

## Critical Review of the Rulemaking Outcome of the Trans-Pacific Partnership --- The Case of E-commerce---

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- Despite its claim as a 21st-century free trade agreement (FTA), the Trans-Pacific Partnership (TPP)'s rulemaking outcome is unremarkable. This is true, as far as its e-commerce chapter is concerned, because several important e-commerce provisions in earlier FTAs are not incorporated into TPP.
- It would have been more difficult for the US to abandon the TPP if its rulemaking outcome was more substantial. For the other eleven countries, TPP is a “comfortable” FTA that does not require drastic reforms.
- A possible bilateral FTA between the US and Japan should include truly significant rulemaking, rather than simply market access.

### Introduction

The Trans-Pacific Partnership (TPP) is unlikely to enter into force as it was signed by the twelve parties in 2016, but some members are still pursuing TPP 11. Securing the rulemaking outcome achieved by the TPP negotiations is often mentioned as a justification for TPP 11.

Was substantial rulemaking outcome really brought about by TPP? While policymakers and commentators typically take as given that the answer is yes, it is worth conducting theoretically informed and sound empirical analysis of the claim. Using the e-commerce chapter as a specific case, this policy brief examines (i) whether TPP incorporates all important rulemaking outcomes achieved prior to TPP and (ii) whether TPP established new rules.

Hence, several claims regarding the significance of TPP from other angles are outside the scope of this study, including the claim that TPP's actual impact is significant (because of wider membership) despite its insufficient rulemaking outcome and the claim that TPP's actual rulemaking is trivial (in terms of actual economic impact) despite its significant rulemaking outcome.

### Method to examine the significance of rules

There are two important “variables” that affect the legal nature of rules. First, the distinction between hard and soft rules is important. When no flexibility language is included regarding obligations and the dispute settlement mechanism applies to the obligation, we say the rule is hard. Second, provisions that require specific actions are considered more significant than non-specific provisions. For example, a requirement to introduce specific legislation is more specific than a requirement to take some necessary measures toward the same problem.

### TPP's rulemaking achievements

There are some remarkable rulemaking achievements brought about by TPP. Several “performance requirement requests” regarding e-commerce are, for the first time, prohibited. A Party's request to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory is prohibited (Article 14.13). Likewise, a Party's request for the transfer of, or access to, source code of software owned by a person of another Party as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory is

also prohibited (Article 14.17).

Some improvement can also be found in TPP provisions on the establishment of domestic institutional frameworks. Regarding online consumer protection, although previous FTAs have set either “specific and soft” requirements (Australia–Thailand FTA) or “non-specific and hard” requirements (Australia–Korea FTA), TPP Article 14.7 includes a “specific and hard” requirement for the establishment of online consumer protection legislation (the same applies to information protection, as stipulated in Article 14.8).

### Disappointing outcomes

Regarding duties on electronic transmission, the duty-exemption provision of the US–Korea FTA (Article 15.3) covers not only digital products electronically delivered but also digital products delivered through traditional means (e.g. Compact Discs). However, only the former is covered by TPP (Article 14.3).

A common practice employed by US FTAs is to include an “extensive” non-discrimination principle for digital products, which means that non-discrimination covers not only digital products originating from contracting parties but also from non-parties (third parties) (see, for example, the US–Singapore FTA Article 14.3). However, the coverage of TPP’s non-discrimination provision (Article 14.4) is limited to products originating from the contracting parties, and so can be regarded as a “restrictive” non-discrimination principle.

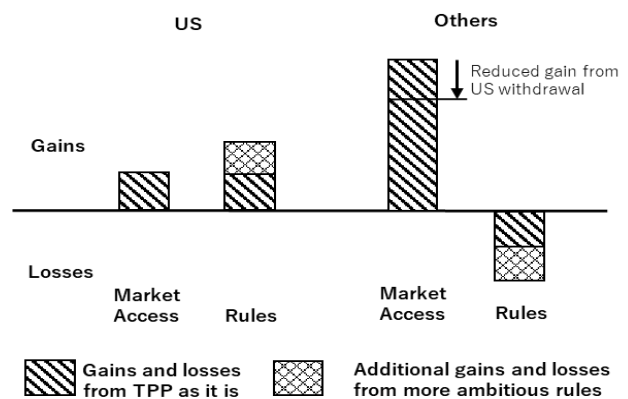
The Singapore–Australia FTA includes paperless trade as an obligation (Article 8). In contrast, TPP’s paperless trade provision (Article 14.9) is best-endeavor because it includes flexibility language. Note, however, that TPP follows the precedent of US FTAs in this regard.

Free information flow is critical for e-commerce. TPP Article 14.11 is about “Cross-Border Transfer of Information by Electronic Means”. It only requests that each Party allow the cross-border transfer of information, including personal information, by electronic means when this activity is for the conduct of the business of a covered person. Hence, information not related to business is excluded from

the scope. It should also be noted that this provision covers only “cross-border” information flow.

### Policy Discussions

The above provides some idea why many TPP parties other than the US are considering reviving the agreed text as TPP 11. For many members, if not all of them, TPP is a comfortable agreement that does not require drastic policy reform. The rules eventually included in TPP were diluted during the negotiations. For the US, it would have been more difficult to abandon the TPP if its rulemaking outcome was more substantial.



If rulemaking is such an important aspect of FTAs, why not pursue an FTA that concentrates on this aspect? A possible bilateral US–Japan FTA would provide a great opportunity for this. The rulemaking in a US–Japan FTA could be said to be very substantial, for example in the case of e-commerce, if the provisions below were included as obligations: (i) duty exemption for digital products delivered via traditional means; (ii) application of non-discrimination principle to non-party digital products; (iii) paperless trade; and (iv) free information flow for both business and non-business purposes. If the two countries really want to assume leadership in trade and investment rulemaking in the Asia-Pacific region, a bilateral FTA that concentrates on rulemaking, rather than market access, is worth consideration.

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### References

S. Hamanaka (2017), The Future Impact of TPP’s Rule-making Achievements: The Case Study of E-commerce, IDE Discussion Paper (forthcoming)