

# ***TPP Objectively***

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***Law, Economics, and National Security  
of History's Largest,  
Longest Free Trade Agreement***

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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 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), and 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*





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# Table of Abbreviations

<i>Acronym</i>	<i>Full Term</i>
AAFA	American Apparel & Footwear Association
AAPC	American Automotive Policy Council
ABC	Australian Broadcast Corporation
ACA	<i>Patient Protection and Affordable Care Act of 2010</i>
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
AFL-CIO	American Federation of Labor—Congress of Industrial Organizations
AG	Attorney General
AGOA	African Growth and Opportunity Act
<i>AIA</i>	<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>	<i>Asia Pacific Economic Cooperation forum</i>
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
<i>BJP</i>	<i>Bharatiya Janata Party (BJP)</i>

BNA	Bureau of National Affairs
BPCIA	<i>Biologics Price Competition and Innovation Act of 2009</i> (part of ACA)
BOJ	Bank of Japan
BOP	Balance of Payments
BOT	Build Operate Transfer
BPM	Border Protection Measure
Brexit	The withdrawal of the United Kingdom from the EU
BTD	Bipartisan Trade Deal
CAFTA-DR	<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
CEPA	<i>Comprehensive Economic Partnership Agreement</i>
CET	Common External Tariff
CETA	<i>Comprehensive Trade and Economic Agreement</i>
CFIUS	Committee on Foreign Investment in the United States
CGE	Computable General Equilibrium
CICC	China International Capital Corporation
CITES	<i>Convention on International Trade in Endangered Species of Wild Fauna and Flora</i>
CMT	Cut-Make-Trim
CPC	Central Product Classification (for Services)
CRS	Congressional Research Service
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
CUSFTA	<i>Canada-United States Free Trade Agreement</i>
CVD	Countervailing Duty
CVMA	Canadian Vehicle Manufacturers' Association
DFAT	Department of Foreign Affairs and Trade (Australia)
DFQF	Duty Free, Quota Free
DFQF EIF	Duty Free, Quota Free (treatment immediately upon) Entry Into Force
DHS	United States Department of Homeland Security
DMCA	1998 United States <i>Digital Millennium Copyright Act</i>
DOC	United States Department of Commerce
DOD	United States Department of Defense
DOI	United States Department of the Interior
DOL	United States Department of Labor
DSU	WTO <i>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 (1 <sup>st</sup> meaning)	Electronic Freedom Foundation
EFF (2 <sup>nd</sup> meaning)	Electronic Frontier Foundation
EIF	Entry Into Force
EPA (1 <sup>st</sup> meaning)	United States Environmental Protection Agency
EPA (2 <sup>nd</sup> meaning)	<i>Economic Partnership Agreement</i>
EPZ	Export Processing Zone
EU	European Union
FCPA	United States <i>Foreign Corrupt Practices Act</i>
FDA	United States Food and Drug Administration
FDI	Foreign Direct Investment
FDRA	Footwear Distributors and Retailers of America
Forex	Foreign Exchange
FOIA	United States <i>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
FY	Fiscal Year
FX	Foreign Exchange
G-20	Group of 20
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>
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
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
ITA	WTO <i>Information Technology Agreement</i>
ITAC	Industry Trade Advisory Committee
ITC	United States International Trade Commission
ITIF	Information Technology & Innovation Foundation
ISDS	Investor State Dispute Settlement
ISP	Internet Service Provider
ITAC	Industry Trade Advisory Committees
ITC	United States International Trade Commission
IUU	Illegal, Unregulated, and Unreported
JCPOA	<i>Joint Comprehensive Plan of Action</i>
JV	Joint Venture
KAFTA	<i>Korea-Australia FTA</i>
KORUS	<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)
LONIS	Law on Network Information Security (Vietnam)
LTFV	Less Than Fair Value
M&A	Merger and Acquisition
MAD	Mutually Assured Destruction
MARPOL	<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 (Deputy Crown Prince, Kingdom of Saudi Arabia)
MEA	<i>Multilateral Environmental Agreement</i>
MEFTA	<i>Middle East Free Trade Agreement</i>

MFAT	Ministry of Foreign Affairs and Trade (New Zealand)
MFN	Most Favored Nation
MOCI	Ministry of Commerce and Industry (India, Kingdom of Saudi Arabia)
MOF	Indian Ministry of Finance
MOFCOM	Chinese Ministry of Commerce
<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>
NAM	National Association of Manufacturers
NAMA	Non-Agricultural Market Access
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
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
<i>OTCA</i>	<i>1988 Omnibus Trade and Competitiveness Act</i>
<i>Paris Convention</i>	<i>1979 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
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
<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>
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
SBS	Simultaneous Buy-Sell
SCM	Subsidies and Countervailing Measures
<i>SCM Agreement</i>	<i>WTO Agreement on Subsidies and Countervailing Measures</i>

SDR	Special Drawing Right
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>
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> (1 <sup>st</sup> meaning)	<i>Trade Promotion Agreement</i>
<i>TPA</i> (2 <sup>nd</sup> 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>	<i>WTO Agreement on Trade Related Aspects of Intellectual Property Rights</i>
TSM	Transitional Safeguard Mechanism

<i>T-TIP</i>	<i>Trans Atlantic Trade and Investment Partnership</i>
TV	Television
UAW	International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, <i>i.e.</i> , United Auto Workers
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
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
USSR	Union of Soviet Socialist Republics
USTR	United States Trade Representative
USW	United Steel Workers
VAT	Value Added Tax
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:

## Shakespeare and *TPP*

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> 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 core text of *TPP* or the Side Letters. That is true for his poetry, too. Shakespeare wrote 154 sonnets. The core text (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 3 quatrains (each a 4 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 them, 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 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 *TPP* ought or ought not to contain, and whether *TPP* 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-*TPP* Parties, too, from Bombay to Bordeaux, Rio to Riyadh. The dominant voice in much, if not most, of the public discourse

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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.

is that akin to Malcolm: People, turn your grief over the adjustment costs from prior trade liberalization deals into revenge: fight *TPP*, oppose free trade.

This book provides an extensive analysis of *TPP*.<sup>3</sup> It 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 *TPP*, it is not yet Act V. Rather, it is Act I, so there is time for critical analysis.

This remarkable FTA has not (yet) been approved or entered into force.<sup>4</sup> All of its draft provisions remained classified until publication of the final text on 5 November 2015, a month after negotiations finished on 5 October.<sup>5</sup> Formal signing occurred on 4 February 2016, coinciding with the 400<sup>th</sup> anniversary of Shakespeare's death (1564–1616). 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.

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 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>6</sup> In its interdisciplinary approach, my text-

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3. This book 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, 3<sup>rd</sup> ed., 2015).

4. In April 2014, the USTR published a 1-page document of changes to United States law necessary for compliance with TPP. Only 6 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).

5. 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.

6. 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)



book also stresses the link.<sup>7)</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 occurs 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, 2 features distinguish this book: The seriousness with which it takes TPP, and the effort it makes to examine TPP as unbiasedly as possible. First, academic writing about TPP has been small in volume. The American legal academy seems slow to appreciate the paradigmatic shift of TPP. The agreement potentially affects every area of law, from Labor and 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>8</sup> (To be fair, interested

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- (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, 40<sup>th</sup> 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).

7. See Raj Bhala, *INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK* Volume II, Chapters 76–80 (4<sup>th</sup> ed., 2015).

8. 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).

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 *TPP* 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* is 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 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* 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 20<sup>th</sup> 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>9</sup> The champion for repeal of Britain Corn Laws, which originated in 1815 and lasted until

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(4) Fazzzone, 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).

9. 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

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>10</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>11</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>12</sup>

There is a diametrically opposite view that this the FTA is a ruthless expression of capitalist corporate greed. Within 2 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>13</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

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of 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).

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

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

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

13. See Erik Wasson, *Obama Trade Deal May Hinge on Republican Policy Demands*, 33 International Trade Reporter (BNA) 46 (14 January 2016) and 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).

importantly, we find that *TPP* would lead to losses in employment and increases in inequality.”<sup>14</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 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>15</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.

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

15. Joseph Stiglitz & Adam S. Hersch, *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.

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.

The day the text of *TPP* was published, a prominent critic of *TPP* intoned:<sup>16</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>17</sup>

Candidates in the 2016 Presidential election were quick to judge, too, within days of the 5 November 2015 publication. Democrat Senator Bernie Sanders (Vermont) said: “It’s even worse than I thought.”<sup>18</sup> Republican billionaire Donald Trump dubbed it “insanity.”<sup>19</sup>

These declarations are 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>20</sup> So, perhaps in a polarized political and stratified economic climate, it is best 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 7% of all Americans favoring more rather than less restrictions.<sup>21</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

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16. 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>.

17. 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>.

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

19. 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.*

20. 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.

21. See John McCormick & Terrence Dopp, *Free-Trade Opposition Unites Political Parties in Bloomberg Poll*, BLOOMBERG POLITICS, 24 March 2016, <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).

incomes under \$50,000 said “yes.” Simply put, opposition to free trade “unites the country like few others, across lines of politics, race, gender, education, and income.”<sup>22</sup>

Honesty about *TPP*—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>23</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>24</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>25</sup> (America’s was 49%, and Chile’s was the highest with 67%.<sup>26</sup>) On one side were the arguments that Malaysian exports like electronics, palm 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 2<sup>nd</sup>-rate Asian country and remain an attractive FDI destination vis-à-vis its neighbor and *TPP* signatory, Singapore, and similarly

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22. John McCormick & Terrence Dopp, *Free-Trade Opposition Unites Political Parties in Bloomberg Poll*, BLOOMBERG POLITICS, 24 March 2016, <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.*

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

24. 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>.

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

26. 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.



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 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>27</sup> They

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27. 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 3 major bond sales in 2012 and 2013. Goldman Sachs netted \$700 million on 1 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 5 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 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, <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 chairs. *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 Dealmaker 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

faulted President Obama for overlooking 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>28</sup> Interestingly, in January 2016, the Malaysian legislature was 1<sup>st</sup> to approve the deal.

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 *TPP* text 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*. 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* actually says—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.

Now that I have finished a manuscript on *TPP*, 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.”

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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, <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.

28. 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).



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 *TPP*. 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*. Might America and its *TPP* partners do well to include the land of Shakespeare in *TPP*, or at least extend to it an FTA on *TPP*-like terms?<sup>29</sup>

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*July 2016*

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29. 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, <http://www2.ljworld.com/news/2016/jun/24/ku-international-trade-law-expert-reacts-brexit-sa/>.



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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.

- **Sangeeta Shastry**

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Sangeeta was born in New Delhi, India, and moved to the United States when she was 1 year old. She attended the University of Missouri School of Journalism and worked as a reporter for *The Kansas City Star*, Kansas City's *National Public Radio* affiliate, and the Thomson Reuters news service. Sangeeta also pursued a Master's degree in journalism, law, and conflict resolution before beginning classes at KU Law School. She served as a Student Ambassador, and Inaugural Member of the Dean's Diversity Leadership Council. Following her 1L year, she was a Summer Associate with Shook, Hardy & Bacon. Sangeeta patiently edited the entire book manuscript, and her work resulted in a vastly improved manuscript.

- **Eric Witmer**

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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 2 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). Eric also 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, he 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 plans a career in which he can facilitate creation of novel solutions to legal conflicts that inevitably arise when emerging markets integrate into the world economy. Cody labored tirelessly to develop both the theory and empirical analysis of managed trade.

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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 2 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, I use Arabic numerals, 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, these 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.

- **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>30</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

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30. 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 247–75 (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 321–82 (Spring 2004) (arguing the WTO is emerging as a major player in the global harmonization of national laws).



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 *TPP*, 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.

