

## Accession clause of TPP : Is it really open?

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## IDE DISCUSSION PAPER No. 606

### Accession Clause of TPP: Is it really open?

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#### Abstract

One of the most important policy questions relating to the future impact of the Trans-Pacific Partnership on the global and regional economy is whether other countries in the region, particularly China, will join the partnership. While several commentators have made some observations regarding the future prospects of TPP expansion, little scholarly analysis has been conducted. To go beyond the speculation of a certain country's accession to TPP, we first attempt to generalize the issue before moving on to a specific question. We conduct a comparative analysis of a large number of regional trade agreements for a better understanding of the parameters of RTAs that are critical for membership expansion. This general framework enables us to conduct a systematic examination of specific membership expansion cases, such as China's membership in TPP. The paper also proposes a necessary "accession practice" that truly facilitates new members' participation.

**Keywords:** Trans-Pacific Partnership (TPP), Free Trade Area of the Asia-Pacific (FTAAP), Membership, Accession, Majority voting, Veto.

**JEL classification:** F15, F53, F55

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# Accession Clause of TPP: Is it really open?

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## 1. Introduction

In assessing the impact of any regional trade agreement (RTA), including the recently concluded Trans-Pacific Partnership (TPP) among the 12 members, we should examine its inclusiveness/exclusiveness. Put differently, the critical question in RTAs is which party enjoys the benefits. At the technical level, the rules of origin for trade in goods and services and the definition of investor and investment are illustrative examples of the methods used to determine the beneficiary of RTAs. At the meta-level, it is membership that defines the beneficiaries (Baldwin and Low 2009).

In fact, one of the most important policy questions relating to the future impact of TPP on the global and regional economy is whether other countries in the region, particularly China, the largest trading country in the region, will join the partnership. While several commentators have made observations about the future prospects of TPP expansion, little scholarly analysis has been conducted, partly because of the methodological problems associated with the sensitivity of membership.<sup>1</sup>

This study attempts to close this gap by analyzing TPP membership expansion. One way to tackle this difficult question is to conduct interviews with officials involved in the TPP negotiations held so far and to analyze the internal debate relating to possible future membership expansion. However, we will not follow this method because an analysis beyond speculation is difficult, even with insider information, if we concentrate on only TPP. Hence, in this study, we will first attempt to generalize the issue before moving on to a specific question. We conduct a comparative analysis of a large number of RTAs to better understand the parameters of RTAs that are critical for membership expansion. This general framework enables us to conduct a systematic examination of specific membership expansion cases such as China's membership in the TPP. It also helps us see how the accession clause can be improved to facilitate accession.

Accordingly, this study is structured as follows. First, we will propose useful classifications of RTAs to analyze the actual accession and review accession clauses in RTAs using these classifications. This will give us the analytical basis for this study. Second, we will review the general trends in RTA membership expansion and attempt to identify the types of RTAs and under what conditions they tend to expand. We will also analyze examples of both successful and unsuccessful negotiations for membership expansion. Given this background, we will analyze an actual accession clause in TPP (Article 30.4) and consider whether membership expansion of TPP is likely. We will also consider accession practice that would facilitate the accession of new members to the TPP, given what is already stipulated in the accession clauses.

While there are some agreements that are not notified to the World Trade Organization (WTO) (Hamanaka 2014a), in this study, we will limit our analysis mainly to notified RTAs. Under the WTO system, the formation of goods RTAs can be based on either GATT XXIV or Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, adopted in 1979 (the so-called Enabling Clause), and services RTAs can be based on the General Agreement on Trade in Services (GATS) Article V. All types of RTAs must be notified to the WTO. As of April 2016, there are 397 agreements in force that had been notified to the WTO, with goods and services agreements counted separately and notifications on accession being excluded. Of these,

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<sup>1</sup> While there are studies on the accession to institutions (Kelley 2004), those focusing on accession to RTAs are limited. Hamanaka (2012) found that South-South RTAs based on the Enabling Clause tend to have an accession clause. Lewis (2011) discussed the significance of an open accession clause in RTAs.

132 RTAs cover only goods and 132 RTAs cover both goods and services. There is one RTA covering only services, which is the European Economic Area, the services agreement covering the EU area. Therefore, the actual or physical number of RTAs is 264, if we count an RTA covering both goods and services as one RTA.

## **2. Accession Clause in RTAs**

### **2.1. Typology of RTAs: Subsidiary and Standalone RTAs**

There are two types of classification of RTAs that are useful in analyzing accession. The first is the number of members. The distinction between bilateral and multilateral agreements is necessary to analyze accession to RTAs. Multilateral agreements refer to agreements that have three or more members. Note that multilateral agreements simply mean multi-party agreements, while the term "multilateral trading system" usually refers to the WTO system. Ruggie (1992, 571) defines multilateralism as an "institutional form which coordinates relations among three or more states on the basis of generalized principles of conduct, that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence." What is called "diffuse reciprocity" is the key to multilateralism, which means that an arrangement is expected to yield a rough equivalence of benefits over time, unlike specific reciprocity.

A bilateral agreement is an arrangement between two parties that is based on specific reciprocities, wherein the simultaneous balancing of specific quid-pro-quo by each party is required (Ruggie 1992). It is based on the assumption of a specific exchange between the two in each dyadic relationship. Thus, bilateralism is regarded as exclusive by definition (Capie and Evans 2002, 39). Krauss and Pempel (2004, 5) summarize bilateralism as the situation when "two countries cede particular privileges to one another that they do not give to other countries." Note, however, that the degree of bilateralism depends on the design of each agreement. As Brian Job said, there is "expansive bilateralism" that contributes to cooperation in a wider membership (Capie and Evans 2002, 40).

Ruggie's distinction between diffuse and specific reciprocity is useful, but his argument that there are multi-country agreements that should not be classified as multilateral agreements (or multilateralism) is slightly confusing. This is especially true for our study, which regards a multi-country agreement as a synonym for a multilateral agreement. Therefore, we argue that there are both multi-country/multilateral agreements based on diffuse reciprocity and multi-country/multilateral agreements based on specific reciprocity, rather than deny calling the latter (multi-country/multilateral agreements based on specific reciprocity) as non-multilateral.

Second, it is necessary to distinguish between two types of RTAs: (i) standalone RTAs and (ii) subsidiary RTAs. Subsidiary RTAs are RTA programs under a large umbrella regional integration project such as a regional community project. Being a member of a regional community or an umbrella institution is a prerequisite for membership in a subsidiary RTA (a non-member of a regional community cannot be a member of an RTA). Countries that have membership in a regional community or umbrella institution usually automatically obtain RTA membership. In this case, we should consider countries that join a regional community or umbrella institution rather than an RTA itself. For example, by obtaining ASEAN membership, a country becomes a member of the ASEAN FTA (AFTA). Countries that have membership in a regional community or umbrella institution sometimes have an option of either joining or staying out of its subsidiary RTA. In contrast, standalone RTAs are not under other institutions. Countries directly become members of standalone RTAs.

### **2.2. Accession Clauses in Standalone RTAs**

For a country to make a decision on whether to join a regional community, it should consider various factors, not just the costs and benefits of RTA membership. Sometimes, accession to a regional community is highly political and the rules of accession to a regional community are not

entirely clear.<sup>2</sup> Therefore, here, we will only analyze accession clauses of standalone RTAs.

Among the 264 RTAs, 37 RTAs are multilateral (Table 1). These 37 multilateral RTAs are composed of 20 subsidiary RTAs<sup>3</sup> and 17 standalone ones. However, two multilateral standalone RTAs are global in nature, meaning that the membership criteria do not have a regional concept: the Global System of Trade Preferences among Developing Countries (GSTP) and the Protocol on Trade Negotiations (PTN). Our analysis here will concentrate on the remaining 15 multilateral standalone RTAs. As Table 2 shows, the majority of multilateral standalone RTAs have accession clauses.

**Table 1: Classification of RTAs**

	Multilateral	Bilateral	Total
Subsidiary	20	0	17
Standalone	17	227	247
Total	37	227	264

Source: Author's compilation

**Table 2: Accession Clauses in 15 Multilateral Standalone RTAs**

RTAs	Accession Clause	Actual accession
Agadir Agreement	Open to any Arab-state member of the Arab League and the Greater Arab Free Trade Area (Article 30)	No
ASEAN-Australia-NZ FTA	No	No
Bangkok Agreement/Asia Pacific Trade Agreement (APTA)	Open to all ESCAP developing members (Chapter 25/30 Accession and Withdrawal)	Yes
Central American Common Market (CACM)	Open to any Central American State (Article XXXIII)	Yes
Central European Free Trade Agreement (CEFTA)	No	No
Common Economic Zone (CEZ)	Open to other states that share its purposes and principles (Article 8)	No
Dominican Republic-Central America-United States FTA (CAFTA-DR)	Any country or group of countries may accede to this Agreement (Article 22.6)	No
El Salvador-Honduras-Chinese Taipei	No	No
European Free Trade Association (EFTA)	Open to any State (Article 56)	Yes
Latin American Integration Association (LAIA)	Open to accession to all Latin American countries (Article 43 and 58)	Yes
North American Free Trade Agreement (NAFTA)	Open to any country or group of countries (Article 2204)	No
Pacific Island Countries Trade Agreement (PICTA)	Open to any State, Territory or Self-Governing Entity (Article 27)	No
Pan-Arab Free Trade Area (PAFTA)	No	No
Mercosur	Open to other members of the Latin American Integration Association (Article 20)	Yes
Trans-Pacific Strategic Economic Partnership (TPSEP)	Open to APEC members and any other states (Article 20.6)	No

Source: Author's compilation

<sup>2</sup> For example, one condition to become a member of European Union is that the applicant should be a European country, while "European" is undefined.

<sup>3</sup> In addition to the 10 subsidiary RTAs listed in the Appendix, there are 10 subsidiary RTAs: Andean Community FTA, Commonwealth of Independent States (CIS), CIS FTA, Central African Economic and Monetary Community (CEMAC), Economic Community of West African States (ECOWAS), Economic Cooperation Organization (ECO), Gulf Cooperation Council (GCC), South Asian Free Trade Agreement (SAFTA), SAARC Preferential Trading Arrangement (SAPTA), and the South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA). Note that both CIS and CIS FTA are separately notified to the WTO.

One interesting case is the Asia-Pacific Trade Agreement (APTA). APTA is open only to developing member-countries of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP); developed-country members of ESCAP and developing countries outside the ESCAP region cannot join APTA. However, in all other aspects, APTA’s accession policy is fairly liberal. No country can exercise a veto over the accession of new members, because a two-thirds majority vote is needed to confirm accession. If any of the participating states object to the accession of a new member that wins two-thirds support, the provisions of the Agreement shall not apply between that country and the acceding country (the “opt-out” clause). The opt-out option can be used only when an incumbent member expresses objection to the new accession, but nonetheless the accession is successful:

**APTA Article 30 Accession to the Agreement**

1. After its entry into force, this Agreement shall be open for accession by any developing member country of ESCAP.
2. After due negotiations, the applicant country may accede to the Agreement by consensus. If consensus is not reached, however, the applicant country may accede to the Agreement if at least two thirds of the Participating States recommend its accession. If any of the Participating States objects to such accession, however, the provisions of the Agreement shall not apply as between that country and the acceding country.

Of the 264 RTAs, 227 are bilateral. All of them are standalone RTAs, because all subsidiary RTAs are multilateral (there is no bilateral subsidiary RTA). Because of the number of bilateral agreements, it is not possible to produce a comprehensive list of bilateral RTAs with accession clauses. Table 3 includes illustrative examples of bilateral RTAs with accession clauses.

**Table 3: Accession Clauses in Bilateral RTAs in the Asia-Pacific**

<b>RTAs</b>	<b>Accession Clause</b>
Thailand-New Zealand	Article 18.5
Thailand-Australia	Article 1905
United States-Australia	Article 23.1
United States-Singapore	Preamble, Article 21.6
Australia-New Zealand	Article 24
New Zealand-Singapore	Article 79

Source: Author’s compilation

We want to point to two interesting findings. First, the US-Singapore FTA not only includes an accession clause but also emphasizes the significance of accession in the Preamble. Second, the US-Australia FTA has an opt-out option. When a new member joins this FTA, there is a possibility that the FTA becomes inapplicable between either of the two countries and the new member. A new member can join the US-Australia FTA if one incumbent member agrees, and the agreement is not applicable between the new member and the other incumbent(s). This implies that unanimous consent may not be necessary for new accession, just as in the case of APTA. It is noteworthy that the US signed such an agreement. Note also that the US-Australia FTA does not employ majority voting, unlike APTA:

**US-Australia FTA Article 23.1 Accession**

1. Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Parties and following approval in accordance with the applicable legal procedures of each country.
2. This Agreement shall not apply as between any Party and any acceding country or group of countries if, at the time of the accession, either Party does not consent to such application.

### 3. Accession to RTAs: State of Play

#### 3.1. Notifications on RTA Accessions to the WTO

In theory, changes in membership of RTAs should be notified to the WTO. The General Agreement on Tariffs and Trade (GATT) XXIV 7(a) states: “Any contracting parties deciding to enter into a customs union or free-trade area ... shall promptly notify the CONTRACTING PARTIES ...” The provision uses the term “enter into” and there is no distinction between the initial formation of RTAs and the accession of a new member to an existing RTA; both shall be notified. In the case of services agreements, the requirement on accession is even clearer. GATS Article V 7(a) states: “Members which are parties to any agreements ... shall promptly notify... any enlargement ... of that agreement.” Meanwhile, the Enabling Clause states “Any contracting party ... subsequently taking action to introduce modification or withdrawal of the differential and more favorable treatment so provided shall ... notify the CONTRACTING PARTIES” (Paragraph 4). Because accession is a serious modification of agreements, it is reasonable to expect that accession into Enabling Clause-based RTAs also needs notification. In fact, there are notifications on accession under all of three types of WTO Agreements.

Table 4 presents the exhaustive list of 13 notifications on accession to RTAs submitted by WTO Members (19 notifications, counting goods and services agreements separately). Among them, six notifications are for EC/EU enlargement and two are for Eurasian Economic Union (EAEU). Therefore, only seven RTAs saw an expansion of membership, if we analyze only WTO notifications. Despite the notification requirement, it seems that not all accessions to RTAs are notified to the WTO.

**Table 4: Notifications of RTA Accession to WTO**

RTA	Notification	In force
EFTA–Accession of Iceland	GATT Art. XXIV	1-Mar-70
EC (9) Enlargement	GATT Art. XXIV	1-Jan-73
EC (10) Enlargement	GATT Art. XXIV	1-Jan-81
EC (12) Enlargement	GATT Art. XXIV	1-Jan-86
EC (15) Enlargement	GATT Art. XXIV & GATS Art. V	1-Jan-95
EC (25) Enlargement	GATT Art. XXIV & GATS Art. V	1-May-04
Asia Pacific Trade Agreement (APTA) ≠ Accession of China	Enabling Clause	1-Jan-02
EC (27) Enlargement	GATT Art. XXIV & GATS Art. V	1-Jan-07
East African Community (EAC)–Accession of Burundi and Rwanda	Enabling Clause	1-Jul-07
EU (28) Enlargement	GATT Art. XXIV & GATS Art. V	1-Jul-13
Eurasian Economic Union (EAEU)–Accession of Armenia	GATT Art. XXIV & GATS Art. V	2-Jan-15
Eurasian Economic Union (EAEU)–Accession of the Kyrgyz Republic	GATT Art. XXIV & GATS Art. V	12-Aug-15
Southern African Development Community (SADC)–Accession of Seychelles	GATT Art. XXIV	25-May-15

Source: Author's compilation using RTA-IA.

#### 3.2. Actual Status of RTA Accession

It is not easy to know the actual status of accessions to RTA, apart from the notification submitted to the WTO. Since the scope of the RTAs analyzed in this paper is mainly those notified to the WTO, we will use the database on RTAs compiled by the WTO, called the Regional Trade Agreements Information System (RTA-IS). However, as the information in RTA-IS, which is based on submissions by WTO members, is sometimes incomplete, we will also use other information sources to supplement it.

The Appendix lists RTA accessions, including those notified to the WTO.<sup>4</sup> As far as we know, at least 15 RTAs saw an expansion of membership. Two points should be noted in this regard. First, all RTAs that have accepted new members have been multilateral agreements from the beginning. In other words, there is no single case where a new member was accepted into a bilateral RTA. However, this does not mean bilateral RTAs rule out the possibility of expansion; some of them have accession clauses, as we have already seen. This leads to a simple but plausible hypothetical observation that ***the smaller the number of RTA members, the more difficult membership expansion becomes, because a smaller RTA is based on specific reciprocity.*** However, it is unclear whether accession becomes easier when an RTA has a very large number of members *and* incumbents have veto of new members: ***the larger the number, the more likely it is that at least one of the members exercises a veto.***

Second, many RTAs that have experienced membership expansion are subsidiary RTAs, or RTA programs under a large umbrella regional integration project, as defined above. Among the 15 RTAs that experienced membership expansion listed in Appendix, 10 are subsidiary RTAs and only four are standalone RTAs. Hence, we can say that ***standalone RTAs seldom expand.***

In this context, it is important to remember that many standalone RTAs—both multilateral and bilateral—have accession clauses (Table 2 and Table 3). Thus, there are many RTAs with accession clauses that have never seen an expansion of membership. Thus, we should note that ***accession clauses are seldom used in reality.*** The absence of membership expansion is not because accession clauses are absent, but because they are not used.

### **3.3. Case Studies: Successful and Failed RTA Accession Negotiations in the TPP Region**

#### **Case 1: Asia-Pacific Trade Agreement (APTA)**

The Bangkok Agreement was signed in 1975 by Bangladesh, India, Korea, Lao PDR,<sup>5</sup> and Sri Lanka, under the initiative of ESCAP. This is the oldest RTA in the Asia-Pacific region. The agreement was renamed the Asia-Pacific Trade Agreement (APTA) in 2005. Both the original Bangkok Agreement (Chapter 25) and APTA (Chapter 30) have accession clauses. As explained, APTA (and the Bangkok Agreement) have fairly liberal accession rules, as no one can exercise a veto.

It is very interesting that both a large country that wants to be a rule setter rather than a rule follower, such as China, and a marginalized country in RTA diplomacy, such as Mongolia, are in APTA. China joined the WTO in 2001 after long and heavy negotiations, and its RTA diplomacy became significantly proactive around that time. While China's proposal to conduct a study on the ASEAN-China FTA in 2001 attracted much attention, the first RTA that China actually signed was the Bangkok Agreement (it received membership in 2002). Mongolia's accession negotiation was finalized in 2013, and the country became a member in 2015. It should be noted that Mongolia has been a marginal player in regional cooperation in Asia—it had not signed any RTA until APTA and its request for membership in APEC has not been approved. The important implication of APTA to other RTAs is that ***majority voting without veto power helps with membership expansion.***

#### **Case 2: North American Free Trade Agreement (NAFTA)**

NAFTA, which came into effect on January 01, 1994, has an accession clause (Table 2). Several countries expressed interest in joining NAFTA. Informal discussions among NAFTA parties and Chile were held in 1994 (Block and Herrup 1994). At the margin of the Summit of the Americas in December 1994, the three member countries (Canada, Mexico, and the US) formally invited Chile to join NAFTA (Miller 1996; Zahradddin-Aravena 1997). A NAFTA ministerial meeting to review Chilean accession to NAFTA took place on June 07, 1995 (Block and Herrup 1994) and formal

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<sup>4</sup> It is not entirely clear whether withdrawal of membership from RTAs shall be notified to WTO, although one could argue that withdrawal is a serious modification of an RTA. In reality, no notification regarding withdrawal is included in RTA-IS. Bulgaria, Croatia, and Romania withdrew their membership in the Central European Free Trade Agreement (CEFTA). Austria, Denmark, Finland, Portugal, Sweden, and UK withdrew membership from the European Free Trade Association (EFTA). Angola, Lesotho, Mozambique, Namibia, and Tanzania withdrew membership in the Common Market for Eastern and Southern Africa (COMESA).

<sup>5</sup> Lao PDR has been a member since 1975, although it has not submitted a concession schedule.

accession negotiations began thereafter (Gantz 2003). However, the negotiations for Chilean accession to NAFTA were prolonged and did not reach any conclusion. Meanwhile, Singapore showed interest in NAFTA membership (Haas 1993). While Singapore officials sometimes talked of the possibility of applying for NAFTA membership soon after the conclusion of NAFTA, it seems that no formal negotiations were held between NAFTA countries and Singapore, unlike in the case of Chile.

The immediate reason why Chile's (and Singapore's) accession to NAFTA did not happen was because of internal politics in the US. Sound policy discussions about RTA-related matters were blocked by party politics and the Clinton Administration did not have a clear idea about the country's RTA strategy. However, we should not forget the fact that NAFTA has an accession clause (Article 2204), and the idea of involving Chile and Singapore came soon after the conclusion of NAFTA. Hence, the fundamental problem was that accession to NAFTA was so difficult because it was based on a delicate balance among the three negotiating parties, at a particular point in time, on all areas covered by the agreement.<sup>6</sup> In fact, the US-Chile FTA signed in 2003<sup>7</sup> includes environment and labor chapters in its body, unlike NAFTA, which has side agreements on labor and the environment, which is a more favorable outcome for the US. In other words, we can easily assume that the three-party NAFTA was based on specific reciprocity, in Ruggie's terms. **It is powerful countries that prefer to pursue negotiations based on specific reciprocity.**

### **Case 3: Singapore-New Zealand FTA and P3/4 Agreement**

Chile and New Zealand held negotiations for an FTA in the early 1990s. While two rounds of negotiations were actually held, they eventually decided not to pursue it (Salazar 2005). Singapore and New Zealand began FTA negotiations in 1999 and a bilateral FTA was signed in 2001 (Siow Yue and Pangestu 2005).

After the conclusion of the Singapore-New Zealand FTA, several ideas for a bigger FTA were discussed. One idea was to create a P5 Agreement among New Zealand, Singapore, Chile, US, and Australia, which had been discussed informally since the 1990s. Another was to create a P3 Agreement among New Zealand, Singapore, and Chile, which was formally raised at the Asia-Pacific Economic Cooperation (APEC) Leaders Meeting in 2000 in Brunei Darussalam. By 2002, it became clearer that the establishment of a P5 Agreement in the near future was difficult and the formal launch of the negotiation for a P3 Agreement was agreed upon at the APEC Leaders Meeting in 2002 in Los Cabos. What is interesting is that the three countries decided to pursue a new agreement rather than facilitate Chile's accession to the Singapore-New Zealand FTA, which has an accession clause (Article 79).

Brunei Darussalam decided to join the P3 negotiations in April 2005, which led to the enlargement of negotiations into P4. The Trans-Pacific Strategic Economic Partnership (TPSEP) was signed by the P4 countries in July 2005 and came into force in May 2006. The important implication here is that ***establishing a new RTA is usually easier than expanding membership of an existing one.***

### **Case 4: The Expansion of the TPSEP and the New TPP**

The TPSEP did not have chapters on investment and financial services, but Articles 20.1 and 20.2 stipulate that negotiations on those outstanding issues should start within two years of the agreement coming into force. Accordingly, the negotiations on investment and financial services were scheduled to start in March 2008 (Lewis 2009). A month before this start date, on February 08, 2008, the US expressed interest in joining the P4 negotiations on financial services and investment liberalization, with the expectation that it would eventually join the TPP (Lewis 2011). Between February and September 2008, three rounds of negotiations on finance and investment were held between the US and P4 members. In September 2008, the Bush Administration notified

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<sup>6</sup> From the US perspective, a "weak" side agreement on labor and the environment was the result of its failed negotiations. Mexico was of the view that the imposition of labor standards by the agreement was a violation of national sovereignty. See Pomeroy (1995).

<sup>7</sup> The US-Chile FTA was concluded after 14 rounds of negotiations since 2000.

Congress that the US would expand its participation beyond the two sectoral issues and begin negotiations to become a full member of the agreement. At this stage, the idea was to ensure US participation in the TPSEP. Meanwhile, Australia, Peru, and Vietnam expressed interest in joining negotiations, and in December 2008 the Bush Administration notified Congress of the start of negotiations with the three countries. At this stage, it seems that there were no substantial discussions on whether the US should “approve” the participation of Australia, Peru, and Vietnam, because it was still unclear which goal to pursue—the expansion of the TPSEP or creation of a new FTA.<sup>8</sup> The TPSEP has an accession clause (Article 20.6) and is open to any APEC member and other states.

By early 2009, it became clearer that the US preference was to create a new FTA. For example, on January 26, 2009 the Office of the US Trade Representative (USTR) published in the *Federal Register* a “Notice of intent to initiate negotiations on a Trans-Pacific Partnership (TPP) free trade agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru, and Vietnam, request for comments, and notice of public hearing.” However, because the new administration needed time to review its RTA policy, no formal decision was reached. The planned TPP negotiations in March 2009 among the P8 were canceled.

Finally, on November 13, 2009, President Barack Obama announced in Tokyo that the US would engage with the Trans-Pacific Partnership, and on December 14, 2009 United States Trade Representative Ron Kirk sent letters to House Speaker Nancy Pelosi and Senate President *pro tempore* Robert Byrd: “On behalf of the President, I am pleased to notify Congress that the President intends to enter into negotiation of a regional Asia-Pacific trade agreement, known as the Trans-Pacific Partnership (TPP) Agreement, with the objective of shaping a high-standard, broad-based regional agreement.” It is interesting to note that this new notification was made despite the two notifications made by the Bush Administration. One could argue that, by making a new notification, the Obama Administration wanted to make it clear that a new RTA is pursued, not the prolonged negotiation on the accession to the existing TPSEP based on the two notifications made during the Bush time.

By early 2010, it became clear that the US was pursuing a new FTA. In February 2010, Ron Kirk, the US Trade Representative, said that Congress would be more receptive to creating a new agreement from scratch (James 2010). Likewise, Karl Ehlers, a US trade official, made it clear in remarks at the American Society of International Laws Annual Meeting in March 2010 that the US was not acceding to the TPSEP agreement, and that a new agreement was being negotiated (Lewis 2011).

The question is whether the TPSEP was the starting point for the TPP negotiations, or was the TPP virtually built from the scratch. As Gao (2012) observes, the TPSEP needed to be transformed substantially largely based on the US template of RTAs. This means the US wanted to be a rule setter rather than a follower of the rules already set by the P4 countries. Thus, we can say that ***a large latecomer tends to insist upon establishing a new RTA, rather than acceding to an existing RTA.***

#### **Case 5: Expansion of TPP Negotiations**

Malaysia decided to join the TPP in July 2010 and was lucky that it did not have to seek prior approval by the US. Malaysia and the US had been holding bilateral FTA negotiations since 2006, which was already notified to the US Congress; no additional notification was required. It seems that the US did not set any precondition for Malaysia’s participation in the TPP, because of their bilateral FTA negotiations between 2006 and 2008.

Canada, Mexico, and Japan expressed interest in participating in the TPP negotiations during the APEC Leaders Meeting on November 11–November 12, 2011. What is interesting is that the three countries were “accepted” at different times despite having expressed their interest at the same

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<sup>8</sup> If the expansion of TPSEP were to be pursued, the US would have been a party to be admitted by P4 countries, and the US can approve other countries’ participation only after its accession. If a new agreement were to be pursued, all eight parties would be the negotiating parties on an equal footing.

time. Mexico and Canada's applications were approved in June 2012 and they participated in the 15th meeting in Auckland in December 2012. Japan's application was approved only in March 2013 and it participated in the 18th meeting in Kota Kinabalu in July 2013. On the one hand, the delay in Japanese participation was partly because of the prolonged internal debate in Japan. On the other hand, it is possible that Japan's accession was prolonged partly because the country is powerful enough to affect the course of TPP negotiation as a whole, unlike Mexico or Canada (Hamanaka 2014b). Thus, we can argue that ***the larger the new entrant is, the more difficult its accession negotiation becomes.***

Several hypothetical conjectures drawn from the analysis in this section can be summarized as follows:

- The smaller the number of RTA members is, the more difficult membership expansion becomes, because a smaller RTA is based on specific reciprocity.
- The larger the number becomes, the more likely it is that at least one of the members exercises a veto.
- Standalone RTAs seldom expand.
- Accession clauses are seldom used in reality.
- Majority voting without veto power helps membership expansion.
- A powerful country prefers to pursue negotiations based on specific reciprocity.
- Establishing a new RTA is usually easier than expanding membership of an existing one.
- A large latecomer tends to insist upon establishing a new RTA, rather than acceding to an existing one.
- The larger the new entrant is, the more difficult its accession negotiation becomes.

#### **4. The Problem of the TPP Accession Rules**

##### **4.1. Accession Clause of the TPP**

The Preamble of the TPP states that members "EXPAND their partnership by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration and create the foundation of a Free Trade Area of the Asia Pacific." Article 30.4, paragraph 1, states that the Agreement is open to "any State or separate customs territory that is a member of APEC" and "any other state or customs territory." However, accession procedures are almost identical for both APEC members and non-APEC entities.<sup>9</sup>

However, just because the TPP has an accession clause, we cannot conclude that it is truly "open." The TPP has clear but overly lengthy accession procedures. While accession clauses in RTAs usually include less than 100 words in total (e.g., TPSEP Article 20.6), the TPP's accession clause (Article 30.4) has more than 500 words.

Once an application for membership is sent to the Depositary, there are several steps to be followed before the accession happens:

- The commission establishes a working group. The commission is composed of government representatives of each party at the level of minister or senior officials.
- The working group parties negotiate the terms and conditions of accession. Membership in the working group is open to all interested parties.
- The commission approves the terms and conditions for accession.

There are four important points to note here. The first is that all incumbents can exercise veto of the new accession candidate. The establishment of a working group and its decision-making process requires either that (i) all parties agree or that (ii) there is no objection in writing within seven days to the decision to establish a working group or the working group's decision.<sup>10</sup> Since

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<sup>9</sup> One possible difference can be found regarding the establishment of a working group for APEC and non-APEC parties. See Footnote 10 for details.

<sup>10</sup> Owing to the stipulation in Paragraph 3(a), the establishment of a working group for non-APEC members requires agreement by all parties (the "no objection within seven days" rule does not seem to be applicable to the establishment of working group for non-APEC members).

unanimous consensus is not required, we could argue that abstention is an option. However, if at least one country expresses objection, it is very likely that the applicant will not be admitted. The fact that all TPP members have veto on new accession is interesting because the TPP's rule on Entry into Force (Article 30.5) needs an 85% majority voting decision.<sup>11</sup> In addition, there is a possibility that one commission member expresses objection to the decision made at the working party, which will lead to the commission disapproving the working party's decision.

The second point is that veto can be exercised at various stages of accession negotiations. There are several occasions when incumbents can exercise their veto: (i) formation of the working group; (ii) decision of the working group; (iii) adoption of decisions by the Commission. Thus, the TPP accession process is likely to be used to tame latecomers (Hamanaka 2014b).

The third problem is that there is no "opt-out clause" in the TPP. In other words, if an incumbent member has some concerns about entering into an FTA with a new member, it shall exercise its veto. Otherwise, it is very likely that such a country will enter into FTA as a new member.

Finally, renegotiation of the text does not seem to be an option. The negotiation items seem to be limited to the terms and conditions for accession. It seems safe to surmise that the TPP is open to a country that is happy to follow rules already established by the incumbents and to accept terms and conditions of accession set by the incumbents. The point here is that TPP accession negotiation is likely similar to WTO accession, which means that the rules are basically given, and that only the terms of accession are negotiable by a new applicant (Elms and Lim 2012).

#### **4.2. Will the TPP Accept New Members?**

The discussions above suggest several important points regarding the possibility of accession: (i) a standalone RTA seldom expands its membership; (ii) RTAs that have a small number of members seldom expand, because they are based on specific reciprocity; (iii) RTAs that have a large number of members may expand, provided they are based on diffuse reciprocity rather than specific reciprocity; (iv) if incumbent members have veto power, RTAs that have a large membership are unlikely to expand, because the probability of exercising the veto by at least one member becomes higher when the RTA has a larger membership.

Are RTAs such as the TPP likely to accept new members? We can provide a rough answer based on a simple characteristics analysis of the TPP. First, the TPP is a standalone RTA, and not a subsidiary of any larger regional community. As we saw, RTAs under a community-building project, such as the EU, tend to expand their membership when new members join a regional community. Acceding countries want to be "European," and membership in the EU's FTA is a side effect. However, there is no TPP or APEC community. Second, the TPP has a larger number of members, but we should remember that the TPP is based on specific reciprocity; it is a bunch of bilateral agreements, rather than a single regional agreement. Hence, it is likely that a new applicant will face a complex negotiation process based on bilateral specific reciprocity, which does not seem to facilitate accession. If the TPP was based on diffuse reciprocity (e.g., common concession schedule), accession would be easier.

This then brings up the next question: is the TPP an exception in terms of accession? Since all RTAs are unique, one may argue that the TPP could be exceptionally good at accepting members. However, as we have already seen, the lengthy accession processes of the TPP and the veto power given to all members seem to protect the interests of incumbent members rather than facilitate new accessions. Thus, even when compared with other RTAs, accession to the TPP seems to be tough. For many non-TPP countries, for example, obtaining membership to the still-existing P4 agreement or the Thailand-Australia FTA or even the US-Australia FTA seems to be easier.

What is worse is that the form of TPP agreements, as a bunch of bilateral agreements, makes the

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<sup>11</sup> Eighty-five per cent of the combined gross domestic product of the original signatories in 2013 is necessary for the Agreement to come into force. Only the US and Japan have a GDP share higher than 15%.

exercise of veto power very problematic. This is because what countries applying for TPP membership will be offered by other TPP members (say, tariff concession by other TPP members to China) is also subject to negotiation, unlike other RTAs where what new entrants can get from others is more or less clear. An incumbent member that does not support a new accession may suddenly insist at the final stage of accession negotiation that it can only offer very poor concessions if a veto is to be avoided.

Finally, we should consider whether the TPP accepts China. The TPP accepts any applicant who agrees to the terms and conditions of accession mainly set by the incumbent members. This implies that China can be accepted only if it agrees not to request the renegotiation of concluded TPP chapters. However, such a scenario is unlikely to play out. One thing we should remember is that a large country's accession tends to be difficult. The larger the latecomer becomes, the greater the possibility that it will insist on establishing a new agreement, rather than accession. This is because a large country wants to be a rule setter rather than a rule follower. The US's accession to the TPSEP is a good example. It preferred negotiating a new agreement to its accession to the existing TPSEP. China is no exception; its preference is very similar to that of the US. In this context, it is easy to understand why China is of the view that the Free Trade Area of Asia Pacific (FTAAP) should be negotiated from scratch, rather than transform the TPP into the FTAAP. At the very least, it is very likely that China will request some revision of TPP texts, if it decides to apply for TPP membership. As discussed, however, from the incumbent members' perspective, the revision of existing texts is not open to negotiation and they have a veto power for new accession.

#### **4.3. Desirable Accession Practice for the TPP**

So far, we have identified several critical parameters of RTAs that are necessary for membership expansion. However, some parameters are fixed for specific cases such as the TPP, as discussed above. For example, subsidiary RTAs, namely RTAs attached to a regional community, tend to expand compared with standalone RTAs. The TPP is a standalone RTA, but it seems very difficult to remake it as a subsidiary RTA, because TPP members do not share the vision of a TPP community. Likewise, if the TPP was based on the philosophy of diffuse reciprocity and each TPP member had a common concession for all fellow members, accession would have been easier. However, changing the modality of concession at this stage is nearly impossible.

One key parameter of RTAs that needs careful attention in examining the prospect of future membership expansion of the TPP is the "veto" and "opt-out" option regarding new accessions. In this regard, one interesting example is APTA, which officially employs majority voting. One APTA member alone cannot block the participation of a newcomer. Instead, an APTA member that does not support accession of a new member has the opt-out option—an option not to exchange the concession with a new member.

It seems possible for the TPP to introduce an opt-out option on a *de facto* basis, even if it maintains the existing accession procedures. In other words, TPP accession procedures should proceed *as if* there was a provision "This Agreement shall not apply as between any Party and any acceding country or group of countries if, at the time of the accession, either Party does not consent to such application." A TPP country that does not support a new accession could agree that the Agreement is applicable only between the other incumbent members and the new member, not between itself and the new member. This idea is not alien; the US-Australia FTA already has a similar provision. While the TPP does not include the opt-out clause, it seems that nothing in the TPP prevents agreement on the non-application of the Agreement between a new member and country that does not support its accession.

In the case of APTA, a country that does not support a new accession should *disagree* with it, so that the Agreement will not be applied between a country that does not support the new accession and the new member. In the case of the US-Australia FTA and possibly the TPP, incumbent members can *agree* to the accession with some reservation regarding a limited application of the Agreement. Some may argue that this would cause an inconsistency problem. However, one should note that the TPP is not a true regional agreement from the beginning, being a bunch of

bilateral agreements. There is no common concession made by each TPP member to fellow members.

## **5. Conclusion**

To answer the specific question about the possibility of future expansion of the TPP, such as Chinese membership, we started our discussion with a general analysis of accession clauses and actual accession experience. We found that, while there are several instances where RTAs accept new members, this usually happens for subsidiary RTAs, namely, RTA programs under regional communities and not standalone RTAs. If RTAs that have a large number of members are based on diffuse reciprocity, there is a bigger chance of expansion. However, RTAs that have a large number of members may easily encounter the exercise of veto by some of the incumbent members vis-à-vis a new applicant, if such power is given to them.

The above suggests that, in general, the prospects of TPP membership expansion do not seem to be bright. This is because (i) the TPP is a standalone RTA; (ii) the TPP is based on a specific reciprocity philosophy rather than on diffuse reciprocity; (iii) TPP incumbent members have the power to veto new accession. One way to increase the openness of the TPP would be to establish a practice to restrain the exercise of veto and the adoption of de facto “opt-out” option.

However, from the perspective of incumbents, they should be the parties to say, “take it or leave it” to applicants. This is exactly the problem for countries that seek membership. If only some, not all, incumbent members are unfavorable toward a new accession, it is reasonable to accept the applicant while making the Agreement non-applicable between them and the new member. Since the TPP already has a large number of members, it does not make sense if one country can break the deals between other incumbent members and the new member.

Given that the TPP is based on specific reciprocity and does not have a common concession from the beginning, non-application of the Agreement between the country that does not support the new accession and the new member does not seem to be a huge problem. Given that the TPP claims to be open, it seems more important to facilitate new members' accession to the TPP rather than to give a veto power to the incumbent members.

### Appendix: Actual RTA Accessions

Name	Original signatories	Accession	Subsidiary RTA
ASEAN FTA (AFTA) (1992)	Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand	Vietnam (1995), Laos (1997), Myanmar (1997), Cambodia (1999)	X
Asia Pacific Trade Agreement (APTA) (1976)	Bangladesh; India; Korea; Lao PDR; Sri Lanka	China (2002), Mongolia (2015)	
Caribbean Community and Common Market (CARICOM) (1973)	Antigua and Barbuda; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; Montserrat; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Trinidad and Tobago	Suriname (1995)	X
Central American Common Market (CACM) (1960)	El Salvador; Guatemala; Honduras; Nicaragua	Costa Rica (1962)	
Common Market for Eastern and Southern Africa (COMESA) FTA (2000)	Burundi, Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Zambia, Zimbabwe	Libya (2005), Comoros (2006)	X
East African Community (EAC) (2000)	Kenya; Tanzania; Uganda	Burundi (2007); Rwanda (2007);	X
Eurasian Economic Community (EAEC) (2000)	Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan	Uzbekistan (2006)	X
Eurasian Economic Union (EAEU) (2014)	Belarus; Kazakhstan; Russia	Armenia (2014), Kyrgyz Republic (2014)	X
European Communities (EC) (1957)	Belgium; France; Germany; Italy; Luxembourg; Netherlands	Denmark (1973), Ireland (1973), UK (1973), Greece (1981), Portugal (1986), Spain (1986), Austria (1995), Finland (1995), Sweden (1995), Cyprus (2004), Czech Republic (2004), Estonia (2004), Hungary (2004), Latvia (2004), Lithuania (2004), Malta (2004), Poland (2004), Slovak Republic (2004), Slovenia (2004), Bulgaria (2007), Romania (2007), Croatia (2013)	X
European Free Trade Association (EFTA) (1960)	Austria; Denmark; Norway; Portugal; Sweden; Switzerland; United Kingdom	Iceland (1970); Liechtenstein (1991); Finland (1986)	
Melanesian Spearhead Group Trade Agreement (MSGTA) (1994)	Papua New Guinea, Solomon Islands, Vanuatu	Fiji (1998)	X
Mercosur (1995)	Argentina, Brazil, Paraguay, Uruguay	Venezuela (2013)	
Latin American Integration Association (LAIA) (1980)	Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela	Cuba (1999); Panama (2011)	
Southern African Development Community (SADC) FTA (2000)	Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe	Madagascar (2006)	X
West African Economic and Monetary Union (WAEMU) (1994)	Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal, Togo	Guinea Bissau (1997)	X

Source: Author's compilation

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