

# OPENING ARTICLE

## THE TPP AND THE FUTURE OF TRADE AGREEMENTS\*

Inu Barbee\*\* & Simon Lester\*\*\*

---

\* Thanks to Meredith Kolsky Lewis and Bryan Mercurio for comments. All errors remain our own.

\*\* Graduate Associate, Center for North American Studies, American University.

\*\*\* Trade Policy Analyst, Cato Institute; President, WorldTradeLaw.net.

---

In recent years, the trade regime has been undergoing an existential crisis. Multilateral trade talks at the WTO have stalled, leading to much hand-wringing from the trade establishment. Although the exact starting point for the difficulties is hard to pinpoint, arguably it has been more than a decade since there was even a real hope for progress. The celebration of very minor developments at last year's Bali ministerial<sup>1</sup> serve only to emphasize how low the expectations are.

During this period, bilateral trade negotiations have fared better, with completed FTAs giving trade negotiators a feeling of success. However, there is a general recognition that the bilateral approach is inferior, and potentially has negative effects for the multilateral system.<sup>2</sup>

Recently, we have moved towards 'Mega-Regional' trade talks, and some see this as the way forward. In particular, the Trans Pacific Partnership (TPP), involving 12 nations in the Asia-Pacific region, and the Transatlantic Trade and Investment Partnership (TTIP), involving the United States and the European Union, have been offered as the solution to problems with the trade agenda. Proponents sell these negotiations as 'high standard' talks, or even the 'gold standard' of trade negotiations; the TPP is even said to be a 'docking station' that will eventually be open to all countries.<sup>3</sup>

---

<sup>1</sup> Uri Dadush, "How can world trade talks stay relevant?" World Economic Forum Blog (January 14, 2014) <<http://forumblog.org/2014/01/how-can-the-world-trade-organization-stay-relevant/>>.

<sup>2</sup> Jagdish Bhagwati offers the strongest version of this view. See, e.g., *Termites in the Trading System*, Oxford University Press (2008).

<sup>3</sup> C. Fred Bergsten and Jeffrey J. Schott, "Submission to the USTR in Support of a Trans-Pacific Partnership Agreement," Peterson Institute for International Economics (January 25, 2010) <<http://www.iie.com/publications/papers/paper.cfm?ResearchID=1482>>.

In this paper, we focus our attention on the TPP and express doubts about its use as a model for future trade agreements. In terms of economic considerations, the U.S. ‘strategic agenda,’ and issues of global governance, we argue that the TPP is flawed. In this regard, we offer a number of specific concerns.

First, the economic arguments for the TPP rest on a number of assumptions that may not come to fruition. For instance, the gains from the TPP will be modest, and may not reach predicted levels, if the agreement does not expand beyond its current 12-country membership, to include China and others, in the form of a Free Trade Area of the Asia Pacific (FTAAP). The likelihood of an expansion to FTAAP remains slim. The exclusion of China from the current negotiating process may also become a major stumbling block to broader Asia Pacific liberalization, and the potential for the creation of competing trade blocs, embodied in the Regional Comprehensive Economic Partnership (RCEP), or separate Asian track negotiations, is a real possibility.

Second, the TPP is not a balanced partnership. One country, the United States, is using the talks to push its domestic policies and *values* on others,<sup>4</sup> and to promote strategic alliances and foreign policy considerations more generally.<sup>5</sup> This is the wrong approach to trade governance.

Lastly, the TPP’s expansive approach to global governance generates a great deal of opposition, and makes the simple and clear benefits of trade liberalization more difficult to achieve. The wide range of issues now included in trade agreements, including the environment, labor, and intellectual property, leads to a lack of focus on a core mission. Notably, it is on these issues where current disagreements among TPP negotiating parties are particularly strong.<sup>6</sup>

Given the lack of certainty at this stage over the ultimate outcome of the TPP, it is worthwhile to step back and examine the foundation of the agreement. To that end, we first set out a brief history of various models of trade agreements, explaining how it is we got to the TPP and the ‘Mega-Regionals.’ Next, we take a closer look at the TPP and evaluate it as a model for future trade agreements, in terms of the economic, strategic, and governance issues noted above. Finally, we conclude by asking whether the current approach is the best path for the global trading system.

---

<sup>4</sup> Michael Froman, “A Values-Driven Trade Policy,” speech delivered at the Center for American Progress (February 18, 2014) <<http://www.americanprogress.org/wp-content/uploads/2014/02/Center-for-American-Progress-Remarks-Ambassador-Froman-2-18-14.pdf>>.

<sup>5</sup> The TPP is part of a broader “pivot to Asia” in US foreign policy.

<sup>6</sup> See, e.g., Henry Farrell, “The United States is isolated in the Trans-Pacific Partnership negotiations,” *The Monkey Cage*, November 18, 2013. <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/18/the-united-states-is-isolated-in-the-trans-pacific-partnership-negotiations/>>.

## I. MODELS OF TRADE AGREEMENTS

Over the years, trade institutions and rules have shifted direction many times. Bilateral trade agreements dominated in the late 19th century, but by the 1950s multilateralism had taken hold. Regionalism arose as a force around the same time. Today, bilateral agreements have reemerged, sharing space with multilateral and regional. This section briefly explores the existing models of trade agreements.

### A. MULTILATERAL

The origins of the multilateral trading system lie with the League of Nations discussions of international economic policies in the 1920s and early 1930s. During this period, the major trading nations held a number of conferences on various issues related to trade barriers, developing ideas and concepts for how to promote economic integration. These early talks did not result in a multilateral trade treaty, but rather a number of bilateral trade agreements between the countries involved. After World War II, however, the principles in these agreements were multilateralized in the General Agreement on Tariffs and Trade (GATT).

The GATT had only 23 countries as original signatories. Over the years, however, membership expanded considerably. At the time the GATT became the WTO, in 1995, there were 128 members. Today, the WTO has 159 countries as members, including all the major economic powers. It also has a widely respected dispute settlement system, one of the most advanced legal systems that exist in the international arena.

For the most part, GATT/WTO integration has been of the ‘shallow’ kind.<sup>7</sup> A core principle is non-discrimination, which reflects the idea of negative integration, in the sense that there is a prohibition on taking measures that discriminate against or among trading partners. An approach to economic integration that relies on non-discrimination is more limited than broader conceptions, such as a ‘single market’ for goods and services.

There are some aspects of WTO rules that go further than non-discrimination. For example, rules in the TBT Agreement and SPS Agreement that promote science-based measures, international standards, and measures that effectively contribute to their stated goals, all have broader implications. In addition, the WTO does make some effort to promote positive actions by governments, such as setting minimum standards for intellectual property protection. However, this aspect of the WTO regime has remained limited and bounded.

---

<sup>7</sup> Robert Z. Lawrence, “Regionalism, Multilateralism, and Deeper Integration (Integrating National Economies),” Brookings Institute (1996).

The crisis within the WTO does not arise from the rules as they are now, but rather from the inability to negotiate additional trade liberalization. After the success of the Uruguay Round, the WTO has found itself in a long period of stagnation. While the noisy and creative protesters from the WTO ministerial in Seattle made the most headlines, the more important hurdle may be the differing views of certain developing countries and the traditional industrial powers. Everyone thinks they have liberalized enough, and now it is the others' turn. India, Brazil and China maintain that their developing country status means they should be given more flexibility in future liberalization, and that the rich world maintains excessive protectionism of its own. On the other side, the United States, the European Union, and Japan feel that the recent economic success of the larger developing economies means that it is time for them to step up their role as trade liberalizers.

The result has been deadlock. There is plenty of talk about trade issues at the WTO, and work is being done behind the scenes, but there has not been much success in terms of completed negotiations. Despite great effort from many people who would like to see the system succeed, trade liberalization in goods and services has barely occurred at the multilateral level since 1995. Whether the primary blame lies with the institution itself, its leadership, or the governments who make up this "member-driven" system is not clear. But the lack of results speaks for itself, and has caused people to turn away from the WTO for trade negotiations.

## **B. REGIONAL & BILATERAL TRADE AGREEMENTS**

The multilateral system was never designed to be the exclusive form of trade liberalization. WTO rules anticipate that countries will negotiate both 'free trade areas' and 'customs unions.'<sup>8</sup> Such agreements have been completed on both a regional and bilateral basis. In recent years, both of these approaches have emerged as a way to forge greater economic gains from close trading partners, and also to maintain momentum for trade liberalization in the absence of multilateral initiatives. According to the WTO, there have been 583 notifications of such trade agreements as of January 2014, 337 of which are in force.<sup>9</sup> With these numbers, the implications of these agreements for the global trading system cannot, therefore, be understated.

The European Union is the most highly developed regional trading bloc, with 28 members. Ushered into existence through the Treaty of Rome in 1957, the original six members, France, Germany, Italy, Belgium, Luxembourg, and the Netherlands, sought to rebuild their war-torn economies and create a lasting peace on the continent.

---

<sup>8</sup> GATT Article XXIV provides for these agreements in the context of trade in goods; GATS Article V refers more generally to "Economic Integration" agreements.

<sup>9</sup> World Trade Organization, "Regional Trade Agreements," <[http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm)>.

Economic cooperation was the means to this end. As the member states have deepened their level of economic integration over time, the trading area has expanded from a FTA and customs union, to a single-market, limited membership monetary union, and is currently negotiating a limited membership fiscal union. This transition from one stage of integration to the next has not always been seamless. In fact, it took the EU well over 10 years to complete the customs union, even though it had declared *désarmement douanier* on July 1, 1968. Slow economic growth in the 1970s largely stalled the integration project, and it was not until the Commission White Paper on the Single Market in 1985, bringing together political and business elites, that the European integration project was revitalized. Its second attempt to free itself from economic decline was largely successful, and in turn spurred on a desire for regional integration elsewhere.

As a result of its complex structure of multi-level governance, the EU must often be treated as *sui generis* simply because the impetus for its creation and level of integration is so unique in the world. However, it is still highly illustrative of how complex initiatives can be tackled at the regional level, and a strong example of the many economic benefits of collaboration with states in close proximity.

A number of other regional agreements were also developed in response to economic stagnation in the 1970s, such as the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations (ASEAN), the South African Development Community (SADC), and the Economic Community of West African States (ECOWAS). These initiatives did not go nearly as far as the EU, but have served to create more regional economic cooperation and market liberalization.

The other major regional trade agreement of this era was the North American Free Trade Agreement (NAFTA), between the United States, Canada and Mexico, which was an initiative put forward by Mexico. Mexico was motivated by a desire to liberalize its economy and move away from the failed policies of import-substitution industrialization, and remedy its debt crisis. The U.S. was irritated by a lack of progress in the Uruguay Round, particularly by the EU's reluctance to eliminate agricultural market protections. Canada did not want Mexico to have a more favorable trade deal with the U.S., and took the NAFTA as an opportunity to update the Canada-U.S. Free Trade Agreement (CUSFTA), signed in 1988. In large part, NAFTA was a response to a lack of progress on trade liberalization at the multilateral level.

NAFTA is important for a number of reasons. First, it went beyond basic FTAs of the time and included a whole host of provisions on services, intellectual property, labor and the environment, as well as the first investor-state dispute mechanism in a trade agreement, the infamous Chapter 11. In addition, NAFTA was unique in that it brought together two highly developed countries with a developing economy. As a result, NAFTA was not seen as a standard FTA, and by some it was also viewed as a new model for development.<sup>10</sup>

---

<sup>10</sup> See Richard S. Belous and Jonathan Lemco, *NAFTA as a Model of Development: The Benefits and Costs of Merging High and Low Wage Areas*, National Planning Association; Institute of the Americas (2000).

Second, it was very successful at removing trade barriers and improving economic exchange between the three countries. Currently, the U.S. trading relationship with Canada and Mexico amounts to over \$1 trillion a year – that’s \$3.4 billion a day, or \$2.4 million every minute.<sup>11</sup> This economic stimulus was considered a precursor to wider economic liberalization in the Americas, through the completion of the Free Trade Area of the Americas (FTAA). However, the misguided characterization of NAFTA as a big business initiative that would reduce standards to the lowest common denominator, and the demonization of the agreement for political gain, made future expansion of the agreement a political challenge.<sup>12</sup> This is one of the reasons the completion of the FTAA was next to impossible.<sup>13</sup> Opponents also drew from the broader anti-globalization movement, which gained substantial momentum after the 1999 ‘Battle in Seattle’ protests over the WTO.

With the failure of the FTAA and growing opposition to trade from organized interests, the U.S. began negotiating more bilateral FTAs with smaller economies.<sup>14</sup> This had been done a few times before, but now it was the focus of U.S. policy. Opposition to NAFTA had the residual effect of making the U.S. more cautious in proposing ‘ambitious’ trade agreements, especially where U.S. laws would have to be changed. The EU, suffering from enlargement fatigue, has also begun to take this approach as well. The past decade or so has seen an explosion of FTA negotiations all around the world. By contrast, regional integration has stalled. C. Fred Bergsten referred to this phenomenon ‘competitive liberalization,’ which he states is a response to the “increase of global interdependence [that] has forced all countries...to liberalize their trade (and usually investment) regimes.”<sup>15</sup> Without this aggressive competition, says Bergsten, countries risk missing out on integration in global supply chains, and reaping the benefits associated with greater FDI.<sup>16</sup>

Despite its benefits, the global proliferation of FTAs has led to an ever increasing ‘spaghetti bowl’ effect from the various rules of origins provisions created by individual agreements, which results in trade discrimination and a complex system of preferences that is difficult to untangle. In addition, though the number of FTAs currently in effect

---

<sup>11</sup> Christopher Wilson and David Biette, eds., “Is Geography Destiny: A Primer on North American Relations,” Woodrow Wilson International Center for Scholars (February 2014) <[http://www.wilsoncenter.org/sites/default/files/primer\\_north\\_american\\_relations.pdf](http://www.wilsoncenter.org/sites/default/files/primer_north_american_relations.pdf)>.

<sup>12</sup> See Generally, Robert Pastor, “A Piñata for Pandering Pundits and Politicians,” in *The North American Idea* (2011).

<sup>13</sup> Jaime Zabudovsky and Sergio Gómez Lora, “Beyond the FTAA: Perspectives for Hemispheric Integration,” in *Requiem or Revival?: The Promise of North American Integration I*, Eds. Isabel Studer and Carol Wise (Washington, DC: Brookings Institution Press, 2007): 101-107.

<sup>14</sup> The only exception being the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) in 2004, which is plurilateral, albeit on a small scale.

<sup>15</sup> C. Fred Bergsten, “Competitive Liberalization and Global Free Trade: A Vision for the Early 21<sup>st</sup> Century,” Peterson Institute for International Economics (Working Paper 96-15) <<http://www.iie.com/publications/wp/wp.cfm?ResearchID=171>>.

<sup>16</sup> *Ibid.*

is vast, we have not been able to achieve the level of free trade globally that would yield the greatest benefits in overall welfare. These roadblocks have spurred a new approach to trade—not bilateral, and not quite multilateral, but instead, mega-regional.

### C. MEGA-REGIONALS

The challenges presented by these overlapping (and at times conflicting) rules, in addition to the stalled Doha Round agenda, are a major reason for the more recent attempts at so-called Mega-Regionals. The first mega-regional was the TPP, which arose out of an effort by the Bush administration to expand the P-4 talks beyond four small Pacific countries, Brunei, Chile, New Zealand and Singapore. After some initial reluctance to address trade issues, the Obama administration began looking for trade initiatives to pursue, and decided to continue this effort, announcing participation in the TPP in 2009.<sup>17</sup> The current talks include 12 countries from the Pacific region, with others thinking of joining.

The TTIP came about more recently, mostly at the urging of the Europeans, who were looking for new sources of economic growth. President Obama signaled his support for the TTIP in his 2013 State of the Union speech, and negotiations began in July of that year. In these talks, the emphasis has been on the potential gains from addressing so-called ‘regulatory trade barriers,’ although the precise scope of this issue is unclear.

In terms of substance, Mega-Regionals are expanding the scope of the traditional trade agenda. They are often said to go beyond negotiations on just tariffs and quotas, to a discussion of ‘beyond the border’ issues that have a significant impact on trade. In reality, such an expansion began decades ago. Nevertheless, it is true that more issues have been added. The list includes domestic regulations and the regulatory process, intellectual property, the environment, labor, state-owned enterprises (SOEs), and financial services, among others. For example, on the issue of regulatory coherence, there has been a new push to address issues in the domestic rulemaking process itself, such as notice and comment on proposed regulations, or developing an organizational structure of regulatory oversight.

In part, this bundling of issues that may have an impact on trade is employed as a strategy to have these topics addressed at the international level. Trade agreements tend to have strong enforcement mechanisms, so if environmental concerns, for instance, cannot be fully addressed at the multilateral level on their own, advocacy groups will try to have them included in trade agreements to ensure some form of commitment. Though this may provide a result of some sort, it also serves to complicate trade negotiations. There is a real danger here that disagreements over these trade-”plus” issues could lead to an

---

<sup>17</sup> “Trans-Pacific Partnership Announcement,” Office of the United States Trade Representative (December 14, 2009) <<http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement>>.

impasse over negotiations, and also serve to weaken total gains by incentivizing countries to concede less in traditional trade areas.

In the end, the implications of the mega-regional approach, if successful, are not clear. Would success result in a world of competing mega-regions? Would they converge into a global agreement, or serve as the basis for multilateral talks? The effort being expended for these talks is enormous, but will they produce the desired benefits and produce a new 'high standard' model?<sup>18</sup> The outcome remains to be seen.

## II. CONCERNS WITH THE TPP MODEL

Though the TPP has been heralded by its proponents as the new '21<sup>st</sup> Century,' 'gold' or even 'platinum' standard agreement, it is worthwhile to step back and evaluate claims of its value to the global trading system. Many economic projections for the TPP, as will be discussed in greater detail below, rely on assumptions that may not play out as predicted. Estimates are, in fact, just that—an educated guess, but by no means a sure fact. In addition, the gains from the agreement may not be so clear cut, and will undoubtedly rely on future cooperation from China, which may be difficult to attain. In addition, there is a sense that the U.S. is pursuing a particular strategic agenda through the TPP, and is not solely concerned with trade liberalization per se. This focus will surely have an impact on the content of the agreement and its eventual outcome. And finally, there is the problem of using trade agreements as a general tool of global governance. This approach has been pushed quite far; it is not clear how much further it can go.

### A. ECONOMICS

Supporters of the TPP are quick to point out its formidable economic benefits. For instance, the current twelve TPP countries make up 40% of world GDP, and proponents estimate that by 2025 it will lead to \$295 billion in annual global benefits.<sup>19</sup> However, these gains need to be placed in context. Alan Deardorff has noted that a simple analysis of trade creation and trade diversion does not apply so neatly to the TPP because many TPP countries already have FTAs with other TPP member countries, and many Asian countries currently outside of the negotiations also have FTAs with a number of TPP

---

<sup>18</sup> For a discussion on the rhetoric of 21<sup>st</sup> century trade agreements, and the potential for their successful adoption, see, C.L. Lim, Deborah Kay Elms, and Patrick Low, Eds., *The Trans-Pacific Partnership: A Quest for a Twenty-first-Century Trade Agreement* (Cambridge University Press, 2012).

<sup>19</sup> Peter A. Petri and Michael J. Plummer, "The Trans-Pacific Partnership and Asia-Pacific Integration: Policy Implications," Peterson Institute for International Economics, Policy Brief (June 2012), 5. Available from: <<http://www.iie.com/publications/pb/pb12-16.pdf>>.

countries.<sup>20</sup> So what does this mean? Deardorff concludes that an agreement with as large a coverage as the TPP would normally be predicted to yield significant gains, but because of the preexisting agreements, the benefits will ultimately be less impressive.<sup>21</sup> Couple this with the fact that the varying rules of origin requirements of each of the preexisting FTAs will still produce a ‘noodle bowl’ effect, albeit slightly smaller, and what you are left with is an agreement with some potential, but no guarantees of great success.

A frequently cited study on the TPP by Petri, Plummer and Zhai provides a quantitative assessment of the agreement.<sup>22</sup> However, the positive results they put forward are estimates based on a number of underlying assumptions that should be taken with a dash of skepticism. The vast economic gains they project for the agreement will not be felt by the conclusion of the TPP itself, but rather if, and only if, a larger Asia-Pacific agreement is completed, such as the FTAAP. In fact, Petri, Plummer and Zhai, admit this is where the majority of welfare gains lie—not in the TPP, but in the FTAAP, especially so for the United States. By 2020, they conclude, the U.S. will see a predicted \$10 billion in welfare gains from the conclusion of the TPP, with a slight increase to approximately \$12-13 billion by 2025.<sup>23</sup> In comparison, the FTAAP would result in \$71 billion in welfare gains for the U.S. by 2025.<sup>24</sup>

The reality is that it is premature to be speaking of the potential gains from the FTAAP, when we have not yet come close to completing the TPP. In fact, it seems we have been in the “endgame” stage of negotiations for quite some time.<sup>25</sup> Without fast-track legislation, and in the absence of a clear commitment on the part of the Obama administration to see this deal through,<sup>26</sup> it is not entirely certain that the TPP will be completed anytime soon.

Adding on a layer of complexity is Japan, which is the United States’ third largest trading partner in the TPP (second to Canada and Mexico). Japan’s entry into the TPP negotiations has had an impact on the dynamics of the talks because it is the TPP country with which the U.S. would benefit most from an economic opening.<sup>27</sup> At the same time,

---

<sup>20</sup> Alan V. Deardorff, “Trade Implications of the Trans-Pacific Partnership for ASEAN and Other Asian Countries,” Research Seminar in International Economics, The University of Michigan, Discussion Paper No. 638 (July 24, 2013), 10.

<sup>21</sup> *Ibid.*

<sup>22</sup> See Peter A. Petri, Michael G. Plummer, and Fan Zhai, “The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment,” East-West Center Working Papers, No.119 (October 24, 2011).

<sup>23</sup> Petri, Plummer and Zhai, 44.

<sup>24</sup> An updated study also cites a comparably large figure, stating that the U.S. would see \$78 billion in annual income gains from the TPP. Peter A. Petri and Michael G. Plummer, “The Trans-Pacific Partnership and Asia Pacific Integration: Policy Implications,” Peterson Institute for International Economics, Policy Brief No. PB12-16 (June 2012).

<sup>25</sup> “Froman Says WTO Will Remain Valuable Dispute Forum If Bali Deal Fails,” *Inside U.S. Trade* (November 14, 2013).

<sup>26</sup> Daniel R. Pearson, “The Obama Administration’s Trade Agenda is Crumbling,” Cato Institute, Free Trade Bulletin No. 58 (March 19, 2014) <<http://object.cato.org/sites/cato.org/files/pubs/pdf/ftb58.pdf>>.

<sup>27</sup> Bryan Mercurio, “The Trans-Pacific Partnership: Potential Failure to Game Changer,” in *Pathways to the Same Destination? Free Trade Negotiations in the Asia-Pacific*, Australian Institute of International Affairs Policy Commentary,

projections of the benefits need to be approached with caution. Estimates of the benefits from the TPP tend to assume that Japan will be willing to negotiate and relax restrictions on its so-called ‘sacred cows’ (rice, wheat, beef and poultry, dairy products and sugar). However, if Japan negotiates exceptions to these sensitive sectors, the benefits of the TPP will be diminished.<sup>28</sup> As a result, it is absolutely imperative that if the TPP is to be successful, Japan must be willing to open up previously protected sectors; whether or not the U.S. is willing to sweeten the pot for Japan will likely play a large role in the eventual outcome.

Currently, U.S. business groups have been arguing that Japan’s most recent tariff proposal is not enough, and it is unclear whether Japan will fully commit to the type of market opening that will allow for real competition.<sup>29</sup> U.S. Trade Representative Mike Froman, at a Hearing at the House Ways & Means Committee on April 3, 2014, reiterated that Japan is providing the largest obstacle to completion of the TPP, though its participation would be of greatest overall benefit. Rep. Dave Camp suggested that if Japan continued to be unwilling to negotiate on key areas such as agriculture or autos, its membership in the TPP should be put on hold as the negotiations with the other members move forward.<sup>30</sup> It is not hard to see why this path would not be the optimal choice for the U.S., since Japan is the largest economy in the TPP that the U.S. does not already have a FTA with.

In order for the FTAAP to ever become a reality, the parallel ‘Asian-track’ also must progress on time, which will require an FTA between China, Japan and Korea (not likely to be easy), and eventually grow to include the 10 members of ASEAN, or RCEP, to make the East Asia Free Trade Area (EAFTA). Even if this can ever be completed, there will be the additional problem of varying levels of commitments between the Asian track countries and members of the TPP. The Asian track is likely to include weaker disciplines than the TPP, though its overall welfare benefits will be much greater.<sup>31</sup> This will certainly pose its own set of problems in the advent of an expansion to FTAAP, as the U.S. is pushing for such a ‘high-standard’ agreement. It is probable that this will isolate or disincentivize a number of countries, mainly China, from pursuing convergence with the TPP. As the U.S. pushes for more stringent standards, moving from “gold” to “platinum,” the possibility of a future FTAAP may be further threatened. In fact, it has already been observed that the U.S. and Japan in particular are quite isolated in the TPP with regard to their negotiating

---

No. 14 (June 2013): 21-30.

<sup>28</sup> Petri, Plummer and Zhai, 50.

<sup>29</sup> “U.S. biz lobby says Japan’s TPP proposal not enough,” *Japan Times* (March 12, 2014) <<http://www.japantimes.co.jp/news/2014/03/12/business/u-s-biz-lobby-says-japans-tpi-proposal-not-enough/#.UyB0IIUzm-V>>.

<sup>30</sup> Len Bracken, “Froman Presses Japanese on Autos in TPP; Rep. Camp Sees Moving Ahead Without Japan,” *Bloomberg BNA* (April 3, 2014).

<sup>31</sup> Petri, Plummer and Zhai, 21.

positions, particularly on intellectual property.<sup>32</sup> If equally strict provisions are also pushed for in the environment, labor, and regulatory coherence chapters, the appeal of the TPP model may fizzle over time.

The following section addresses two related issues—the overall strategic agenda of the U.S. to include more broad-ranging and stringent disciplines, and also the exclusion of China from the TPP, which may prove less innocuous than many commentators have suggested. In fact, if the TPP is concluded without China, it is not entirely clear that the evolution of Asia-Pacific economic integration would naturally progress to the FTAAP, and in fact, this pathway may be obstructed over the competition between two varying models of integration in the first place.

## B. THE STRATEGIC AGENDA OF U.S. TRADE POLICY

The second critique of the TPP is that it is not a well-balanced agreement, featuring one dominant economy (the United States) pushing its ‘values’ on others.<sup>33</sup> In addition, there is a strong potential for the U.S., as the driver of these talks, to set the agenda, and to shape the content and trajectory of Asia-Pacific integration.<sup>34</sup> Three issues illustrate this well: the U.S. approach to regulatory trade barriers, its approach to intellectual property protection, as well as the exclusion of China from the TPP.

### *1. Regulatory Trade Barriers*

As noted earlier, tariff levels have decreased over time and become less of the focus of international trade discussions. The new focus has been on so-called ‘beyond the border’ measures such as regulatory trade barriers. Though these types of barriers can be categorized in a number of ways, there are two basic categories that recent trade talks have sought to deal with: regulatory cooperation and regulatory reform.<sup>35</sup> Regulatory cooperation seeks to address divergences in regulatory outcomes through the use of mutual recognition agreements, recognizing equivalent standards, or harmonization. These

---

<sup>32</sup> Henry Farrell, “The United States is isolated in the Trans-Pacific Partnership Negotiations,” *The Washington Post* (November 18, 2013) <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/18/the-united-states-is-isolated-in-the-trans-pacific-partnership-negotiations/>>.

<sup>33</sup> Michael Froman, “A Values-Driven Trade Policy,” speech delivered at the Center for American Progress (February 18, 2014) <<http://www.americanprogress.org/wp-content/uploads/2014/02/Center-for-American-Progress-Remarks-Ambassador-Froman-2-18-14.pdf>>.

<sup>34</sup> Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?*, 34 B.C. Int’l & Comp. L. Rev. 27 (2011): 39, <<http://lawdigitalcommons.bc.edu/iclr/vol34/iss1/3>>.

<sup>35</sup> For a more in depth discussion, see Simon Lester and Inu Barbee, “The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership,” *Journal of International Economic Law*, 2013 16: 847-867.

efforts can help reduce the costs of testing and certification, and help bring products to market in a more efficient manner. Regulatory reform, however, deals with changes to the regulatory process itself.

Both the TTIP and the TPP appear to be tackling both at the same time, though in the TTIP there has been ample resistance from the Europeans to addressing issues of regulatory reform.<sup>36</sup> As for the TPP, a leaked version of the chapter on this issue from March 2010 provides insight into the specific provisions currently being discussed.<sup>37</sup> Though this is an early draft, and much has likely changed since then, it is still useful in understanding the thinking of the negotiators on the issue.

The provisions in the leaked text appear to consider both regulatory reform and cooperation, which it refers to together as ‘regulatory coherence’—semantics aside, these are essentially the same. Much of the focus, however, is on the reform of domestic regulatory processes, through making legal or administrative documents publicly available; the authority to review regulatory measures to ensure they meet good regulatory practice requirements; transparency; strengthening coordination among government ministries and departments to avoid duplication and inconsistencies; the ability for systemic regulatory reform; and a periodic report on activities. To take one example of how this will be addressed in the TPP, one provision from the leaked draft encourages the coordination of regulatory efforts through the creation of a central regulatory oversight authority, similar to the role of OIRA in the United States. As things currently stand, most countries have numerous regulatory bodies developing regulations on a wide range of policy issues, and changing their domestic regulatory structure may be challenging, particularly given the fact that most TPP members are developing countries.

Aside from what the substance of these texts will be, it is also important to ask whether initiatives to address domestic reform through trade agreements are a good idea. As a general matter, reform of the domestic regulatory process can be of great value. The United States has been proactive in this area for decades, trying to make domestic regulations more sensible. Arguably, we are better off than we would have been without such efforts. But there are risks in this approach. One risk is that we apply our model to places that are not ready for it, which is a particular problem that could arise with the TPP countries. Developing the tools to implement sophisticated programs like those in place in the U.S. takes time.

In addition, this approach assumes that there is only one model for better regulation. But one size does not necessarily fit all. It would not be surprising if the model we have tinkered with over a period of four decades to fit our specific traditions and history cannot

---

<sup>36</sup> See “De Gucht Proposal For TTIP Regulatory Effort Contrasts With Froman’s,” *Inside U.S. Trade* (October 10, 2013), “CBI Exec Says U.S. Demand For EU Regulatory System Overhaul Is Unacceptable,” *Inside U.S. Trade* (March 12, 2014) and “European Business Down On U.S. Demand To Alter EU Legislative Process,” *Inside U.S. Trade* (March 10, 2014).

<sup>37</sup> Trans-Pacific Partnership, Regulatory Coherence (March 4, 2010) <[http://insidetrade.com/iwppfile.html?file=oct2011%2Fwto2011\\_3025d.pdf](http://insidetrade.com/iwppfile.html?file=oct2011%2Fwto2011_3025d.pdf)>.

simply be imposed on, say, Viet Nam, without any adjustment. Viet Nam may be better off taking the time to develop its own approach. It is also possible that we could learn a few things about regulation from other countries, and the issue should be less of a one way street.<sup>38</sup> International discussion of how different countries regulate is probably a useful exercise. But a unilateral push to have everyone else adopt *our* model through an international legal instrument may not be appropriate.

## 2. *Intellectual Property*

Intellectual property protection has been a part of the trade regime for decades now, both through international agreements like the TRIPs Agreement, and through unilateral pressure by the United States (such as through the special 301 process, and GSP conditionality). In the TPP, the United States is taking these issues a step further, pushing its trading partners to adopt stronger protections in a number of areas. It is beyond the scope of this article to go into all the details, and we focus instead on one particular issue: the length of the copyright term.

The Electronic Frontier Foundation, an organization that is critical of excessive protections, explains how the TPP would affect copyright terms:

New Zealand, a party to the TPP negotiations, currently has a copyright term of the author's life and an additional 50 years for literary works. Another TPP member, Malaysia, has a copyright term of life plus 50 years for 'literary, musical or artistic work.' Canada, which is just entering negotiations, has an even shorter term of just 50 years for fixed sound recordings. Pursuant to the current TPP terms, all of these countries would be required to extend their terms and grant companies lengthy exclusive rights to works for no empirical reason.<sup>39</sup>

Intellectual-property protection is an important policy area and its scope needs to be examined in a robust, public debate. The earliest time periods for copyright<sup>40</sup>—twenty-

---

<sup>38</sup> While it may be best for domestic regulatory *reform* to remain primarily at the domestic level, international regulatory *cooperation* -- through information sharing, mutual recognition when necessary, and adoption of common standards where deemed appropriate -- can be very beneficial, and has fewer political sensitivities. International regulatory cooperation proposals seek to remedy inefficiencies, and to the extent that we can limit the impact on policy autonomy by focusing only on certain kinds of issues, such as arbitrary differences and minor policy disagreements, these should be pursued. Reducing barriers to trade is an important policy outcome, and if regulatory cooperation assists in that regard, then it is a worthy objective.

<sup>39</sup> Carolina Rossini and Yana Welinder, "All Nations Lose with TPP's Expansion of Copyright Terms," *Electronic Frontier Foundation* (August 8, 2012) <<https://www.eff.org/deeplinks/2012/08/all-nations-lose-tpps-expansion-copyright-terms>>.

<sup>40</sup> It is worth noting that in the United States, the copyright term has evolved over time. Terms for individual authors went from fourteen years (with the possibility of a fourteen-year renewal) as set by the first Congress, to twenty-eight years (with a twenty-eight-year renewal) in 1909, to life of the author plus fifty years in 1976, to life of

eight years total or fifty-six years total, taking into account renewal—seem reasonable. Even life of the author may be appropriate. But the continued extensions are pushing the bounds of rationality.

The reality is, that when the United States pushes for these longer terms, it is doing so not to support free trade, but in order to give its companies an edge. It feels more like economic nationalism than free trade.<sup>41</sup> In a sense, the longer periods in U.S. law are a hidden subsidy to U.S. producers. By including these demands in the TPP, the U.S. position seems less about a good faith effort to reign in economic nationalism through an international agreement, and more about pushing the interests of a few U.S. corporations at the expense of everyone else. It is worth noting that, as things stand, the U.S. is isolated on this issue in the TPP talks.<sup>42</sup>

### 3. *China*

The most obvious exclusion from the Asia-Pacific trade talks is, perhaps ironically, the largest Asian economy, China. This poses two problems: first, in leaving out the largest economy, the potential for the greatest market opening and gains from trade are limited; and second, it raises the question as to whether the U.S. is simply pursuing strategic alliances, and purposely keeping China on the sidelines for, in part, broader foreign-policy reasons.

To some extent, the agreement begins to look a lot less about free trade than it does about the U.S. strategically positioning itself in the Asia Pacific to compete with China and potentially complicate China's relationship with its neighbors through new rules of origin provisions that will undoubtedly discriminate against Chinese goods. This can be seen as a way to attempt to pressure China to adopt U.S. standards, by first compelling China's geographic neighbors to bend to U.S. demands on controversial subjects such as intellectual property, regulatory reform, and investor-state dispute settlement. In this sense, the TPP becomes a template for trade agreements that the U.S. can use to strategically push its vision of what international trade regulation should look like.

Some have argued that the TPP "aims to eventually develop an Asia-Pacific wide platform of economic integration, not to draw lines encircling China."<sup>43</sup> But even if the ultimate aim is for China to be included sometime down the road, via the FTAAP or

---

the author plus seventy years today. Based on the history of copyright, even the shorter terms used by our trading partners today seem a bit excessive.

<sup>41</sup> For more on this, see Simon Lester, "Is the TPP about Free Trade or Economic Nationalism?" (December 26, 2013) <<http://www.cato.org/blog/confused-about-tpp-dont-worry-so-everyone-else>>.

<sup>42</sup> Henry Farrell, "The United States is isolated in the Trans-Pacific Partnership Negotiations," *The Washington Post* (November 18, 2013) <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/18/the-united-states-is-isolated-in-the-trans-pacific-partnership-negotiations/>>.

<sup>43</sup> Mireya Solis, "The Containment Fallacy: China and the TPP," Brookings Institution (May 24, 2013) <<http://www.brookings.edu/blogs/up-front/posts/2013/05/24-china-transpacific-partnership-solis>>.

otherwise, that does not solve the immediate problems the TPP may pose in terms of rules of origin requirements. Products are no longer made in just one country and sold to another, but rather are put together in various stages with inputs from numerous places, making up a value-chain. China, often as ‘final assembler,’ plays a key role in East Asian production networks.<sup>44</sup> If China is the last stop before a good reaches its final export destination, for instance, the U.S., that product, even if it has a significant amount of content from TPP partners, will not be given TPP tariff treatment. Since China is a net exporter to the U.S., it is not hard to see why this might pose a unique set of challenges, and also limit the potential gains from the TPP. It could, for instance, lead to divestment in China, and a shift in East Asian supply chains, perhaps leading to final assembly in Vietnam or Malaysia.<sup>45</sup> This would serve to isolate China or minimize its role in these supply chains.

China recognizes this possibility. In fact, it is worth noting that China showed a renewed interest in negotiations with Japan and Korea, in addition to the RCEP, once Japan announced it was to join the TPP.<sup>46</sup> RCEP includes all 10 members of the ASEAN and the six FTA partners – China, Japan, South Korea, India, New Zealand and Australia, accounting for 40% of world trade. RCEP would appeal to China as the preferred path in the immediate future for a few reasons. First, it could serve to further solidify and strengthen regional supply chains among its members,<sup>47</sup> alleviating a major concern of the TPP for China, which is the potential for a disruption in East Asian supply chains, or trade diversion. Second, the RCEP, in excluding the U.S., allows for a negotiation that will be more sensitive to these countries’ concerns. In addition, without the U.S. these countries may be able to pursue ‘soft regionalism,’ which is generally the preferred path for integration in Asia.<sup>48</sup>

Chinese officials have recently noted that they have “an open attitude” to the TPP,<sup>49</sup> but it is important not to make too much of such statements. Strategically speaking, it makes sense for China to make such a statement, as it keeps open the possibility that the FTAAP is more than just fantasy. It also could imply that China may be willing to see some convergence in certain areas between the Asian track negotiations and the TPP. It has not said, however, that it is formally considering membership in the TPP.

In the end, the isolation of China will not be in the long-term economic interests of the United States, and it is worth considering whether an accession provision to the TPP is a sufficient mechanism to allow eventual inclusion. If the provisions in the TPP do, in fact,

---

<sup>44</sup> Evelyn S. Devadason, “The Trans-Pacific Partnership (TPP): The Chinese Perspective,” *Journal of Contemporary China*, 12.

<sup>45</sup> Conversation with Dan Ikenson, Director of Trade Policy Studies, Cato Institute, April 2, 2014.

<sup>46</sup> Bryan Mercurio, 26.

<sup>47</sup> Evelyn Devadason, 14.

<sup>48</sup> *Ibid.*, 12.

<sup>49</sup> “China Open to Trans-Pacific Partnership,” *China Daily* (April 10, 2014) <[http://www.chinadaily.com.cn/business/2014-04/10/content\\_17424439.htm](http://www.chinadaily.com.cn/business/2014-04/10/content_17424439.htm)>.

reach a ‘platinum standard,’ it may be politically difficult for China to accept the terms of the agreement in the near future. Also, it seems highly unlikely that China would simply accept all the provisions of an agreement if it were not part of the negotiating process, making accession after the TPP’s conclusion a less feasible scenario.

Petri, Plummer and Zhai estimate that by 2020 the FTAAP could be concluded, but given the current opposition to fast-track legislation in particular, and trade agreements in general, 2020 seems a bit of a stretch. In addition, even though a China-U.S. FTA may be beneficial to both countries, it is also unlikely that this would be a popular initiative in the United States. With lawmakers already calling for the inclusion of a currency manipulation provision in the TPP, as well as strict disciplines on labor and the environment, these political debates will weigh negatively on China’s decision to push for convergence of the Asia and TPP tracks.

Furthermore, there is no certainty as to whether the ‘Asia pivot’ will remain a key priority in the U.S. once a new administration takes office in 2016. After TPP and the TTIP, will the U.S. suffer from trade liberalization fatigue? It is difficult to say, but given how hard a battle the current negotiations have shaped up to be, it would not be surprising.

### C. TRADE AGREEMENTS AS GLOBAL GOVERNANCE

In their original form, trade agreements focused on reducing the impact of border measures, such as tariffs, quotas, tariff-rate quotas, customs procedures, and export restrictions. By the 1930s, however, governments had realized that internal laws and regulations could also affect trade, and discussed ways to address the problem. Since that time, there has been an expansion in the scope of trade agreement rules to cover more and more aspects of domestic policy.<sup>50</sup>

In the early years of the trade regime, international trade rules related to domestic regulation focused on the non-discrimination principle. The idea was that governments could regulate however they wanted to, as long as they did not discriminate against foreign products in their regulation. Setting the precise boundaries of such rules was challenging, and the jurisprudence has undergone many refinements over the years in an effort to find the appropriate balance, but the idea has found general acceptance.

By the 1990s, international trade obligations began to push beyond the limited non-discrimination principle in a number of ways. In response to concerns that increased trade would have a negative impact on labor rights and the environment, positive rules were added to the trade regime, setting standards for domestic labor and environmental rules. These rules started as non-binding guidance, but eventually became enforceable obligations.

---

<sup>50</sup> Simon Lester, “The Role of the International Trade Regime in Global Governance,” 16 *UCLA J. Int’l L. & For. Aff.* 209 (2011).

Intellectual property was also inserted into the trade regime, with traditional domestic issues such as patents, copyrights and trademarks now subject to international trade obligations. Minimum standards were set out very precisely and clearly, and were enforceable through the normal trade dispute mechanism.

More recent trade negotiations, both bilateral and mega-regional, have pushed the role of the trade regime in global governance even further. In the TTIP, there have been efforts by the United States to reform the EU regulatory process, for example by including a notice and comment period for draft regulations, akin to what occurs in the United States.<sup>51</sup> And in the TPP, the United States has pushed for broader efforts to promote environmental protection, such as binding rules related to the practice of shark finning.<sup>52</sup>

Taken together, the expansion of trade agreements to address so many new issues means that these agreements go far beyond the traditional issues of protectionism and economic integration. In effect, it makes trade agreements one of the main sources of global governance across all policy areas. While there is certainly nothing that exists today that could be called a ‘global government,’ *global governance* is expanding and it is doing so in the form of trade agreements.

Such a result is problematic both for trade liberalization and for global rule-making. First, putting these issues in trade agreements is a problem for trade agreements themselves. The trade debate has been muddled by the infusion of these additional issues, because objections now come from sources who have little interest in the free trade versus protectionism debate, and in many cases would actually be sympathetic to traditional free trade. By adding new opponents, governments have made reaching agreement on core trade liberalization issues more difficult.

In addition, when we disguise efforts to promote international cooperation and governing as merely ‘trade’ issues, we do not address these issues head on. Taking the example intellectual property, the length of the copyright term is an important issue in and of itself, regardless of its impact on trade. It is difficult to debate this issue when it is buried in the larger context of trade negotiations, and it might be better if governments addressed the issue directly outside the trade context.

### III. THE FUTURE OF TRADE AGREEMENTS

The TPP is perhaps best looked at as an experiment with a new model of trade agreement. An agreement on multilateral trade liberalization has been elusive, and bilateral trade agreements have perhaps reached the limits of their success. As a result, governments

---

<sup>51</sup> Inu Barbee and Simon Lester, “Will Regulations Sink EU-U.S. Free Trade?,” *National Interest*, October 15, 2013. <<http://nationalinterest.org/commentary/will-regulations-sink-eu-us-free-trade-9229>>.

<sup>52</sup> USTR, “The United States and Environmental Protections in the TPP,” January 15, 2014. <<http://www.ustr.gov/about-us/press-office/blog/2014/January/The-US-and-Environmental-Protections-in-the-TPP>>.

have pushed forward with an alternative model that is loosely tied to regions, but is perhaps more accurately described as a strategic trade alliance. This model moves ahead with using trade agreements as global governance, tries to export U.S. values to trading partners, and expands trade relationships with some countries while excluding others.

The most obvious measure for whether the TPP can act as a future model is if an agreement can be reached. If the 12 countries that are currently negotiating the TPP, and any others who might join, can reach agreement amongst themselves, and then pass the completed agreement through their domestic political process, the TPP can declare victory. Where other trade negotiations have failed, the TPP would be a success. People can debate whether it has merit, based on one aspect or another, but simply achieving a deal gives the TPP international credibility.

But can it succeed in this way? As much as trade officials try to talk up the TPP as almost finished, describing the TPP as in the 'end game' late last year and early this year,<sup>53</sup> it appears that there is much still to be done. Based on recent reports and leaks, there are substantial gaps in the views of the parties on what the rules should say. The role of officials' positive public statements is clear: to keep people motivated to move towards the finish. However, after too many overly optimistic assessments, people begin to take any statement with an appropriate amount of skepticism. It is therefore imperative that we take a realistic and balanced approach to examining the benefits particular arrangements will yield, so as not to over or under sell an initiative. This is precisely why we urge caution in overly ambitious estimations of the TPP's gains, because if it does not succeed in bringing about the results the rhetoric claims, there will undoubtedly be a backlash towards the initiative. And, as we saw with the NAFTA, it could hamper any further expansion efforts to include China through the FTAAP.

If the TPP fails, on the other hand, then perhaps the trade community can begin to think more deeply about the best approach to economic integration. Many models have been tried over the years. There have been successes and there have been failures. What worked in the past, and why? What would work now?

In terms of economics, the multilateral and regional approaches are clearly the best. A broad principle of non-discrimination at the multilateral level, combined with deeper integration at the regional level, seem to make the most sense. The multilateral regime should remain open for all to participate in; at the regional level, a deeper opening of the borders, and a recognition that trade ties between neighbors are naturally stronger, can supplement the shallower multilateral approach. While trade blocs can be problematic, with appropriate multilateral oversight they can serve as an important part of the trade regime.

With regard to the strategic agenda of U.S. trade policy, trade negotiations should be about bringing countries together rather than separating them into alliances. When we pick and choose our trading partners based on foreign policy issues or other strategic

---

<sup>53</sup> See, e.g., Reuters, "Pacific trade partners in end-game of trade talks: U.S. official," January 22, 2014. <<http://in.reuters.com/article/2014/01/22/usa-trade-tpp-idINL2N0KW1LI20140122>>.

and political considerations, we sublimate the benefits of economic integration to the vagaries of whatever foreign policy we are pursuing at that moment. Whether we are 'isolating China,' or rewarding countries who supported particular military interventions, we undermine the trade regime when we base trade alliances on non-economic considerations. What is the benefit in claiming a 'pivot to Asia' without the involvement of the largest country on the Asian continent? What signal does this send, and is such a message in the best long-term interest of trade liberalization?

On a related note, we should be careful when pushing our 'values' on others. Such an approach is not conducive to cooperation and good international relations in general.

And finally, as to global governance issues, various interest groups have pushed hard for their pet issues to be included in trade agreements. We should be wary of using the trade regime as a general tool of global governance. It may be true that international rules on the environment, labor, or intellectual property would be useful. But even if that is the case, putting everything into the trade regime makes trade talks a target for all sides of the political spectrum, all around the world. The expansion of the trade regime over the years is almost surely one of the reasons for its recent stagnation.

Regardless of what happens with the TPP, a reconsideration of the trade regime, including its scope, its institutions, and its negotiating processes, would be of great value. The principles and issues described above could serve as a guide for such an effort. More generally, rather than simply push forward with the current model of economic integration, it would be of great value for trade officials and outside experts to take a step back and assess this approach.

One important question to ask is, with whom should we be negotiating trade agreements? Should it be everyone, a coalition of the willing, the region, our friends and allies? The relative merits of each approach should be discussed and debated. Another question is, what should we be negotiating? A diverse set of issues, including non-discrimination for goods and services, domestic regulations, intellectual property, the environment, and monetary and fiscal policy, have all been included to some extent. What is the appropriate way to address each of these in the international arena? Until these questions are properly answered, the trade regime may see less progress than many of us would like.

