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ARTICLE

TPP AND TRANS-PACIFIC PERPLEXITIES

*Peter K. Yu**

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INTRODUCTION

In the past few years, the United States has been busy negotiating the Trans-Pacific Partnership (“TPP”) Agreement with countries in the Asia-Pacific region. These countries include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. As Ronald Kirk, then-United States Trade Representative (“USTR”), declared when the negotiations began in Melbourne, Australia:

Trans-Pacific Partnership negotiations offer a unique opportunity to shape a high-standard, broad-based regional pact. In line with the President’s goal of supporting two million additional American jobs through exports, a robust

* Copyright © 2014 Peter K. Yu. Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School. Earlier versions of this Article were presented at the “Trade and Transparency in the Internet Age” Conference at Yale Law School and “The Trans Pacific Partnership Agreement: Impact and Implications” Workshop at the Faculty of Law, Chinese University of Hong Kong, and as a public lecture at the School of Law at Xiamen University in China. The Article also benefits from the insights provided by a briefing meeting with the negotiators of the Trans-Pacific Partnership Agreement during the 14th negotiating round in Leesburg, Virginia. The Author is grateful to Sean Flynn, Margot Kaminski, Lin Xiuqin, and Bryan Mercurio for their kind invitations and the other participants of these events for valuable comments, suggestions, and helpful exchanges.

TPP agreement would expand our exports to one of the world's fastest-growing regions. Our team's aim is to achieve the biggest economic benefits for the American people, and these negotiators will be working to set a new standard for 21st century trade pacts.¹

The TPP began as a quadrilateral agreement between Brunei Darussalam, Chile, New Zealand, and Singapore known as the Trans-Pacific Strategic Economic Partnership Agreement, or more commonly as the "P4" or "Pacific 4."² As Meredith Lewis recounted:

[The negotiations were initially] launched by Chile, New Zealand and Singapore at the APEC [Asia Pacific Economic Cooperation Forum] leaders' summit in 2002. These original negotiations contemplated an agreement amongst the three participating countries, to be known as the Pacific Three Closer Economic Partnership (P3 CEP). However, Brunei attended a number of rounds as an observer, and ultimately joined the Agreement as a 'founding member'. The 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 2005.³

In March 2010, the TPP negotiations began among Australia, Peru, Vietnam, the United States, and the P4 members for an expanded agreement.⁴ Since then, Malaysia, Canada, Mexico, and Japan have joined the negotiations.⁵

1. Press Release, Office of the U.S. Trade Representative [USTR], USTR Begins TPP Talks in Australia (Mar. 15, 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/march/ustr-begins-tpp-talks-australia> [hereinafter TPP Launch Press Release].

2. Trans-Pacific Strategic Economic Partnership Agreement, Brunei-Chile-N.Z.-Sing., July 18, 2005, 2592 U.N.T.S. 225.

3. Meredith Kolsky Lewis, *Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities*, 4 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 401, 403–04 (2009).

4. TPP Launch Press Release, *supra* note 1.

5. Press Release, Office of the USTR, Statement of the Ministers and Heads of Delegation for the Trans-Pacific Partnership Countries (Feb. 25, 2014), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2014/February/Statement-of-Ministers-and-Heads-of-Delegation-for-TPP-countries>.

Although it remains unclear which of the nearly thirty chapters⁶—or, more importantly, which specific provisions in those chapters—will be included in the final text of the TPP Agreement, the negotiations have been quite controversial. In addition to the usual concerns about having high standards that are heavily lobbied by industries and arguably inappropriate for many participating countries, the TPP negotiations have been heavily criticized for their secrecy and lack of transparency, accountability, and democratic participation.⁷ The draft text of the TPP intellectual property chapter, for example, was hitherto available only through WikiLeaks.⁸ Since then, the TPP chapter on environmental standards has also been publicly leaked.⁹

This Article does not seek to continue this line of criticism, although transparency, accountability, and democratic participation remain highly important. Nor does the Article aim to explore the agreement's implications for each specific trade sector, which have already received book-length treatments.¹⁰ Instead, this Article focuses on the ramifications of the exclusion of four different parties or groups of parties from the TPP negotiations: (1) China; (2) BRICS and other emerging economies; (3) Europe (including members of the European Union and other countries in the region such as Switzerland);

6. Deborah Kay Elms, *The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379, 384 (2013) [hereinafter Elms, *TPP Trade Negotiations*].

7. See, e.g., Letter from Prof. David S. Levine et al. to Ron Kirk, USTR (May 9, 2012), available at <http://infojustice.org/archives/21137>. In the interest of full disclosure, the Author has signed on to this letter.

8. James Love, *KEI Analysis of Wikileaks Leak of TPP IPR Text, from August 30, 2013*, KNOWLEDGE ECOLOGY INT'L (Nov. 13, 2013), <http://keionline.org/node/1825>.

9. *Wikileaks Releases TPP Environmental Chapter; Once Again Shows Why Negotiators Wanted Details Hidden*, TECHDIRT (Jan. 15, 2014, 11:02 AM), <http://www.techdirt.com/articles/20140115/07432625883/wikileaks-releases-tpp-environmental-chapter-once-again-shows-why-negotiators-wanted-details-hidden.shtml>.

10. See, e.g., NO ORDINARY DEAL: UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT (Jane Kelsey ed., 2010) [hereinafter NO ORDINARY DEAL]; JEFFREY J. SCHOTT ET AL., UNDERSTANDING THE TRANS-PACIFIC PARTNERSHIP (2012); TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (Tania Voon ed., 2014) [hereinafter TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION]; THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT (C.L. Lim et al. eds., 2012) [hereinafter TRANS-PACIFIC PARTNERSHIP].

and (4) civil society organizations. Targeting these “TPP outsiders” and using illustrations from the intellectual property sector and the larger trade context,¹¹ this Article seeks to highlight the perplexities created by the TPP negotiations. It cautions policymakers, commentators, and the public at large against the negotiations’ considerable and largely overlooked costs.

I. CHINA

As far as “TPP outsiders” are concerned, the first country that comes to mind is China. The exclusion of this country has raised a wide array of questions: Should the TPP be used to serve not only economic goals but also noneconomic goals? What role would the exclusion of China play in the TPP negotiations? Would all negotiating parties be better off with such exclusion? Or would such exclusion make the regional pact less valuable and less sustainable in the long run? If so, should the TPP negotiating parties bring China into the fold to provide additional trade benefits? Would the inclusion of the country create an additional threat to the weaker negotiating parties? Or would such inclusion help them resist the demands of the United States, Japan, and other major trading powers?¹²

When the TPP is criticized for being used to isolate or contain China, two rebuttals are usually offered. The first one, which is rather defensive, points out that, even though the TPP negotiations have excluded China, the negotiating parties have actively engaged the country in other fora at both the multilateral and nonmultilateral levels. Consider, for example,

11. Intellectual property remains one of the more sensitive areas in the TPP negotiations, along with sugar, dairy, and textiles. See Elms, *TPP Trade Negotiations*, *supra* note 6, at 384.

12. Simon Tay noted China’s importance to its Asian neighbors:

[W]hile many talk about Asians rebalancing their economy to focus more on regional and domestic consumption rather than depending on the American consumer, the first alternative market they usually look to is that of China. If China keeps growing over the medium to longer run, this will help not only its own people but many more across Asia, and attract more and more of them to China.

SIMON TAY, *ASIA ALONE: THE DANGEROUS POST-CRISIS DIVIDE FROM AMERICA* 49 (2010).

the United States' engagement with China. Since 2006, the two countries have engaged in the high-profile US-China Strategic and Economic Dialogue.¹³ For more than three decades, China and the United States have also had regular meetings through the US-China Joint Committee on Commerce and Trade (JCCT), which "was established in 1983 as a forum for high-level dialogue on bilateral trade issues and a vehicle for promoting commercial relations."¹⁴

Although this rebuttal effectively denies the existence of an overarching US foreign policy toward isolating or containing China, it speaks very little to the motives behind the TPP negotiations. Given China's current position as the world's second largest economy, it is virtually impossible to imagine the United States and other TPP negotiating parties not having any active and continuous engagement with the country. Such engagement is also badly needed in sensitive noneconomic matters such as nuclear nonproliferation and peace-keeping operations, not to mention China's veto power in the UN Security Council.

Thus, the important question here is not whether other international discussions are still being held between China and the TPP negotiating parties. Those discussions will be held regardless. Rather, the question should be why the TPP negotiations have excluded China when countries are already very eager to engage the country in international discussions. More specifically, what are the motives behind such exclusion?

The second rebuttal suggests that the TPP's goals have been misunderstood by many, including those in China. As this counterargument goes, the plan of the TPP is not to isolate or

13. The US-China Strategic and Economic Dialogue was originally established by the Bush administration in 2006 as the US-China Strategic Economic Dialogue. See JOHN NAISBITT & DORIS NAISBITT, CHINA'S MEGATRENDS: THE 8 PILLARS OF A NEW SOCIETY 157 (2010); see also Bonnie S. Glaser, *The Diplomatic Relationship: Substance and Process*, in TANGLED TITANS: THE UNITED STATES AND CHINA 151, 158–61 (David Shambaugh ed., 2012) [hereinafter TANGLED TITANS] (discussing the US-China Strategic and Economic Dialogue).

14. *US-China Joint Commission on Commerce and Trade (JCCT)*, INT'L TRADE ADMIN., <http://www.mac.doc.gov/china/JCCTforweb.htm> (last visited Feb. 12, 2014).

contain the country, but rather to integrate it to the larger international economy.¹⁵

At the moment, China does not possess the necessary conditions to be further integrated¹⁶ into what the USTR referred to as “a high-standard, 21st-century [trade] agreement.”¹⁷ As a result, the existing negotiating parties, many of which have similar economic, social, and technological conditions, have to negotiate first. The plan, however, is to add China and other countries at a later point in time when they become ready. Even if China eventually decides not to join the regional pact, a “TPP first, China later” process would still

15. See Hillary Rodham Clinton, Sec’y of State, Remarks at Singapore Management University (Nov. 17, 2012), *available at* <http://iipdigital.usembassy.gov/st/english/texttrans/2012/11/20121117138825.html> (“We welcome the interest of any nation willing to meet 21st century standards as embodied in the TPP, including China.”); see also SCHOTT ET AL., *supra* note 10, at 58 (“We see little evidence to support the notion that China is being excluded as part of a broader containment strategy.”); Ann Capling & John Ravenhill, *The TPP: Multilateralizing Regionalism or the Securitization of Trade Policy*, in *TRANS-PACIFIC PARTNERSHIP*, *supra* note 10, at 279, 293 (noting the risk of the “TPP becom[ing] hostage to perceptions that it is part of a US foreign policy strategy to contain China”). As Jeffrey Schott, Barbara Kotschwar, and Julia Muir observed:

The containment thesis falls flat for several reasons. First, and most obviously, a trade agreement simply cannot “contain” a large country, either economically or politically. Second, US officials need a cooperative China to confront the myriad problems facing the world economy and the security challenges posed by Iran and North Korea as new and aspiring nuclear nations in Asia. The United States and China need to work together and therefore must manage the inevitable frictions that arise as the breadth and scope of their commercial relations expand. Third, no one else in Asia wants to contain China either. The trade and investment integration in the Asia-Pacific region achieved over the past few decades benefits all the TPP participants, even as it poses competitiveness challenges for their manufacturing industries. The proper response is to use trade arrangements, in conjunction with domestic economic reforms, to boost productivity of local industry and thereby be better positioned to compete against Chinese firms at home and abroad.

SCHOTT ET AL., *supra* note 10, at 58.

16. See SCHOTT ET AL., *supra* note 10, at 58 (noting that “China is not ready to implement and enforce the types of obligations under construction in the TPP negotiations”).

17. Press Release, Office of the USTR, USTR Statement Regarding the Trans-Pacific Partnership Negotiations (Sept. 5, 2011), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/september/ustr-statement-regarding-trans-pacific-partnersh>.

benefit the United States and other negotiating parties. As President Barack Obama recently acknowledged, “if we can get a trade deal with all the other countries in Asia that says you’ve got to protect people’s intellectual property[,] that will help us in our negotiations with China.”¹⁸

Moreover, it is not unusual for like-minded countries to band together to develop higher trade standards. To be certain, commentators have widely criticized the increased fragmentation of the international trading system brought about by bilateral, plurilateral, and regional trade agreements.¹⁹ For example, Pascal Lamy, the Director-General of the World Trade Organization (“WTO”), noted that “proliferation is breeding concern—concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations.”²⁰ Likewise, Francis Gurry, the then-Director General of the World Intellectual Property Organization (“WIPO”), lamented how the negotiating parties of the Anti-Counterfeiting Trade Agreement (“ACTA”)²¹ had “tak[en] matters into their own hands to seek solutions outside of the multilateral system to the detriment of inclusiveness of the present system.”²²

18. President Barack Obama, Press Conference by the President, WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2013/10/08/press-conference-president> (Oct. 8, 2013); see also Capling & Ravenhill, *supra* note 15, at 292 (“Obama identified the TPP as a ‘potential model’ for the entire region, thus melding together US business interests and foreign policy interests to put pressure on China and others.”).

19. See generally Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596–600 (2007) (discussing the growing “proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries”); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 13–21 [hereinafter Yu, *International Enclosure*] (discussing the development of the “international intellectual property regime complex”).

20. Pascal Lamy, Dir.-Gen., World Trade Org., Opening Remarks at the Conference on “Multilateralizing Regionalism” in Geneva (Sept. 10, 2007), available at http://www.wto.org/english/news_e/sppl_e/sppl67_e.hun.

21. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011) [hereinafter ACTA].

22. Catherine Saez, *ACTA a Sign of Weakness in Multilateral System, WIPO Head Says*, INTELL. PROP. WATCH (June 30, 2010, 6:18 PM), <http://www.ip-watch.org/weblog/2010/06/30/acta-a-sign-of-weakness-in-multilateral-system-wipo-head-says/>.

Nevertheless, the establishment of bilateral, plurilateral, and regional trade agreements can result in more harmonized standards if these agreements are eventually consolidated into what commentators once described as “TRIPS II”²³—referring to a potential major revision of the Agreement on Trade-Related Aspects of Intellectual Property Rights²⁴ (“TRIPS Agreement”). In the TPP context, greater harmonization can also occur if Asia-Pacific regionalism is eventually multilateralized.²⁵

In general, nonmultilateral agreements are likely to be consolidated if they provide enough incentives for outsiders to join at later stages. As Ruth Okediji pointed out, countries may seek to “consolidate and (perhaps improve) the gains from bilateralism” once they have developed a “network of bilateral agreements [that] is sufficiently dense” for that purpose.²⁶ Cho Sungjoon concurred: “[R]egionalism may contribute to multilateralism under certain circumstances through a ‘laboratory effect’. After experiencing trial and error as well as learning-by-doing in the regional level, countries may feel confident in ratcheting these regional initiatives up to the multilateral forum.”²⁷

The negotiation of many key international agreements, in fact, began with mini-negotiations among a small group of key, and often likeminded, players before the negotiations were finally extended to other members of the international community. A case in point is the negotiation of the TRIPS Agreement, which began with trilateral discussions among the

23. See, e.g., DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 48 (2d ed. 2003); Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 98 AM. SOC’Y INT’L L. PROC. 213, 217 (2004); Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 21 (2004).

24. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement].

25. See Capling & Ravenhill, *supra* note 15, at 280 (noting “the multilateralization of regionalism in the Asia-Pacific”).

26. Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 143 (2004).

27. Cho Sungjoon, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT’L ECON. L. 219, 238 (2004).

European Communities, Japan, and the United States.²⁸ Another good, but much earlier, example is the establishment of the Paris Convention for the Protection of Industrial Property²⁹ and the Berne Convention for the Protection of Literary and Artistic Works.³⁰ As Bryan Mercurio recounted in regard to these two cornerstone agreements:

By the mid-1800s, . . . trading nations had created a complex web of agreements in which [most-favoured-nation and national treatments] applied bilaterally. When the “spaghetti bowl” agreements became unmanageable, practitioners and government[s] realized the rights needed to be formally adopted in an international framework. Such efforts built upon the bilateralism by filling gaps and providing coherence to [intellectual property rights]. This process culminated in the Paris Convention . . . and the Berne Convention³¹

To a great extent, bilateral, plurilateral, and regional trade agreements have been used as “building blocks.” For example,

28. See generally SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 96–120 (2003) (recounting the trilateral discussions among the United States, the European Union, and Japan).

29. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1538, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

30. Berne Convention for the Protection of Literary and Artistic Works app., Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised at Paris July 24, 1971).

31. Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 217 (Lorand Bartels & Federico Ortino eds., 2007). Jagdish Bhagwati coined the term “spaghetti bowl.” Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995). This term refers to “a mish-mash of overlapping, supporting, and possibly conflicting, obligations.” Simon Lester & Bryan Mercurio, *Introduction to BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES* 1, 2 (Simon Lester & Bryan Mercurio eds., 2009) [hereinafter BRTA CASE STUDIES]. In the Asian context, the Asian Development Bank and other commentators have used the term “noodle bowl” instead. Wang Jiangyu, *Association of Southeast Asian Nations–China Free Trade Agreement*, in BRTA CASE STUDIES, *supra*, at 192, 224 [hereinafter Wang, *ACFTA*]; Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 978 (2011); Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism* (Asian Dev. Bank, Working Paper on Regional Economic Integration No. 7, 2007), available at <http://www.adb.org/documents/papers/regional-economic-integration/WP07-Baldwin.pdf>; Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends and Challenges* 3 (Asian Dev. Bank, Working Paper No. 144, 2009), available at <http://www.adb.org/documents/WorkingPapers/2010/Economics-WP226.pdf>.

Jason Kearns found the United States–Morocco Free Trade Agreement reflecting “a ‘building block’ approach: first ensuring that countries accede to the WTO, then negotiating trade and investment agreements with individual countries in the region (such as the Agreement with Morocco), and finally reaching a comprehensive United States–Middle East Free Trade Area.”³² The TPP can also be seen “as a building block towards a Free Trade Area of the Asia-Pacific [FTAAP]”³³—a concept APEC studied in 2006 and an agreement it pledged to create in 2009.³⁴ If created, the FTAAP is likely to provide considerable trade and nontrade benefits to both the Asia-Pacific region and the global economy.³⁵

32. Jason Kearns, *United States–Morocco Free Trade Agreement*, in *BRTA CASE STUDIES*, *supra* note 31, at 144, 146; *see also* Chia Siow Yue & Hadi Soesastro, *ASEAN Perspective on Promoting Regional and Global Freer Trade*, in *AN APEC TRADE AGENDA? THE POLITICAL ECONOMY OF A FREE TRADE AREA OF THE ASIA-PACIFIC* 190, 198 (Charles E Morrison & Eduardo Pedrosa eds., 2007) [hereinafter *AN APEC TRADE AGENDA?*] (“The Singapore government views FTAs as building blocks towards global and APEC freer trade. Formation of bilateral FTAs among like-minded partners is seen as a way to avoid the problem in which the pace of trade liberalization is held back unnecessarily.”).

33. Jeffrey J. Schott & Julia Muir, *US PTAs: What’s Been Done and What It Means for the TPP Negotiations*, in *TRANS-PACIFIC PARTNERSHIP*, *supra* note 10, at 45, 61. Meredith Lewis recounted the origin of the FTAAP:

In 1994, the APEC membership held its annual meeting in Bogor, Indonesia and adopted the Bogor Goals, which included the objective of achieving free and open trade and investment amongst developed APEC members by 2010, and developing country members by 2020. Although this Bogor Goal has yet to be fully realized, APEC has continued to strive towards this objective. And consistent with the desire for free trade within APEC, in 2006 APEC announced a study into the prospect of a [FTAAP], with later pronouncements endorsing an FTAAP as a goal.

Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 359, 362 (2013) [hereinafter Lewis, *TPP and RCEP*]. For an excellent collection of articles discussing the APEC trade agenda and the development of the FTAAP, *see generally* *AN APEC TRADE AGENDA?*, *supra* note 32.

34. *See* Meredith Kolsky Lewis, *Achieving a Free Trade Area of the Asia-Pacific: Does the TPP Present the Most Attractive Path?*, in *TRANS-PACIFIC PARTNERSHIP*, *supra* note 10, at 223, 223 [hereinafter Lewis, *Achieving a FTAAP*].

35. According to Fred Bergsten, the FTAAP could provide “the best, or perhaps only, way” to:

- catalyse a substantively successful Doha Round;
- offer an alternative “Plan B” to restore the momentum of liberalization if Doha does falter badly;

Thus, if the TPP's ultimate goal is to develop a treaty that requires higher standards than what the WTO currently requires, it makes sense to exclude China from the negotiations. To begin with, China continues to struggle with a wide variety of internal problems despite having joined the international trading body in December 2001.³⁶ To date, these problems have included "decreasing control by the state, decentralization of the central government, significant losses suffered by inefficient state-owned enterprises, the widening gap between the rich and the poor and between the urban and rural areas, massive urban migration, widespread unemployment, corruption, and growing unrest in both the cities and the countryside."³⁷ Given the scale and persistence of these problems, it is no surprise that China thus far has kept a rather low profile in the WTO—or for that matter other intergovernmental organizations.³⁸ As Henry Gao explained:

-
- prevent a further, possibly explosive, proliferation of bilateral and sub-regional PTAs that create substantial new discrimination and discord within the Asia-Pacific region;
 - avoid renewed risk of "drawing a line down the middle of the Pacific" as East Asian, and perhaps Western Hemisphere, regional initiatives that APEC was created to foster;
 - channel the China-U.S. economic conflict into a more constructive and less confrontational context that could defuse at least some of its attendant tension and risk; and
 - revitalize APEC itself, which is now of enhanced importance because of the risks of Asia-Pacific and especially China-U.S. fissures.

C. Fred Bergsten, *A Free Trade Area of the Asia-Pacific in the Wake of the Faltering Doha Round: Trade Policy Alternatives for APEC*, in AN APEC TRADE AGENDA?, *supra* note 32, at 15, 32–33.

36. For a timely collection of articles discussing China's performance in its first decade in the WTO, see generally CHINA AND GLOBAL TRADE GOVERNANCE: CHINA'S FIRST DECADE IN THE WORLD TRADE ORGANIZATION (Zeng Ka & Liang Wei eds., 2013).

37. Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 3 (2003) (remarks of the Author).

38. See Henry S. Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. Y.B. INT'L L. 41, 69 (2007) [hereinafter Gao, *China's Participation in the WTO*] ("Be it in the informal green room meetings, the formal meetings of the various committees and councils or the grand sessions of the Ministerial Conferences, China has generally been reticent."); Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 229–37 (2011) [hereinafter Yu, *Middle Kingdom*] (discussing China's low profile in the international intellectual property arena).

As a newly-acceded Member, China is required to undertake a lot of commitments, many of which are more onerous than those of existing WTO members. It is already a humongous challenge for China to try to implement these commitments. After having been in the spotlight for fifteen years, what China needs now is some quiet breathing space. Shouldering a leadership role would put China back on the front stage again and encourage other Members to pressure China to make more concessions.³⁹

Moreover, the experience in the Doha Development Round of Trade Negotiations (“Doha Round”) has shown that China is unlikely to quickly support standards that exceed what the WTO presently requires.⁴⁰ China has also been the respondent in a growing number of WTO complaints, on issues ranging from intellectual property enforcement to duties on steel products to exports of rare earths.⁴¹ Thus, if including China in the TPP negotiations would slow down the discussions or create deadlocks similar to what the Doha Round now experiences, it makes great strategic sense to exclude China from the negotiations—or, at least, from the initial stages of these negotiations.

Such exclusion is particularly important, considering the significant leverage China can derive from its economic strength and vast market. It is also badly needed considering that the

39. Gao, *China's Participation in the WTO*, *supra* note 38, at 70.

40. See TRIPS Council, *Minutes of Meeting ¶¶ 248–63*, IP/C/M/63 (Oct. 4, 2010) (reporting China's criticism of the TRIPS-plus enforcement standards established by ACTA and other bilateral and regional trade agreements); Tu Xinquan, *China's Position and Role in the Doha Round Negotiations*, in *CHINA AND GLOBAL TRADE GOVERNANCE: CHINA'S FIRST DECADE IN THE WORLD TRADE ORGANIZATION*, *supra* note 36 at 167 (noting that “some Members and observers claim that China is the root cause of the WTO's Doha fiasco”); Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 514–15 (2011) (recounting China's strong opposition to enforcement-related discussions at the TRIPS Council).

41. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009); Panel Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R (June 15, 2012); Appellate Body Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R (Oct. 18, 2012); Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R (Mar. 26, 2014).

United States and other developed and like-minded countries are now in need of an alternative international forum. As Mitsuo Matsushita, a former member of the WTO Appellate Body, reminded us, “the power relationship in the WTO has changed, that is, the majority of WTO members today are developing countries and they have been successful in rallying their forces to act as countervailing powers *vis-à-vis* the hegemony of developed-country Members, such as the United States and the European Union.”⁴²

Although good policy arguments exist to support the exclusion of China from the TPP negotiations, especially when the focus is on the short term, such exclusion is likely to significantly curtail the agreement’s long-term regional impact. In fact, if the TPP negotiating parties had made a conscious and determined choice to exclude China from the negotiations, it is unclear how they could now induce China to join the regional pact.⁴³ As I noted in earlier articles in the context of ACTA, another plurilateral agreement set up with the ill-advised “country club” approach,⁴⁴ it is instructive to compare joining that agreement with joining the WTO, a multilateral trade club to which China acceded more than a decade ago.

In the 1990s and early 2000s, China was very eager to join the WTO and accede to the TRIPS Agreement, even though it had to revamp a wide array of laws and regulations and agree to high WTO-plus standards.⁴⁵ As Samuel Kim observed at that

42. Mitsuo Matsushita, *Japanese Policies Toward East Asian Free Trade Agreements: Policy and Legal Perspectives*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 41, 42 (Ross Buckley et al. eds., 2008) [hereinafter CHALLENGES TO MULTILATERAL TRADE].

43. *But cf.* Lewis, *TPP and RCEP*, *supra* note 33, at 372–74 (discussing China’s statement of interest in regard to the TPP).

44. For discussions of this approach, see Daniel Gervais, *Country Clubs, Empiricism, Blogs and Innovation: The Future of International Intellectual Property Norm Making in the Wake of ACTA*, in TRADE GOVERNANCE IN THE DIGITAL AGE: WORLD TRADE FORUM 323 (Mira Burri & Thomas Cottier eds., 2012); Peter K. Yu, *The ACTA/TPP Country Clubs*, in ACCESS TO INFORMATION AND KNOWLEDGE: 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE 258 (Dana Beldiman ed., 2014).

45. See Samuel S. Kim, *China in World Politics*, in DOES CHINA MATTER? A REASSESSMENT: ESSAYS IN MEMORY OF GERALD SEGAL 37, 49 (Barry Buzan & Rosemary Foot eds., 2004) (“In a few important areas, China assumed obligations that exceed normal WTO standards—the so-called WTO-plus commitments.”); Julia Ya Qin, *China*,

time, China was willing “to gain WTO entry at almost any price.”⁴⁶ The country’s approach was understandable. To many Chinese leaders, the WTO membership helped secure China’s rightful place in the international community. Even if the economic costs were high, the symbolic value of the WTO accession and an improved standing in the international community would more than compensate for the accession’s short-term costs.

The TPP, however, is not the WTO. It does not give China a rightful place in the international community. Nor does TPP club membership have any bearing on China’s dignitary interests. To be certain, not being allowed to join the TPP could cause China to lose face, international reputation, or even soft power.⁴⁷ Nevertheless, whether the exclusion would achieve this outcome will depend on whether the TPP is seen as a fair and legitimate trade pact. If most countries and members of the public consider the TPP an illegitimate attempt to bully the less powerful countries into adopting inappropriate standards, the exclusion of China from the negotiations will have a very limited impact on its dignitary interests, international reputation, and soft power.

Moreover, inclusion in the TPP negotiations does not indicate that the possession of high trade standards. Consider, for example, the intellectual property standards in the TPP Agreement. Although it would be highly unattractive for China to be branded as a pirate nation, especially after undertaking so

India and WTO Law, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 167, 173–75 (Muthucumaraswamy Sornarajah & Wang Jiangyu eds., 2010) (outlining China’s “‘WTO-plus’ rules”); Yu, *Middle Kingdom*, *supra* note 38, at 224 (“As part of its entry price, China took on not only obligations under the TRIPS Agreement but also additional WTO-plus commitments.”).

46. Kim, *supra* note 45, at 49.

47. As Derek Mitchell observed:

[I]nternational condemnation of China’s domestic record on human rights, rule of law, political freedom, corruption, and export product safety has infuriated Beijing. This is true not only because of traditional Asian notions of “losing face” or contentions that it “hurts the feelings of 1.3 billion Chinese people,” as the Chinese are wont to say, but also because these public criticisms affect China’s international reputation and thus its soft power.

C. FRED BERGSTEN ET AL., CHINA’S RISE: CHALLENGES AND OPPORTUNITIES 216 (2008).

many legal reforms and enforcement campaigns in the past two decades,⁴⁸ TPP membership is not limited to countries that have always respected intellectual property rights. The checkered pasts of Japan and the United States speak for themselves.⁴⁹ More importantly, as the USTR declared in his latest *Section 301 Report*, close to half of the twelve TPP negotiating parties failed to adequately protect intellectual property rights. While Chile earned the distinction of being on the Priority Watch List, Canada, Mexico, Peru, and Vietnam were all on the Watch List.⁵⁰ Malaysia was only removed from the Watch List in 2012,⁵¹ more than a year after the country joined the TPP negotiations.⁵² Thus, even under the USTR's unilateral standards, the TPP country club is a den filled with known pirates.

While it is already highly challenging for the TPP negotiating parties to induce China to participate in the negotiations or join the agreement after its formation, the pre-conditions attached to joining the negotiations or the agreement have become even more problematic. Most of the present negotiating parties simply do not see the agreement as

48. For the Author's earlier discussions of the Chinese intellectual property system, see generally Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 2007); Yu, *Middle Kingdom*, *supra* note 38.

49. As William Kingston noted:

From the start of the industrial revolution, every country that became economically great began by copying: the Germans copied the British; the Americans copied the British and the Germans, and the Japanese copied everybody. The trust of the TRIPS Agreement is to ensure that this process of growth by copying and learning by doing will never happen again.

William Kingston, *An Agenda for Radical Intellectual Property Reform*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 653, 658 (Keith E. Maskus & Jerome H. Reichman eds., 2005); Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 12–13 (2009) (discussing the United States' past as a pirate nation).

50. OFFICE OF THE USTR, 2013 SPECIAL 301 REPORT 2–3 (2013).

51. See OFFICE OF THE USTR, 2012 SPECIAL 301 REPORT 8 (2012).

52. Press Release, Ministry of Int'l Trade & Indus. (Malay.), Malaysia Joins TPP Agreement Negotiations (Oct. 8, 2010), available at http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_8b253a38-c0a81573-f5a0f5a0-d9375f5b.

an open pact that Asia-Pacific countries can freely join *at any stage and under any condition*.⁵³ For example, when Canada, Mexico, and Japan requested to join the negotiations, they had to agree not to renegotiate chapters that have already achieved consensus among the preexisting negotiating parties.⁵⁴ While

53. As Deborah Elms and Lim Chin Leng observed:

Although the TPP is being designed to allow other states to join, the entire Agreement cannot be renegotiated for each new member. At a certain point, the Agreement will have to be closed for new membership—after that, economies could still elect to accede, but they would have to accept the deal on the table as given (subject, presumably, to minor modifications and certain conditions for entry).

Deborah K. Elms & C.L. Lim, *An Overview and Snapshot of the TPP Negotiations*, in *TRANS-PACIFIC PARTNERSHIP*, *supra* note 10, at 21, 41–42. But see C.L. Lim et al., *What Is “High-Quality, Twenty-First Century” Anyway?*, in *TRANS-PACIFIC PARTNERSHIP*, *supra* note 10, at 3, 3 [hereinafter Lim et al., “*High-Quality, Twenty-First Century*”] (“[The TPP] is an open-ended agreement that clearly contemplates an expanded membership over time.”). To a large extent, one can contrast the TPP with the original P4, which “ha[d] an open accession clause [and] encourage[d] other economies to negotiate to accede to the agreement.” Lewis, *Achieving a FTAAP*, *supra* note 34, at 223, 225; see also C.L. Lim, *The China-ASEAN Tariff Acceleration Clause*, in *CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER*, *supra* note 45, at 427, 439–41 (discussing open regionalism); Wang Jiangyu, *The Role of China and India in Asian Regionalism*, in *CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER*, *supra* note 45, at 333, 374–75 [hereinafter Wang, *Role of China and India*] (discussing how China and India should lead Asia to practice open regionalism with an Asian identity).

54. As *Inside U.S. Trade* reported, Mexico had to accept the following conditions in order to join the TPP negotiations:

First, Mexico agreed to accept all text on which the nine current TPP partners have already reached consensus. That consensus text cannot be reopened unless the nine current TPP partners agreed to revisit it, one official explained.

In addition, Mexico agreed to accept all future text on which the nine partners reach consensus during the forthcoming 90-day window. This appears to reflect the idea forwarded by some TPP observers earlier this week that new entrants like Mexico will not have “veto authority” over the closing of some future TPP chapters.

Mexico did not have a chance to review the past consensus text that it agreed to accept as a condition of entry. Its current understanding is that it also will not have access to any texts until it formally enters the talks, meaning that it will also have to agree to text to which TPP partners agree during the 90-day period without getting to review it first.

Mexico Stresses It Will Be a Full TPP Partner, Despite Terms of Entry, *INSIDE U.S. TRADE*, June 22, 2012. In regard to Canada, Michael Geist wrote:

1. According to *Inside US Trade*, the U.S. established two conditions for Canadian entry. First, Canada will not be able to reopen any chapters where agreement has already been reached among the current nine TPP partners.

agreeing to such terms would literally place the late-arriving countries as “second class citizens,” this lower status would not matter much substantively when most chapters have not yet achieved consensus.⁵⁵

For countries joining the agreement after its formation, however, the impact of being second-class TPP citizens—and therefore not having the ability to renegotiate chapters or provisions with which they disagree—would be quite significant. Given China’s now considerable economic power and geopolitical leverage, it is indeed difficult to see why China—or, for that matter, other large developing countries like India—would join an agreement that is filled with rules and standards that it had no role in shaping and that it cannot re-negotiate.⁵⁶ Gone are the days where trade rules could be created in the developed world and then shoved down the throats of large developing countries. If China is to eventually become a party to the TPP, the negotiating parties will have to make significant adjustments to induce the country to join.

The problem with this is that Canada has agreed to this condition without actually gaining access to the current TPP text. Has Canada agreed to be bound by terms it has not even read? Can it disclose what it has effectively agreed to simply by accepting the offer to enter the negotiations?

2. *Inside US Trade* also reports that Canada has second tier status in the negotiations as the U.S. has stipulated that Canada would not have “veto authority” over any chapter. This means that should the other nine countries agree on terms, Canada would be required to accept them. Has Canada agreed to this condition? How will it deal with the prospect that the other nine countries agree to terms that are disadvantageous to Canada?

Michael Geist, *2nd Tier Status for Canada?: 5 Questions on Canada’s Entry to the Trans Pacific Partnership Talks* (June 19, 2012), <http://www.michaelgeist.ca/content/view/6547/125/>; accord Elms, *TPP Trade Negotiations*, *supra* note 6, at 372 (“Getting approval to participate did not mean . . . that Japan automatically became eligible to see all the negotiating texts or to sit in on bargaining at the next round of discussions. Instead, Japan was forced to wait for the domestic procedures in each TPP member country to be completed before it was allowed to commence discussions with any of them.”); *see also* Capling & Ravenhill, *supra* note 15, at 290 (“US Trade Representative declared that ‘potential new entrants must be prepared to address a range of US priorities and issues’.”).

55. *See* SCHOTT ET AL., *supra* note 10, at 41 (noting that Canada and Mexico’s commitments not to reopen the already “agreed” text is “not an onerous requirement since much of what has been completed involves relatively less controversial issues”).

56. *Cf.* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1090–91 (2011) [hereinafter Yu, *Six Secret Fears*] (advancing a similar claim in relation to ACTA).

Moreover, some of the TPP standards, if adopted as reported, would present major challenges to China. A case in point is the proposed government procurement standards, which would drastically alter the structure and operation of state-owned enterprises. As Professor Gao rightly observed:

[I]f China were to join the TPP Agreement one day, it w[ould] have to comply with the discipline on state-owned enterprises (SOEs), which have already become a hot issue in the current negotiations. However, as SOEs are of great political as well as economic significance in China, it would be impossible for China to accede to such demands.⁵⁷

The TPP's electronic commerce standards could also deeply affect China's censorship and information control policy.⁵⁸ This issue has become especially sensitive in the trade context following China's losses before both the WTO panel and the Appellate Body in *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*.⁵⁹

To complicate matters even further, some negotiating parties simply do not see the TPP solely as a trade pact. Instead, they consider it as an important alliance that helps foster regional security.⁶⁰ Some may have gone even further to view the

57. Henry Gao, *From the P4 to the TPP: Transplantation or Transformation*, in *TRANS-PACIFIC PARTNERSHIP*, *supra* note 10, at 64, 79 [hereinafter Gao, *From the P4 to the TPP*]; see also Ted Murphy, *Government Procurement and Labour Issues*, in *NO ORDINARY DEAL*, *supra* note 10, at 189, 190–95 (discussing the government procurement standards in the TPP Agreement).

58. See Gao, *From the P4 to the TPP*, *supra* note 57, at 79–80 (“[R]equests for China to remove barriers on e-commerce will meet major resistance from the internet censorship regime of China.”).

59. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009); Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

60. See Paul G. Buchanan, *Security Implications of the TPPA*, in *NO ORDINARY DEAL*, *supra* note 10, at 82, 87 (“The strategic context in which the proposed TPPA [Trans-Pacific Partnership Agreement] is being negotiated is one where the People's Republic of China is gradually challenging US military and economic primacy in the Western Pacific amid a general military build-up throughout the region.”); Capling & Ravenhill, *supra* note 15, at 292 (“The ‘securitization’ of the TPP is consistent with a recent trend in US trade policy to use PTAs to reinforce strategic relationships. This development can be dated to the Israel-US free trade agreement of 1985, but it gained momentum

TPP as a strategic tool to ward off the threat created by a rapidly-emerging China,⁶¹ or the so-called “China threat.”⁶² It is

after the September 11, 2001 terrorist attacks when the Bush administration initiated a series of [preferential trade agreement] negotiations with countries that were of strategic or geopolitical importance to the United States.”); Olivier Cattaneo, *The Political Economy of PTAs*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 28, 42–50 (Simon Lester & Bryan Mercurio eds., 2009) [hereinafter *BRTA COMMENTARY*] (discussing how bilateral and regional agreements are instruments of foreign policy that are primarily driven by political considerations); Chad Damro, *The Political Economy of Regional Trade Agreements*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 23, 39 (Lorand Bartels & Federico Ortino eds., 2007) (“[M]any states enter into RTAs [regional trade agreements] for important political, rather than exclusively economic, considerations. In short, states are using economic means for political ends.”); see also Kearns, *supra* note 32, at 145 (“Morocco and the US agreed to negotiate an agreement just eight months after the terrorist attacks of 11 September 2001. The US was looking to strengthen its relationship with a reform-minded Muslim nation in the Middle East—and to provide economic opportunities in that region as a way to counter terrorism.”); Andrew D. Mitchell & Tania Voon, *Australia–United States Free Trade Agreement*, in *BRTA CASE STUDIES*, *supra* note 31, at 6, 8 (“An unofficial suggestion is that the AUSFTA was ‘payback’ for Australia’s support of the Iraq war: September 11 may have been what finally led the US to agree to the AUSFTA.” (footnote omitted)).

61. As Paul Buchanan observed:

[F]or the US, the TPPA has strategic implications beyond trade *per se*. The TPPA would provide the US with a trade-based counterbalance to Chinese ambitions as well as a means by which to redress the current soft power imbalance that favours the Chinese in the South Western Pacific. Beyond any material benefits that accrued, the establishment of a US-led eight-country [now twelve-country] trading bloc across the Pacific Rim, with potential to expand to other APEC members, would help offset Chinese ‘chequebook diplomacy’ as a form of influence and leverage in that part of the world.

Buchanan, *supra* note 60, at 89; see also Avery Goldstein, *U.S.-China Interactions in Asia*, in *TANGLED TITANS*, *supra* note 13, at 263, 281 (“[W]hen American support for realizing the TPP was given a high priority two years later in conjunction with the November 2011 [APEC] meeting in Honolulu, the prominence accorded the initiative was widely viewed as having a new political significance related to the turbulence in the U.S.-China relations during the years following Obama’s 2009 trip to China.”); Lewis, *Achieving a FTAAP*, *supra* note 34, at 226 (recalling the speech of the chair of the House Ways and Means Trade Subcommittee that “the TPP ‘at least begins the process of positioning the US as a counterweight to China in the Asia-Pacific Region’”); Jagdish Bhagwati, *Deadlock in Durban*, *PROJECT-SYNDICATE* (Nov. 30, 2011), <http://www.project-syndicate.org/commentary/deadlock-in-durban> (stating that TPP “will principally aid countries that are worried about an aggressive China and seek political security rather than increase trade”).

Nevertheless, some countries remain wary about such a strategic approach, especially vis-à-vis China. As Ann Capling and John Ravenhill recounted:

In November, it was reported that Australia and New Zealand: “have had to communicate to key figures supporting the TPP [in Washington] in no

therefore understandable why some TPP negotiating parties would have second thoughts about admitting China into the regional pact.

When all of these factors are taken together, it is no surprise that China remains outside the TPP and will likely continue to be so in the near future. Nevertheless, its outsider status is likely to create problems not only for the TPP, but also more broadly for the Asia-Pacific region and the global economy. To begin with, many commentators believe that the TPP needs to include China if it is to have long-term regional success. As Lim Chin Leng, Deborah Elms, and Patrick Low observed:

If the ultimate goal of the TPP is to expand to the FTAAP, then the TPP will have to include China. If the TPP is serious about expanding trade cooperation in the Asia-Pacific, then the TPP ought to include China at some point in the future. This is not to say that China needs to participate in the negotiations at this initial stage. But it is to suggest that China's involvement should be planned for and that steps should be taken to make it more—and not less—likely that China will join in the future.⁶³

At the regional and multilateral levels, excluding China from the TPP negotiations could also have serious implications for both trade and regulation. As Avery Goldstein observed:

uncertain terms that the moment New Zealand and Australia smell a China containment policy, they are 'gone' from the negotiations". Such views are likely to be shared by other TPP members that have important trade, investment and political relationships with China, and who do not want these to be held hostage to US foreign policy concerns.

Capling & Ravenhill, *supra* note 15, at 293.

62. For discussions of the so-called China threat, see generally CHINA'S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT (Ted Galen Carpenter & James A. Dorn eds., 2000); BILL GERTZ, THE CHINA THREAT: HOW THE PEOPLE'S REPUBLIC TARGETS AMERICA (2000); STEVEN M. MOSHER, HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD (2000); PETER NAVARRO, THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON (2007).

63. C.L. Lim et al., *Conclusion*, in TRANS-PACIFIC PARTNERSHIP, *supra* note 10, at 319, 325; see SCHOTT ET AL., *supra* note 10, at 55 ("It is hard to conceive of a comprehensive Asia-Pacific trade arrangement that does not eventually include China."); Lewis, *Achieving a FTAAP*, *supra* note 34, at 235 ("[I]t . . . does not seem realistic that in the long-term there will be an FTAAP that does not include China.").

Suspicious of U.S. intentions, China might have been expected to reconsider the usefulness of regional organizations that, since the mid-1990s, it had seen as venues for reassuring nervous neighbors. If they were instead becoming settings in which others could gang up on China or act as fronts for American efforts to check China's rise (as Beijing had feared in the early 1990s), their appeal would diminish.⁶⁴

To be certain, Chinese leaders, especially those nationalistic ones, may consider it offensive for China to be left out of the TPP negotiations. However, it is also plausible that they see the exclusion as a blessing in disguise. Because China continues to struggle with a wide variety of internal problems, its leaders may not be convinced that the country is ready for further trade liberalization under the TPP. Moreover, China has always taken a strong sovereignty-based position that resists international intervention in domestic affairs.⁶⁵ From this perspective alone, the more the TPP negotiations weaken the existing multilateral system, the stronger China's arguments against multilateral intervention will be in the future.

Finally, China has been actively negotiating its own version of bilateral, plurilateral, and regional trade and investment agreements just as the TPP is being developed.⁶⁶ Since the mid-

64. Goldstein, *supra* note 61, at 282.

65. See Adama Gaye, *China in Africa: After the Gun and the Bible . . . A West African Perspective*, in CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE 129, 138 (Chris Alden et al. eds., 2008) [hereinafter CHINA RETURNS TO AFRICA] ("We don't believe that human rights should be above sovereignty issues" (quoting He Wenping, Director of Africa Department of Chinese Academy of Social Sciences)); Shalmali Guttal, *Client and Competitor: China and International Financial Institutions*, in CHINA'S NEW ROLE IN AFRICA AND THE SOUTH: A SEARCH FOR A NEW PERSPECTIVE 17, 32 (Dorothy-Grace Guerrero & Firoze Manji eds., 2008) [hereinafter CHINA'S NEW ROLE] ("What China argues for is the sovereign rights of governments to shape their own development strategies and to make decisions about projects and policies regardless of social, environmental and governance implications."); Denis M. Tull, *The Political Consequences of China's Return to Africa*, in CHINA RETURNS TO AFRICA, *supra*, at 111, 118 (noting that "unconditional respect for national sovereignty [that] makes any attempt to interfere into the domestic affairs of a state illegitimate").

66. For discussions of these developments, see generally Henry Gao, *The RTA Strategy of China: A Critical Visit*, in CHALLENGES TO MULTILATERAL TRADE, *supra* note 42, at 53; Marc Lanteigne, *Northern Exposure: Cross-Regionalism and the China-Iceland Preferential Trade Negotiations*, 202 CHINA Q. 362 (2010); Wang, *Role of China and India*, *supra* note 53; Yu, *Sinic Trade Agreements*, *supra* note 31.

2000s, China has successfully negotiated bilateral agreements with Chile, Pakistan, New Zealand, Singapore, Peru, Costa Rica, Iceland, and Switzerland, including four of the twelve TPP negotiating parties.⁶⁷ China is also negotiating a free trade agreement with Australia.⁶⁸ In addition, China has developed the ASEAN–China Free Trade Area with Brunei Darussalam, Malaysia, Vietnam, and other members of the Association of Southeast Asian Nations (ASEAN).⁶⁹ Included in many of these agreements is an “Early Harvest Program,” whose generous trade terms have greatly improved China’s regional reputation.⁷⁰ It is therefore no surprise that Joshua Kurlantzick described these programs as part of the country’s “charm offensive.”⁷¹

In November 2012, China, India, members of ASEAN, and other key Asia-Pacific neighbors also launched the negotiation of the Regional Comprehensive Economic Partnership (“RCEP”).⁷² Building on past trade and non-trade discussions under the ASEAN+6 framework (Australia, China, India, Japan, New Zealand, and South Korea), this new regional partnership will cover not only the two most powerful middle-income countries in the Asia-Pacific region (China and India), but also two advanced Asian economies (Japan and South Korea) as well as seven of the TPP negotiating parties.⁷³

67. The texts of the agreements are available at <http://fta.mofcom.gov.cn>.

68. See *China-Australia FTA*, CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/topic/enaustralia.shtml> (last visited Sept. 13, 2013) (providing updates on the negotiations).

69. For discussions of ASEAN-China Free Trade Area, see Wang, *ACFTA*, *supra* note 31, at 224; Yu, *Sinic Trade Agreements*, *supra* note 31, at 1007–09.

70. See Yu, *Sinic Trade Agreements*, *supra* note 31, at 996–97 (discussing these programs).

71. JOSHUA KURLANTZICK, *CHARM OFFENSIVE: HOW CHINA’S SOFT POWER IS TRANSFORMING THE WORLD* (2007); see also THOMAS LUM ET AL., CONG. RESEARCH SERV., RL 34310, *CHINA’S “SOFT POWER” IN SOUTHEAST ASIA* (2008) (discussing China’s growing use of soft power in Southeast Asia).

72. Press Release, ASEAN Secretariat, ASEAN and FTA Partners Launch the World’s Biggest Regional Free Trade Deal, Nov. 20, 2012, <http://www.asean.org/news/asean-secretariat-news/item/asean-and-fta-partners-launch-the-world-s-biggest-regional-free-trade-deal>; see also Lewis, *TPP and RCEP*, *supra* note 33, at 363–62 (discussing the RCEP).

73. See Lewis, *Achieving a FTAAP*, *supra* note 34, at 227–29 (discussing possible avenues for Asian economic integration, including ASEAN+3, ASEAN+6 and APEC); see also MARK BEESON, *REGIONALISM AND GLOBALIZATION IN EAST ASIA: POLITICS, SECURITY*

Thus, if China considers the TPP a foreign policy instrument initiated by the United States and other like-minded countries to isolate or contain the country, it may greatly accelerate the development of these alternative regimes. This scenario is not unforeseeable considering that many countries in the Asia-Pacific region remain reluctant to pick between China and the United States despite their concern about China's growing economic and military strengths. As David Shambaugh pointed out:

[H]aving to choose between Beijing and Washington as a primary benefactor is the nightmare scenario for the vast majority of Asian states It is not an exaggeration that all Asian states seek to have sound, extensive, and cooperative relations with *both* the United States and China, and thus will do much to avoid being put into a bipolar dilemma.⁷⁴

In sum, the exclusion of China from the TPP negotiations has raised questions regarding the agreement's benefits, significance, and viability. The exclusion has also created complications and perplexities concerning the future development of bilateral, plurilateral, and regional trade and investment agreements in the Asia-Pacific Region. For better or worse, the TPP negotiations could initiate and accelerate the development of a new set of nonmultilateral agreements that further undermine the international regulatory environment and multilateral trading system.

II. BRICS AND OTHER EMERGING COUNTRIES

The second group of "TPP outsiders" consists of fast-growing, emerging middle-income economies in the Asia-Pacific

AND ECONOMIC DEVELOPMENT 232–36 (2007) [hereinafter BEESON, REGIONALISM AND GLOBALIZATION] (discussing ASEAN+3).

74. David Shambaugh, *Introduction: The Rise of China and Asia's New Dynamics*, in *POWER SHIFT: CHINA AND ASIA'S NEW DYNAMICS* 1, 17 (David Shambaugh ed., 2006) [hereinafter *POWER SHIFT*]; accord Ellen L. Frost, *China's Commercial Diplomacy in Asia: Promise or Threat?*, in *CHINA'S RISE AND THE BALANCE OF INFLUENCE IN ASIA* 95, 105 (William W. Keller & Thomas G. Rawski eds., 2007) (noting that Asian countries "do not wish to be forced to choose between Beijing and Washington").

region, including the so-called BRICS countries.⁷⁵ Coined in 2001 for a group of high-growth developing countries by Jim O'Neill, Goldman Sachs's then-chief global economist, the term "BRICs" initially referred to Brazil, Russia, India, and China.⁷⁶ Since then, this rapidly popularized term has been generalized to cover other emerging middle-income countries, including South Africa⁷⁷ and what O'Neill and his associates have described as "N-11" (Next 11) countries⁷⁸ and later "growth markets."⁷⁹

These fast-growing, emerging middle-income economies are important because these countries are likely to provide the most significant growth in the near future. As two Goldman Sachs global economists noted in a study entitled *Dreaming with BRICs: The Path to 2050*,⁸⁰ the economies of Brazil, Russia, India,

75. See generally Peter K. Yu, *The Middle Intellectual Property Powers*, in *LAW AND DEVELOPMENT IN MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP* 84 (Tom Ginsburg & Randall Peerenboom eds., 2014) (discussing intellectual property developments in large middle-income economies).

76. See JIM O'NEILL, GOLDMAN SACHS, BUILDING BETTER GLOBAL ECONOMIC BRICS (Goldman Sachs, Global Economics Paper No. 66, 2001), available at <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf>.

77. See, e.g., CHIDI OGUAMANAM, INTELLECTUAL PROPERTY IN GLOBAL GOVERNANCE: THE CRISIS OF EQUITY IN THE NEW KNOWLEDGE ECONOMY 221–22 (2012) (expanding the definition of the BRICS countries to cover other emerging middle-income economies); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 346 (2008) [hereinafter Yu, *Access to Medicines*] (expanding the BRICS acronym to cover South Africa); Sebastien Hervieu, *South Africa Gains Entry to BRIC Club*, GUARDIAN WKLY. (Apr. 19, 2011, 9:04 AM), <http://www.guardian.co.uk/world/2011/apr/19/south-africa-joins-bric-club> (reporting about the South African president joining his counterparts from Brazil, Russia, India, and China for the third summit meeting of the informal group in China).

78. See JIM O'NEILL ET AL., GOLDMAN SACHS, HOW SOLID ARE THE BRICS? 7–8 (Goldman Sachs, Global Economics Paper No. 134, 2005), available at <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/how-solid.pdf> (advancing the concept of the N-11 countries in response to questions concerning whether more "BRICs" are out there). The N-11 countries are Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, the Philippines, South Korea, Turkey, and Vietnam. *Id.* at 7.

79. See JIM O'NEILL, THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND (2011) (providing an up-to-date analysis of the BRICS and what O'Neill now terms "growth markets").

80. DOMINIC WILSON & ROOPA PURUSHOTHAMAN, GOLDMAN SACHS, DREAMING WITH BRICS: THE PATH TO 2050 (Goldman Sachs, Global Economics Paper No. 99),

and China are likely to overtake those of many existing developed economies by 2050:

[I]n less than 40 years, the BRICs' economies together could be larger than the G6 in US dollar terms. By 2025 they could account for over half the size of the G6. Currently they are worth less than 15% Of the current G6 (US, Japan, Germany, France, Italy, UK) only the US and Japan may be among the six largest economies in US dollar terms in 2050.⁸¹

If a key goal of the TPP is to open up new or fast-growing markets, it seems rather ill-advised and short-sighted to exclude all of these high-growth economies from the negotiations. As commentators rightly observed, the present lineup in the TPP negotiations does not provide the United States—or, for that matter, other negotiating parties—with a lot of trade benefits.⁸² Thus, if the TPP is to have a larger regional economic impact, it has to grow to include other Asia-Pacific countries. As Sebastian Herreros declared:

Ultimately, the TPP will have to expand to include large, mostly Asian economies, to be a meaningful exercise. Its current commercial appeal is very modest, given the small size of most participating economies. More importantly, an agreement limited to the . . . nine [and now twelve] participants would be far from a credible platform for large-scale trans-Pacific economic integration.⁸³

available at <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf>.

81. *Id.* at 4.

82. See Jane Kelsey, *Introduction* to NO ORDINARY DEAL, *supra* note 10, at 10, 18 (“[M]ost of the participating economies are of limited regional importance in Asia and the Pacific Rim or to the US.”).

83. Sebastian Herreros, *Coping with Multiple Uncertainties: Latin America in the TPP Negotiations*, in TRANS-PACIFIC PARTNERSHIP, *supra* note 10, at 260, 274; accord Lewis, *Achieving a FTAAP*, *supra* note 34, at 226 (“[T]he United States’ interest in the Agreement was clearly tied to its potential to expand. This remains the case today, as the other countries that have joined the negotiation also provide little in the way of new market access opportunities for the US.”); Kimberlee Weatherall, *The TPP as a Case Study of Changing Dynamics for International Intellectual Property Negotiations*, in TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION, *supra* note 10, at 50, 60 (“[T]he economic benefits of a TPP between the negotiating parties would be limited; only if bigger regional economies participate, such as India, South Korea, and China, will these negotiations generate a real payoff.”).

Obviously, the issues I raised earlier in regard to China are applicable to other BRICS countries. Consider, for example, India, the world's second most populous country and the fourth largest economy in the Asia-Pacific region (behind only the United States, China, and Japan). Like China, India has "the potential to redefine the balance of influence and power within any grouping of which they are a part and the very definition of the region any new institution claims to represent."⁸⁴ India's emerging role in Asia is so important that some East Asian countries have welcomed India into the East Asian Summit in an effort to "provide a 'hedge' against Chinese dominance."⁸⁵

Many policymakers and commentators have also linked China and India together when exploring the future development of the Asia-Pacific region. As Singapore's Senior Minister Goh Chok Tong declared:

I like to think of new Asia as a mega jumbo jet that is being constructed. Northeast Asia, comprising China, Japan and South Korea, forms one wing with a powerful engine. India, the second wing, will also have a powerful engine. The Southeast Asian countries form the fuselage. Even if we lack a powerful engine for growth among the 10 [ASEAN] countries, we will be lifted by the two wings.⁸⁶

Some commentators—most notably Pete Engardio, the Asia correspondent for *Business Week*—even used the term "Chindia" to underscore the growing global importance of these two emerging trade powers.⁸⁷

84. MARK BEESON, INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC AND BEYOND 88 (2008) [hereinafter BEESON, INSTITUTIONS OF THE ASIA-PACIFIC]; see ROBERT KAGAN, THE RETURN OF HISTORY AND THE END OF DREAMS 41 (2009) ("In Asia . . . it is a three-way, not a two-way, competition [referring to the competition between China, India, and the United States]."); see also BILL EMMOTT, RIVALS: HOW THE POWER STRUGGLE BETWEEN CHINA, INDIA, AND JAPAN WILL SHAPE OUR NEXT DECADE (2009) (discussing the power struggle between China, India, and Japan in Asia).

85. BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 84, at 88.

86. Goh Chok Tong, Senior Minister, Republic of Sing., Global City of Opportunity, Keynote Address at the Singapore Conference in London (Mar. 15, 2005), available at http://www.mfa.gov.sg/content/mfa/overseasmission/pretoria/press_statements_speeches/2005/200503/press_200503_01.html.

87. For discussions of China, India, and the so-called "Chindia," see generally ASIA'S GIANTS: COMPARING CHINA AND INDIA (Edward Friedman & Bruce Gilley eds., 2008); CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS (Pete

Like China, if India is not involved in the TPP negotiations, it is hard to imagine what incentives the TPP negotiating parties could provide to induce this country to join the agreement after its formation. To be certain, India is not an APEC member, even though it did request to join the organization.⁸⁸ Nevertheless, India has been actively establishing bilateral and regional agreements with other trading partners, including members of ASEAN.⁸⁹ India is also currently negotiating an economic partnership agreement with the European Union, a trading bloc with size and strength comparable to those of the United

Engardio ed., 2006); *DANCING WITH GIANTS: CHINA, INDIA, AND THE GLOBAL ECONOMY* (L. Alan Winters & Shahid Yusuf eds., 2007); ROBYN MEREDITH, *THE ELEPHANT AND THE DRAGON: THE RISE OF INDIA AND CHINA AND WHAT IT MEANS FOR ALL OF US* (2007); JAIRAM RAMESH, *MAKING SENSE OF CHINDIA: REFLECTIONS ON CHINA AND INDIA* (2006).

88. See BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC*, *supra* note 84, at 88 (noting that “India has already tried without success to gain entry to APEC”).

89. As Ellen Frost observed:

The Indian government has negotiated a framework agreement with ASEAN whose ambition and scope resemble the China-ASEAN agreement. It has also negotiated an economic cooperation agreement with Singapore, which could be a launching pad of sorts for an India-ASEAN FTA. An FTA with Thailand is also joining the list. Thanks to these and other diplomatic efforts, New Delhi now holds its own annual summit meeting with ASEAN in an “ASEAN+1” arrangement, and India was included in the December 2005 East Asian Summit.

Frost, *supra* note 74, at 99 (footnote omitted); Wang, *Role of China and India*, *supra* note 53, at 365 (“India might have a stronger incentive for an Asian Economic Community, as India will relatively gain more benefits from a pan-Asian free trade arrangement. However, it is not easy to convince China to sincerely endorse such an idea.”); see also Locknie Hsu, *China, India and Dispute Settlement in the WTO and RTAs*, in *CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER*, *supra* note 45, at 250, 266–68 (discussing the South Asian Free Trade Area, the Comprehensive Economic Cooperation Agreement Between India and Singapore, India’s FTAs with Sri Lanka and Bhutan, the India-MERCOSUR Preference Trade Agreement, and the Agreement on South Asian Free Trade Area); Chia & Soesastro, *supra* note 32, at 212–13 (discussing the ASEAN-India Comprehensive Economic Cooperation); Wang, *Role of China and India*, *supra* note 53, at 356–58 (discussing India’s regional trade initiatives). But see TAY, *supra* note 12, at 64 (“India, in many ways, is new to East Asia. While its economy is growing, it is not fully integrated with the rest of East Asia, and not as central as others. It has negotiated a free trade agreement with ASEAN, but this was subject to much haggling that showed not just economic differences but also that India has not observed and absorbed the social norms prevailing in ASEAN, and perhaps does not want to. As a result, India remains peripheral relative to others.”).

States.⁹⁰ If these negotiations are not enough, India was instrumental in the development of the India-Brazil-South Africa Dialogue Forum (IBSA), which features trilateral cooperation among Brazil, India, and South Africa.⁹¹ It is also one of the five key participants of the BRICS Summit.⁹² If all of these developments become fruitful, India will be able to diversify its trade portfolio away from reliance on the regional market covered by the TPP.

Apart from India (and Russia, the other BRICS country in the Asia-Pacific region), the same analysis can be extended, perhaps to a lesser extent, to other large developing countries in the region, such as Indonesia, the Philippines, Thailand, and South Korea⁹³ (although the last two countries have expressed interest in joining the negotiations⁹⁴). To some extent, the exclusion of the BRICS and other fast-growing, emerging middle-income countries has raised a difficult and

90. See Patralekha Chatterjee, *Leaked IP Chapter of India-EU FTA Shows TRIPS-Plus Pitfalls for India*, *Expert Says*, INTELL. PROP. WATCH (Mar. 12, 2013, 5:35 PM), <http://www.ip-watch.org/2013/03/12/leaked-ip-chapter-of-india-eu-fta-shows-trips-plus-pitfalls-for-india-expert-says/> (reporting about the leaked draft text of the intellectual property chapter of the India-European Union Free Trade Agreement).

91. As stated in IBSA's website:

Established in June 2003, IBSA is a coordinating mechanism amongst three emerging countries, three multiethnic and multicultural democracies, which are determined to:

- contribute to the construction of a new international architecture
- bring their voice together on global issues
- deepen their ties in various areas.

IBSA also opens itself to concrete projects of cooperation and partnership with less developed countries.

IBSA Trilateral Official Website: About IBSA Background, <http://www.ibsa-trilateral.org/about-ibsa/background> (last visited Mar. 29, 2014).

92. See Hervieu, *supra* note 77.

93. Cf. Lim et al., *Conclusion*, *supra* note 63, at 323 (“[E]very clause in the Agreement must be negotiated with at least one eye on potential future members It is not simply Viet Nam that must be accommodated in the TPP, but other countries like the Philippines and Papua New Guinea.”).

94. See *South Korea Moves Closer to Joining TPP Trade Talks*, REUTERS (Nov. 29, 2013, 4:47 AM), <http://www.reuters.com/article/2013/11/29/us-korea-trade-tpp-idUSBRE9AS06M20131129> (reporting that the South Korean government “said it would make a final decision on whether to formally join the [TPP] based on the outcome of talks with the member countries”); *Thailand Says to Join Trans-Pacific Partnership Trade Talks*, REUTERS (Nov. 18, 2012, 7:29 AM), <http://www.reuters.com/article/2012/11/18/us-asia-obama-trade-idUSBRE8AH06R20121118> (reporting Thai Prime Minister Yingluck Shinawatra stating that Thailand would join the TPP negotiations).

diplomatically perplexing question concerning why the TPP negotiations have included some developing countries in the region while ignoring other more qualified ones. From the current list of twelve countries, it is indeed hard to divine the logic behind the countries chosen to negotiate the TPP, other than historical legacy and the self-interested preferences of the more powerful negotiating parties.⁹⁵ This lack of easily discernible logic becomes particularly problematic when viewed against the background of frequent, vocal complaints about the double standard in US foreign policy toward Asia-Pacific countries.⁹⁶ The hard-to-explain negotiating lineup also has greatly affected the dynamics of the TPP negotiations.⁹⁷

95. See Buchanan, *supra* note 60, at 82 (“[T]he impact on multilateral trade of the growing strategic competition between the US and China in the Western Pacific may have a significant influence on the way in which TPP expansion is approached by the actors involved.”).

96. As Kishore Mahbubani, Singapore’s former Permanent Representative to the United Nations, observed:

The regime in Myanmar overturned the results of the democratic elections in 1990 and brutally suppressed the popular demonstrations that followed. Myanmar was punished with Western sanctions. Asian governments were criticised for not enthusiastically following suit.

The regime in Algeria overturned the results of the democratic elections in 1992 and brutally suppressed the popular demonstrations that followed. Algeria was not punished with Western sanctions. The Asian governments have never been provided with an explanation for this obvious double standard.

KISHORE MAHBUBANI, *CAN ASIANS THINK?* 87 (4th ed. 2009). Likewise, Mark Beeson wrote:

As the most prominent and influential champion of global democratic reform, the USA plays an especially critical role in placing reformist pressure on *some* of the governments of the region. In this regard, it is important to note that the USA’s concern about human rights abuses and the importance of democratic procedures is highly selective, and determined by a wider strategic calculus. Consequently China, which is still viewed primarily as a strategic competitor, a challenger for regional influence, and associated with major trade imbalances, is subjected to much hectoring about its human rights record. By contrast, because of the war on terror, the USA has taken a much more indulgent view of human rights abuses and non-democratic processes in countries such as Thailand and Malaysia, which have cracked down on supposedly subversive elements or discouraged radical Islamism.

BEESON, *REGIONALISM AND GLOBALIZATION*, *supra* note 73, at 138. A former Chinese finance minister went even further to suggest that the US foreign policy had “a triple standard”: “For their own human rights problems they shut their eyes For some other countries’ human rights questions they open one eye and shut the other. And for

If one goes back to the “P3,” the TPP’s predecessor, the choice of the negotiating parties is not hard to discern. Chile, New Zealand, and Singapore all have small markets with highly liberalized trade sectors.⁹⁸ Based on World Bank indicators in 2002, the year the P3 was established, these countries had a gross domestic product of approximately 71, 65, and 92 billion, respectively.⁹⁹ Their location on three different continents also made the P3 an attractive vehicle to provide entry points into regional networks.¹⁰⁰ As the number of TPP negotiating parties

China, they open both eyes and stare.” Thomas L. Friedman, *Deal with China Urged by Bentsen*, N.Y. TIMES, Mar. 20, 1994, at A20 (quoting Chinese Finance Minister Liu Zhongli).

97. As Henry Gao observed in regard to Brunei Darussalam:

[T]he Brunei market is too small and insignificant for the other parties. If we look at the negotiating history of the P4 Agreement, we can see that the talks were interrupted several times due to the reluctance of Chile. While there might be real political difficulties at home, such reluctance on the side of Chile, coupled with eagerness on the side of New Zealand, gave Chile more bargaining power in the process and that is why Chile, from a mercantilist point of view, got much more than the other parties in the final Agreement. This sets a rather bad example for the other potential members: if the P4 Agreement cannot even handle the pressure from a country that is at best a regional power, how can it deal with the pressure from a superpower like the US?

Gao, *From the P4 to the TPP*, *supra* note 57, at 72.

98. See Chia & Soesastro, *supra* note 32, at 222–23 (noting that the P4 members “are among the most open economies in the Pacific”).

99. Data: GDP (Current US\$), WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?page=2> (last visited Feb. 12, 2012).

100. As I explained in an earlier article:

Strategically, FTAs and EPAs provide important entry points into other regional or plurilateral networks. In doing so, they allow developed countries to explore interstate relationships with a smaller number of countries. Such an arrangement helps reduce the complexity and high costs of negotiation with a large number of parties or a complex regional body. The negotiation of the agreements also helps countries test the feasibility of applying specific models to a particular region. In fact, because the agreements involve self-selected parties, they allow parties to avoid negotiation of issues that would require them to make concessions that are important to their domestic constituencies. The exclusion of issues will also quicken the negotiation process, as those issues tend to slow down, if not derail, the negotiations.

Yu, *Sinic Trade Agreements*, *supra* note 31, at 970–71; see also Sidney Weintraub, *Lessons from the Chile and Singapore Free Trade Agreements*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* 79, 79 (Jeffrey J. Schott ed., 2004) (noting that the United States’ free trade agreements with Chile and Singapore were “intended to be bellwethers for future FTAs in both regions, some bilateral and others plurilateral, as

grows, however, it has become increasingly difficult to separate the insiders from the outsiders based on economic size, trade patterns, or sectors that are targeted for trade liberalization (see TABLE 1).¹⁰¹

TABLE 1. Exports and Imports in World Merchandise Trade in 2012¹⁰²

Country	Exports (US\$B)	Imports (US\$B)
Australia	257	261
Brunei Darussalam	13	4
Canada	455	475
Chile	78	79
Japan	799	886
Malaysia	227	197
Mexico	371	380
New Zealand	37	38
Peru	46	43
Singapore	408	380
United States	1546	2336
Vietnam	115	114

well as to set the substantive parameters for the hemispherewide Free Trade Area of the Americas”).

101. As Lim Chin Leng, Deborah Elms, and Patrick Low observed:

One of the unusual elements of the TPP is the fact that members of the TPP represent a range of economic development, from the world’s largest economy to a lower middle income economy. While members have been clear that the TPP will not have any sort of “two speed” or explicit special and differential (S&D) treatment for developing country members, it is true that the final Agreement will need to have some provisions to account for the developmental aspects of some members.

Lim et al., *“High-Quality, Twenty-First Century,”* *supra* note 53, at 12.

102. WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2013, at 24 (2013); *Trade Profiles: Brunei Darussalam*, WORLD TRADE ORG., <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=BN> (last visited Apr. 21, 2014).

To make matters more complicated, the sectors that countries seek to liberalize through trade agreements vary significantly even within the developing world. Consider the difference between India and Brazil. Although Brazil's geographical location will likely preclude it from participating in the TPP negotiations or joining the agreement after its formation, the comparison between these two BRICS countries is highly instructive.¹⁰³ As Professor Cho noted in relation to the complex positions the G-20 countries took during the Fifth WTO Ministerial Conference in Cancún, "while India still wants to protect domestic agricultural industries, Brazil, a member of the Cairns Group consisting of agricultural product exporters, wants to further liberalize trade in this area."¹⁰⁴ Likewise, Sonia Rolland observed:

Brazil had a liberal approach to further its export interest, whereas India maintained conservative positions with respect to liberalization of the agriculture sector and had a protectionist stance. Brazil's shift toward a more aggressive stance on agriculture corresponded to its liberalization of the agricultural sector and the increased pressure by

103. It is also worth noting that the ASEAN+6 countries "accounted for 28 percent of Brazilian exports and 32 percent of its imports in 2010." Herreros, *supra* note 83, at 275.

104. Cho, *supra* note 27, at 236; *see also* Jean Touscoz, *A Changing Policy Landscape*, in *INTERNATIONAL TECHNOLOGY TRANSFER: THE ORIGINS AND AFTERMATH OF THE UNITED NATIONS NEGOTIATIONS ON A DRAFT CODE OF CONDUCT* 287, 288 (Surendra J. Patel et al. eds., 2001) ("[T]he 'big five' non-members of OECD (Russia, China, Brazil, India and Indonesia) do not always act in concert; the least developed countries themselves do not present a common front."). As Simon Tay elaborated:

The G-20 is primarily designed on power rather than norms. While this is a concern in many other regions, the question of power is especially tense in Asia, where small and medium-sized countries that are open to the global economy have sought to work alongside larger countries. Many of the Asian forms of cooperation have emphasized equality, in contrast to the underlying G-20 principle of size and power. If the Asians who are in the G-20 try to dictate to the others in the region, this would conflict with the existing forums and norms of intra-Asian cooperation. This is especially true in finance and trade, which involve questions of competition and different interests between countries. To focus on power in Asia will also probably sharpen differences. Rivalries among the Asian members of the G-20 will simmer and could boil over.

TAY, *supra* note 12, at 166.

domestic investors on the government on this issue both in negotiating rounds and in dispute settlement (particularly in disputes with Europe and the United States).¹⁰⁵

Thus, even though policymakers and commentators often focus on the dichotomy between developed and developing countries, serious and complicated variations exist in the positions taken by the latter in both multilateral and nonmultilateral fora. In certain sectors, such as intellectual property, the main dividing line is not often drawn across the stage of economic development. Rather, it concerns the country's propensity to export intellectual property-based goods and services or economic reliance on such exports.¹⁰⁶ Although the United States has greatly benefited from the TRIPS Agreement and the international intellectual property system, the same cannot be said of all members of the Organisation for Economic Co-operation and Development ("OECD").¹⁰⁷

If the divergent positions taken by developing countries in relation to their export sectors have raised complications, the inclusion of non-trade issues, such as environmental and labor standards, has posed even greater problems.¹⁰⁸ Consider, for example, my hometown Hong Kong, an APEC member that has not yet joined the TPP, but has entered into a closer economic

105. Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L.J. 483, 495 (2007).

106. Cf. Susan Corbett, *Regulation for Cultural Heritage Orphans: Time Does Matter*, 1 WIPO J. 180, 181 (2010) (making the distinction between "countries which are net-importers of copyright works . . . [and] the net-copyright exporting countries, such as the United States and the United Kingdom").

107. See J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round 11* (Asia Development Bank, ERD Working Paper Series No. 21, 2002), available at http://www.adb.org/documents/ERD/Working_Papers/wp021.pdf (providing a table documenting changes of net annual patent rent obligations resulting from the full application of the TRIPS Agreement).

108. See generally Lorand Bartels, *Social Issues: Labour, Environment and Human Rights*, in BRTA COMMENTARY, *supra* note 60, at 342 (discussing the labor and environmental standards in the TPP Agreement); Kimberly Ann Elliott, *Labour Standards and the TPP*, in TRANS-PACIFIC PARTNERSHIP, *supra* note 10, at 200 (discussing the labor standards in the TPP Agreement); Murphy, *supra* note 57, at 195–97 (discussing those standards); Jeffrey J. Schott & Julia Muir, *Environmental Issues in the TPP*, in TRANS-PACIFIC PARTNERSHIP, *supra* note 10, at 187 (discussing the environmental standards in the TPP Agreement).

partnership agreement with New Zealand¹⁰⁹ and a free trade agreement with Chile.¹¹⁰ Hong Kong has been ranked the world's freest economy for the past two decades since the inception of the Index of Economic Freedom, published annually by the *Wall Street Journal* and the Heritage Foundation.¹¹¹ While the region's heavy emphasis on economic freedom has led it to welcome the TPP's trade liberalization goals, that same emphasis has made it somewhat reluctant to embrace the agreement's labor and environmental standards. As important as these standards are, they could easily jeopardize Hong Kong's reputation as the world's freest economy.

To complicate matters even further, many countries in the Asia-Pacific region have highly uneven economic and technological developments. As a result, they harbor "schizophrenic" preferences when deciding how to strike the most appropriate balance in the intellectual property system.¹¹² As I noted in the past:

While [large developing countries such as China and India] may want stronger protection for their fast-growing industries and highly economically developed regions, they want weaker protection in the remaining areas. The economies of these countries, indeed, are highly complex, and the profound sub-regional disparities in socio-economic conditions and technological capabilities have made it very difficult to implement nation-based intellectual property standards.¹¹³

In sum, the TPP does not include enough fast-growing, emerging middle-income economies to generate a large economic impact within the Asia-Pacific region. With a large

109. Hong Kong, China–New Zealand Closer Economic Partnership Agreement, H.K.-N.Z., Mar. 29, 2010, *available at* http://www.tid.gov.hk/english/trade_relations/hknzcep/text_agreement.html.

110. Free Trade Agreement between Hong Kong, China and Chile, Chile-H.K., Sept. 7, 2012, *available at* http://www.tid.gov.hk/english/trade_relations/hkclfta/text_agreement.html.

111. *See 2014 Index of Economic Freedom: Hong Kong*, <http://www.heritage.org/index/country/hongkong> (last visited Feb. 17, 2014) (stating that, "[t]hroughout the 20-year history of the Index, Hong Kong has been rated the world's freest economy").

112. *See* Yu, *International Enclosure*, *supra* note 19, at 21–33.

113. Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 559 (2009).

number of negotiating parties and chapters, the cross-sector disagreements among these parties also have made the TPP negotiations highly challenging. In fact, because the TPP has strong historical and continued ties to APEC, deadlocks in the negotiations could undermine the ability of APEC or other regional fora to provide an effective venue for further trade liberalization.¹¹⁴ APEC is particularly important to the TPP because “[m]any of the big announcements about the [agreement] are made in conjunction with APEC meetings.”¹¹⁵ The organization “is also an important incubator of ideas that could be taken into account in the TPP negotiations.”¹¹⁶

III. EUROPE

The third group of outsiders consists of European countries, including the twenty-eight members of the European Union and other countries in the region such as Switzerland. The exclusion of this group is logical, given the TPP’s regional focus and the group members’ geographical location. It would indeed be odd to admit the European Union or Switzerland into APEC. Nevertheless, the exclusion of Europe has greatly affected the dynamics of the TPP negotiations. Such exclusion also has serious ramifications for the future development of nonmultilateral agreements within the Asia-Pacific region.

114. See Carlos Kuriyama, *APEC and the TPP: Are They Mutually Reinforcing?*, in TRANS-PACIFIC PARTNERSHIP, *supra* note 10, at 242, 243 (“[T]he TPP itself is proving extremely useful for APEC as well, by demonstrating the utility of some of the ideas that have been discussed for years within the non-binding context of APEC. The TPP is actually providing one of the many avenues to strengthen regional economic integration in the APEC region.”); see also BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 84, at 16 (“The key issue facing the Asia-Pacific region is whether it has enough political and ideological internal coherence to allow it to facilitate and encourage the underlying economic integration that has already occurred.”); *id.* at 53 (“Many East Asians were already concerned that the ASEAN way of consensus and voluntarism was being overthrown by the pushy, insensitive and excessively legalistic Anglo-Americans as they tried to turn APEC into a forum for negotiation, rather than discussion.”); BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 73, at 226 (“Some member countries were concerned about APEC’s inability to deliver trade liberalization, while others—especially Korea and Japan—were concerned that it might force them to open politically sensitive domestic sectors to external competition.”).

115. Kuriyama, *supra* note 114, at 243.

116. *Id.*

Consider, for example, the negotiation of intellectual property standards. The omission of European countries has affected not only the dynamics of the negotiation process, but also the types of issues that are to be negotiated. Without the European Union at the negotiation table, the United States is able to rely more on its sheer economic and geopolitical strengths to push for provisions that are in the interests of its intellectual property industries.¹¹⁷ From increased enforcement in the digital environment to greater protection of pharmaceutical products and biologics, the TPP is likely to track more closely to the high US standards than the compromised standards developed in other fora, including ACTA.¹¹⁸

It is therefore no surprise that the TPP negotiations have resurrected those treaty terms that have already been rejected in other plurilateral negotiations involving the European Union, including the ACTA negotiations.¹¹⁹ These terms range from the safe harbors for online service providers to provisions on “cooperation” between copyright holders and these providers in the area of copyright enforcement.¹²⁰ It is also not unusual to find the United States dominating the negotiation of the TPP intellectual property chapter. The technical expertise commanded by the large US intellectual property delegation has

117. See Elms & Lim, *supra* note 53, at 37 (“Even Australia, regarded as the second most powerful state at the TPP table [at the time of the writing], was unable to prevail over the United States in bilateral negotiations.”).

118. See Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 60 *DRAKE L. REV. DISCOURSE* 16, 26 (2012) [hereinafter Yu, *Alphabet Soup*].

119. See Patricia Ranald, *The Politics of the TPPA in Australia*, in *NO ORDINARY DEAL*, *supra* note 10, at 40, 40 (“The negotiations for a Trans-Pacific Partnership agreement . . . resurrect many of the issues that were debated in the Australia-US Free Trade Agreement.”); Yu, *Alphabet Soup*, *supra* note 118, at 27 (“The TPP negotiators could also revive proposals that were rejected by the ACTA negotiators, especially the EU delegates.”); see also Capling & Ravenhill, *supra* note 15, at 291 (“Even for those countries that have existing bilateral PTAs with the US (Australia, Chile, Peru and Singapore), the TPP negotiations have provided the US with a new opportunity to push for changes in their trade partners’ domestic regulatory regimes that it was unable to secure in the earlier agreements.”).

120. See *Analysis of the Text of the Leaked TPP Intellectual Property Text Dated August 2013*, INFOJUSTICE.ORG, <http://infojustice.org/tpp-leak-analysis> (last visited Feb. 17, 2014) (providing a collection of analyses of the leaked draft text of the TPP intellectual property chapter). See generally Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 *AM. U. INT’L L. REV.* 105 (2012) (discussing the US proposal for the TPP intellectual property chapter).

simply overwhelmed the delegates from other TPP negotiating parties.

As if the United States' economic and negotiation strengths were not enough, the country could offer concessions in other trade or trade-related areas in exchange for greater concessions in the intellectual property area. For instance, New Zealand may find it beneficial to make greater concessions in the intellectual property area if the United States is willing to allow for more exports in dairy, lamb, wool, and other sheep products.¹²¹ The same can be said about Vietnam and, to a lesser extent, Malaysia in regard to the United States' concessions in textiles.¹²² By contrast, the European Union is unlikely to find similar

121. As Deborah Elms observed:

Dairy has been a headache for negotiators. Because the United States does not have a [preferential trade agreement] with New Zealand, this sector has never been addressed between the two countries before (unlike, say, the dispute between the United States and Australia over sugar). The primary issue for American milk producers is that New Zealand's dairy industry is viewed as a monopoly, with one firm (Fonterra) in control of 90 percent of the market, and substantial barriers to entry into the market. If the American market were to be opened to competition through a [preferential trade agreement] like the TPP, dairy farmers feared that New Zealand dairy would enjoy unfair competitive advantages.

Deborah K. Elms, *Negotiations over Market access in Goods*, in TRANS-PACIFIC PARTNERSHIP, *supra* note 10, at 109, 117; *see also id.* at 117 n.29 (providing an estimate of the National Milk Producers Federation that "US dairy producers would lose gross revenues of US\$20 billion over the first ten years of a [preferential trade agreement]"); Lewis, *TPP and RCEP*, *supra* note 33, at 367–68 ("New Zealand's main economic interest in the TPP is the potential for expanded access to the United States market for its dairy products. While New Zealand might ultimately be willing to trade off higher intellectual property standards in exchange for such market access, if dairy were to be excluded from the TPP, New Zealand would struggle to find enough value in the agreement to remain a participant."). Nevertheless, Bryan Gould expressed skepticism about New Zealand's perceived benefits provided by the TPP:

We are . . . deluding ourselves if we believe that an enlarged free trade area will deliver wider markets and better returns for New Zealand exports, but will somehow spare us the obvious downsides. The likelihood is that New Zealand's already depleted reserves of capital, talent and natural resources will be attracted to more promising prospects elsewhere in the wider free trade area, with the result that the country's overall economic performance is more likely to decline in comparative terms than to improve.

Bryan Gould, *Political Implications for New Zealand*, in NO ORDINARY DEAL, *supra* note 10, at 29, 34.

122. *See* Elms, *TPP Trade Negotiations*, *supra* note 6, at 388 ("Vietnam, and to a lesser extent, Malaysia, have highly competitive textile industries.").

concessions attractive enough to give up its proposals on intellectual property protection and enforcement. Thus, without the European Union's involvement in the negotiations, the United States has a much easier time getting its intellectual property-related proposals accepted by other negotiating parties.

It is worth recalling that, during the ACTA negotiations, the European Union and the United States had wide and deep disagreements over quite a number of issues. For example, the United States wanted to have stronger mandates concerning digital intellectual property enforcement, yet the European Union was not ready to agree to provisions that the Union had not yet harmonized. Examples of these yet-to-harmonize areas are the introduction of a graduated response system and safe harbors for online service providers.¹²³ Similarly, although the European Union pushed hard for the inclusion of criminal liability for infringement on all forms of intellectual property rights (including most notably geographical indications), the United States was reluctant to provide such broad coverage.¹²⁴ In the end, the two countries could only settle on a much more moderate agreement than what was originally advanced by both sides—an agreement that observers have since dubbed “ACTA Lite.”¹²⁵

Apart from impacting on the dynamics of the TPP negotiations, excluding Europe from the agreement could raise complicated questions concerning the future development of the international regulatory environment and the multilateral trading system. On June 17, 2013, the European Union and the United States launched the negotiation of the Transatlantic Trade and Investment Partnership (“TTIP”) Agreement.¹²⁶ The

123. See Yu, *Six Secret Fears*, *supra* note 56, at 1055–57.

124. See Monika Ermert, *European Commission on ACTA: TRIPS Is Floor Not Ceiling*, INTELL. PROP. WATCH (Apr. 22, 2009, 7:18 PM), <http://www.ip-watch.org/weblog/2009/04/22/european-commission-on-acta-trips-is-floor-not-ceiling/>.

125. Monika Ermert, *Treaty Negotiators Turn to “ACTA Lite” in Hopes of Closure*, INTELL. PROP. WATCH (Sept. 8, 2010, 4:39 AM), <http://www.ip-watch.org/2010/09/08/treaty-negotiators-turn-to-%E2%80%9Cacta-lite%E2%80%9D-in-hopes-of-closure/>.

126. Press Release, Office of the USTR, U.S., EU Announce Decision to Launch Negotiations on a Transatlantic Trade and Investment Partnership (Feb. 13, 2013),

first round of negotiations was held in Washington, D.C. in July 2013. As the USTR declared on its website:

T-TIP will be an ambitious, comprehensive, and high-standard trade and investment agreement that offers significant benefits in terms of promoting U.S. international competitiveness, jobs, and growth. This ambitious trade and investment agreement will aim to boost economic growth in the United States and the EU and add to the more than 13 million American and EU jobs already supported by transatlantic trade and investment.¹²⁷

It remains to be seen what impact the TTIP will have on the TPP negotiations. Would the provisions found in both the TPP and TTIP create the much-needed nexus between the European Union and the TPP negotiating parties?¹²⁸ Would the TTIP serve as the missing link between free trade agreements established by the United States (including the TPP) and the free trade and economic partnership agreements established by the European Union? Would the TTIP raise the standards embraced by the

available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents>.

127. *Transatlantic Trade and Investment Partnership (T-TIP)*, U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/ttip> (last visited Sept. 13, 2013).

128. As Meredith Lewis observed:

To the extent that would-be participants (and dual participants) are wondering whether their commitments made in the TPP or the RCEP would be more likely to become multilateralized, (*de jure* through the WTO process or *de facto* through additional FTA proliferation), the TTIP would suggest the answer to that question is the TPP. Presumably the United States would, in TTIP negotiations, seek to import in as many commonalities as possible with the TPP in order to create common rules across even more countries. If the EU and the TPP countries all take a common approach to an issue—for example, state-owned enterprises—then that has a better chance of becoming the global approach than anything developed within the RCEP. At the same time, the understanding that the U.S. will be seeking to include TPP-consistent provisions into the TTIP may well make countries participating in both the RCEP and TPP more intent on fighting for the terms they want in the TPP. This could result in more protracted TPP negotiations, but it also creates an incentive to conclude the agreement soon. If the EU were to push the U.S. in the TTIP towards a position the TPP participants didn't like, that situation would be more dangerous the farther from completion the TPP was at the time. Once terms are locked in via the TPP, however, it would seem unlikely the U.S. would pursue a contradictory approach in the TTIP.

Lewis, *TPP and RCEP*, *supra* note 33, at 370–71.

TPP negotiating parties, due in part to the already high EU and US standards and in part to the limited need for these two trading powers to foster compromises in the form of exceptions, limitations, safeguards, and flexibilities? Would the TTIP involve an entirely different set of issues and concerns and therefore create inconsistencies or even conflicts that further complicate the existing international regulatory environment and multilateral trading system? These are all questions that do not have clear and immediate answers.

Within the Asia-Pacific region, the exclusion of Europe from the TPP could also raise complications concerning the future development of nonmultilateral trade and investment agreements, especially those established by the European Union. Regardless of whether the TTIP will become successful, it is important to explore what the TPP negotiations will mean for the European Union. If the TPP were established, would the United States become more effective in trading with the TPP members to the detriment of Europe? If so, would the European Union and other European countries respond by negotiating their own bilateral, plurilateral, and regional agreements with countries in the Asia-Pacific region, similar to the economic partnership agreements that the European Union has already established with South Korea and is now negotiating with India, Malaysia, Singapore, and other members of ASEAN?¹²⁹

One could also ask some specific questions about the global transplant of international trade and regulatory standards. For example, if the TPP were established, would the TPP negotiations make US models more dominant in the Asia-Pacific region than European and other models, due in part to the successful transplant of US standards onto the TPP Agreement and eventually on to the soil of other TPP members?¹³⁰ If so,

129 . See *Free Trade Agreements*, EUROPEAN COMM'N, <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/> (last visited Feb. 17, 2014) (providing a list of EU free trade agreements concluded and in negotiation).

130. For discussions of legal transplants in the intellectual property area, see Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. (forthcoming 2014); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693 (2010). See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (articulating the legal transplant thesis).

would such transplants precipitate greater rivalry between the European Union and the United States over what standards they seek to export to other countries via bilateral, plurilateral, and regional trade and investment agreements? Would such rivalry lead to inconsistencies, tensions, or conflicts over trade and regulatory standards?¹³¹ Would this rivalry precipitate what I have called the “battle of the FTAs”?¹³²

In sum, even though the geographical location of European countries has made it logical for them to be excluded from the TPP, such exclusion could have serious ramifications for the negotiations and the agreement’s benefits, significance, and viability. Such exclusion could also affect the negotiation of other nonmultilateral trade and investment agreements in the Asia-Pacific region as well as the future development of the international regulatory environment and the multilateral trading system.

131. As Robert Scollay wrote:

A particular problem for convergence arises if more than one major economy establishes its own FTA “template”, and if there are inconsistencies between the different “templates”. The outlook then is for the establishment of multiple “hub and spoke” configurations centred on each major economy as a “hub”, where the FTAs in each configuration converge on the “template” of the “hub”, but where the prospect of convergence between the configurations with their inconsistent “templates” is remote. Other economies may then either seek to follow one of the “hub” templates in their own FTAs, as Mexico has tended to do (essentially following the NAFTA template), or, if they seek to participate in more than one “hub and spoke” configuration, be willing to adapt the design of their FTAs to the “template” of each configuration, as Chile and Singapore have tended to do.

Robert Scollay, *Prospects for Linking Preferential Trade Agreements in the Asia-Pacific Region*, in AN APEC TRADE AGENDA?, *supra* note 32, at 164, 185; *see also* Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 398–99 (2004) [hereinafter Yu, *Currents and Crosscurrents*] (discussing the potential conflicts between different bilateral and regional trade agreements); Yu, *Access to Medicines*, *supra* note 77, at 386 (suggesting that “conflicts may arise if less developed countries sign the trade agreements supplied by both the European Communities and the United States without appropriate review and modification”).

132. *See* Yu, *Sinic Trade Agreements*, *supra* note 31, at 1018–27 (discussing the “battle of the FTAs”).

IV. CIVIL SOCIETY ORGANIZATIONS

While the first three groups of TPP outsiders consist of state actors, the last group comprises non-state actors. Similar to the ACTA negotiations, the TPP negotiations have been widely criticized for their lack of transparency, accountability, and democratic participation. Notably omitted is the representation of civil society organizations, which Sisule Musungu and Graham Dutfield have considered “the single most important factor in raising the issue of the impact of the international intellectual property standards . . . on development issues such as health, food and agriculture.”¹³³ Although the USTR insisted that the TPP is negotiated in a similar manner as the negotiation of other bilateral, plurilateral, and regional trade agreements—at least according to the USTR¹³⁴—its secretive negotiations stand in sharp contrast to other more transparent international negotiations, including the region-based Free Trade Area of the Americas and those concerning the WTO and UN specialized agencies, such as WIPO.¹³⁵

In the past, the public is generally not interested in trade or intellectual property treaty negotiations, which are dull, legalese, complex, and highly technical.¹³⁶ Nevertheless, as the

133. Sisule F. Musungu & Graham Dutfield, *Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation (WIPO)* 22 (Quaker United Nations Office, TRIPS Issues Paper No. 3, 2003), available at [http://www.geneva.quino.info/pdf/WIPO\(A4\)final0304.pdf](http://www.geneva.quino.info/pdf/WIPO(A4)final0304.pdf) (footnote omitted).

134. See Yu, *Six Secret Fears*, *supra* note 56, at 1005 (“Although both the European Union and the United States have taken more open approaches in negotiations at WIPO, WTO, WHO, and other international fora, negotiations at the bilateral and plurilateral levels have indeed been kept secret in the past.” (footnote omitted)).

135. For discussions of the openness in WIPO, WTO, the World Health Organization, and other international fora, see Letter from Robert Weissman, Dir., Essential Action, to Susan Schwab, U.S. Trade Rep. 1–3 (Sept. 17, 2008), available at http://www.ustr.gov/archive/assets/Document_Library/Fact_Sheets/2008/asset_upload_file98915121.pdf; Memorandum from Elec. Frontier Found. et al. to Ron Kirk, U.S. Trade Rep., attachment 1 (July 22, 2009), available at http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf.

136. See ANDREW GOWERS, *GOWERS REVIEW OF INTELLECTUAL PROPERTY* 1 (2006) (“For many citizens, Intellectual Property . . . is an obscure and distant domain—its laws shrouded in jargon and technical mystery, its applications relevant only to a specialist audience.”); SELL, *supra* note 28, at 99 (“To a certain extent IP law is reminiscent of the Catholic Church when the Bible was in Latin. IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy.”); Yu, *Currents and*

negotiations became more intrusive on one's personal life and as the negotiated agreements began to include provisions concerning the internet and the digital environment, civil society organizations and the public at large have begun paying greater attention to the standards included in these agreements.

For example, the negotiation of ACTA led to the widespread online coverage of the leaked drafts and updates on the negotiations.¹³⁷ The effort to adopt the agreement in the European Union also led to massive street protests throughout Europe in the middle of the winter—in major cities such as Amsterdam, Berlin, Copenhagen, Krakow, Munich, Paris, Prague, Sofia, Stockholm, and Vienna.¹³⁸ In addition, “a petition of 2 million signatures was handed in to the European Parliament, and thousands of emails were sent to Members of the European Parliament.”¹³⁹ These protests and signatures not only “ignited coverage of ACTA in the mainstream media, which had largely ignored the issue up to that point,”¹⁴⁰ but eventually led to the European Parliament's resounding rejection of the trade agreement in June 2012.¹⁴¹ This rejection marked the first

Crosscurrents, *supra* note 131, at 419 (“In the past, intellectual property issues were considered arcane, obscure, complex, and highly technical.”).

137. As I observed in an earlier article:

While disclosure of official information remained sparse at this stage of negotiations, civil liberties groups had been active in providing information to help the public understand the agreement's potential impact. For example, in March 2008, more than a couple of months before the first round of negotiations, IP Justice published a pioneering and very informative white paper discussing the potential negotiation items on ACTA. Academics and civil liberties groups across the world also worked hard to obtain information through FOIA, the Canadian Access to Information Act, or their equivalents. Many of them even managed to obtain “leaked” information or documents, which were quickly posted onto the Internet via WikiLeaks and other websites. In addition, commentators—most notably Professor Geist—offered concise yet valuable commentary on the potential provisions while keeping the public up-to-date about the state of the negotiations.

Yu, *Six Secret Fears*, *supra* note 56, at 1016–17 (footnotes omitted).

138. See MONICA HORTEN, A COPYRIGHT MASQUERADE: HOW CORPORATE LOBBYING THREATENS ONLINE FREEDOMS 107–14 (2013).

139. *Id.* at 115.

140. *Id.* at 108.

141. “The final outcome was rejection of ACTA by an astonishing 478 votes to 39, with 165 abstentions.” *Id.* at 127; see also *id.* at 106 (“In 2012 that all changed, and ACTA exploded onto the public stage with massive street protests in sub-zero

time the Committee on International Trade of the European Parliament struck down a trade agreement.¹⁴²

In the United States, the entertainment industry's push for controversial domestic copyright legislation, such as the PROTECT IP Act (PIPA)¹⁴³ and the Stop Online Piracy Act (SOPA),¹⁴⁴ also led to an unprecedented, massive service blackout launched by Wikipedia, Reddit, WordPress, and other internet companies.¹⁴⁵ This blackout, in turn, caused Congressional representatives to quickly withdraw their support for the controversial bills, leading SOPA and PIPA to die in the 112th Congress.¹⁴⁶ As Senator Ron Wyden succinctly summarized in his reminder to then-USTR Ronald Kirk in a Senate Finance Committee hearing, "[t]he norm changed on Jan. 18, 2012, when millions and millions of Americans said we will not accept being locked out of debates about Internet freedom."¹⁴⁷

To some extent, the recent massive public protests can be traced back to the anti-globalization protests at the turn of this millennium in Seattle, Washington, Prague, Quebec, and Genoa.¹⁴⁸ What is different today, however, is the protestors'

temperatures, forcing government U-turns and prompting accusations that the EU had engaged in corrupt policymaking.").

142. See Monika Ermert, *Unprecedented Vote: EU Parliament Trade Committee Rejects ACTA*, INTELL. PROP. WATCH (June 21, 2012, 2:38 PM), <http://www.ip-watch.org/2012/06/21/unprecedented-vote-eu-parliament-trade-committee-rejects-acta/>.

143. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PIPA), S. 968, 112th Cong. (2011). See generally Letter from John R. Allison, Professor, Univ. of Tex. at Austin, et al. to Members of the U.S. Cong. (July 5, 2011), available at http://cdt.org/files/pdfs/SOPA_House_letter_with_PROTECT_IP_letter_FINAL.pdf (arguing against the adoption of the PROTECT-IP Act). In the interest of full disclosure, the Author signed onto this letter.

144. Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011).

145. See Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, at A1.

146. See Yu, *Alphabet Soup*, *supra* note 118, at 32–33.

147. Joseph J. Schatz, *Technology Groups Worry About Trade Pact*, CQ TODAY ONLINE NEWS 13, 2012, 11:47 PM), <http://public.cq.com/docs/news/news-000004045563.html?ref=corg>.

148. See Peter K. Yu, *World Trade, Intellectual Property, and the Global Elites: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1, 3 (2002) (noting the protests); see also Yu, *A Tale of Two Development Agendas*, *supra* note 113, at 566 ("[T]he anti-globalization protests in Seattle, Washington, Prague, Quebec, Genoa, and other major cities have

changing and more specific focus. Instead of broad, and at times vague, issues such as globalization or the WTO, the current protests target concrete issues, such as what individuals can or cannot do on the internet. As civil society organizations, civil liberties groups, consumer advocates, and user communities become more familiar with the issues in the public intellectual property debate, and as they gain more knowledge about the secretive bilateral, plurilateral, and regional negotiations, their criticisms will become even more powerful. Even if these individuals and organizations do not always get the specific complex legal issues entirely correct—as Justin Hughes lamented¹⁴⁹—their voice and grievances deserve considerable attention.

Indeed, it is amazing how much activism one can now find in the intellectual property field.¹⁵⁰ As Amy Kapczynski observed:

Who would have thought, a decade or two ago, that college students would speak of the need to change copyright law with “something like the reverence that earlier generations displayed in talking about social or racial equality”? Or that advocates of “farmers’ rights” could mobilize hundreds of thousands of people to protest seed patents and an [intellectual property] treaty? Or that AIDS activists would

helped provide the needed background and momentum to the push for reforms in the international intellectual property system.”).

149. Professor Hughes observed:

What is good about the SOPA/PIPA debate is that significantly more citizens got involved and the legislative process responded to that activism by postponing votes on the bills. But the good part came at quite a cost. The public discourse on SOPA/PIPA quickly became as uninformed, vitriolic, and warped as our public debates about national healthcare. Corporate behavior on both sides contributed to the mess—that’s no surprise. But so did legal academics. Academics conflated issues in the bill with an enthusiasm you’d expect from Rush Limbaugh or Rachel Maddow. Law professors who in an earlier time would have told you that the Internet interprets control as damage and routes around it were ready—in the interest of rhetorical flourish—to oppose the bills with a “don’t break the Internet” mantra.

Justin Hughes, *Introduction*, 30 CARDOZO ARTS & ENT. L.J. 1, 7 (2012).

150. See SEBASTIAN HAUNSS, CONFLICTS IN THE KNOWLEDGE SOCIETY: THE CONTENTIOUS POLITICS OF INTELLECTUAL PROPERTY 2 (2013) (highlighting the social conflicts precipitated by “[t]he struggles against ‘biopiracy’, i.e. the private appropriation of traditional (indigenous) knowledge, the conflicts about file-sharing in peer-to-peer networks, the coming-together of the access to knowledge (A2K) movement and the advent of Pirate Parties in various European countries”).

engage in civil disobedience to challenge patents on medicines? Or that programmers would descend upon the European Parliament to protest software patents?¹⁵¹

What happened today in the intellectual property field is very different from the time when the internet just started to enter the mainstream. One may still remember James Boyle's pioneering call for the creation of "a politics of intellectual property" in the mid-1990s when the internet first entered the mainstream.¹⁵² As he declared at that time:

A successful political movement needs a set of (popularizable) analytical tools which reveal common interests around which political coalitions can be built. Just as "the environment" literally disappeared as a concept in the analytical structure of private property claims, simplistic "cause and effect" science, and markets characterized by negative externalities, so too the "public domain" is disappearing, both conceptually and literally, in an intellectual property system built around the interests of the current stakeholders and the notion of the original author. In one very real sense, the environmental movement invented the environment so that farmers, consumers, hunters and birdwatchers could all discover themselves as environmentalists. Perhaps we need to invent the public domain in order to call into being the coalition that might protect it.¹⁵³

Although intellectual property activism still has a long way to go before it reaches the same level as environmental activism, such activism has certainly gone a long way since Professor Boyle made this important call for action.

Finally, one should not ignore how the lack of transparency, accountability, and democratic participation in the TPP negotiations could backfire on the longstanding efforts on the part of the United States and other TPP negotiating

151. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J. POCKET PART* 262, 263 (2008), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4296&context=fss_papers (footnotes omitted).

152. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 *DUKE L.J.* 87 (1997).

153. *Id.* at 113.

parties to promote transparency and rule of law in the Asia-Pacific region.¹⁵⁴ It is indeed disturbing that leaders of these parties fail to practice what they preach when the message becomes an inconvenient barrier to achieving economic goals. Such failure, to some extent, reminds us of the harsh criticisms these same countries made when Asian leaders prioritized economic development over the protection for civil and political rights.¹⁵⁵

In fact, if the TPP includes transparency provisions, similar to other bilateral, plurilateral, regional, or multilateral agreements,¹⁵⁶ those provisions would become some of the most ironic and hypocritical provisions ever written into a treaty adopted for the Asia-Pacific region.¹⁵⁷ After all, it is very difficult to find a good justification for a nontransparent, unaccountable, and undemocratic process to develop a treaty that calls for transparency. It also makes one wonder whether the way the TPP is negotiated would create a perverse excuse for authoritarian governments in the Asia-Pacific region to conduct affairs in a nontransparent, unaccountable, and undemocratic manner.

To be certain, these governments might still conduct affairs in this manner if the TPP were negotiated in a transparent, accountable, and democratic manner. The “no worse off” argument was indeed quite frequently offered in response to this line of criticism. Nevertheless, one should not ignore the considerable political costs incurred in conducting affairs in a nontransparent manner. These costs are significant even in countries that do not offer much political freedom. When the practices of foreign countries are offered as justifications, much of the government’s political capital will be saved. Without comparison, the local people in those countries will also lose an

154. Cf. Yu, *Six Secret Fears*, *supra* note 56, at 1050–59 (discussing how the ACTA negotiations could backfire on these longstanding efforts).

155. For discussions of the Asian values debate in the human rights area, see generally sources cited in Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 337 n.26 (2012).

156. E.g., ACTA, *supra* note 21, art. 30; TRIPS Agreement, *supra* note 24, art. 63.

157. See Yu, *Six Secret Fears*, *supra* note 56, at 1015.

opportunity to see how negotiations could have been done differently.

CONCLUSION: THE FUTURE

The TPP negotiations have raised a lot of important questions concerning the future development of trade relations in the Asia-Pacific region, the international regulatory environment, and the multilateral trading system. It has also sparked a debate on how bilateral, plurilateral, and regional agreements should be negotiated in the future,¹⁵⁸ especially when these agreements include provisions concerning the internet and the digital environment. Although it remains unclear how the TPP negotiations will evolve, or whether China, India, or other large developing countries in the region would eventually join the agreement, it is clear that the negotiations will have harmful consequences if they are conducted in the same manner as it is today.

For example, the negotiations could lead to the creation of a tri-polar world, in which three dominant trading systems will be created under the leadership of China, Europe, and the United States.¹⁵⁹ If these systems materialize, they could bring forth inconsistent, or even conflicting, rules and standards that undermine the international regulatory environment and multilateral trading system. The TPP negotiations could also greatly accelerate the development of the RCEP and other nonmultilateral agreements within the Asia-Pacific region.

158. See *Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, MAX-PLANCK-INSTITUT FÜR INNOVATION UND WETTBEWERB, http://www.ip.mpg.de/files/pdf2/Principles_for_IP_provisions_in_Bilateral_and_Regional_Agreements_final1.pdf (last visited Jan. 6, 2014) (outlining principles to facilitate the development of “international rules and procedures that can achieve a better, mutually advantageous and balanced [international intellectual property] regulation”); see also Peter K. Yu, *The Strategic and Discursive Contributions of the Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, 62 *DRAKE L. REV. DISCOURSE* 20 (2014) (discussing these principles).

159. See Lewis, *Achieving a FTAAP*, *supra* note 34, at 226 (“The US . . . has been facing the prospect of a world with three major economic trading blocs: the Americas, the EU and an Asian bloc.”). Bryan Mercurio made a similar observation at “The Trans Pacific Partnership Agreement: Impact and Implications” Workshop at the Faculty of Law, Chinese University of Hong Kong.

Although more than half of the TPP negotiating parties (Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, and Vietnam) are also negotiating the RCEP, countries are unlikely to have the ability, resources, and sustained interest in actively developing two rather similar trade pacts in the same region. At some point, countries will have to decide whether they want to focus on one or the other.¹⁶⁰ It is therefore no surprise that “[a]n analyst with the Asian Development Bank has predicted that ASEAN+6 and the TPP will ultimately merge together.”¹⁶¹ Likewise, Merdith Kolsky Lewis observed:

[Such merger] is a definite possibility. It is hard to envision economies such as India or China agreeing in the near-term to the comprehensive liberation on trade in goods that acceding to the TPP would entail. At the same time, it also does not seem realistic that in the long-term there will be an FTAAP that does not include China. Furthermore, should Korea and Japan agree to join the TPP, it would not be in China’s interest to remain on the outside. . . . [Thus, i]t is possible that these competing considerations will coalesce via an ultimate melding together of the TPP with ASEAN+6, such that non-TPP members of ASEAN+6 phase in their commitments over a longer and later time period.¹⁶²

160. See *id.* at 231 (“The most likely alternatives to the TPP . . . are either ASEAN+6 or ASEAN+3, or perhaps a new model with a China-Japan-Korea FTA at its core.”); Lewis, *TPP and RCEP*, *supra* note 33, at 369–70 (“Of course there is nothing to stop countries from seeking to join both the TPP and the RCEP, and several countries in ASEAN seem inclined to do so by seeking to join the TPP. But particularly for countries with limited human and financial resources for negotiations and those outside the Asia-Pacific, it will probably be the case that countries will seek to join one or the other rather than both.”); see also *id.* at 223 (examining the prospects for the TPP to expand into a FTAAP); Kelsey, *supra* note 82, at 17–18 (“[T]he TPPA was envisaged as the foundation for an APEC-wide free trade agreement.”).

161. Lewis, *Achieving a FTAAP*, *supra* note 34, at 235.

162. *Id.* Deborah Elms expressed skepticism over such a merger:

Of course, a lot will ultimately depend on what happens with RCEP and the level of ambition shown. From the beginning however, a merger is already looking tricky. For instance, RCEP explicitly allows special and differential treatment for developing economies, while the TPP does not. The TPP mandates are much broader and deeper than the agenda drawn up by the 16 RCEP parties. It is highly likely that, at the end of the day, the TPP members will be reluctant to drop down the level of ambition in the TPP to meet the RCEP or that RCEP members will come up much farther to meet the TPP.

Finally, just as the United States is willing to negotiate the TTIP with the European Union, it may be willing to negotiate separate agreements with other major trading powers in the Asia-Pacific region, such as China and Japan. The discussion of a bilateral trade agreement with Japan began in response to the latter's emergence as an economic power in the 1980s.¹⁶³ Even though such discussion has now subsided, Japan continues to play an important role in the region. It is therefore no surprise that some commentators have wondered whether China's growing importance in the Asia-Pacific region would lead to more intense rivalry between China and Japan.¹⁶⁴ If such rivalry

[E]ven if a merger of some sort were possible between RCEP and the TPP, creating a 21 member [preferential trade agreement] in such a fashion would likely be a poor way to draft an agreement. Docking on and massaging existing commitments to fit a new environment is less likely to deliver maximum benefits to all parties than a new agreement negotiated from the beginning.

Elms, *TPP Trade Negotiations*, *supra* note 6, at 396–97.

163. See, e.g., Michael Aho, *More Bilateral Agreements Would Be a Blunder: What the President Should Do*, 22 CORNELL INT'L L.J. 25, 33–35 (1989) (questioning the advantages of a US-Japan bilateral trade agreement); Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 CORNELL INT'L L.J. 1, 8–17 (1989) (contending that Japan would be a particularly attractive target for a new bilateral trade agreement).

164. William Callahan disagreed:

Both Japan and China are “reluctant powers” that are not willing to take the lead in regional integration (indeed, the main activities of each seem to involve forestalling the other from assuming regional leadership). This reluctance stems from a regional environment that is characterized by fears of Japan's past (militarism) and of China's future (hegemonism). The Japanese empire regionalized East Asia during the first half of the twentieth century, and Chinese and Korean memories of this period still stress the violence of Japanese occupation and colonialism. Because of this suspicion of its intentions, Japan repeatedly failed to shape an East Asian regionalism in the 1960s and 1970s.

China has been unable to take the lead in forming regional institutions because its East Asian neighbours worry about the character of Chinese hegemony. Its recent rapid economic growth and military modernization present a potential threat to regional order and stability. Moreover, there are concerns that China's future leadership will follow the pattern of its imperial past. Some fear that the PRC is modernizing the traditional Sinocentric order, where the Middle Kingdom is surrounded by a periphery of tributary states and barbarians, as a model for its new hegemonic politics.

William A. Callahan, *Comparative Regionalism: The Logic of Governance in Europe and Asia*, in *THE INTERNATIONAL POLITICS OF EU-CHINA RELATIONS* 231, 242–43 (David Kerr & Liu Fei eds., 2007) (footnote omitted); see also Zhang Yunling & Tang Shiping, *China's Regional Strategy*, in *POWER SHIFT*, *supra* note 74, at 48, 55 (“China understands that the

occurs, Japan may be eager to foster a stronger alliance with the United States, India, and other major countries in the Asia-Pacific region.¹⁶⁵ Countries in the region may also welcome the United States to play a larger role¹⁶⁶—a role that will certainly benefit Japan.

Recent years have also seen growing discussions of the need for a bilateral investment agreement between China and the United States.¹⁶⁷ Such an agreement is especially attractive among those advocating greater engagement between China and the United States in the form of a G-2 partnership.¹⁶⁸ After

future of the region depends upon a constructive relationship between China and Japan.”). Simon Tay concurred:

Asian regionalism is moving forward—but without clear direction and leadership. Without change in Japan, there can be no rapprochement with China. This deprives East Asian regionalism of what should logically be its main driver, a partnership between China and Japan, akin to that in Europe between France and Germany. The idea of a shared leadership with China seems alien to the Japanese, and vice versa. Asia’s contentious history combines with fundamental differences to raise tensions and lead to flash points between Japan and China that the region has no proven capacity to handle.

TAY, *supra* note 12, at 82.

165. As Professor Tay explained:

As China continues to grow and charm fellow Asians, Japan cannot compete on its own. It recognizes this and has clung to its alliance with the United States and, in 2007, reached out to Australia, the closest American ally in Asia. Similarly, Japan has been reaching out economically to engage India as a counterweight to China. Even if Japan cannot compete with China in the near future, or even presently, it can be spoiler in Asian regionalism. Japan might limit Asia’s effective progress by lack of cooperation or by taking steps to bandwagon against China, forcing rivalry and tension as other Asians find they have to choose sides.

TAY, *supra* note 12, at 81–82.

166. See Lewis, *Achieving a FTAAP*, *supra* note 34, at 232 (“[G]iven concerns about China’s economic and military might, some Asian Countries may welcome the US playing a greater role in the region, and the opportunity to forge linkages with the US.”).

167. For discussions of such an agreement, see generally David A. Gantz, *Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns*, 31 ARIZ. J. INT’L & COMP. L. (forthcoming 2014); Kong Qingjiang, *U.S.-China Bilateral Investment Treaty Negotiations: Context, Focus, and Implications*, 7 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 181 (2012).

168. As Fred Bergsten argued:

The United States should . . . implement a subtle but sharp change in its basic economic strategy toward China. Instead of focusing on bilateral problems

all, in recent years, China and the United States have already actively cooperated in addressing a large variety of global problems, which range from climate change to global economic recovery. As Fred Bergsten and his colleagues reminded us:

It is now clear that an effective response to every major international economic issue requires close cooperation between [China and the United States]. There will be no sustained recovery from the global economic crisis unless China and the United States lead it and they have appropriately launched by far the largest stimulus programs in the world. There will be no renewed momentum toward trade liberalization through the Doha Round or otherwise, a credible defense against the protectionist pressures that have been intensified by the crisis, unless they endorse it. There will be no international cooperation on global warming unless they embrace it. The United States is the world's largest deficit and debtor country, and China is the world's largest surplus and creditor country, and without

and complaints, and seeking to coopt China into a global economic system that it would try to continue leading by itself, the United States should seek to develop a true partnership with China to provide joint leadership of that system, even if the system requires substantial modifications to persuade China to play that role. The two economic superpowers should begin to pursue together the development of coordinated, or at least cooperative, approaches to global issues that can be resolved effectively only through their active co-management. Such a "G-2" approach would accurately recognize, and be perceived by the Chinese as accurately recognizing, the new role of China as a legitimate architect and steward of the international economic order.

BERGSTEN ET AL., *supra* note 47, at 22–23; *see also* STEFAN A. HALPER, *THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* 25 (2010) ("[T]he American and Chinese economies are heavily interdependent. America has grown addicted to Chinese credit; China has grown equally addicted to American consumption. The depth of this interdependence creates a relationship that is stabilized in a kind of economic version of mutually assured destruction."); Walden Bello, *Chain-Gang Economics: China, the US, and the Global Economy*, in *CHINA'S NEW ROLE*, *supra* note 65, at 7, 11 (describing "a chain-gang relationship" between China and the United States in light of their growing economic interdependence); Niall Ferguson & Moritz Schularick, "Chimerica" and the Global Asset Market Boom, 10 *INT'L FIN.* 215 (2007) (coining the term "Chimerica"). *But see* HALPER, *supra*, at 216–18 (arguing against elevating the US–China relationship to a special G-2 bilateral partnership). *See Generally* ZACHARY KARABELL, *SUPERFUSION: HOW CHINA AND AMERICA BECAME ONE ECONOMY AND WHY THE WORLD'S PROSPERITY DEPENDS ON IT* (2009) (discussing the intertwined economic relationship between China and the United States).

their concurrence there will be neither resolution of the global imbalances that helped bring on the current crisis nor lasting reform of the international financial architecture.¹⁶⁹

In sum, as far as the future goes—whether it relates to the development of trade relations in the Asia-Pacific region, the international regulatory environment, or the multilateral trading system—the TPP negotiations have created more perplexities than certainty and predictability. Without the inclusion of China, India, and other fast-growing, emerging middle-income countries, the agreement is likely to have a limited impact in the Asia-Pacific region. At this point, it is also unclear whether the benefits the negotiations provide would outweigh their exorbitant geopolitical, economic, social, cultural, and technological costs.

The TPP negotiations greatly deserve continued and more dedicated attention from policymakers, commentators, and the public at large, including those from countries not hitherto involved in the TPP negotiations as well as those located outside the Asia-Pacific region. As much as we want to know what will be *included* in the final text of the TPP Agreement, we also need to be conscious of what has been *excluded* from the negotiations and what such exclusion means for the Asia-Pacific region, the international regulatory environment, and the multilateral trading system.

169. BERGSTEN ET AL., *supra* note 47, at x–xi.

