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DEBATE 2016

TO TPP OR NOT TPP? SHOULD THE U.S. JOIN THE TRANS-PACIFIC PARTNERSHIP AND OTHER INTERNATIONAL TRADE AGREEMENTS?

Moderator

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Remarks by

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DEBATE 2016: TO TPP OR NOT TPP?

INTRODUCTION

Professor Julian Ku: Thank you so much everyone. I really appreciate you being here. Good afternoon. For those of you that don’t know me, my name is Julian Ku. I’m very pleased to host this part of the university’s event in preparation for the first 2016 Presidential Debate. This title of the panel is, the title that I made up which is not actually very funny but I thought was funny at the time, To TPP or Not To TPP? Should the U.S. Join the Trans-Pacific Partnership and Other International Trade Agreements. I’m going to begin the session today with a brief overview of our topic to lay the ground for our panel discussion and then I’ll introduce in more detail each of our excellent panelists who came from great distances to be with us here today. I’ll quickly point them out here before we begin. So we’ll start Professor Raj Bahala, Professor Robert Howse, Simon Lester, and Professor Marley Weiss. And I’ll talk a little bit more about their background and credentials in a moment, but we really want to thank them for coming here today. I also want to thank you for taking the time to talk about this very important and complicated issue.

So the main focus of our discussion on this panel is the Trans-Pacific Partnership. The TPP, as many of you know, is an international trade agreement between twelve Pacific Rim nations including the United States. The other nations that’ll join the TPP are Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile, and Peru. That’s a handful. Combined, the economies of these countries in the TPP have a combined population of eight hundred million people and comprise of about forty percent of the world’s economy.

Negotiations for the TPP have been going on in bits and parts, largely over the last seven years and have been a priority of the Obama administration for most of its two terms. Negotiations went on culminating in a final agreement signed on February fourth of this year. Under the Trade Promotion Authority and Law enacted by Congress in 2015, the TPP must be either approved or rejected by the Congress, but knowing them, this may be delayed. Alright, so that’s just the background that lays our foundation for the discussion today. The TPP, as our discussion today will indicate, is quite controversial. I’ll just note that the controversy of the TPP is not just about the TPP, but about trade agreements in general, and that’s something our panelists will talk about as well. Since the end of the Cold War, the United States has entered into numerous new trade agreements, most famously the North American Free Trade Agreement, NAFTA, in 1994. It was a founding member of the World Trade Organization (WTO) in 1995, which formalized a previous trade agreement that now includes over one hundred sixty four countries and actually since that time, the United States has entered into thirteen other trade agreements with countries such as countries within Central America, Australia, Singapore, Israel, and Chile. There are a lot of countries. Trust me on this one.

So, now in the last seven years since President Obama took office, the U.S. has only approved one trade agreement, which is the U.S.-Korea Free Trade Agreement, which was actually negotiated during the Bush Administration. So, the Obama years, I think, have largely been focused from a trade perspective on the TPP and also on a companion agreement with Europe called confusingly, the TTIP, the Transatlantic Trade and Investment Partnership. But let’s just focus on the TPP for now. Especially given the contents of the presidential debates, which are coming up, the TPP has been something that the presidential
candidates have given their opinions about and have strong views on. Now let me give you some quotes from President Obama and all the Presidential candidates.

So here’s President Obama on why the US should join the TPP: “Right now the rules of global trade too often undermine our values and put our workers and businesses at a disadvantage. TPP will change that. It eliminates more than eighteen thousand taxes that various countries put on made in America products. TPP allows America, and not countries like China, to write the rules of the road in the twenty first century.”

So that’s one of the many arguments President Obama has put for supporting the TPP.

Despite his strong support and support of some members of Congress, only one of the Presidential candidates running has actually expressed support for the TPP and he’s not a major party candidate. He is Libertarian candidate Kerry Johnson. Both major party candidates have said they oppose the TPPs and let me just quickly go over some of the reasons they’ve stated for why they oppose the TPP. So we’ll start first with Republican Presidential candidate Donald Trump, who has probably expressed the harshest and most colorful opposition to the TPP. In a Twitter post, Mr. Trump said, “the Trans-Pacific Partnership is another disaster done and pushed by special interest who want to rape our country. Just a continuing rape of our country. It’s a harsh word, but it’s true.” Now in more detailed remarks, Mr. Trump argued, “the TPP would be a death blow for American manufacturing. It would give up all of our economic leverage to an international commission that would put the interests of foreign countries above our own. It would further open our markets to aggressive currency cheaters. It would make it easier for our trading competitors to ship cheap, subsidized goods into the US markets. Not only will TPP undermine our economy, it will undermine our independence. It creates a new international commission that makes decisions the American people can’t veto.”

Now turning to Secretary of State Hillary Clinton, when she was Secretary of State she supported the idea of the TPP, but she no longer supports it. In recent remarks she made clear that she is unequivocally opposed to the TPP. And here’s Secretary Clinton, I quote her, “I oppose it now, I’ll oppose it after the election, and I’ll oppose it as President.”

So that’s a Secretary Clinton’s views. I think it reflects the mood of her party as well.

During the Democratic nomination fight, Senator Bernie Sanders, her rival, had and even now, continues to make opposing to TPP a central plank of his campaign and his views. Senator Sanders wrote recently, “in my view, the trade deal would result in job losses in the United States, make the global race to the bottom even worse, harm the environment, undermine democracy, and increase the price of prescription drugs for some of the poorest

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people in the world. Those are some of the reasons Senator Sanders has given for opposing TPP.

So with all this in the background, putting TPP in the context of our current Presidential election, I am especially pleased that I can turn to an expert panel today to give some really expert and substantive analysis of the statements made by the various presidential candidates about the TPP. I myself am particularly interested in the critique offered by Donald Trump and Bernie Sanders, where both suggest that not only is it bad for the economy, but somehow the TPP undermines our independence, which is Trump's version, or Sanders says it undermines democracy, which is Sanders' critique. So now we'll begin, and I'm going to sort of retreat to the podium now.

I'll begin with Professor Raj Bhala, a Raymond F. Rice Distinguished Professor of Law at the University of Kansas School of Law. And I'll just quickly note, Professor Bhala is a leading scholar of international trade law and has done really important work in mainstreaming international trade law into our thinking as a judicial system. He has pioneered an annual review of case law issued by the World Trade Organization and he has really been an important scholar helping to organize into some sort of legal system, the strong world international trade law. This includes a publication of a treatise on GATT (the General Agreement on Tariffs and Trade) law and a recent, very newly published comprehensive study of the TPP. And now I will turn to Professor Bhala.

**BHALA COMMENTARY**

**Professor Raj Bhala:** Thank you so much to all of you for coming today to this panel and particularly to Hofstra Law School and to Professor Julian Ku and Judy Black. They worked so hard over several months and it's an honor to be here, and it's an honor to serve with my fellow panelists.

Comprised of two hundred and forty lines, Act IV, Scene 3 of *Macbeth* is the longest scene of that Shakespearean tragedy. 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 Macbeth have Duncan murdered but also Fleance, the son of Banquo, and all of Macduff's family. Does this mean that Macduff should grieve indefinitely and be passive? Or as Malcolm successfully argues, should grief be turned to revenge?

TPP is the longest free trade agreement in human history. Consisting of a core text of thirty chapters, plus sixty-three annexes, plus sixty-one side letters, TPP spans six thousand pages. It's far easier and more pleasing to peruse Act IV, Scene 3 of *Macbeth* or even the entirety of Shakespeare's longest play, *Hamlet*, than it is to read just the core text of TPP. That's true for Shakespeare's poetry too. He wrote one hundred and fifty-four sonnets. The core text of the TPP has five hundred and six articles, and the side letters run two hundred and thirty-one pages. And there's little in the way of stylistic grace. After all, a trade rule is not

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restricted to fourteen lines with a particular rhyme scheme. It's not organized into three quatrains. And there's no final couplet of iambic pentameter. In fact like some sonnets, the theme of the rule is time, but unlike them, love, beauty, truth, they're not building much concern.

Now the stylistic contrast also is true regardless of our initial substance of disposition to the English language. We might not like early modern English, but international trade English is very difficult; turn to any page of TPP and you're likely to find a difficult noun or verb or odd acronym. Stylistic issue aside, there is a crucial similarity on substance. The debate about what TPP is to say or not to say, or whether it ought to be passed or not passed, is a debate about the meaning of the past for the future, as is Act 4, Scene 3 of Macbeth. What do NAFTA and post-NAFTA FTA's, what are the Uruguay Round Agreements, and what do they teach families around the world about trade liberalization? From Kansas City to Kuala Lumpur that question is being asked. It's being asked in non-TPP parties too, from Bombay to Bordeaux, and Rio to Riyadh. And the dominant voice in much of that public discourse is like that of Malcolm from Macbeth. People turn over your grief. To turn over your grief from adjustment costs of trade globalization into revenge. Fight TPP, oppose free trade.

Now as Professor Ku who kindly noticed and mentioned, I'm biased in that I have a book that has just come out about TPP. It does not take all the omens from the past trade deals as bad. It does not adopt a near-paranoid opposition to trade liberalization. Macbeth made those mistakes by drawing dreadful inferences from the prophecies of the three witches, and all died as a result. That's the worst outcome with any tragedy. Maybe Macbeth might have avoided that outcome with careful, reasoned meditation and deliberation. Now this remarkable FTA has not yet entered into force, as we know. All of its draft positions remained classified until publication of the final text on the fifth of November, 2015, a month after the negotiations finished on the fifth of October, 2015. And I should say very clearly, I did not access any WikiLeaks versions of the draft text in working on my own book. Formal signing of the text occurred only on February fourth of this year, which coincided with the four hundredth anniversary of Shakespeare's death. And on the twelfth of August, President Obama sent to Congress a draft statement of administrative action for TPP and as trade lawyers know, statements of administrative action need to accompany the submission of implementing legislation. In contrast to the six thousand pages of the TPP, we have about thirty-six pages of statement of administrative action. And unlike NAFTA and definitely unlike the Uruguay Round SAA's (statement of administrative action), this one is not very helpful either in explaining the trade treaty all in the marketing to the American public. It is a missed opportunity by the USTR (United States Trade Representative).

As I said, I am biased. The thesis of the book and research is that TPP merits a preliminary grade of B. That is an evenly weighted average of a C on economics and A on national security. The importance of the latter grade, the A on national security should be stressed. That's because the connection between trade and national security is not sufficiently appreciated in the legal academy or in the broader discourse about Trade that we're seeing in the Presidential campaign. And what I'm trying to say in the remaining time that I have, is to tell you a little bit about why give a C on economics to TPP and why give an A to TPP on national security.

Much of TPP is also of great intellectual interest, as well as practical interest, is because there are a number of what we call WTO-plus rules, rules that go beyond standards or
specific black letter rules in the WTO agreements. We'll see that, for example, with copyright protection. So that's an important point to keep in mind. Another important point to keep in mind is about overselling free trade. And this relates a little bit more to the economic side. Adam Smith, and his law of absolute advantage, and David Ricardo, and his law of comparative advantage, never promised that free trade would result in an increase in jobs. Nor did either of these classical economists ever promise that trade liberalization would result in an increase in incomes. What they promised was that trade liberalization would result in a net social gain to society, and the net social gain to society would come about through specialization in production based on comparative cost advantages, and increased consumption opportunities at lower prices. They never promised more jobs or greater income. If we measure TPP by that metric, we're not following in the tradition of the classical economists. That's a different standard. Their standard was about international division of labor resulting in production and consumption gains, and that seems to be fundamentally misunderstood or distorted by politicians.

Why the grades of a B over all weighted by an A and C on economics and national security, economics respectively. Start with economics, to call this a free trade agreement is misleading. It is really a managed trade agreement. Now the concept of manage trade is not well developed in the economics literature. The book tries to lay out some empirical metrics for managed trade. What you hear the USTR say and the President say over and over again is that TPP results in eighteen thousand tariff cuts. And that is technically true. Tariffs are going down on eighteen thousand products okay, so it doesn’t matter if Brunei lowers its tariff on Christmas trees, okay? It doesn’t matter. Not a big population, not a lot of celebration of Christmas in Brunei, I’ve been there. So they will tell you that this is dramatic in terms of trade liberalization, but a little more careful analysis indicates that in terms of, here’s an acronym, DFQFEIF treatment, duty free, quota free treatment for merchandise upon entry into force. That’s your DFQFEIF acronym. About eighty-two percent of tariff lines get DFQFEIF. Okay, that means that about fifteen, eighteen percent are in what are called “staging categories.” Tariffs are phased out. An empirical study of those tariff phase-out categories indicates that on average about thirteen hundred products are put into them by the twelve TPP countries and those products may be put in the staging categories that backload tariff phase-out for upwards of twenty years. So, we have to look very carefully, as is often the case in trade agreements. The devil is in the details. And when you look into the details, you see the deal is about managed trade. Now that critique comes from Chapter Two of TPP.

To give you another managed trade type of critique coming from Chapters Three and Four, the Rules of Origin Generally and the Rules of Origin on Textiles and Apparel, or “T&A.” Specifically, we can see that there are three basic types of rules of origin. The first being, where is the good wholly obtained from or wholly grown in? If it’s wholly grown or wholly obtained good in a TPP country, it originates in that country. The second rule, also quite familiar to trade lawyers, is originating materials. If all of the input comes from a TPP country, then that good is considered originating and gets, ultimately, eventually, DFQF treatment. And the third rule is what’s called, another acronym, PSRO, product-specific rule of origin. Here we have to look, again, into the details and ask what is the specific rule conferring origin for say, autos? And we’ll see for examples for some autos and auto parts, it’s as low as thirty-five percent, meaning supply chains of Honda and Toyota don’t need to be changed dramatically to qualify the ultimate good, the car that they make, in Japan. They can continue to use Thai or Chinese supply chains. We also we see that in the specific
formula, like how you actually calculate a regional value content. Without getting into all the
details of the numerator and the calculation, you’ll see that corporate interests were successful
in getting originating or non-originating goods in or out of the numerator to raise or lower
regional value content (RVC) to suit their global supply chains.

That leads to a second macro level concept in critiquing TPP on the economic side.
Is this really a managed trade agreement for the benefit of plutocratic interests? The concept
of plutocracy goes back to, actually, the ancient Greek times, and it’s a concept that Plato and
Aristotle studied at length, and critiqued at length. When you try and connect dots between
devilishly detailed rules in Chapters Two, Three, and Four with whose backing them, you can
definitely see some linkages to plutocratic interests. Now that’s on the side of economics and
that’s why it suggests that maybe if we’re looking at free trade and Smith and Ricardo and
looking for those net gains, this deal is a C. But that’s not the end of the story. It’s absolutely
not the end of the story.

There’s a reason why secretary of defense, Ashton Carter said, “TPP is worth to me
another aircraft carrier.” As you may know, United States has ten aircraft carriers, one in
reserve. China has one aircraft carrier, none in reserve. So right now, the power seems
asymmetric. But, to think that TPP is not about containment of China is not is to miss the
story, that’s very much what TPP is about. The administration doesn’t like to use the word
“contain.” They might say “challenge” or they might say, “stay engaged in” the Asia-Pacific
specific region, or talk about long term historical continuity of American engagement in the
Pacific Rim. But make no mistake, all eleven other TPP countries, including one with which
this country fought a bitter war, Vietnam, “begged” too strong, “implored” perhaps not,
implored the United States to do this deal and help protect them by diversifying them away
from dependence on Chinese markets and giving them a sense of comfort that our national
security and our nuclear umbrella has been giving them or tried to give them, for many years.

Now, that leads to a third macro level concept. What do we mean by national
security? Containment is a doctrine from George Kennan, who under the pseudonym of Mr.
X, wrote the famous 1947 Foreign Affairs article on the topic. But why are we worried about
containing China? Well some of you may have seen or heard of the nine-dash line. It is a
line that envelopes nearly ninety percent of the South China Sea, through which fifty percent
of world trade flows. The Pentagon very clearly and carefully identifies choke points around
the world, such as the Straits of Hormuz, Suez Canal, and Panama Canal. That kind of
control over the South China Sea is a risk from the American and the other eleven allies’
perspective, a risk to their economic and national security interests.

So then how do we connect dots from that national security paradigm, or metric, to
specific rules in TPP? Well, here, we can look at Chapters Fourteen, Seventeen, and Eighteen
to give you some examples. In Chapter Fourteen we have rules on electronic commerce and
those rules include one that forbids data localization. It forbids the localization of servers and
all instances except for financial services. We also have rules facilitating and encouraging
Internet service providers, ISPs. What does the Chinese Communist Party not like? Offshore
ISPs, right? That’s how Tibetans or Taiwanese or the Hong Kong Independence Party work,
through ISPs. It’s also how regular Chinese people try to get real news. Does the Communist
Party include data localization requirements? Yes, yes they do. So the pattern you’re starting
to see just from Chapter Fourteen is, and this was in President Obama’s statement embedded
in what Professor Ku read, that we want to write the rules of the road. The pattern is what’s
the rule in China? And then flip it around and the anti-rule is TPP.

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Okay, here are other examples in Chapter Seventeen on state owned enterprises, they have to be privatized, they have to operate on commercial principles, all of the operations have to be transparent and held accountable. All issues we've had with China and the WTO.

The final set of examples comes from Chapter Eighteen, on IP. You'll notice, probably, or have read, that there are huge concerns about copyright piracy in China by the likes of our IP companies, such as Disney, or trademark infringement. Well, the rules in Chapter Eighteen include a special new set of rules for widely recognized trademarks; it's a TRIPS Plus rule. And what would be widely recognized trademarks? A lot of what we're wearing today, such as the checkmark on our Nike shoes, or on what we use today, such as the apple on our Apple devices, those have to be specially protected. The penalties for copyright piracy are in most cases criminal penalties, so the severity of the punishment goes up. These are rules to write if China one day comes into TPP; China will be bound down by those rules. But in the meantime, these are the rules needed to work with our allies and think about their national security interests.

So I hope that in what I've said in the past few minutes I've conveyed a sense of what the title of the book is, it's TPP Objectively. It's a difficult agreement to just come at and it takes time to study. It's far broader and deeper than other trade agreements we've seen.

And I would just conclude with one point, which is maybe a little bit even more biased from my side, TPP has a chapter on women and development. So this is the same glass is half empty, glass is half full story I've been trying to convey. On the one hand, it's fantastic to see in the trade agreement an acknowledgement of the importance of woman in the economy, and that's something that economic development scholars have known for many years. On the other hand, there are two problems with that chapter. It's all soft law. It's the softest of soft law. They're no hard law obligations, or no metrics or benchmarks to measure progress in the likes of Brunei or Malaysia on women. And the second problem is that the chapter does not include any reference to the LGBTQ or religious minority communities. I am working on an article on these points. For now, suffice it to say that if our basic goal is to advance human dignity and free trade agreements through them, and if that's where the core of both our economic and national security interest lie in advancing human dignity and human flourishing, the Agreement takes only a first initial step towards doing that. So with that I'll stop. Thank you very much for your kind attention and I look forward to your questions and answers later.

Ku: Thank you so much. Also want to thank him for reading the TPP. But really for reading it fairly, because very few people have actually done this. So I want turn it over now to our next speaker, who is Professor Robert Howse from New York University School of Law. Professor Howse is a leading scholar of international, economic, and trade law and the author of a leading treatise. He's also a serious scholar of political philosophy and theory, a really interesting and unusual combination for the field. He's been a consultant to organizations such as the OECD and Inter-American Development Bank and has actually also been involved arbitration. So I want to give him a chance to give his views also on this very difficult topic.
Professor Robert Howse: Thank very much, Julian. I look at this beginning from the reality that today we have global rules that govern international trade. Those are the rules embodied in the agreements of the World Trade Organization. Those were very difficult negotiations. The United States and some other developed countries questioned what many people today call a neoliberal agenda. For example, for developing countries to accept intellectual property protections that were not to the benefit of their people to accept a dogmatic preference for privatization and private provision in essential industries, that’s the WTO services agreement; to accept a higher straight jacket of the ability to democratically create regulations that suit that particular country. That’s the requirement of the WTO. Technical barriers to the NASDAQ standards and regulations have to be based on international standards and that your food and agriculture regulations have to be based on science, that is another WTO agreement.

But this being said, there were balancing and limiting provisions in the WTO treaties. Developing countries and others were able to resist demands. For example, the WTO agreements don’t contain provisions protecting investors and allowing investors to sue governments on those rights. The WTO agreements represented a balance, and once the ink was dry on those agreements, interests like the pharmaceutical industry and certain services industries said, “well this was a success, but we want more.” And so they started demanding more by launching another round of WTO negotiations. What happened with the WTO was that unlike in the old days, developing countries had more power and they weren’t going to give in and give more than they’ve given up, as had happened in the original WTO negotiations. In fact, there was a call for a rebalancing of the WTO agreements, somewhat away from neoliberalism, or what Joseph Stiglitz has called market fundamentalism.

So basically, the context in which negotiations like TPP emerge, is that certain interests didn’t get enough to their satisfaction in the original WTO negotiation, in the Uruguay Round. They then tried to get more multilaterally through the WTO, but because the balance of power had been altered in the WTO, they weren’t able to push that through the WTO. So then the idea was to push it through in regional negotiations. And low and behold, it turns out if you go regional, you can keep the negotiations secret. You can keep the negotiating drafts from the public. That has been stopped now at the WTO, as that was the case for TPP, and it’s been the case for TPIP as well. If you go regional, the governments can limit, like the USTR has done, the particular interests and lobbies that get in the door and influence detail of the text. And so that very much goes to the point that these agreements are managed trade agreements that are there not because free trade is good for everyone, but because some lobbies and particular corporate interests have the ear of the government and its negotiations.

It’s not surprising that the TPP is so long, because what you’re basically trying to do is to assist the interest of particular companies and not others, meaning you’re going to have to write a lot of very, very, very, fine print. So negotiate it in secret, unbalanced participation in favor of certain interests. TPP does not think to advance the challenge of climate change mitigation. There might have been an opportunity there to do it. That opportunity was not taken. It does very little to repress problems with labor rights abuses, some of which are absolutely egregious and horrific in some of the countries that are part of TPP. And it also contains the kind of traditional mechanism where under many bilateral agreements, investors and corporations can sue governments and through an arbitration process that is so lacking in
ethics and conflict of interest rules. In that process, somebody can be an arbitrator and affect the judgment in one case, while at the same time they are legal counsel in another case that deals with a very similar issue. And whenever I talk to lawyers and law professors who are not that small subset who have made a fortune off of ISDS (Investor-State Dispute Settlement), and tell them about this provision, they're absolutely horrified. There is no accountability for arbitrators. For example, in one kind of investor-state dispute settlement regime, there's the so-called annulment process where there's some kind of very, very limited appeal. But who are the appeal judges? They are exactly the same kind of people who decide the original cases wearing a different hat.

So there are a lot of problems with TPP. Particularly if, as I am, you are a liberal or progressive or somebody who questions the neoliberal or the market fundamentalist agenda as 'the' agenda for trade. That being said, I'm not going to do what some people who share my perspective do, which is to claim that the TPP is going to result in significant job losses in the United States. I think the responsible economic analysis, and I point you to a very good post on some kind of online magazine by Dartmouth College economist Nina Pavcnik that I just picked up on the Internet this morning, called Stumped about what to make of Obama's TPP trade deal? You're not alone. I think a responsible analysis would suggest that there are a lot of imponderables and that probably there will neither be very large job losses nor job gains. But as a matter of principle, there enlists a strong compelling case to reject TPP. And as a matter of principle I need to say that if your principles are those of progressivism.

Now, this being said, we have the national security argument that somehow by entering into TPP, we will be entering into some kind of mutual security arrangement or security law with Asian allies that can contain China. This is a very good sound bite. But actually, when you look at the text of the TPP agreement, I don’t see anything in it that creates mechanisms for security cooperation. I see nothing in it that tries to promote democratization, the strengthening of legitimate governments under the rule of law in Asia, and very little about the possibility of cooperation on labor and social issues within the region. So what is actually in this agreement that is going to contain China? It seems like it's a substitute that is mistaken for a real security and political cooperation pact in the Asian region. And if you look at the governments involved, they are very diverse governments. Some of them are quite fragile and there are significant governance problems in a number of the countries concerned. And I don’t see anything in the TPP that’s going to actually solve that.

But now we turn to the current political environment in the United States. And so given all I’ve said so far, it will surprise you to say that from a political perspective, I actually said the best option and I blogged about this on Simon Lester's blog recently, is that the TPP will be passed but with some reservations that will allow it to be fixed in important ways over the next number of years. Now what is a reservation? As Julian said, the meaning of fast track is that, and if the President actually does go through with his promise or threat, depending on your point of view, with TPP to Congress under fast track in the lame duck session, the existing text cannot be altered or amended. But what is permitted under TPP is something called a reservation. It’s a concept in international law that allows a country to qualify or modify its obligations under a treaty even after the stage of ratification or approval through a side instrument, which as I say, is called a reservation.

And why do I say that this is the politically best option? Because I think that the way in which the Democratic Party has been divided by TPP is very destructive in this current
election environment. It confuses people both at home and abroad where opposition to TPP is often taken to be an endorsement of an isolationist agenda of the kind being promoted by the Presidential candidate Donald Trump. It also puts Presidential candidate Hilary Clinton in a difficult position. She opposes TPP, but as I’ve blogged with Simon’s blog, it’s not clear exactly what she’s in favor of in terms the future of trade agreements. So many people think she’s insincere. I don’t think that, but they say, well in the past, she supported this neoliberal trade agreement and part of the broader Clinton legacy has been supported in these kinds of agreements. So it doesn’t help Hillary Clinton on the trust front. On the other hand, Obama’s determination to push this thing through and to regard opposition as “mere noise,” I think is also destructive of the Democratic Party. It seems arrogant, and in a way to make the transition from an Obama to a Clinton administration very difficult. My sense is that this scenario is one that Trump is very well posed to exploit and to take advantage of.

So what would these reservations be? The first reservation would be to say that the U.S. would not sign on to the investor-state dispute settlement provisions of TPP. In terms of critics like Elizabeth Warren and others, such as Bernie Sanders, my perception is that it’s really ISDS that represents the one single problem of the agreement, which is a deal breaker for them. So, getting rid of ISDS with respect to the U.S. would be an important step forward towards a more common ground in the Democratic Party, and it can be done. The legal mechanics are there to be able to do it consistent with fast track because it is consistent with that of modifying the actual legal tasks of the TPP itself. Now I have a softer version of the reservation which would give the TPP countries several years to negotiate alternatives to investor-state dispute settlement, which would help to protect the legitimate interests of investors against high political risks in certain countries. That could include a political risk insurance fund, or it could include a proposal that I’m favorable to, which the EU has made in TPIP the contest, which is the replacement of arbitration by ad-hoc, accountable and often interest groups with their arbitrators, to create a true judicial system for solving investment disputes. So that would be the alternative version, taking two years to do that and after that period of time, if no alternatives are found, then the U.S. opting out of old fashioned arbitrations for solving investment disputes would become permanent.

A second reservation may be that the U.S. shall endeavor with the TPP partners to negotiate a new mechanism for enforcement of labor rights and environmental obligations that would allow civil society, non-governmental interested actors to bring a complaint, which would be an independent judicial mechanism. In unveiling this negotiation the United States would reserve the right to use and strengthen its trade remedy laws to counter environmental and social docket. So that’s second that’s the second reservation.

The third reservation I think is a direct target against Trump and some of the things he’s been saying about betraying American workers. And this would be a declaration would say the United States will provide or that Congress will provide that there will be an independent commission to evaluate the investment TPP on levels of employment, wages, conditions of work and social and economic inequality in the United States. Then if in any two-consecutive year period the Commission applies significant negative effects on some of these, the President shall put to Congress a proposition and it shall be debated in Congress whether the United States should withdraw from TPP. So it’s kind of an insurance policy. If the strong critics or skeptics are actually right, and that a lot of jobs might be lost or the inequality will be worsened we reconsider the Agreement.
So I think all of these three measures would be consistent with passing the existing TPP text without changing a word. And to change a word would involve Congress taking extraordinary action to move back from the fast track framework for the vote. That is not impossible, since Congress is the only master of its own process, but I think this is a much easier kind of fix.

Now if this fix is adopted or none of it is adopted, I’m really very concerned about this division between President Obama trying to push this thing through exactly as it is, and Hillary Clinton rejecting it. It can only hurt Secretary Clinton’s chances of being elected. Why? Because the fact that she’s not able to effectively oppose the President and putting this to a vote in Congress, makes her look either possibly insincere, if she doesn’t mind TPP but she’d just rather somebody else take the wrap for it. Or, alternatively without sufficient political strength or credibility, to get the President even to be open to the kinds of fixes that I’m speaking about today. And I think I’ll end on that note, I very much look forward to your questions and comments.

Ku: Thank you so much, Professor Howse for your creative thinking about the TPP and the upcoming presidential election. Let me introduce our next speaker, Simon Lester. Simon is a Trade Policy Analyst of the Cato Institute’s Herbert A. Steifel Center for Trade Policy Studies. His research focuses most on the dispute resolution process but also on trade law. And near and dear to my heart, Simon is the founder of the International Trade Law Blog, which is not actually about studying law, but it’s the leading website for practitioners about international trade law policy. So I really look forward to him sharing his views. Thank you.

**LESTER COMMENTARY**

Simon Lester: Thank you very much to Professor Ku and Hofstra Law School for the invitation to come up here and talk about the TPP and international trade agreements with this distinguished panel behind me. In some ways, it feels like an awkward time to be talking about all of these issues. It feels like we’re in this period of limbo, just waiting for the election to finish, and then we can start a serious conversation again. Now if they’d wrapped up the TPP negotiations two years ago, we might have had a normal debate. We might have even had a vote in Congress. But instead, they finished it just in time for the U.S. Presidential Campaign. And so as Professor Ku told us, and I’ll just remind people some of the things that we’ve heard, we’ve heard Donald Trump say that the TPP is “the rape of our country.”

That’s just not really constructive or helpful for a good policy debate. As for Hillary Clinton, as Secretary of State, she helped promote the TPP. And just to be clear, she was not directly involved in the negotiations, but she did say nice things about it. But then when the final text came out and she was in the Presidential campaign, – you might say based on politics or you might say based on principles – she looked at the text and said “I don’t like them any anymore.” She says she’ll oppose it now, she’ll oppose it after the election and she’ll oppose it as President.

So with the next U.S. President, either Hillary Clinton or Donald Trump, saying they’re against this thing, what do we make of this? Is the TPP dead? Have the negotiators

12 Lima, supra note 7.
13 Calmes, supra note 9.
from all twelve countries wasted all of their time? Has Raj wasted all his effort on this masterful book? Well, things look kind of bleak but I don’t think so. I think Raj might need to write a second volume, but I think there is a future here. So for one thing, we heard a little bit about the lame duck session. After the election, Congress will be in session and in theory will be able to debate and vote on the TPP. Most people who seem to know these things suggest that it is unlikely to happen. But who knows? Anything is possible in politics. The more likely scenario, in my view, is that let’s just say there’s a President Hillary Clinton (if it’s President Donald Trump, we have to do a whole new analysis), but if it’s President Hillary Clinton, I think she may find a way to support it. And I’m going to come back to that in my conclusion when I address the question of how can Hillary go back on her campaign statements and support the TPP.

So if it’s not dead, let’s talk about the substance. There are five of us at the Cato Institute doing trade policy work, and we have just put together a working paper that reviews the TPP chapter by chapter. We can’t cover all of that here today, but I encourage you to look online. If you search for Cato, Working Paper, TPP, you’ll probably find it. I encourage you to take a look. It’s interesting, we actually use similar language to what Raj said earlier; we said this is managed trade, it’s not free trade. We focused on the economics, and we sort of gave a score to each chapter. Raj gave it a “C” on economics. We gave it a number rating; I think it was six out of ten. I don’t know how you count that. Five was the middle. We were moderately for it, in terms of the economics. I will say there are sort of varying positions within the five of us at Cato who were thinking about it. I guess I’m on the pro-TPP side of this panel. But I will say my support is somewhat lukewarm. There is probably more I dislike about it than I like about it and to some extent, I only support it because I hate the idea of voting against a trade agreement. I wish there was something better to vote on but this is what they have given us. This is what’s on the table.

So, let me start off with the positive. Here are some things that I like about the TPP. First, it lowers tariffs, which are taxes on imports, just to put it very simply. Tariffs are bad. They mostly hurt the poor. They help well-connected corporations who lobby them. They limit competition. They make the economy less efficient. Now, we are at a law school and we have a lot of law students here. In terms of the law of tariffs, this is probably the most boring part of trade agreements. There really aren’t any deep legal principles here or any sophisticated legal concepts and it’s not much fun for lawyers, but in terms of policy it’s the best part of trade agreements in my view. I often hear that tariffs are low these days and we don’t have to worry about them anymore. And I mean, I think it’s true they’re lower on average; there is no question about that. But there’s still some that are high. For example, a twenty-five to thirty percent tariff on a particular product, that’s pretty high, that’s a pretty substantial tariff. Even a three percent tariff is a real cost. If you look at an individual product and say, well the three percent of this little toy I bought isn’t much, okay that’s true. But if you look at the aggregate of everything that you’ve purchased in the economy, it costs the economy a lot each year to pay these taxes. It costs you. So that’s tariffs, my favorite thing about trade agreements.

Second, the TPP opens up services markets to foreign competition. Traditionally, trade agreements were about trade in goods but more recently they’re about trade in services too. It’s much more complicated to promote trade in services. There are a lot of regulatory barriers involved. The TPP goes a bit further in opening up service markets, although it can be hard to determine exactly how much liberalization has taken place in there. And so, to some extent I’m relying on the governments who have negotiated this saying they’ve opened up these services markets, but it’s often hard to tell from the text what has been opened up.

Similar to services liberalization, there’s also government procurement. You may have heard about ‘Buy America’ laws and I know many people support them but I strongly oppose them. The TPP doesn’t get rid of ‘Buy America’ laws but it does place various limits on this kind of discrimination in government procurement, and to me, that’s positive.

And then finally it makes foreign investment a little bit easier. So to give you an example, New Zealand has increased the threshold amount for foreign investment for which it won’t even screen, it won’t do a government review of whether that investment should be permitted. So it makes foreign investment a little bit easier.

So those are the things I like about the TPP. Now, onto the other side; it’s time to get a little negative, so here are the things I don’t like about it. So, first up is foreign policy and national security. So, after agreeing with Raj before, I’m actually going take an opposite view from him now. Many people promote the TPP as vital to what they might refer to as ‘geostrategic U.S. interests.’ Presumably, this is part of the whole pivot to Asia in foreign policy. Somehow, U.S. interests in Asia are supported by the TPP. This may be really a debate about U.S. foreign policy rather than the TPP. In my view there are a lot of flaws in the U.S. foreign policy. I’m a non-interventionist (not an isolationist) and so I generally object to U.S. efforts to intervene somewhere in the world or to project power on other parts of the world, as people put it. So promoting U.S. foreign policy is not a good reason for me to support the TPP.

A second thing I don’t like about it is that it does lower tariffs, but it does it in a way that it is not really free trade; rather, it is preferential trade. It lowers tariffs for some countries that are part of the TPP but not for others. And that is not an efficient way to do things. In order to make sure that only some countries get the benefit of the lower tariffs, you have these complicated and messy rules requiring you to have to figure out where the product came from to determine what tariff it gets. (That part is fun for lawyers and that keeps a lot of trade lawyers employed).

A third thing I don’t like about TPP, like all modern trade agreements, TPP promotes what I consider excessive intellectual property protection, such as a copyright terms of life of the author plus seventy years. Since I am speaking later in the panel, I get to respond to what people have already said. Rob talked a bit about the neoliberal agenda. And I just want to sort of push back on that quickly and say, as a neoliberal myself, I don’t think that strong intellectual property protection is something most neoliberals support. When I ask around the hallways of the Cato Institute, I see more skepticism about strong intellectual property protection and support for it. I mean, there’s a variety of views, but I think most of us are skeptical.

**Howse:** I think you’re a classical liberal, not a neoliberal.

**Lester:** There may be distinctions between different kinds of liberals. But I want to put
intellectual property protection in the camp of the corporate agenda, and that often differs from what I see as the neoliberal agenda—we’d have to talk about what neoliberals are. But corporations are often lobbying for more government intervention because that is what benefits them.

A fourth thing I don’t like about it is all the labor and environment provisions of the TPP. And that’s not saying I don’t think we should have international law on these issues. I just don’t think it should all be gathered into one central place in a trade agreement. Trade agreements shouldn’t be the enforcer of all things international law, and they’re kind of moving in that direction.

And then finally, to agree somewhat with Rob, I’m also skeptical about the investor-state dispute settlement mechanism, which allows foreign investors to sue governments in an international tribunal. To me, this is a special right given to mainly wealthy individuals in corporations, and actually undermines the rule of law.

So, from my perspective you can tell, even though I am a supporter of the TPP, what we have with the TPP is sort of a mixed bag. There is some good, there is some bad. Again this is what we have been handed, so the question is now what do we do with it?

I’m going turn now to what Hillary Clinton should do with it. Let’s assume she’s elected. We can talk about what happens if Donald Trump gets elected if you want in Q&A. But if she’s elected, what can she do to triangulate the situation?

Now first of all let me explain why she would want to support the TPP. What would motivate her to support it? She said she is against it, but what would change her mind? I think there are a couple of things here. First is that presidents have a lot of power in foreign affairs, and international trade is part of foreign affairs, and it’s something she can do largely on her own without Congress getting in the way. Congress has already given her the authority to negotiate it, to negotiate trade agreements, and they will only have to ratify it. But aside from that, presidents have a lot of power in trade, and when people have power they like to exercise it. She’s going to have the power here. She’s going to want to exercise it.

Second is that the U.S. can’t sit on the sidelines in international trade. Everybody else, all the other countries in the world are negotiating trade agreements. We can’t just go cower in a bunker pretending this isn’t happening. We really have to engage somehow. And this is an agreement that’s just sitting out there and is already negotiated. Our trading partners want it ratified. She’s going to have a lot of pressure to do something with the TPP. So I think she will pursue it.

But now the hard part: how can she do a graceful flip-flop on the TPP? After having said she is so strongly against it, how can she find a way to support it? I don’t think a modest tweak is enough. The people who criticize her say, well she’s just going to immediately support it as is. She’s going to make some minor change and say now it’s a completely different agreement and now I support it. I don’t think that’s enough. I think that would create, as Rob has pointed out, a massive internal battle within the Democratic Party and I don’t think she can do it. I don’t think progressives would let her get away with it. I think she’s made promises to them, and she just can’t do it that quickly. So I think to really mollify the Elizabeth Warren—Bernie Sanders wing of the Democratic Party, she has to do a little bit more.

She has a couple of options. She has specifically criticized the intellectual property protections of the TPP as too strong, and the currency manipulation provisions of the TPP as too weak. So in theory she could do something on those issues. The problem with currency
manipulation is nobody really agrees on what we should do. Economists don’t agree. Our trade partners don’t agree. The U.S. Government doesn’t agree because the Treasury Department doesn’t want anything done. So I’m not sure about this one. I think if she pushes for new rules on currency manipulation, that might be the end of the TPP, which is fine if that’s what you want, but I’m saying that I think she will want to get the TPP done.

She also mentioned intellectual property protection. She’s worried that it’s too strong. The problem is you have people like Senator Orrin Hatch, a Republican, who thinks that it’s too weak. So I don’t know that there’s an agreement there, I don’t know if there’s a middle ground that she can find. So my suggestion, and this is similar I think to what Rob has said. He’s talking about a reservation to the TPP to get ISDS out. What I’m suggesting is, and everyone will tell you can’t renegotiate the TPP, it’s done, you can’t renegotiate it. I don’t believe it. You can renegotiate it. What I’m suggesting is that she proposes renegotiating the TPP, to get rid of ISDS. I think that is a way that you could get Congress to pass the TPP. We know that Senator Elizabeth Warren hates ISDS, she’s written op-eds about this. She has talked about it at length. She’s very vocal about it. We also know that Hillary Clinton doesn’t like it, because in her book from a couple years ago, she specifically mentioned it. Not in great detail, not to the extent that Elizabeth Warren has, but she’s mentioned that she’s pretty skeptical of it. So it wouldn’t really be a flip-flop, it would be following through on her past statements.

Now what about the Republicans in Congress? Won’t they object to this? Aren’t they going to put up a fight? Maybe, but I just don’t get the sense that they strongly believe in the ISDS system the way they believe, for example, in intellectual property. I think deep down, many of them probably have concerns about sovereignty, worries about foreign investors suing the U.S. Government, so I’m not convinced that we would get that much of an objection from the Republicans in Congress on this issue.

So that kind of leads us to a more general question. I think I’ll end on this. It leads us to a more general question that Professor Ku presented us all with. How should the U.S. approach international trade agreements as a more general matter? So here are some thoughts. So basically in two minutes, here’s everything I want to see change about U.S. trade agreements. First, going back to my disagreement with Raj, take foreign policy out of the equation. It has been said that the U.S. negotiated an FTA with Australia but not with New Zealand, as a reward for Australia’s support of the Iraq invasion and as punishment for New Zealand’s opposition. To me, this is definitely bad economics and it’s also bad foreign policy and we shouldn’t be thinking about trade agreements that way. I know we do and maybe we always will, but I’m just saying we shouldn’t.

Second, get rid of all the tariffs and do it multilaterally. Tariffs are boring. Many business groups actually don’t mind them, but it’s just good economics and good international relations to get rid of all of them at the multilateral level.

Third, listen to economists on intellectual property protection. I’m not an intellectual property expert but I’ve tried to read what economists have to say about it and most of them are pretty skeptical. I know that U.S. business groups want ever-stronger intellectual property protection, but I don’t think we should make trade agreements based on what business groups want. And then more generally I would say don’t let interest groups dominate the process of negotiating trade agreements. It seems to me that a lot of what we do now is based on assembling a coalition of interest groups trying to give everybody something they want in the trade agreement. But the problem with that is when you give everybody
something they want, you give everybody else that they don’t like at the same time, and that’s a big reason that I think trade agreements are much more controversial and difficult to pass today than they were, say, twenty years ago, thirty years ago. So to sum up my overall message is get back to the basics of trade liberalization; it’s boring but effective.

Ku: Thank you very much Simon. And now let me introduce Professor Marley Weiss. Professor Weiss is a professor of law at University of Maryland School of Law. She is an expert in labor and employment law. One of the areas she is engaged in is labor rights and obligations in the context of international trade agreements, including serving as the chairperson for the National Advisory Committee, to the National Administration Office of the NAFTA Labor Side Agreement for many years. So with that I will turn it over to her.

WEISS COMMENTARY

Professor Marley Weiss: Thank you very much. Since I’m the odd one out here, I’m not a trade lawyer, I do my best to read the works of everybody else on this panel to understand trade, but perhaps like many of you in the room, this is not my course to teach. So I think about these agreements not just from the proposition of existing or potential trade but from the perspective of the broader set of economic, social and legal relationships involved. So I also want to thank Julian and all the people at Hofstra for all their hard work in putting this together. I think this is a fabulous program and I am so delighted to be on it and to have this opportunity to share some with all of you.

First of all, let me say a couple words about the position of the TPP in the larger trade lexicon. A few years ago, when they were still negotiating the TPP, there was a book, and I don’t remember the exact title, that was basically saying that the negotiators aspire to make it the trade agreement for the twenty-first century. And in order to make it the trade agreement for the twenty-first century, it was going to include chapters on a whole series of topics that went beyond those in previous agreements. One of the problems in trying to get your arms around the TPP is all the things that are in it, because calling it a trade agreement makes us think that it’s all about trading goods. And even here today, at least of a quarter of our time has been spent talking about the provisions about trade in goods. But even as to the core, trade-related issues we would have to list: trade in goods, trade in services, free movement of investment and assurances for investors, and then we also probably ought to think -- this is way they do it in Europe -- we’ve got to think about whether that should include movement of persons, which is not just labor but also has to do with cross-border capital mobility issues. So all of that is in here and there are a host of other things that have been alluded to, such as intellectual property, labor, environment. There’s something called ‘regulatory coherence,’ which conceptually I find extremely offensive, so later I will say a little bit more about that. Even though like many things in this Agreement, the substance doesn’t live up to the hack.

That is the Agreement is almost like Swiss cheese. There are so many carved out exclusions and exceptions, nobody quite really knows what they’re getting. And everything is buried in one hundred page annexes that says this country reserves the right to do this and that country excludes that. And some of them are, we get to continue existing activities like this, and some of them are, and we get to continue doing certain types of new things in the
future. So, conceptually, I totally agree with my colleagues, who have said, though all this is billed as a “free trade agreement”, it’s really a managed trade agreement.

But it’s also not a trade agreement at all. It is a mobility-across-borders in goods and services and investments agreement that is designed largely to minimize the barriers for multi-national corporations to have global supply chains that run in a very criss-cross fashion among the twelve countries that are all within the agreement. And so when we talk about the rules of origin, the rules of origin aren’t that different from the NAFTA rules of origin or from the rules of origin in the DR-CAFTA Agreement or from the U.S.-Peru or US-Korea Agreements. But when you do those rules of origin and you lock twelve countries together, now you’re not saying that the origin has to be from one country or from one of two, or three of five. Now you’re saying from any one or more among twelve.

Now, I only have a little bit of time, and so I’m trying to figure out how best to focus this. First of all, I want to say that one of the predicates behind the selling of this Agreement is a predicate that says that the free market will be the best solution. Now some of us know about real existing socialism, right? That was called communism, and it is pretty widely understood that it has fatal flaws in its construction. But what free trade has partly done is to reveal real, existing capitalism. And 2008 and the current election in my view, and not just in the U.S., but Brexit in Great Britain and the rise of the right wing in at least half a dozen core European countries, there are many factors involved. I don’t want to oversimplify it, but I think it is a mistake to not see the connection between real existing capitalism and several decades now of deregulatory impetus in not just the U.S., but in many other democracies, which is very closely tied to the ethos of the free trade agreement. Real, existing capitalism is at risk of doing itself in, particularly if we believe that real, existing capitalism depends on democracy and vice versa. So I’m going to give a few words about the Bernie Sanders democracy pitch, but I do think that we have to just question the predicate underlying the whole ‘we need to have free trade’ and ‘free trade is better,’ and ‘lower tariffs are better because they are more and more of an approximation of free trade.’

Having said that, I think when we look forward rather than backward, trade in goods, although it seems very significant now, twenty years from now it’ll be less and less significant. We already know that the American economy has moved very much away from being based on jobs in manufacturing to jobs in services. I was in Hong Kong for a conference several months ago and what really interested me was that the Chinese are now encouraging their big enterprises to invest heavily in robotics, even though much of their industrialization impetus has been to produce more jobs at better pay for their huge population. Now some of this is the aging of their population so they have stopped labor shortages in a lot of places. But some of it has to do with where manufacturing is going. Manufacturing is going back to, on the one hand, robotics for mass manufacturing, and number two, 3D printing in order to get to artisanal manufacturing or much more tailored manufacturing for craft-like products.

So twenty years from now, tariffs are maybe not going to be so important. And whether we move the jobs back to the U.S. or not, the number of manufacturing jobs is going to be diminishing, diminishing, and diminishing. So to me, the really important things that have to be thought a lot about in TPP are the provisions about services, the provisions about investments. I also think the chapter about government procurement is very important because it affects both goods and services and because it is those services that we think of both in the U.S., and especially in foreign countries as “essential” as either government-
provided or government-intertwined. For example, not quite in the U.S. but healthcare in many countries around the world is one of the many deeply affected government procurement services that we have to talk about. So I view all of those as the much more important pieces of TPP then the stuff about trade in goods.

Now I just want say a few points about the way that the rules about trade in goods and services have been constructed. This is the WTO approach, and in a very large number of places, I think Raj described TPP as WTO-plus, and that makes a lot of sense because there are whole sections of TPP where it says “here’s what the WTO deals with, we incorporate this by reference” and then it adds on. So some of the core principals, this is for those of you like me who are not trade lawyers, there are some core principals about equal treatment between countries. One is a comparison to the way a country treats its own producers of goods and services, the national treatment (NT) principle. And the other is called MFN, Most Favored Nation, which is looking to compare among the other countries, and the benchmark is the best treatment of any of what the other countries’ producers of goods and services get.

It’s too long to do a detailed discussion of this and Rob may tell me I’m wrong, but I got my understanding mostly from reading his books. But in the United States, if you look at our Constitutional law, our Supreme Court has always been very nervous about interpreting the equal protection clause as requiring anything but discriminatory intent. That is, notions in a lot of American law about equality, require an intentional difference in treatment, sometimes called disparate treatment. That is opposed to discrimination in results or outcomes that’s often called disparate impact in American law.

Now in international trade and particularly some of the basics of WTO law, rules that would be incorporated right into the analysis for purposes of the TPP, basically nobody wants to accuse another government of intentionally discriminating. And besides that, it’s really hard to prove. And in these kinds of international forums, this is a particularly hard kind of proof to make. So instead, they have adopted the opposite strategy where what they’re interested in is what we would call disparate impact. That is, the impact of a seemingly neutral regulation or rule about a good or service that adversely affects either foreign countries compared to the domestic producers, or foreign producers of one country versus another. They actually use the phrase discriminatory treatment regarding this version of trade-related discrimination, even though we Americans would think conceptually, or in constitutional terms, as the rule being a factor or having a disparate impact without any discriminatory intent.

Why does this matter? Well, it’s important for how you think about goods and criteria for goods, specifications for goods, their safety and so on. But that pales in comparison to how important these things are when you talk about services. Because when you talk about services, you’re talking about a host of regulations. These are the regulatory barriers that Simon alluded to among other things. Once you’re talking about services, everything we do about services that are designed to ensure that consumers who may not be in a position to assess the quality, or the efficacy, all of that becomes in play, because almost all of that is likely to pit one group versus another. And often that is going to mean, that because of how these are designed with domestic professional service providers in mind, they’re going to have advantages over foreign service providers, even if the regulations were written at time when the idea of foreign service providers wasn’t in the lexicon. So I find the TPP rules about services really disturbing.
DEBATE 2016: TO TPP OR NOT TPP?

Then I said even in all the annexes, almost nothing is covered. That is because there are so many exceptions that are exclusive between one country and another that there’s very little left. And this is why you also heard that the forward movement to removing barriers to services is not so great. It’s because there are so many exemptions and exclusions. But first, conceptually it is a crapshoot and nobody really knows what they’re getting, and second, on services and here I mention another agreement as well, the Trade in Services Agreement (TISA), this is all a one-way ratchet. That is, the system is specifically designed always to level, to reduce regulatory limitations on free movement, whether it’s goods or services, rather than to allow what is sometimes called ‘regulatory space.’

Who else knows another definition of the word “regulatory space?” To quote Bernie Sanders, “democracy.” When you talk about limiting regulatory space, what we’re saying is we’re going to put the ability to craft new law beyond the reach of the domestic population, meaning you have limited democratic input.

So these words mean a lot; investment worries me for the same reasons and then some even more. And to me, getting rid of the extremely problematic investor-state dispute system is our first step. But it is not a sufficient step. And I’m not all that enamored of the European Union’s idea about an investment court. I’ll say a couple words about that, which is really the idea that Rob is wants to build into his proposal to get the TPP passed. But apart from that, the investment systems have so many flaws, and these cover mostly private businesses or individuals who are wealthy and have foreign investments. These investor protections include both assurances of equal treatment on the same kind of grounds that I alluded to, that foreign investors can’t be disadvantageously treated when compared to domestic investors. They can’t be disadvantageously treated compared to investors from other countries. But they also have this series of other provisions, which are sort of trade jargon such as “fair and equitable treatment,” and these are like Trojan horses. That is, nobody quite knows what they mean.

There’s quite a history of investor-state arbitration under bilateral investment treaties in some of the previous free trade agreements the U.S. has entered into that have these kinds of investment chapters. There have been repeated efforts to narrow them down and to change the language, but then you look at the arbitration under the new language and these things keep coming back. Now, one of the reasons they come back is, as we’ve already heard, the somewhat bankrupt method by which these arbitrators are chosen in the investor-state process, and the fact that it’s a revolving door. But there’s a really nice paper that I just saw last week. And I forget the name of the woman, Rob might help me out, she’s at NYU, who has written a paper that talks about specialized cannon courts particularly in the European Union and the proposal for an investor-state court in the European Union. And really what this is all about is the fact that when you isolate from the mainstream law in a specialized tribunal, you almost induce a form of regulatory capture, creating repeat players on both sides. She gives the example of the U.S. Federal Circuit Court as a comparison and also she sees this happening with the EU’s Patent Court, and this is what she thinks might happen if instead of an ad hoc investment dispute arbitrator, you would have in a standing, specialized investment dispute court.

So I know that we want to have some time for conversation, so let me just say a few words about the labor chapter, and also make one other comparison. Implicit in what you heard, and I think this was from Rob earlier, one of the great imbalances in the entire TPP, is an imbalance about who gets to enforce what rights. The traditional system for all kinds of
international agreements is that all the enforcement is state-to-state. For those of you who have a labor background, the nation-state has the exclusive bargaining representation rights, so all of the national and corporate interests are treated alike, subject to government prioritization decisions regarding enforcement. That’s the scheme. So whether a provision has individuals as beneficiaries or corporations as beneficiaries, in the traditional state-to-state enforcement system, which can take the form of arbitration, the state decides what to trade off. They’re like the prosecutorial arm of many U.S. federal agencies, where there’s a gatekeeper who has to decide what claims to pursue. And so there are some priorities, especially in trading off objectives.

There are many kinds of claims that private businesses will make through the investor-state dispute system because they have the equivalent of a private right of action that nation-states would never bring. And this is totally unequal as to every other section of the Agreement. Things that are not in the investment chapter don’t provide a private claim for whoever the parties are that will be likely to benefit from the provision. They all have to go through one or another process that their home government controls. Now, one solution is to say, everybody should have a private right of action. But an alternative is to say, let’s return to the old days and say nobody has a private right of action. And that everyone is subject to the whole government doing enforcement.

So I have one minute. So let me just say one thing about the labor provisions. There are many flaws to that, including that there is nothing like a private right of action and the workers’ rights, like the environmental rights, are very likely to get traded off favor of economic interests. But there’s another big problem. What we have seen from some of the other U.S. FTAs, U.S. Free Trade Agreements, is that when the governments are not in compliance with the labor obligations before the agreement has been ratified and put into place, it’s been impossible for that government to come into compliance. And right now, this is the route that we are entering into. Malaysia is notorious for human labor trafficking. They are so notorious that the state department in issuing its annual human trafficking report, doctored up its results to re-categorize them from category three, which would not allow TPP to get fast track treatment because of the language in the trade promotion law that Congress adopted, so the administration made them a two and a half. And a two and half means they’re trying to improve their trafficking record. So that’s Malaysia, they have modern slave work on a rampant scale. And then there’s Vietnam. You all remember it’s still a communist country formally. They have a single, monopolistic, government- and party-linked trade union. It is inconceivable that they will have freedom of association unless they change their political system, which they’re not obligated to do. Yet they will supposedly separate the party and the trade union and the government, which is the unitary state socialist construct in Vietnam as it is in China and used to be in all of the eastern bloc countries. So with that I’ve exhausted my time allocation and I’ll end there.

Ku: Thank you I really do appreciate everyone. Also, I just wanted to give Professor Bhala a few minutes to speak, since he hasn’t had a chance to speak in a while.

Bhala: Thank you very much. Let me try to play the role of a teacher, because I know all of us are trying to make up our minds about TPP in advance of the election. I think we heard from the main presentations a lot of agreement on many of the economic issues but a little bit more of a disagreement on foreign policy and national security matters. So, let me just try to
give some other sides to those foreign police and national security points. The first question is, or actually there are two, is should foreign policy be an element in considering a trade agreement? Should foreign policy be a part of our trade policy? And if we go back to Horace and Plutarch, they debated that very question. And if we were to ask President Eisenhower (who is from Kansas!) in 1955, he famously said, that trade is the greatest weapon in the hands of diplomats. And his successor President Kennedy said that we’ve always enjoyed a bipartisan consensus in favor of free trade. That is because an agreement on the essentiality of trade and national security abroad and domestic economic help at home is broadly appealing. So whether that should be the case is an issue, but it is the case in our own trade history.

Now the second question’s come up, is that case a serious one? Now eight American Secretaries of Defense and four American Secretaries of state, from both parties, have not dismissed this agreement as a sound bite. They have seen the specific provisions in it and said yes, we need this for our national security. Because their understanding of containment has evolved from simple military pressure on the likes of the former Soviet Union, to a synthesis of American values and American economic interests in trade agreements. So they see Chapters like Twenty-Four, enhancing small and medium size enterprises. They see Chapters like Twenty-Nine, with provisions to protect the sovereign rights of the Maori, under the Treaty of Waitangi and they understand that those facilitate democracy. They see provisions like Article 17-10 on state owned enterprises, which requires disclosure of the extent of government ownership of an SOE (state owned enterprises) and also of non-commercial support subsidies to SOEs. They see provisions in Chapter Eighteen, on forbidding the circumvention of technology protection mechanisms; the very topic on which Apple sued the U.S. Federal Government a couple of months ago. And even the point about democracy and labor rights, consider the Vietnam General Confederation of Trade Unions; while it will not be given its own political space, to its credit the Vietnamese Communist Party is changing Vietnam’s Constitution to allow for independent trade unions and independent collective bargaining on the economic sense. So, over all the point is, without taking one side or another, is that in a synthetic value-based sense, there is a multi-dimensional strategy as to why people are writing the rules of the road, so that if China one day accedes to TPP, it will do so under TPP rules that represent a higher and better level, and it’s up to us to decide that level.

**Audience Member:** I think that generally what the panel was saying was that, if the TPP is passed, the price of goods of member nations would fall relative to the price of Chinese goods. And I was wondering in the national security context, won’t that serve as inspiration for China just to continue to manipulate the yuan or cut working conditions to keep pace and wouldn’t that be encouraging bad behavior rather than better behavior?

**Lester:** I mean we really don’t know how China will react. What I think that hope among people who want to use this against China, is that China will feel left out by this, will feel that discrimination of the higher priced goods and say we better get in. And how do we get in? Well, we have to go comply with all the rules that everyone else complies with. And these are good rules. These help protect labor and the environment. They discipline state enterprises. So I think people who see this as a way to bring China in the direction we want them to go. I don’t know if that’s right, I don’t know if we can predict that. I think China’s
watching and waiting, seeing if there really is going to be a TPP, and China is sort of negotiating their own Asian trade agreement which is probably less likely to come into effect. So I think for me, it's just too hard to predict how this is going to affect China. I can see your point thought that if China feels excluded by this, they say, well we better work harder to do all the bad things that people say we're doing. That's too far in the future for too many uncertainties for me to have a prediction for how China actually will react.

Ku: I'm noticing another question. Yes sir.

Audience Member: How is country expelled for non-compliance?

Ku: Okay, actually we usually us sanctions, countries aren't expelled, right?

Lester: If there was a specific permission they weren't complying with, normally one of the governments would bring a complaint against them, saying, here's the rules and you violated it, we're going to have this neutral panel decide if you have violated it. Well then we get to impose sanctions on you to induce you to comply. I mean, we don't exactly, we have a system at the WTO that works like this, the TPP on paper looks it will work like this, but there have been a lot of free trade agreements out there and not a lot of compliance issues. So we don't know exactly, but yes, basically, you don't expel them. You bring cases alleging specific violations and try to impose sanctions to encourage them to comply.