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THE TRANS-PACIFIC PARTNERSHIP: NEW PARADIGM OR WOLF IN SHEEP'S CLOTHING?

MEREDITH KOLSKY LEWIS*

Abstract: The Office of the United States Trade Representative (USTR) is currently negotiating with seven other countries to form a new trade agreement called the Trans-Pacific Partnership (TPP). The TPP has the potential to expand into a Free Trade Agreement of the Asia-Pacific (FTAAP). At present there are several competing models for Asia-Pacific economic integration that exclude the United States entirely. In such an environment, the TPP presents the United States with a welcome opportunity, not only to participate, but also to take a leadership role in establishing the terms for a region-wide agreement. Nevertheless, the USTR must make the TPP sufficiently attractive to other Asia-Pacific economies, such that those countries will prefer the TPP over other integration models. This will require the USTR to partially diverge from its standard FTA template and liberalize in new areas. Although doing so may be politically challenging, it is the United States' best strategy if it wishes to solidify a role for itself in an economically integrated Asia-Pacific.

INTRODUCTION

The Office of the United States Trade Representative (USTR) has devoted significant resources to negotiating the United States' accession to a trade agreement known as the Trans-Pacific Partnership (TPP). Although these negotiations have captured the attention of U.S. negotiators, and are well-known to the countries already participating in the TPP, the TPP's existence is not otherwise well-known. As of mid-2009, mentioning the TPP at international legal academic conferences drew mainly blank looks. Correspondingly, there is a dearth of legal scholarship on the TPP.¹ Nevertheless, although the TPP has slid beneath the radar until this point, it should not be ignored any longer.

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¹ This author is only aware of two other legal academic articles that discuss the TPP: the first is an article that only mentions the TPP in a passing footnote, and the second is this author's earlier article on the subject. See Meredith Kolsky Lewis, *Expanding the P-4*

The TPP is a new type of trade agreement. It does not fit into the more common molds of bilateral free trade agreements or plurilateral customs unions. Rather, the TPP represents an unprecedented free trade agreement (FTA) comprising eight or more members, including the United States, and has implications for regionalism—particularly in the Pacific Rim—and the World Trade Organization (WTO), and for the power dynamics between major trading blocs. The TPP has the potential both to harmonize and to fragment. It reflects both a convergence of economies seeking to form a broader alliance, and a divergence from the multilateral trading system. The TPP has the potential to create a new paradigm for trade agreements, to form the basis for a Free Trade Area of the Asia-Pacific (FTAAP), and to provide an alternative power center within Asia-Pacific Economic Cooperation (APEC)² in ways that are distinct from the models that have been jockeying for

Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 401, 403 (2009); Yanning Yu, *Trade Remedies: The Impact on the Proposed Australia—China Free Trade Agreement*, 18 MICH. ST. J. INT'L L. 267, 269 n.8 (2010). Most of the available commentary on the TPP is in electronic form and is authored by economists, political scientists, think tanks, and NGOs. One exception to this is a collection of works edited by Professor Jane Kelsey of the University of Auckland Law School. See generally NO ORDINARY DEAL: UNMASKING FREE TRADE AND THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (Jane Kelsey ed., 2010). Additional information regarding the TPP can be found on the TPP-dedicated website created by Professor Kelsey. See Jane Kelsey, TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPP)(US-P4+), http://web.me.com/jane_kelsey/Trans-Pacific_Partnership_FTA/Welcome.html (last visited Nov. 15, 2010). Various government websites also provide information regarding the precursor agreement to the TPP and the current negotiations. See, e.g., *Australia's Participation in Trans-Pacific Partnership Agreement Negotiations*, AUSTL. GOV'T DEP'T OF FOREIGN AFF. & TRADE, <http://www.dfat.gov.au/trade/fta/tpp/index.html> (last visited Nov. 15, 2010); *Trans-Pacific Partnership*, OFFICE OF U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Nov. 15, 2010); *Trans-Pacific Strategic Economic Partnership Agreement*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Relationships-and-Agreements/Trans-Pacific/index.php> (last visited Nov. 15, 2010).

² Cf. N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE, THE TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP AGREEMENT 1, <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/transPac-Factsheet-2Mar09.pdf> (last visited Nov. 15, 2010) [hereinafter N.Z. MEAT TPP FACTSHEET] (P-4 is generally regarded as “a state of the art modern free trade agreement” that “could be seen as a model within the Asia-Pacific region”). APEC is an acronym for Asia Pacific Economic Cooperation, sometimes referred to as four adjectives in search of a noun. *About APEC*, ASIA-PACIFIC ECON. COOPERATION (Jan. 14, 2009), http://www.apec.org/apec/about_apec.html. The twenty-one members of APEC are: Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Republic of the Philippines, Russia, Singapore, Taiwan, Thailand, the United States, and Vietnam. *Member Economies*, ASIA-PACIFIC ECON. COOPERATION (2010), http://www.apec.org/apec/member_economies.html (last visited Nov. 16, 2010).

favor the past several years.³ Nevertheless, if the TPP is not negotiated properly, these results are unlikely to materialize. At times, the United States has appeared to approach the negotiations as if it were negotiating just another FTA according to the standard U.S. template. This tactic is contrary to the United States' long-term interests, however, as it is likely to result in an agreement that will not be sufficiently attractive to convince other APEC economies to join en masse.

In short, the TPP has the potential to be an exceedingly important agreement. This Article thus seeks to highlight what the TPP is, why it is an agreement to watch, and what negotiating issues will affect whether or not the agreement is truly groundbreaking or merely a repackaged version of the United States' existing FTAs.

I. WHAT IS THE TPP?

The TPP is a trade agreement—currently under negotiation—that has its roots in an existing agreement between Brunei, Chile, New Zealand, and Singapore.⁴ The goal of these original four TPP members was not to form a union based on economic synergies among the current partners, but rather to create a model agreement that could be expanded to include additional members from both sides of the Pacific.⁵ This is the first non-customs union trade agreement with the avowed purpose—and potential—of transforming into a large, plurilateral free trade agreement.⁶

The United States is currently negotiating to join an expanded version of the TPP, along with Australia, Peru, and Vietnam.⁷ An ex-

³ See Lewis, *supra* note 1, at 408. These include: an East Asian FTA comprising China, Korea, and Japan; an ASEAN + 3 model, that would see the Association of Southeast Asian Nations (ASEAN) forming an FTA with China, Korea, and Japan; and an ASEAN + 6 model that would additionally include Australia, New Zealand, and India. *Id.*

⁴ *Id.* at 403.

⁵ *Id.*

⁶ See *id.* at 403, 404; N.Z. MFAT TPP FACTSHEET, *supra* note 2, at 1.

⁷ Press Release, Office of the United States Trade Representative, USTR Ron Kirk Comments on Trans-Pacific Partnership Talks (June 18, 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/june/ustr-ron-kirk-comments-trans-pacific-partnership-talk>. Malaysia has recently committed domestically to seek to join the TPP and is presently engaging in bilateral discussions with the other participating countries. See *TPP Members Examine Proposals in Peru, Do Not Reach Final Agreements*, 28 Inside U.S. Trade Online (Inside Wash. Publishers) (Aug. 27, 2010), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-08/27/2010/tpp-members-examine-proposals-in-peru-do-not-reach-final-agreements/menu-id-710.html>. Canada has also expressed interest in joining. See *id.* As of late August 2010, neither country has been invited to participate in the multilateral negotiating rounds. See *id.* It is likely that this invitation will be extended more easily to Malaysia than to Canada, due to Canada's current level of agricultural protection. See *id.*

amination of the USTR's website reveals a significant amount of information about the TPP. In fact, the USTR has set up a separate section of its website specifically devoted to this negotiation.⁸ Although there is a great deal of material on the USTR website, it does not provide a complete picture of the origins and nature of this agreement.⁹

The USTR website explains that the TPP comprises eight countries—the United States, Australia, New Zealand, Singapore, Chile, Brunei, Peru, and Vietnam—that have recently decided to form a trade agreement.¹⁰ The USTR suggests that the Obama administration became interested in forming the TPP after the administration reviewed its trade policy strategy in conjunction with members of Congress.¹¹ The USTR also suggests that the TPP is geared toward obtaining market access for U.S. exports.¹² Although not technically inaccurate, this description of the TPP agreement, how it arose, and the USTR's explanation of why the United States is seeking to join the TPP, is somewhat misleading. The following section sets out a more comprehensive explanation of the TPP, including why the United States may have elected to participate in its expansion.

A. *The Genesis of the TPP*

The USTR website suggests the TPP is a new agreement that does not have a precursor. This is not entirely accurate. As noted above, in 2005, four countries from different corners of the globe—Brunei, Chile, New Zealand, and Singapore—entered into a unique and potentially path-breaking free trade agreement called the Trans-Pacific Strategic Economic Partnership Agreement.¹³ This agreement was informally

⁸ *Trans-Pacific Partnership*, *supra* note 1.

⁹ *See id.*

¹⁰ *USTR FACT SHEET: Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 2009), <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/ustr-fact-sheet-trans-pacific-partnership>.

¹¹ *See Trans-Pacific Partnership: Frequently Asked Questions*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/webfm_send/1711 (last visited Nov. 15, 2010); *USTR FACT SHEET: Trans-Pacific Partnership*, *supra* note 10; *see also* Karl Ehlers, U.S. Trade Representative's Office, Remarks at the American Society of International Law's 104th Annual Meeting: International Law in a Time of Change, "Asian Economic Integration—Reflecting or Reshaping Legal and Economic Realities?" (Pacific Rim Region Interest Group Session) (Mar. 25, 2010) (attended by author) (suggesting that the Administration's interest was the result of a general review of U.S. trade policy).

¹² *See Ehlers*, *supra* note 11; *USTR FACT SHEET: Trans-Pacific Partnership*, *supra* note 10.

¹³ *See N.Z. MFAT TPP FACTSHEET*, *supra* note 2, at 1.

known as the Trans-Pacific SEP, the P-4 Agreement, or just the P-4.¹⁴ Since the United States joined negotiations, the agreement has become more commonly referred to as the TPP.¹⁵

What is now known as the P-4 Agreement began with negotiations launched by Chile, New Zealand, and Singapore at the APEC leaders' summit in 2002.¹⁶ These original negotiations contemplated an agreement known as the Pacific Three Closer Economic Partnership (P3 CEP).¹⁷ Nevertheless, Brunei attended several negotiating rounds as an observer, and ultimately joined the P-4 Agreement as a "founding member."¹⁸ The P-4 Agreement was signed by New Zealand, Chile, and Singapore on July 18, 2005, and by Brunei on August 2, 2005, following the conclusion of negotiations in June 2005.¹⁹ Following the passage of implementing legislation, the P-4 Agreement entered into force on differing dates in 2006 with regard to the various parties.²⁰

The P-4 Agreement is the first multi-party free trade agreement linking Asia, the Pacific, and Latin America.²¹ In addition to its geographic diversity, the P-4 Agreement is interesting because of the comprehensiveness and depth of its coverage. Unlike most FTAs, the P-4 Agreement provides for nearly total liberalization of all goods, including agriculture.²² It calls for Chile, New Zealand, and Singapore to reduce

¹⁴ *Trans-Pacific Strategic Economic Partnership Agreement*, *supra* note 1; see *History of the Trans-Pacific SEP Agreement P4*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Relationships-and-Agreements/Trans-Pacific/0-history.php> (last visited Nov. 15, 2010); *SICE: Trade Policy Developments: Trans-Pacific Partnership Agreement*, ORG. OF AM. STATES FOREIGN TRADE INFO. SYS., http://www.sice.oas.org/TPD/CHL_Asia/CHL_Asia_e.ASP (last visited Nov. 15, 2010).

¹⁵ See *SICE: Trade Policy Developments: Trans-Pacific Partnership Agreement*, *supra* note 14. To avoid confusion, in this article "P-4" will be used to refer to the agreement as originally formed, whereas "TPP" will be used to refer to the agreement that the United States is negotiating.

¹⁶ Lewis, *supra* note 1, at 403.

¹⁷ *Id.*

¹⁸ *Id.* at 403–04.

¹⁹ *Id.* at 404. At the same time, the parties signed a binding Environment Cooperation Agreement and a binding Labour Cooperation Memorandum of Understanding. See *id.*

²⁰ *Id.* Brunei only deposited an instrument of provisional application and the Agreement has therefore provisionally applied to Brunei since June 2006. *Id.*

²¹ *Id.*

²² Lewis, *supra* note 1, at 415. It is common for FTAs to exclude a significant percentage of agricultural products from their coverage. See *id.* at 415–16; see also Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 268 (2004) (noting frequent exclusion of agriculture from European Union FTAs); Anna Turinova, *Free Trade Agreements in the World Trade Organization: The Experience of East Asia and the Japan—Mexico Economic Partnership Agreement*, 25 UCLA PAC. BASIN L.J. 336, 347 (2008) (discussing Asian FTAs).

tariffs to zero on all goods by 2017, and for Brunei to reduce tariffs to zero on all but a handful of products.²³ The P-4 Agreement did not cover financial services or investment, but provided that these areas would be negotiated two years after the P-4 Agreement came into force.²⁴ Those negotiations have substantially completed.²⁵

Although the P-4 Agreement is comprehensive in its scope—particularly now that the financial services and investment negotiations have taken place—its uniqueness is more attributable to its structure than its content.²⁶ First, although the participating countries are all APEC members, the P-4 Agreement deliberately joins countries spanning the globe. It creates a strategic linkage that extends to the far corners of the Pacific, joining Latin America, South East Asia, and Oceania.²⁷ These countries were not motivated by improved access to each other's markets; Singapore already provided duty-free access on all goods except alcohol and tobacco,²⁸ and New Zealand maintains very few tariffs.²⁹ None of the countries has a particularly large economy or population.³⁰ Instead, the parties' intent was to form a high-standards

²³ See N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE, THE NEW ZEALAND–SINGAPORE–CHILE–BRUNEI DARUSSALAM TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP AGREEMENT 22 (2005), <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/trans-pacificbooklet.pdf> [hereinafter N.Z. MFAT 2005 REPORT].

²⁴ *Id.* at 47.

²⁵ *Trans-Pacific Strategic Economic Partnership Agreement*, *supra* note 1.

²⁶ Cf. Henry Gao, The Trans-Pacific Strategic Economic Partnership Agreement: High Standard or Missed Opportunity? 4–6 (Nov. 2, 2009) (unpublished manuscript), available at http://www.unescap.org/tid/artnet/mtg/con09_papers.htm [hereinafter Gao, Trans-Pacific SEP] (noting the range of goods included in the P-4 Agreement); *Trans-Pacific Strategic Economic Partnership Agreement*, *supra* note 1 (highlighting that financial services and investment negotiations have occurred). Not everyone is convinced that the P-4 is truly a “high-standards” agreement. See Henry Gao, *A Scorecard for the P4: Full or Fail?*, EAST ASIA FORUM (Dec. 2, 2009), <http://www.eastasiaforum.org/2009/12/02/a-scorecard-for-the-p4-full-or-fail> (arguing that the agreement could have phased out tariffs more quickly and that its provisions on rules of origin, trade remedies, and services are more restrictive than necessary).

²⁷ See N.Z. MFAT 2005 REPORT, *supra* note 23, at 13.

²⁸ See Gao, Trans-Pacific SEP, *supra* note 26, at 6.

²⁹ *Trade and the New Zealand Economy: New Zealand's Tariffs*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE (Oct. 2005), <http://www.mfat.govt.nz/posts/pdf/paris-nztariffs.pdf>.

³⁰ *World Development Indicators Database: Gross Domestic Product 2009, PPP*, WORLD BANK (Sept. 27, 2010) http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf; *World Development Indicators Database: Population 2009*, WORLD BANK (Sept. 27, 2010) <http://siteresources.worldbank.org/DATASTATISTICS/Resources/POP.pdf>. According to World Bank statistics for 2009, New Zealand has a population of 4.3 million; Singapore of 5 million; and Brunei of 400,000. Chile has the largest population within the P-4, at 17 million (all figures rounded). *World Development Indicators Database: Population 2009*, *supra*.

agreement that could serve as a model for a broader APEC-wide agreement, and to which other APEC members could accede.³¹

To facilitate the P-4 Agreement's potential to serve as an APEC-wide model or template for an ultimate Free Trade Area of the Asia-Pacific, the parties included an open accession provision in the P-4.³² The P-4 Agreement provides that it is open to accession "on terms to be agreed among the [p]arties, by any APEC [e]conomy or other [s]tate."³³ In theory, FTAs without open accession provisions could be expanded upon the agreement of all of the members. Nevertheless, this does not tend to happen in practice. Indeed, even in the relatively few FTAs that do contain open accession provisions, expansion rarely occurs.³⁴ Nonetheless, in the context of the P-4 Agreement, the open accession clause is important because the parties' goal from the beginning was to expand the agreement.³⁵ Therefore, the parties included the provision in hopes that like-minded countries would consider joining the agreement, propelling it towards a possible APEC-wide phenomenon.

Interestingly, although the P-4 countries included an open accession provision so that other countries could accede to the P-4 Agreement, it appears that TPP negotiations are not going to entail any newcomers formally acceding to the P-4 Agreement.³⁶ At a conference

³¹ See N.Z. MFAT 2005 REPORT, *supra* note 23, at 13. In its official publication on the P-4 Agreement, the New Zealand Ministry of Foreign Affairs and Trade (MFAT) states that "[b]ecause of the low barriers to trade between the partners to the Trans-Pacific SEP, a key objective of the negotiations, from the start, was the potential strategic benefits." *Id.* at 12–13.

³² See Trans-Pacific Strategic Economic Partnership Agreement art. 20.6, Jul. 18-Aug. 2 2005, ORG. AM. STATES, http://www.sice.oas.org/Trade/CHL_Asia_e/mainAgreement_e.pdf (accessed through the Organization of American States' Foreign Trade Information System) [hereinafter Trans-Pacific Partnership].

³³ *Id.* Open accession provisions are unusual but not unheard of. Meredith Kolsky Lewis, *The Prisoner's Dilemma Posed by Free Trade Agreements: Can Open Access Provisions Provide an Escape?* 11 CHI. J. INT'L L. (forthcoming 2011) (manuscript at 35) (on file with author). The North American Free Trade Agreement (NAFTA) contains such a provision, as do a number of FTAs among APEC members, including the Thailand–New Zealand FTA and the Thailand–Australia FTA. Thailand–New Zealand Closer Economic Partnership Agreement, Thai–N.Z., art. 18.5, Apr. 19, 2005, available at <http://www.mfat.govt.nz/downloads/trade-agreement/thailand/thainzcep-december2004.pdf>; Australia–Thailand Free Trade Agreement, Austl.–Thai, art. 1905, July 5, 2004, available at <http://www.austlii.edu.au/au/other/dfat/treaties/2005/2.html>; North American Free Trade Agreement art. 2204, U.S.–Can.–Mex., Dec. 17, 1992, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtplID=ALL>.

³⁴ Lewis, *supra* note 33, at 35.

³⁵ See Trans-Pacific Partnership, *supra* note 32, pmbl. See generally Lewis, *supra* note 33 (providing a more detailed discussion of open accession provisions).

³⁶ See Ann Capling, *The Trans-Pacific Partnership*, EAST ASIA FORUM (Nov. 23, 2009), <http://www.eastasiaforum.org/2009/11/23/the-trans-pacific-partnership>.

session of the 2010 American Society of International Law Annual Meeting, official Karl Ehler made clear that the United States was not acceding to the P-4 Agreement, but rather that a new agreement was being negotiated.³⁷ This is consistent with reports from individuals familiar with the negotiations.³⁸ Nonetheless, the genesis of the TPP is clearly the P-4 Agreement. In addition to the obvious fact that all the P-4 countries are involved in the TPP negotiations, the P-4 Agreement contains the key ingredients that are being sought in the TPP: geographic diversity, a high-standards agreement, and a model for expansion.³⁹

B. *The United States Joins the Party*

Although the Obama administration presents the TPP as its idea—derived after reviewing U.S. trade policy objectives—the United States' substantive involvement actually dates back to the Bush administration.⁴⁰ The two-year anniversary of the P-4 Agreement triggered the beginning of the negotiations on investment and financial services.⁴¹ The United States expressed interest in joining those negotiations, with the ultimate intention of acceding to the P-4 Agreement if terms could be agreed upon.⁴² The P-4 Agreement member countries then entered into preliminary negotiations with the United States in early 2008 that were intended to lay the groundwork for the United States' ultimate accession.⁴³ Shortly after these negotiations commenced, Australia and Peru announced that they also intended to join the P-4 Agreement. More recently, Vietnam was identified as an additional planned partici-

³⁷ See Ehlers, *supra* note 11.

³⁸ See, e.g., *Trans-Pacific Strategic Economic Partnership Agreement*, *supra* note 1.

³⁹ See *Trans-Pacific Partnership*, *supra* note 32, pmbli., art. 1.1.

⁴⁰ See Ann Capling, *Multilateralising PTAs in the Asia-Pacific Region: A Comparison of the ASEAN–Australia–NZ FTA and the P4 Agreement*, at 8 (United Nations Econ. & Soc. Comm'n for Asia & the Pacific, Conference Paper, Asia-Pacific Trade Economists' Conference, 2009), available at <http://www.unescap.org/tid/artnet/mtg/2-2Ann%20Capling.pdf>. The United States apparently proposed the negotiation of an FTA with Australia, Chile, New Zealand, and Singapore back in 1998, with the goal of sparking further trade liberalization within APEC. See *id.* at 7. Although Australia, Chile, and the United States ultimately did not pursue this idea, New Zealand and Singapore went on to negotiate a high-standards bilateral FTA. See *id.*

⁴¹ See N.Z. MFAT 2005 REPORT, *supra* note 23, at 47.

⁴² See *Trans-Pacific Strategic Economic Partnership Agreement*, *supra* note 1.

⁴³ See *Understanding the TPP—The Path to Expansion*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE (Sept. 14, 2010), <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Relationships-and-Agreements/Trans-Pacific/index.php#UnderstandingTPP>.

pant.⁴⁴ Once the United States signaled its intention to join, the agreement came to be called the Trans-Pacific Partnership or TPP.⁴⁵

In September 2008, comprehensive negotiations for the United States to join the Trans-Pacific Partnership were launched informally.⁴⁶ The first round of formal negotiations was originally scheduled to commence in March 2009, with Vietnam expected to join as an observer, and Australia and Peru intending to participate.⁴⁷ Nevertheless, with the intervening change in U.S. administration, the first round of negotiations was deferred until the Obama administration conducted a general review of U.S. trade policy.⁴⁸ Accordingly, although the Obama administration decided to participate in the negotiations following a review of its trade policy, the decision can be seen as an extension of Bush administration trade policy.

C. *Why Is the United States Pursuing the TPP?*

Some scholars have commented that the USTR has not focused significant energy on the WTO Doha Round of trade negotiations, but instead has treated the TPP agreement as the “only game in town.”⁴⁹ Yet it is not obvious why the United States has decided to pursue the TPP. Although the USTR suggests that the TPP will expand market access and is driven by purely economic considerations, this is at best only true in an indirect sense. In reality, the TPP is more significant as a potential Asia-Pacific agreement than as an agreement among the initial eight countries.⁵⁰

⁴⁴ See *id.*

⁴⁵ See *SICE: Trade Policy Developments: Trans Pacific Partnership Agreement*, *supra* note 14; *Understanding the TPP—The Path to Expansion*, *supra* note 43.

⁴⁶ Press Release, Office of the U.S. Trade Rep., Trans-Pac. Partners and U.S. Launch FTA Negotiations (Sept. 22, 2008), available at <http://www.ustr.gov/trans-pacific-partners-and-united-states-launch-fta-negotiations>.

⁴⁷ *U.S. Delays TPP Talks to Allow Obama Cabinet Members to Take Office*, 27 Inside U.S. Trade Online (Inside Wash. Publishers) (Feb. 27, 2009), <http://insidetrade.com/Inside-US-Trade-02/27/2009/us-delays-tpp-talks-to-allow-obama-cabinet-members-to-take-office/menu-id-710.html>.

⁴⁸ *Id.*

⁴⁹ See, e.g., Bernard K. Gordon, *Obama's Visit to Indonesia and Australia and the TPP*, EAST ASIA FORUM (May 30, 2010), <http://www.eastasiaforum.org/2010/05/30/obamas-visit-to-indonesia-and-australia-and-the-tpp/>. Indeed it appears that the United States is making no significant efforts to conclude the Doha Round any time soon. See Gary Clyde Hufbauer et al., FIGURING OUT THE DOHA ROUND 7, 10–11 (Peterson Inst. for Int'l Econ., 2010) available at http://www.wto.org/english/res_e/reser_e/dialogue_paper_schott_e.pdf.

⁵⁰ See Myron Brilliant, Senior Vice President, Int'l Affairs, U.S. Chamber of Commerce, Oral Testimony to the Trade Policy Staff Committee, Office of the United States Trade Representative, 2 (Mar. 4, 2009). Brilliant notes:

The United States' decision to join the TPP is not driven by the market access potential within the current eight parties. Of the TPP members or members-to-be, the United States already has FTAs with Australia, Chile, Singapore, and Peru.⁵¹ Therefore, the United States could only form new connections with Vietnam, New Zealand, and Brunei. Vietnam is in some ways an attractive potential free trade agreement partner for the United States, but Vietnam joined the talks only after the United States had signaled its interest. Therefore, Vietnam is not driving the United States' involvement.⁵² New Zealand has long expressed its interest in an FTA with the United States.⁵³ Until the

While new export opportunities in the seven partners of the TPP negotiations . . . may be relatively modest for U.S. companies, . . . [i]f the TPP agreement evolves gradually into the Free Trade Area of the Asia-Pacific, then the United States has the potential to reach into economically significant markets that previously have been closed off to us through bilateral negotiations.

Id.

⁵¹ See *Free Trade Agreements*, INT'L TRADE ADMIN., <http://www.trade.gov/fta> (last visited Nov. 15, 2010). Indeed, among the eight countries currently negotiating the TPP, there are so many existing free trade agreements that there are only eight bilateral combinations that are not already covered by existing preferential arrangements: Australia–Peru; Brunei–United States; Brunei–Peru; Chile–Vietnam; New Zealand–Peru; New Zealand–United States; Peru–Vietnam; and Vietnam–United States. John Ravenhill, *Extending the TPP: The Political Economy of Multilateralization in Asia*, at 25 (United Nations Econ. & Soc. Comm'n for Asia & the Pacific, Conference Paper, Asia-Pacific Trade Economists' Conference, 2009), available at <http://www.unescap.org/tid/artnet/mtg/2-3John%20Ravenhill.pdf>.

⁵² See generally *Data Profile of Vietnam*, WORLD BANK (2010), <http://www.worldbank.org> (navigate to “Data” hyperlink; then navigate to “By Country”; then navigate to “Vietnam”); *Vietnam*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/vietnam> (last visited Nov. 15, 2010) (reporting that Vietnam has a relatively large population of approximately 86 million, and yet it is only the United States' 45th largest goods market as of 2009). Further, entering a free trade agreement that includes Vietnam as a partner would also cause some consternation within the United States. Vietnamese shrimp and catfish exports have been the subject of antidumping investigations and associated litigation within the United States, resulting in the imposition of duties on these products. See generally Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. AND BUS. 315 (2005); Stephanie Showalter, *The United States and Rising Shrimp Imports from Asia and Central America: An Economic or Environmental Issue?*, 29 VT. L. REV. 847 (2005); Joshua Startup, *From Catfish to Shrimp: How Vietnam Learned to Navigate the Waters of “Free Trade” as a Non-Market Economy*, 9 IOWA L. REV. 1963 (2005). The U.S. industries that filed these petitions are unlikely to be pleased by the prospect of Vietnam's products obtaining improved market access to the United States in the form of reduced—and perhaps ultimately removed—tariffs. See Cho, *supra*, at 315–17.

⁵³ See United States of America: Country Information, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, available at <http://www.mfat.govt.nz/Countries/North-America/United-States.php>. MFAT publicly acknowledges that “[s]ecuring a free trade agreement negotiation with the United States has been a key New Zealand trade objective for more than a decade.” *Id.*

TPP, however, New Zealand has largely received the “cold shoulder.”⁵⁴ In any case, New Zealand’s market is only four million people and is already highly liberalized,⁵⁵ so it is evident that New Zealand is not the driver. That leaves the small state of Brunei, which is also an unlikely driving force behind the United States’ interest.

The United States clearly sees opportunities beyond the eight current parties, and hopes that more countries will join the TPP. Although the current TPP partners are not major trading partners of the United States, APEC as a whole represents a huge market.⁵⁶ Therefore, the TPP makes a good deal of strategic sense for the United States so long as it continues to expand. Nevertheless, the reasons go beyond the long-term economic potential of a Free Trade Area of the Asia-Pacific; the reasons also include a significant geopolitical component. In particular, the United States has the potential to alter some of the economic power dynamics in the Asia-Pacific, which is consistent with President Obama’s stated goals of increased U.S. engagement in the region.

At a major address in Japan in November 2009, President Obama promised increased U.S. engagement in all aspects of its relations with countries in the Asia-Pacific, proclaiming that he would be “America’s first Pacific president” and announcing that the United States would participate in negotiations to join the TPP.⁵⁷ To its credit, the Obama Administration appears to recognize the strategic significance the TPP could have for the United States—although USTR officials deny the agreement has any purpose other than an economic one—and is presumably pursuing the TPP for these additional reasons.

⁵⁴ See James M. McCormick, *The New Zealand—United States Relationship in the Era of Globalization*, in SOVEREIGNTY UNDER SEIGE? GLOBALIZATION & NEW ZEALAND 213, 216 (Robert Patman & Chris Rudd eds., 2005). In the past, the United States objected to any suggestion of a free trade agreement with New Zealand because New Zealand refuses to allow United States’ nuclear ships into its territorial waters. See *id.* In recent years, however, the United States has softened its stance towards New Zealand with respect to this issue. Nonetheless, with a market of only four million people, a highly liberalized economy that is open to United States products, and a competitive dairy export sector, it is likely that the United States sees few potential gains from an FTA with New Zealand. See *id.* at 217.

⁵⁵ See *id.*

⁵⁶ See OFFICE OF U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 123–24 [hereinafter 2008 REPORT]. In 2008, the United States traded \$2.1 trillion in goods, and \$287 billion in services, with APEC. See McCormick, *supra* note 54, at 217.

⁵⁷ See President Barack Obama, Remarks at Suntory Hall (Nov. 14, 2009, 10:12 AM), <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-suntory-hall>.

II. IMPLICATIONS OF TPP EXPANSION FOR (BOTH SIDES OF) THE PACIFIC

A. *Implications for the United States*

Twenty years ago, then-Secretary of State James Baker famously cautioned that it would be a mistake for the United States to permit “a line to be drawn down the middle of the Pacific” with the United States on one side, separated from Asian countries on the other.⁵⁸ Notwithstanding this warning, we have seen numerous models for economic integration in East Asia and the Asia-Pacific that exclude the United States from their formulations. ASEAN + 3, ASEAN + 6, and an East Asian FTA comprising Japan, Korea, and China, are all different visions for deeper regional economic integration, and each has deliberately omitted the United States from the equation.⁵⁹ If the United States could succeed in negotiating the TPP—and additionally succeed in selling the TPP as the basis for broader expansion within APEC—it could represent a major step toward achieving President Obama’s goal of engaging with Asia,⁶⁰ and would erase the line down the middle of the Pacific, which China,⁶¹ Japan,⁶² and perhaps others, might prefer to draw.⁶³

⁵⁸ See Jeffrey Bader, Special Assistant to the President, National Security Council, Address at the Brookings Institution, *Obama Goes to Asia: Understanding the President’s Trip*, 47 (Nov. 6, 2009) (transcript available at http://www.brookings.edu/~media/Files/events/2009/1106_obama_asia/20091106_obama_asia_trip.pdf); Claude Barfield, *APEC: The Keystone to U.S. Asian Policy*, THE AMERICAN (Nov. 13, 2009), http://www.american.com/archive/2009/november/apec-the-keystone-to-u-s-asian-policy/article_print.

⁵⁹ Lewis, *supra* note 1, at 408–09. For a more detailed analysis of the competing regional economic models, see *id.* at 408–13.

⁶⁰ See Evan A. Feigenbaum, *America, Trade, and Asia*, COUNCIL ON FOREIGN RELATIONS (May 14, 2010, 2:12 PM), <http://blogs.cfr.org/asia/2010/05/14/america-trade-and-asia/> (characterizing the TPP as a “modest effort” that will not be sufficient to restore the United States’ historical economic role in Asia). Some, however, doubt whether the TPP will significantly enhance the United States’ position in Asia. See *id.*

⁶¹ See Claude Barfield & Philip I. Levy, *Tales of the South Pacific: President Obama and the Transpacific Partnership*, INT’L ECON. OUTLOOK, Dec. 2009, at 4, available at <http://www.aei.org/docLib/09-IEO-Dec-g.pdf> (suggesting that China appears to prefer the ASEAN + 3 model to an APEC formulation because APEC includes the United States and Taiwan).

⁶² *Id.* at 7 (noting that Japan’s Prime Minister, Yukio Hatoyama, has advocated for an East Asian Community that would appear to exclude the United States).

⁶³ See Association of Southeast Asian Nations, *The 23rd ASEAN Economic Ministers Meeting*, para. 3 (Oct. 7–8, 1991), available at <http://www.aseansec.org/6126.htm>. This Asia-only focus is nothing new. Originally promoted by Malaysia’s then-Prime Minister Mohamad Mahathir, the idea of an East Asian economic grouping that would exclude the United States has been around for the past two decades. See C. Fred Bergsten, *The New Asian Challenge*, INST. FOR INT’L ECON., at 2–3 (Mar. 2000), available at <http://iic.com/publications/wp/00-4.pdf>.

An expanded TPP could lead to a different path toward Asian economic integration, which would have neither ASEAN nor the three major East Asian economies as its driver, and which would instead have the United States as a central participant.⁶⁴

If the expanded TPP becomes the basis for a Free Trade Area of the Asia Pacific (FTAAP), Asian integration will likely develop along lines more similar to those envisioned (even if primarily in an aspirational sense) by the members of the Asia Pacific Economic Cooperation (APEC) than those being contemplated in the context of ASEAN-plus arrangements or an East Asian FTA. In particular, an expanded TPP would lead to a trans-Pacific integration rather than an intra-Asian integration.

The United States' decision to negotiate to join the TPP is therefore quite savvy. By joining the TPP, the United States has the potential not only to thwart efforts to shape Asian economic regionalism models that exclude it, but, if the TPP expansion is successful and continues, the United States will also be a leader and agenda-setter with respect to the parameters of a future FTAAP. Further, if the TPP grows into an FTAAP, the global economic order would also be altered. At present there are three major economic blocs—the Americas, Europe, and Asia—and the American bloc is not necessarily the most economically powerful among these.⁶⁵ An Asia-Pacific integration has the potential to alter the balance into a two-bloc model comprising Europe and the Asia-Pacific, with the latter including Asia, the United States, Oceania, and much of South America. Therefore, joining the TPP could help the United States play an active role in altering the regional power balance, thereby inserting itself into what is likely to be the more powerful of two large blocs as opposed to remaining on the wrong side of a divided Pacific.

Depending on how the expansion is structured, the TPP additionally has the potential to multilateralize some aspects of regionalism,⁶⁶

⁶⁴ Claude Barfield & Philip I. Levy, *Tales of the South Pacific: President Obama, the Trans-Pacific Partnership and U.S. Leadership in Asia*, Vox (Jan. 28, 2010), <http://www.voxeu.org/index.php?q=node/4533> (arguing that the TPP is an ideal mechanism for the United States to assert leadership in the creation of a new, inclusive Asian architecture).

⁶⁵ See John Ravenhill, *A Three Bloc World? The New East Asian Regionalism*, 2 INT'L RELATIONS OF THE ASIA PAC. 167, 170 (2002).

⁶⁶ See Ann Capling, *The Trans-Pacific Partnership*, EAST ASIA FORUM (Nov. 23, 2009), <http://www.eastasiaforum.org/2009/11/23/the-trans-pacific-partnership/>. Multilateralizing regionalism is an important goal, as it could counteract the fragmenting effects of the hundreds of FTAs currently in existence or being negotiated. Richard Baldwin et al., *Beyond Tariffs: Multilateralizing Non-Tariff RTA Commitments*, in MULTI-LATERALIZING REGIONALISM:

which would help facilitate the creation of an FTAAP. In other words, the famous “spaghetti bowl”⁶⁷ of overlapping and inconsistent FTAs proliferating the globe could be partially untangled if a large group of countries could agree to a harmonized set of commitments to which other countries could accede.⁶⁸ The TPP—and ultimately an FTAAP—has the potential to serve as a model of open regionalism⁶⁹ and a stepping stone toward multilateral trade liberalization, rather than the stumbling block that FTAs more commonly present.⁷⁰

By combining a high-standards, comprehensive trade agreement with an open accession provision and the United States as a party, the TPP has the potential to create a new paradigm for trade agreements. Rather than presenting the usual two country model in which both countries pick and choose the areas they wish to liberalize, the TPP would draw together multiple countries from both sides of the Pacific. The TPP has the potential to be far more comprehensive than the average FTA. With the United States as a party, other countries will be interested in joining the TPP, and doing so would require significant liberalization commitments. If the TPP were negotiated on these terms, it is possible—perhaps even likely—that the TPP would lead to an FTAAP.

CHALLENGES FOR THE GLOBAL TRADING SYSTEM 79–80 (Richard Baldwin & Patrick Lows, eds., 2009). This has been the subject of at least one conference: the Conference on Multilateralizing Regionalism, September 10–12, 2007 in Geneva, Switzerland, along with an associated collection of scholarly articles. See MULTI-LATERALIZING REGIONALISM, *supra*, at xiv.

⁶⁷ See JAGDISH BHAGWATI, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 2, 2–3 (AEI Press, 1995). This description of FTAs was coined by Jagdish Bhagwati. The spaghetti bowl imagery is used in particular to refer to the fact that different agreements apply different rules of origin (ROO), resulting in a highly challenging situation for would-be exporters, as they may find they need to comply with rules that are inconsistent from one importing country to another. *Id.* at 3. Inconsistent rules of origin are further fragmenting the world trading system; nevertheless, getting the WTO membership to agree to adopt a single, harmonized ROO system has not yet been possible. See generally Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT’L ECON. L. 111 (2010) (providing an analysis of ROO issues in global free trade).

⁶⁸ See John Ravenhill, *Can the TPP Resolve the ‘Noodle Bowl’ Problem?*, EAST ASIA FORUM (Nov. 26, 2009), <http://eastasiaforum.org/2009/11/26/can-the-tpp-resolve-the-noodle-bowl-problem/> (noting that if TPP expansion were successful, the agreement would have the potential to multilateralize the free trade agreements in the Asia-Pacific region).

⁶⁹ Barfield & Levy, *supra* note 64 (describing the TPP as a potential model of open regionalism).

⁷⁰ See JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 81–88 (2008); Matthew Schaefer, *Ensuring That Regional Trade Agreements Complement the WTO System: U.S. Unilateralism a Supplement to WTO Initiatives?*, 10 J. INT’L ECON. L. 585, 586 n.4 (2007).

B. *Implications for the WTO*

If the TPP does expand in the near future into a larger agreement that captures a significant percentage of trans-Pacific trade, it may impact the ability of WTO members to complete the current Doha Round of negotiations.⁷¹ The nature of this impact could be negative because the United States and other TPP members could determine that expanding the TPP is an easier and more fruitful path towards new trade liberalization gains than is the multilateral framework. On the other hand, the growth of the TPP could have a positive impact on the Doha Round. USTR Ron Kirk has indicated that he believes the TPP will complement the WTO negotiations.⁷² Although Kirk did not explain his comment, it seems feasible that he is correct. Countries that are not currently a part of the TPP discussions may fear that the world is splitting into large trading blocs from which they are currently excluded, and thus be incentivized to reinvigorate the Doha Round. In particular, India and Brazil may determine it is worth giving additional WTO concessions to refocus the United States on the WTO.

III. POTENTIAL PITFALLS FOR THE TPP

Although the USTR appears to be enthusiastically pursuing the TPP, and the other countries involved in the agreement seem to be similarly motivated, TPP expansion is far from guaranteed. There are a number of issues that must be resolved before an expanded TPP can become a reality. These issues comprise substantive obstacles in the negotiating process as well as procedural hurdles that must be addressed once an agreement is reached. Moreover, these issues will significantly affect whether the TPP will multilateralize trade among APEC members, ultimately leading to an FTAAP. Although some scholars have suggested that the United States should conclude the TPP negotiations by the time it hosts the APEC summit in November 2011,⁷³ this may be optimistic given the issues that must be resolved.

⁷¹ See Doug Palmer, *Asia Pacific Talks No Threat to DOHA: USTR Kirk*, REUTERS, Dec. 15, 2009, available at <http://www.reuters.com/article/idUSTRE5BE4BD20091215>.

⁷² *Id.*

⁷³ See C. Fred Bergsten, Peterson Inst. for Int'l Econ., *Speech at the Seventh Annual U.S. Asia Pacific Council Panel Discussion: Should APEC Focus on Trade Liberalization?* (May 6, 2010) (transcript available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=1600>).

A. Substantive Negotiating Challenges

In most FTA negotiations there are a number of issues relating to substantive coverage that pose challenges to resolve. Although each partner stands to benefit from the market access liberalization measures taken by the trading partner, each partner in turn faces domestic opposition to liberalizing its home market for goods and services produced or supplied domestically.⁷⁴ The P-4 Agreement was relatively unique in being able to overcome some of these obstacles and achieve a highly comprehensive agreement, at least with respect to trade in goods.⁷⁵ With the addition of the United States, however, the TPP negotiations are more typical of many bilateral FTA negotiations.⁷⁶ Accordingly, there are a number of potential issues regarding substantive matters within the negotiation. This section briefly discusses two of these issues: agriculture and intellectual property.

I. Agriculture

The United States has historically refused to liberalize most aspects of trade in agriculture in its FTAs,⁷⁷ yet the P-4 countries have agreed to comprehensive removal of tariffs on agricultural products.⁷⁸ How much of its agricultural sector the United States will be willing to include in its TPP commitments, is likely to be a significant issue. Roughly half of New Zealand's exports to the United States are agricultural products that the United States considers sensitive: primarily dairy, lamb, and

⁷⁴ See David A. Gantz, *The "Bipartisan Trade Deal," Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 115, 118 (2008); C. O'Neal Taylor, *Regionalism: The Second-Best Option?*, 28 ST. LOUIS U. PUB. L. REV. 155, 173-74 (2008). Both articles were published as part of a symposium entitled, "The Changing Tide of Trade: The Social, Political, and Environmental Implications of Regional Trade Agreements," hosted by the *St. Louis University Public Law Review*.

⁷⁵ See Deborah K. Elms, *From the P4 to the TPP: Explaining Expansion Interests in the Asia-Pacific*, at 6 (United Nations Econ. & Soc. Comm'n for Asia & the Pacific, Conference Paper, *Asia-Pacific Trade Economists' Conference*, 2009), available at <http://www.unescap.org/tid/artnet/mtg/Deborah%20Elms.pdf>.

⁷⁶ See Ravenhill, *supra* note 51, at 25.

⁷⁷ See Taylor, *supra* note 74, at 188. At the same time, the United States often insists on agricultural market access concessions from its trading partners. For example, the Korea—United States FTA is unlikely to be presented to Congress until Korea makes new concessions on access to its market for U.S. beef. See Gantz, *supra* note 74, at 147-48. For a discussion of the general tendency to exclude agriculture from FTAs, see Schaefer, *supra* note 70, at 588-89.

⁷⁸ See Elms, *supra* note 75, at 23 n.71. Chile only committed to removing tariffs immediately on a subset of New Zealand's dairy exports. The remaining Chilean tariffs are subject to a twelve year phase-out period. See *id.*

beef.⁷⁹ The U.S. dairy industry has already reacted with alarm to the idea of an agreement that could involve New Zealand dairy products gaining improved access to the U.S. market, and thirty senators signed a letter to USTR Ron Kirk expressing concern in this regard.⁸⁰

For New Zealand, excluding dairy from the agreement would be a very hard sell. Nevertheless, New Zealand has very little to offer the United States in exchange for including dairy. In fact, the United States may have little to gain from forming an alliance with New Zealand. The New Zealand market is already highly liberalized, so there would be only minimal gains in the form of improved market access.⁸¹ And New Zealand is a small market, currently accounting for less than .05% of U.S. exports.⁸² Thus, notwithstanding New Zealand's long-term goal of achieving an FTA with the United States, it may be that New Zealand does not have enough to offer the United States, or (admittedly less likely) that the United States' demands will result in insufficient payoffs for New Zealand.⁸³

2. Intellectual Property

A second issue that may prove challenging in the negotiations is intellectual property protection. The United States generally includes provisions in its FTAs that are referred to as "TRIPS-plus" in that they provide higher levels of protection than is required by the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.⁸⁴ This does not pose an issue for countries that already have FTAs—including TRIPS-plus provisions—with the United States—such as Australia.⁸⁵ Nevertheless, there are aspects of the Australian—United States Free Trade Agreement (AUSFTA) that are inconsistent with the United States—Singapore FTA with respect to intellectual property protection. For example, the United States—Singapore agreement does not prohibit the practice of parallel importation, whereas the AUSFTA does prohibit parallel importation.⁸⁶

⁷⁹ Ravenhill, *supra* note 51, at 25.

⁸⁰ See Dustin Ensinger, *TPP Could Cost U.S. Dairy Farmers Billions*, ECONOMY IN CRISIS (Mar. 23, 2010, 2:10 PM), <http://www.economyincrisis.org/content/tpp-could-cost-us-dairy-farmers-billions>.

⁸¹ See *id.*

⁸² Ravenhill, *supra* note 51, at 25.

⁸³ See Elms, *supra* note 75, at 22–25.

⁸⁴ See BHAGWATI, *supra* note 70, at 95.

⁸⁵ See *id.* at 80.

⁸⁶ See U.S.—Australia Free Trade Agreement art. 17.9(4), U.S.—Austl., May 18, 2004, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_up-

For a small market economy such as New Zealand, permitting parallel imports makes good economic sense; indeed, New Zealand allows parallel imports in its domestic law and has yet to agree to limit such imports in any of its FTAs.⁸⁷ Presumably the United States will want the TPP to include provisions restricting parallel imports, which will be opposed at a minimum by New Zealand and Singapore. The AUSFTA also imposes restrictions that affect how Australia purchases prescription drugs for its public health system.⁸⁸ It is likely that the United States would want New Zealand to make similar changes, which New Zealand would oppose.⁸⁹

B. Procedural Obstacles Within the United States

Even if the USTR succeeds in reaching an agreed-upon text with the other seven members of the proposed TPP expansion, it will still need for Congress to enact implementing legislation.⁹⁰ In the United States, unless a treaty is self-executing, it will not become enforceable as a matter of domestic law until it is implemented via legislation.⁹¹

Under the United States Constitution, Congress has the authority to “regulate commerce with foreign nations.”⁹² Nevertheless, Congress

load_file148_5168.pdf; US–Singapore Free Trade Agreement art. 16.7, May, 6, 2003, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf.

⁸⁷ See Elms, *supra* note 75, at 23 n.72; *Parallel Importing in New Zealand*, MINISTRY OF ECON. DEV. (Dec. 18, 2007), <http://www.med.govt.nz> (navigate to “Regulation” drop-down menu; click “International Property Policy” hyperlink; navigate to “Parallel Importing”; navigate to “Parallel Importing in New Zealand”).

⁸⁸ See BHAGWATI, *supra* note 70, at 80.

⁸⁹ See Elms, *supra* note 75, at 20 n.62. The enforcement of intellectual property rights is also likely to be an issue. Chile, Peru, Brunei, and Vietnam have all been placed on the United States’ Special 301 watch lists based on perceived deficiencies in their domestic enforcement regimes. See *id.* at 18.

⁹⁰ See IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 48–49 (7th ed. 2008).

⁹¹ See *id.* This is often referred to as a dualist approach to international and domestic law. In contrast some countries have monist systems where international legal commitments are automatically incorporated into domestic law without any need for implementing legislation. See *id.* at 31–33 (discussing monist and dualist systems). Some argue that the United States is a dualist system; others characterize it as a hybrid of both the monist and dualist approaches. See, e.g., LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 71–72 (1995); Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 *STAN. L. REV.* 529, 531 (1999). In general, however, when a treaty has terms that reflect the need for legislative action, it will not be treated as self-executing. This principle was first elaborated in *Foster & Elam v. Neilson*, 27 U.S. 253, 314 (1829).

⁹² U.S. CONST. art. I, § 8.

has on numerous occasions delegated this authority to the President.⁹³ When the President holds this authority it is referred to as “fast track authority” or “Trade Promotion Authority” (TPA).⁹⁴ TPA gives the President authority not only to negotiate trade agreements, but also to present Congress with treaty text that Congress must then either accept or reject in its entirety.⁹⁵ In other words, Congress does not have the power—when the administration is in possession of TPA—to exercise line-item vetoes, to filibuster, or to condition acceptance of the bill on amendments, riders, provisos, or other conditions.⁹⁶

The President held TPA continuously from 1974 to 1994.⁹⁷ But following the contentiousness surrounding Congressional approval of the North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreements Act of 1994—the implementing legislation for the Marrakesh Agreement creating the WTO—Congress declined to renew TPA for eight years.⁹⁸ The majority-Republican Congress finally ended the drought and granted the Bush administration TPA pursuant to the Bipartisan Trade Promotion Authority Act of 2002.⁹⁹ This Act, which expired in 2007, required the administration to engage in consultations with Congress, domestic stakeholders, and private sector advisory committees throughout the process of negotiating trade agreements.¹⁰⁰

In the past, U.S. administrations have succeeded in passing trade agreements through Congress by virtue of having TPA.¹⁰¹ It is widely recognized that in the absence of TPA, it would be extremely difficult for any trade agreement legislation to be passed, and thus difficult for treaties to come into effect.¹⁰² Without TPA, Congress would inevitably insist upon redrafting provisions of the agreement texts, and adding to and subtracting from the negotiated and agreed to obligations. The

⁹³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-59, AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY 7 (2007), available at <http://www.gao.gov/new.items/d0859.pdf> (discussing history and parameters of Trade Promotion Authority); see, e.g., Reciprocal Trade Agreements Act of 1934, 43 Stat. 943 (1934) (first delegation of Congressional authority).

⁹⁴ See Gantz, *supra* note 74, at 117.

⁹⁵ See *id.* at 131–32.

⁹⁶ See *id.*

⁹⁷ See *id.* at 130–31.

⁹⁸ Gonzalo Villalta Puig & Georgios Andreou Avgousti, “Ignite a New Era of Global Economic Growth Through Free Markets and Free Trade”: *The Rejection of Multilateral Trade Liberalisation by the National Security Strategy of the United States (2002–2006)*, 16 INT'L. TRADE L. & REG. 96, 96–97 (2010).

⁹⁹ Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–3813 (2006).

¹⁰⁰ *Id.* §§ 3804, 3812.

¹⁰¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 93, at 9.

¹⁰² See Gantz, *supra* note 74, at 153; Taylor, *supra* note 74, at 162.

other party to the agreement is unlikely to agree to renegotiate significant portions of the treaty in response to Congress's demands. Thus as a practical matter TPA is seen as all but necessary to get any trade agreements enacted.¹⁰³ Indeed, the Bush administration negotiated a number of trade agreements during its last term, including FTAs with Korea,¹⁰⁴ Panama,¹⁰⁵ and Colombia.¹⁰⁶ The Panama and Colombia agreements have not been submitted to Congress for consideration because the deals are seen as doomed in the absence of TPA.¹⁰⁷

Although TPA is of paramount importance, Congress has been unwilling to grant the authority since it expired in 2007.¹⁰⁸ Moreover, it is unlikely that Congress will grant the Obama administration TPA any time soon. Democrats in Congress are not on the whole favorably inclined toward pursuing a free trade agenda, and wish to see environmental and labor side agreements in any FTA.¹⁰⁹ Additionally, in the current political environment it is not realistic to think that Republi-

¹⁰³ See Gantz, *supra* note 74, at 122; Taylor, *supra* note 74, at 162–63. *But see* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 93, at 9.

¹⁰⁴ See Alan Beattie, *Obama Aims to Renegotiate S Korea Trade Pact*, FINANCIAL TIMES (June 26, 2010, 10:25 PM), <http://journalisted.com/alan-beattie?allarticles=yes> (navigate to article title and click hyperlink; free registration required at Financial Times website) (last visited Oct. 25, 2010). The Korea–U.S. Trade Agreement (“KORUS”) is of important economic and strategic significance for the United States’ ability to be a significant player in Asian markets and to participate in Asian economic integration efforts. See Feigenbaum, *supra* note 60. It is thus troubling that KORUS has been languishing, not presented to Congress since 2007. See *id.* Korea has not been sitting idly; in the interim it has negotiated an FTA with the European Union (although this has yet to be implemented). See *id.*; John W. Miller, *EU, Central America Reach Trade Agreement*, COSTA RICA NEWS (May 18, 2010), <http://thecostaricanews.com/eu-central-america-reach-trade-agreement/3175>. The European Union has taken advantage of the United States’ failure to implement the agreements negotiated by the Bush administration, having now negotiated FTAs with all of the United States’ pending FTA agreement partners: Colombia, Panama, and Korea. See Miller, *supra*.

¹⁰⁵ See *Panama Trade Promotion Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa> (last visited Nov. 15, 2010).

¹⁰⁶ See *Colombia FTA*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta> (last visited Nov. 15, 2010).

¹⁰⁷ See *Levin Argues Against Fast-Track Trade Authority*, CQ POLITICS (Dec. 15, 2009), available at http://www.citizenstrade.org/pdf/20091215_levinarguesagainstastrack_cqpolitics.pdf. The Bush administration signed KORUS shortly before the expiration of TPA, and thus that agreement could still be presented to Congress for an up or down vote. Nevertheless, it also has not been submitted due to strong pressures from United States interests to renegotiate commitments relating to market access for U.S. beef and auto parts. See Jeffrey J. Schott, Op-Ed., *Congress and the KORUS FTA*, KOREA TIMES (Nov. 8, 2010), available at <http://www.iiec.com/publications/opedcs/print.cfm?researchid=1706&doc=pub>.

¹⁰⁸ See *Levin Argues Against Fast-Track Trade Authority*, *supra* note 107.

¹⁰⁹ See Beattie, *supra* note 104.

cans in Congress are going to bestow any power to the Obama administration that they do not have to.

Interestingly, the USTR appears to be following the mandates of the previous grant of TPA even though there is no current authority. The USTR has been engaging in extensive consultations with Congress and interested manufacturing, farming, and other interests.¹¹⁰ It has held public question and answer sessions on the internet,¹¹¹ and has been very vocal in its efforts to consult with interested stakeholders.¹¹² Presumably this is all part of an effort to soften Congress so that it will ultimately grant TPA—even if only with respect to the TPP. If Congress grants TPA after the negotiations are largely completed—and the grant contains the same constraints on the Obama Administration that the 2002 grant contained—then the USTR has covered itself by fulfilling all required consultations. Nonetheless, there is no guarantee Congress will grant TPA. Accordingly, this remains a large obstacle.¹¹³

C. *Disagreements over the Negotiating Architecture*

An important question is whether the TPP will be structured to serve as a model for an FTAAP, or whether it will instead be based on a U.S. bilateral FTA model, which would be much less likely to grow into a larger region-wide agreement.

Following the second round of negotiations in June 2010, the USTR reported that the talks had focused on several negotiating goals,

¹¹⁰ 19 U.S.C. § 3804 (requiring the President to consult with various Congressional committees when negotiating free trade agreements regarding tariff and nontariff barriers); see *TPP Outreach and Updates*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-outreach-and-updates> (last visited Nov. 15, 2010) (describing the USTR efforts as an “unprecedented fifty-state domestic outreach strategy”).

¹¹¹ See Transcript of *USTR’s TPP Online Chat*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (May 21, 2010, 11:00 AM), <http://www.ustr.gov/about-us/press-office/blog/2010/may/ustrs-tpp-online-chat>; Transcript of *TPP Question and Answer: Colombia and TPP*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jun. 15, 2010, 7:06 PM), <http://www.ustr.gov/about-us/press-office/blog/2010/june/tpp-question-and-answer-colombia-and-tpp>; Transcript of *TPP Question and Answer: Customs*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jun. 18, 2010, 5:21 PM), <http://www.ustr.gov/about-us/press-office/blog/2010/june/tpp-question-and-answer-customs>; Transcript of *TPP Question and Answer: Legal Services*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jun. 17, 2010, 1:30 PM), <http://www.ustr.gov/about-us/press-office/blog/2010/june/tpp-question-and-answer-legal-services>.

¹¹² See Transcript of *USTR’s TPP Online Chat*, *supra* note 111.

¹¹³ See J.F. HORNBECK & WILLIAM H. COOPER, CONG. RESEARCH SERV., RL 33743, TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL 21–22 (2008) (positing that if Congress elected to grant TPA, it could do so for the limited purpose of implementing a completed WTO Doha Round set of negotiations).

including “determining the architecture for market access negotiations.”¹¹⁴ This determination will significantly impact the nature of any final agreement, and the future attractiveness of the TPP to other countries.

“Determining the architecture for market access negotiations” refers to a difference in approach between the United States, on the one hand, and New Zealand, Australia, and Singapore, on the other. Existing TPP members New Zealand and Singapore, together with the United States’ FTA partner Australia, want to negotiate a unified market access schedule.¹¹⁵ This form of schedule would entail reopening the market access schedules within the bilateral FTAs already in place among various TPP countries.¹¹⁶ Under this system, each member would have a single tariff schedule, with each concession applying to all TPP members.¹¹⁷ The unified market access schedule approach has the benefits of making it more difficult to exclude sensitive sectors and creating an agreement that is relatively straightforward for new countries to accede to, particularly if the agreement included a uniform approach to Rules of Origin (ROO).¹¹⁸ This approach would also allow TPP members to revisit the exclusions agreed to in their bilateral agreements. For example, if the approach shared by Australia, New Zealand, and Singapore were adopted, Australia would have an opportunity to attempt to negotiate to have the TPP include sugar.¹¹⁹ Thus, adopting a unified market access schedule would lead to a more comprehensive and uniform agreement than the United States’ preferred alternative.

Instead, the United States has taken the position that its negotiations should be on a bilateral basis with the TPP players with which it does not currently have FTAs: namely, New Zealand, Vietnam, and Brunei. Additionally, the United States has maintained that for those countries with which it currently has FTAs the terms of those FTAs should apply in the TPP context.¹²⁰ This would mean that the market

¹¹⁴ Press Release, *supra* note 7.

¹¹⁵ See *TPP Negotiators to Seek Market Access Structure Deal at August Meeting*, 28 Inside U.S. Trade Online (Inside Wash. Publishers) (June 25, 2010), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-06/25/2010/tpp-negotiators-to-seek-market-access-structure-deal-at-august-meeting/menu-id-710.html>.

¹¹⁶ See *id.*

¹¹⁷ See *TPP Negotiators Unable to Reach Consensus on Key Structural Issues*, 28 Inside U.S. Trade Online (Inside Wash. Publishers) (June 18, 2010), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-06/18/2010/tpp-negotiators-unable-to-reach-consensus-on-key-structural-issues/menu-id-710.html>.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *TPP Negotiators to Seek Market Access Structure Deal at August Meeting*, *supra* note 115.

access schedules in the bilateral agreements would not be reopened but would instead be kept intact within the TPP.¹²¹ Such an approach would have significant ramifications for the participating countries. For Australia, it would mean that the United States-required carve out of sugar in the AUSFTA would remain in effect.¹²² For New Zealand, it would almost certainly mean having to agree to exclusions—or at a minimum very long phase-ins—for dairy products.¹²³ This is in stark contrast to the extant TPP agreement, which provided for the majority of tariffs to be removed entirely upon the TPP’s entry into force, and for any remaining tariffs to be reduced to zero by 2017.¹²⁴ Indeed, in general, the United States’ proposed approach would likely lead to a lower level of market access than if the negotiations began from the standpoint of creating an across-the-board high-standards agreement.

This approach would probably make other countries less likely to want to join the TPP agreement. It is easier to negotiate to join a single agreement than to have to negotiate separate bilateral arrangements with each partner.¹²⁵ Ironically, the United States’ negotiating stance will make it less likely to achieve its goal of forming an agreement that will expand into an APEC-wide FTA. In fact, what would arguably exist under the U.S. approach would not be a single unified FTA, but rather a series of spoke-and-wheel bilateral arrangements existing under a veneer of commonality.¹²⁶

In the context of multiple bilateral negotiations, one has to worry that the United States will not pursue the “high-standard, comprehensive agreement”¹²⁷ it purports to desire, but will instead succumb to domestic pressures and seek significant exclusions from some of the bilateral relationships. Indeed, the likely outcome if the United States

¹²¹ See *id.*

¹²² See *TPP Countries Examining New Compromise Idea For Market Access Talks*, 28 Inside U.S. Trade Online (Inside Wash. Publishers) (Aug. 6, 2010), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-08/06/2010/tpp-countries-examining-new-compromise-idea-for-market-access-talks/menu-id-710.html>.

¹²³ See *id.*

¹²⁴ See N.Z. MFAT 2005 REPORT, *supra* note 23.

¹²⁵ See *TPP Negotiators to Seek Market Access Structure Deal at August Meeting*, *supra* note 115 (noting that the parties have recently agreed that all of the FTAs currently in effect among the TPP parties should co-exist alongside the TPP).

¹²⁶ See Ann Capling, *supra* note 36 (suggesting that an expanded TPP might not be a genuine region-wide agreement).

¹²⁷ *USTR Fact Sheet: Trans-Pacific Partnership*, *supra* note 10 (“The United States will engage with an initial group of seven like-minded countries . . . to craft a platform for a high-standard, comprehensive agreement—one that reflects U.S. priorities and values—with these and additional Asia-Pacific partners.”).

approach prevails is that the United States will negotiate bilateral agreements with New Zealand, Vietnam, and Brunei that are modeled on previous U.S. FTAs.¹²⁸

In a recent report on trade agreements, the Government Accountability Office notes that “[o]ther countries that negotiate FTAs frequently exclude sensitive industries or issues. Some trade experts argued that USTR’s pursuit of comprehensive agreements limits potential FTA partners since a number of larger economies are unwilling to enter into such comprehensive negotiations.”¹²⁹ Although this is undoubtedly accurate—for example, it would be difficult for the United States to achieve an FTA with Japan because of the exclusions Japan would presumably demand—it is equally true of the United States, which generally insists upon exclusions—or at a minimum, lengthy implementation periods—for various agricultural products.¹³⁰ Therefore, it may well be that the TPP will merely appear on the surface to be a new paradigm, but will in fact represent business as usual. This would be a mistake on the United States’ part. Although it would be the easier negotiating path for the United States, it would be far less likely to achieve the strategic goals that made the TPP an attractive proposition in the first place.

For the TPP to serve as a model for a future FTAAP, it will have to be an agreement that other countries are interested in joining. The TPP agreement is not the only option available for Asia-Pacific regionalism, and if the TPP is not sufficiently attractive, one of the other visions for regional economic integration may instead fill the role as FTAAP model. China would like to see ASEAN + 3 serve this function, particularly because it would exclude the United States.¹³¹ Japan prefers

¹²⁸ See *TPP Countries Examining New Compromise Idea for Market Access Talks*, *supra* note 122; see also Meredith Kolsky Lewis, *The Free Trade Agreement Paradox*, 21 N.Z. UNIV. L. REV. 554, 564–65 (2005). In the case of New Zealand, the AUSFTA is the most likely model, both because it is relatively recent and because this is the liberalization benchmark New Zealand would likely seek, as its export portfolio is similar to Australia’s in a number of respects. Lewis, *supra*, at 564. Although not nearly as ambitious or desirable as an agreement that fully liberalizes trade in goods, New Zealand would at least be brought back onto an even footing with Australia in competing in the United States market. *Id.* at 564. This recalibrating of comparative advantage—sometimes called domino regionalism or the “me too” effect—is often a motivation for entering into FTAs. *Id.* at 564–65.

¹²⁹ GOV’T ACCOUNTABILITY OFFICE, *supra* note 93, at 18.

¹³⁰ See, e.g., North American Free Trade Agreement annex 703.3, U.S.–Can.–Mex., Dec. 17, 1992, available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtplID=ALL> (United States claiming special safeguard goods exempt from tariff reduction, including tomatoes, onions, shallots, eggplants, “chili” peppers, squash, and watermelon).

¹³¹ See Vincent Wei-cheng Wang, *China-ASEAN Free Trade Area: A Chinese “Monroe Doctrine” or “Peaceful Rise”?*, CHINA BRIEF, Aug. 20, 2009, at 9, 10–11 (discussing China’s trade liberalization and economic development in Southeast Asia).

ASEAN + 6 because it would include more economies to counterbalance China, and would still exclude the United States.¹³² The TPP needs to be more attractive to potential partners than ASEAN + 3, ASEAN + 6, or any other potential regional models. If the TPP is cleaner and more comprehensive, it will be a more attractive model because it will be relatively simple to incorporate other countries into the partnership. On the other hand, if bilateral agreements must be negotiated between every set of partners that do not already have a bilateral FTA, the negotiations will be highly burdensome and the outcomes will be less attractive. Thus the United States' approach in the June negotiations is worrisome, and suggests that the USTR does not have a clear idea of what its negotiation goals are, or should be.¹³³

More recently, the United States has signaled it may be willing to compromise on this important negotiating issue. Following the June negotiations, Australia, New Zealand, and Singapore have continued, in informal discussions, to push for multilateral market access negotiations.¹³⁴ Sources indicate that the parties are now searching for a middle ground, and that there is disagreement within the USTR regarding the best approach to pursue.¹³⁵ Reports from the subsequent round of intercessional talks in Peru are that this issue remains unresolved.¹³⁶ Hopefully USTR officials will reach agreement and recognize that a significant value of the TPP would be that it provides a leadership role for the United States in an Asia-Pacific economic integration agreement, and that this role is unlikely to materialize if the TPP is merely an assemblage of bilateral agreements that are insufficiently comprehensive.

CONCLUSION

The Obama administration is wise to negotiate for a Trans-Pacific Partnership. Such an agreement has the potential to re-assert the United States' position as a leader and economic participant on both sides of the Pacific. It also represents the best chance, among the options otherwise in play, for the United States to play a role in shaping a future Free Trade Area of the Asia-Pacific (FTAAP). The TPP agreement has the potential to act as a building block toward further liberalization,

¹³² Masahiro Kawai Dean & Ganeshan Wignaraja, *ASEAN+3 or ASEAN+6: Which Way Forward?*, ASIAN DEV. BANK INST., at 10 (ADB Discussion Paper No. 77, 2007), available at http://www.wto.org/english/tratop_e/region_e/con_sep07_e/kawai_wignaraja_e.pdf.

¹³³ See *TPP Negotiators to Seek Market Access Structure Deal at August Meeting*, *supra* note 115.

¹³⁴ See *TPP Countries Examining New Compromise Idea for Market Access Talks*, *supra* note 122.

¹³⁵ See *id.*

¹³⁶ See *TPP Members Examine Proposals in Peru, Do Not Reach Final Agreements*, *supra* note 7.

and to multilateralize some of the fragmentation resulting from the panoply of FTAs today.

If a TPP agreement is reached in the form of one unified agreement with common market access schedules, it will have a greater potential to attract more participants and meaningfully reduce trade barriers among a growing circle of nations. Nevertheless, there is a significant risk that the TPP will not live up to its potential. The more the TPP looks like a series of bilateral U.S. FTAs with exclusions for products the United States considers sensitive, the less likely the TPP will attract other countries to accede. Thus, the United States must carefully assess its goals for the TPP. Moreover, the United States must be careful not to shoot itself in the foot by following a “business as usual” approach, if it truly intends to create a high-standards agreement that will be a model for an FTAAP. The traditional U.S. FTA model is not as likely as the model advocated by Australia, New Zealand, and Singapore, to achieve the result the USTR claims to be pursuing. Nonetheless, it will be surprising if the United States agrees to diverge from its previous negotiating strategies and assent to the model advocated by Australia, New Zealand, and Singapore.

There are a number of impediments that may torpedo the TPP agreement before it is concluded, and other factors that could render any agreement of no more significance than any other U.S. FTA. Nevertheless, the TPP agreement has the *potential* to become a new paradigm for trade agreements, to help the United States re-assert its position in the Asia-Pacific, and to begin the process of defragmenting international trade. The potential payoffs are significant and important: hopefully the United States can resist the temptation to pursue “business as usual”—an approach that would actually undermine its strategic objectives—and instead take the necessary steps to achieve those goals.