emerging markets integrate into the world economy, Cody helped economic and social reforms in the Mongolian legal with a view to foreign arenas. Following his 2L year, he was a Summer Associate at Dentons. Cody is an Associate practicing International Trade Law at Dentons. Cody labored tirelessly to develop both the theory and empirical analysis of managed trade.

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- Saudi Arabia, April 2015, Saudi Chambers of Council and Harvard Alumni Association of Saudi Arabia (HASA), Riyadh.
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Nothing herein necessarily reflects the views of the aforementioned persons, the institutions with which I am affiliated, or the clients whom I serve. Of course, I am responsible for all errors.



# Style Conventions

In preparing this manuscript, I adhere to certain mutually complementary practices. They are not supposed to be idiosyncrasies. Rather, they are to make the published work as efficient and accessible as possible.

## Acronyms and Alphabetisms

International Trade Law is a discipline replete with acronyms and alphabetisms. (The former can be pronounced as a word, *e.g.*, “NAFTA,” while the latter cannot, *e.g.*, “CCP.”) For many readers, most acronyms and alphabetisms are familiar, so there is no need to define them. For many other readers, most of them will be unfamiliar. For both groups, it is too cumbersome to spell out each acronym or alphabetism every time it is used. But, it is frustrating to find in a text odd abbreviations that are not explained once in that text. This tension is between efficiency with comprehension, speed with user-friendliness.

Two devices in this book help balance this tension. First, all readers may avail themselves of the Table of Abbreviations. The Table lists each acronym and alphabetism used in the book. Second, unusual acronyms and alphabetisms—ones not common in International Trade literature—are spelled out the initial time they are used in a Chapter. Thereafter, familiarity is presumed. In both instances, the Table avoids the need to go back through the text of a Chapter to find a definition.

## Citation

To a modest degree, I follow the standard American system of citation, known as the *Uniform System of Citation*, or informally, the *Blue Book*. However, in the interest of user-friendliness towards readers unfamiliar with the *Blue Book*, and readers who view the dictates of the *Blue Book* as arbitrary and tyrannical, I deviate from the forms it prescribes in two principal instances.

First, scrupulous adherence to the *Blue Book* would mean the use of *supra* (above) and *infra* (below) references, rather than the repetition of a full citation previously made. I am not so scrupulous, because I know from practical experience that busy lawyers have little time to search back for the full reference and photocopy the page on which it appears, as well as the page they really need. From visiting their offices, I also know of lawyers in poor countries for whom photocopying remains somewhat of a luxury. Any assistance on cutting down on the number of pages that need to be copied is welcome.

Thus, I try to make every footnote self contained, or at least make the reference therein obvious. A lawyer interested only in the contents of that page need turn no further pages. I apologize for the irritation caused to some readers by a full footnote that could be replaced with “*Id.*”

Second, scrupulous adherence also would entail using abbreviated names for the titles of journals. That prescription leads to efficiency. But not every reader is familiar with the abbreviations. In turn, finding an article cited, should a reader want to consult the full piece, can be frustrating. Accordingly, I use the full name of journal titles.

## Numbers

Numbers are to be written out if they are less than 10, and thereafter Arabic numbers are to be used. That is what the *Blue Book* teaches. As a corollary, ordering words like “first,” “second,” etc. are to be spelled out.

However, on a page filled with words, in a book containing several hundred pages, it is pleasing to the eye to see Hindu-Arabic cardinal and ordinal numerals, *i.e.*, 1, 2, 3, etc., and 1st, 2nd, 3rd, etc. At least, the eye sees a distinction between the numerals and words, which can ease the task of reading and place-finding amidst possible distractions and disturbances. So, admitting this bit of heresy, on occasion, I use Arabic numerals, particularly in the Tables, unless a number starts a sentence, or is part of an idiomatic expression or a quotation.

## Italics

I have sought to be consistent in using italics. Obviously, they are used in quotations when the quoted source also highlighted particular words. In that event, I indicate “Emphasis original” in a footnote to the quotation. In some instances, however, it may be useful to a reader to see through italics the part of a quotation that is of great importance to the topic under discussion. Therefore, I italicize key language, and provide a footnote indicating “Emphasis added.”

I also use italics to indicate the titles of Interpretative Notes to the GATT, namely, *Ad Articles*. To illustrate: Ad Article III, Paragraph 2, appears as *Ad Article III, Paragraph 2*. That appearance gives visual differentiation of the Interpretative Note from the provision-in-chief, Article III. Likewise, to enhance the user-friendliness of the text by calling out the words “Side Letter,” “Annex,” and “Appendix,” I italicize these them—*Side Letter*, *Annex*, and *Appendix*.

## Precedent

Occasionally the concepts of “precedent” or “case law” arise. In using such terms, my attitude to the importance of adopted GATT Panel and WTO Appellate Body Reports is revealed. Rather than tyrannize the busy legal practitioner or scholar with



reminders of my views on *stare decisis* in international trade, let me summarize my thesis, articulated over a decade ago in a trilogy.<sup>1</sup>

I am certain adopted Appellate Body Reports have, as a *de facto* matter, the status of precedent in the Anglo-American sense of the term. I also am certain it would advance the international rule of law to make the necessary adjustments to the WTO agreements to give these Reports a *de jure* status as a source of law. Until then, there will be a monstrous incongruity between the cases are adjudicated and our formal theory about that law, and governments will succumb to the temptation of arguing a decision is not applicable to them because their country was not a party to the case.

Unfortunately, already, there are examples of that unraveling of case law in the WTO system. Consider the 2001 *Bed Linens* decision, in which India scored a key victory against the EU on the issue of zeroing. The Appellate Body correctly concluded the practice does not yield a fair comparison between weighted average Normal Value and weighted average Export Price (or Constructed Export Price) when calculating a dumping margin in an AD case. It, and many panels, has repeated that conclusion, in multiple contexts. Yet, while in some types of AD investigations and reviews of AD orders, the United States has dropped the methodology of zeroing, it has not done so in all instances. Using zeroing in a targeted dumping case remains an option.

As long as this kind of behavior occurs—refusing to accept the force and logical implications of prior adjudications—the international rule of law is compromised. The ramifications for Third World countries in which the rule of law is weak and unsteady, is unfortunate. If First World countries choose not to comply on certain matters, then why should they? More generally, they rightly query, is the dispute settlement playing field as level as it could be?

So much for the views of a law professor. From a practical standpoint, I think it is nearly malpractice not to consider previous case law, either in the context of business planning or litigation strategy. In the context of *CPTPP*, at issue will be whether the mythology about “precedent” and “case law” continues, or whether *de facto stare decisis* emerges through the accretion of both Investor-State and State-to-State adjudications under Chapters 9 and 28, respectively.

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1. See Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 *GEORGE WASHINGTON INTERNATIONAL LAW REVIEW* 873–978 (2001); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 *FLORIDA STATE UNIVERSITY JOURNAL OF TRANSNATIONAL LAW AND POLICY* 1–151 (Fall 1999); *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 *AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW* 845–956 (1999). See also Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 247–275 (April 2004) (elaborating on the precedential significance of Appellate Body decisions, and arguing (1) international judicial lawmaking is bounded by an elastic interpretive discourse nested in a loose set of constitutional rules, (2) this discourse and the rules are constrained by politics, and (3) politics operate as an important constraint on judicial activism and infringement on sovereignty). See generally Arie Reich, *The WTO as a Law-Harmonising Institution*, 25 *UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW* 321–382 (Spring 2004) (arguing the WTO is emerging as a major player in the global harmonization of national laws).



# Introduction: Thesis Summarized

## A. Overall Grade: B

The “*Trans-Pacific Strategic Economic Partnership*,” or “*TPP*,” is a 21st century vehicle for trade liberalization through expanded market access for goods and services, enhanced IP protection, and increased FDI, for the United States and countries in the Asia-Pacific region. As initially conceived, this vehicle took the form of the largest FTA in human history. *TPP* spanning 12 countries—Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam—accounting for 800 million people and 40% of world GDP, 30% of global exports, and 25% of global imports.<sup>1</sup> Even after America’s infamous withdrawal from *TPP*—a decision squarely attributable to President Donald J. Trump—the other 11 *TPP* countries continued with the deal. The new *CPTPP* accounts for 14% of world GDP, and encompasses over 500 million people.<sup>2</sup>

The United States has long had FTAs with six *TPP* Parties: Canada and Mexico (via the 1 January 1994 *NAFTA*); Australia (effective 1 January 2005); Chile (1 January 2004); Peru (1 February 2009); and Singapore (1 January 2004). It helped negotiate the terms of accession to the WTO of Vietnam (effective 1 January 2007), which along with the other Parties are WTO Members. Thus, American producer-exporters and importers already enjoy considerably liberalized trade in goods and services via the preferential access under pre-*TPP* FTAs and MFN treatment memorialized in WTO Schedules of Concessions for goods and services. Nonetheless, the entire *TPP* zone matters to American exports: nearly 45% of its exports of goods go to the other

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1. See Daniel Twining, Opinion, *Obama’s Late Lamented Trade Deal*, FINANCIAL TIMES, 15 October 2015, at 11.

2. In *Big Win for Japan, CPTPP to Start at Year’s End after Australia Ratifies Pacific Trade Pact*, THE JAPAN TIMES, 31 October 2018, [www.japantimes.co.jp/news/2018/10/31/business/big-win-japan-cptpp-start-years-end-new-zealand-ratifies-pacific-trade-pact/#.W9tX9y-ZP2U](http://www.japantimes.co.jp/news/2018/10/31/business/big-win-japan-cptpp-start-years-end-new-zealand-ratifies-pacific-trade-pact/#.W9tX9y-ZP2U); Matthew Brockett, *New Zealand Says CPTPP Trade Pact Activation Has Been Triggered*, 35 International Trade Reporter (BNA) 1399 (1 November 2018).

11 Parties.<sup>3</sup> Moreover, under these regional and multilateral frameworks, American direct foreign investors benefit from credible, reliable dispute settlement mechanisms. And, of course, all other 11 *TPP* Parties count as American geopolitical and military allies. *Thus, how much value added does TPP offer? How successful is this FTA over and above the status quo?* That is a key issue examined herein.

The answer is *TPP* is a *partial economic success*, with farsighted, even innovative, free trade obligations. It also is a partial economic failure. It promotes short-term, *plutocratic interests* through *managed trade* in goods and services markets. It fails to address satisfactorily currency manipulation, or labor, environmental, women's, LGBTQ+, or religious minority rights.<sup>4</sup> But, *TPP* adds (or would have added, but for America's withdrawal) considerable value to the collective *national security* of America and its allies, perhaps more so than to their common economic good. *TPP* does so through bolstering America's pivot out of the hell of the Middle East, into the strategically more important Asia Pacific region, to contain a China dominated by a CCP with which Americans share few common values, or at least to write rules by which China would have to abide if it ultimately joined this FTA.<sup>5</sup> Those national security benefits carry through to the *TPP* 11 that are Parties to *CPTPP*.

So, if a *grade* is to be assigned to *TPP* as of the conclusion of its negotiations, publication, and formal signing, but before implementation, and thus before experience in operation, then a "B" is appropriate. That is the thesis of the book: *TPP merits a grade of "B," reflecting an equal weighting of a "C" on economics and an "A" on national security.*

## B. Hidden Assumption Unveiled

An assumption hidden behind this weighting must be revealed, indeed, confessed. The balancing presumes the economic and national security aspects of *TPP* operate more or less independently of one another. Or, to the extent they interact, the balancing presumes the economic features of the deal either reinforce its security features, or at least do not undermine them. However, what is the relationship between economics and national security?

3. See Council on Economic Advisors Issues Brief, *Industries and Jobs at Risk if the Trans Pacific Partnership Does Not Pass*, (November 2016), [www.whitehouse.gov/sites/default/files/page/files/201611\\_cost\\_of\\_tpp\\_delay\\_issue\\_brief.pdf](http://www.whitehouse.gov/sites/default/files/page/files/201611_cost_of_tpp_delay_issue_brief.pdf). The figure is as of 2015.

4. On the provision in *TPP* and *CPTPP* concerning women (Article 23:4), and the analogous provision in the *Comprehensive Economic and Trade Agreement (CETA)* between Canada and the European Union, see Raj Bhala & Cody N. Wood, *Two Dimensional Hard-Soft Law Theory and the Advancement of Women's and LGBTQ+ Rights through Free Trade Agreements*, 47 *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* issue 2 (2018–2019), <https://digitalcommons.law.uga.edu/gjicl/>.

5. For an overview of the "pivot" and the policy of the Administration of President Barack H. Obama to China's controversial South China Sea claims, see Jacques deLisle, *International Law in the Obama Administration's Pivot to Asia: The China Seas Disputes, the Trans-Pacific Partnership, Rivalry with the PRC, and Status Quo Legal Norms in U.S. Foreign Policy*, 48 *CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW* issues 1 & 2, 143–176 (2016).

This momentous question is beyond the present scope, and of course the subject of a considerable literature already. That is for good reason, because the question is an eternal one, with no fixed answer. Narrowed a bit, the question might be put as: “What is the relationship between free trade and national security?” This more focused inquiry is addressed elsewhere, and specifically the “Peace through Trade” thesis articulated by Secretary of State Cordell Hull (1871–1955, 1933–1945) is probed.<sup>6</sup>

In the *CPTPP* context, the inquiry may be tweaked as follows: “What is the relationship between managed trade and national security?” After all, if this FTA merits only a C because it is largely a managed trade deal, then what does that grade say about the implications of managed trade for national security? Would America’s national security be enhanced through free trade, or could it be that some of the managed trade rules in the FTA redound beneficially to the nation’s security? The question calls for exploration of whether there is a link between managed trade measures, on the one hand, and national security interests, on the other hand. The present examination does not take a position on whether such a link exists, and if so, whether it is on balance a net positive or negative one. In other words, the hidden assumption is one of “independence” or “neutrality” between the two dimensions. Confessedly, that assumption is worth examining.

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6. See RAJ BHALA, *INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK*, Volumes One (Interdisciplinary Foundations and Fundamental Obligations) and Three (Remedies) (Durham, North Carolina: Carolina Academic Press, 5th ed., 2019).

