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# **EXPANDING THE P-4 TRADE AGREEMENT INTO A BROADER TRANS-PACIFIC PARTNERSHIP: IMPLICATIONS, RISKS AND OPPORTUNITIES**

*Meredith Kolsky Lewis\**

## **ABSTRACT**

*In 2005, New Zealand, Singapore, Chile and Brunei enter into a path-breaking free trade agreement, the Trans-Pacific Strategic Economic Partnership Agreement which also is also known as the P-4 Agreement. The agreement contains an open accession provision which explicitly contemplates the expansion of the agreement to include other countries willing to commit to its terms. The expansion of the agreement has important implications for the world trading system. Its broad coverage and open accession provision may suggest that the agreement has the potential to serve as a stepping stone in the path towards further multilateral trade liberalization in the WTO context. On the other hand, the expanding of the agreement may make the agreement so powerful that its members no longer consider devoting energies to liberalizing in the WTO context to be of great importance. The article explores some of the unique aspects of the TPP as well as the potential implications of expanding the agreement, both of the East Asian region and for the broader multilateral trading system.*

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**KEYWORDS:** *P-4 Agreement, Trans-Pacific SEP, TPP, FTA (Free Trade Agreement) , APEC, East Asian region, open accession provision, comprehensive coverage, trade liberalization*

## I. INTRODUCTION

In 2005, four countries from different corners of the globe entered into a unique and potentially path-breaking free trade agreement. The Trans-Pacific Strategic Economic Partnership Agreement, also known as the P-4 Agreement, comprises New Zealand, Singapore, Chile and Brunei. The agreement is notable not only for its geographic diversity but also for the comprehensiveness and depth of its coverage. In addition, the agreement contains an open accession provision which explicitly contemplates the expansion of the agreement to include other countries willing to commit to its terms. This expansion potential may soon become a reality. In 2008, the P-4 Agreement member countries entered into preliminary negotiations with the United States that were intended to lay the groundwork for the United States' ultimate accession to the Agreement. Shortly after these negotiations commenced, it was announced that Australia and Peru also intend to join the agreement. More recently Vietnam has been identified as an additional planned participant. Other countries have also signalled interest in joining an expanded version of the agreement, which is now being referred to as the TPP.<sup>1</sup> The expansion of the TPP has important implications for the world trading system. It may serve as the template for a much larger FTA, perhaps even for an ultimate free trade area of the Asia-Pacific. In addition, its broad coverage and open accession provision may suggest that the agreement has the potential to serve as a stepping stone rather than a stumbling block in the path towards further multilateral trade liberalization in the WTO context. On the other hand, should the agreement expand to encompass a very significant percentage of world trade, it may become so powerful that its members no longer consider devoting energies to liberalizing in the WTO context to be of great importance. This article explores some of the unique aspects of the TPP as well as the potential implications of expanding the agreement, both for the East Asian region and for the broader multilateral trading system.

## II. THE TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP AGREEMENT: A UNIQUE FREE TRADE AGREEMENT

What is now known as the Trans-Pacific SEP or P-4 Agreement began with negotiations launched by Chile, New Zealand and Singapore at the APEC 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

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<sup>1</sup> In this article the Trans-Pacific Strategic Economic Partnership Agreement in its current composition will be referred to as the P-4 Agreement. The proposed expanded version of that agreement to include, *inter alia*, the United States, will be referred to as the TPP.

attended a number of rounds as an observer, and ultimately joined the Agreement as a “founding member”.<sup>2</sup> 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. A binding Environment Cooperation Agreement and a binding Labour Cooperation Memorandum of Understanding, which had been negotiated as part of the Trans-Pacific package, were signed concurrently.<sup>3</sup> Following the passage of implementing legislation and related regulations, the Agreement entered into force for New Zealand and Singapore on May 1, 2006 and for Chile on November 8, 2006. Brunei deposited an instrument of provisional application on May 12, 2006 and the Agreement has provisionally applied to Brunei since June 12, 2006.<sup>4</sup> The P-4 Agreement is the first multi-party free trade agreement linking Asia, the Pacific and Latin America.<sup>5</sup>

The P-4 Agreement liberalises and facilitates trade in goods and services and promotes cooperation on a range of areas of mutual economic interest.<sup>6</sup> The Agreement is comprehensive in scope, including rules to determine which goods qualify for tariff preferences (rules of origin); measures relating to customs procedures (chapter 5), trade remedies (chapter 6), sanitary and phytosanitary procedures (chapter 7), technical barriers to trade (chapter 8), competition policy (chapter 9), intellectual property (chapter 10), and government procurement (chapter 11). It also includes broad coverage of services (chapter 12) and a dispute settlement chapter (chapter 15).<sup>7</sup> For disputes arising under both the WTO and the P-4, the agreement provides a complaining party with the choice of bringing the dispute before the WTO or of initiating dispute settlement (in the form of arbitration) under the FTA. The agreement precludes recourse to both methods of dispute settlement one after the other – a party must choose its

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<sup>2</sup> New Zealand Ministry of Foreign Affairs & Trade, History of the Trans-Pacific SEP Agreement P4, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/0-history.php> (last visited Sept. 23, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> New Zealand Ministry of Foreign Affairs & Trade, Trans-Pacific Strategic Economic Partnership Agreement Between Brunei Darussalam, Chile, New Zealand, Singapore, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/index.php> (last visited Sept. 23, 2009) [hereinafter *Trans-Pacific Strategic Economic Partnership Agreement*].

<sup>5</sup> NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE, THE NEW ZEALAND-SINGAPORE-CHILE-BRUNEI DARUSSALAM TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP 8 (1991) [hereinafter TRANS-PACIFIC BOOKLET], available at <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/trans-pacificbooklet.pdf> (last visited Sept. 23, 2009). All of the parties to the P-4 Agreement are members of the APEC.

<sup>6</sup> Brunei was given some flexibility to implement its commitments in light of its late entry into the negotiation process. For example, it was given more time to negotiate its services and government procurement schedules. *Trans-Pacific Strategic Economic Partnership Agreement*, *supra* note 4.

<sup>7</sup> TRANS-PACIFIC BOOKLET, *supra* note 5.

forum and is thereafter not permitted to bring the same dispute before the alternate forum.

While the initial agreement did not include chapters on investment or financial services, it provided that negotiations in these areas would commence two years after the agreement came into force. These negotiations were duly initiated in 2008 and it was these negotiations that the United States initially sought to, and ultimately did join.

The P-4 is what many would consider a “high standards” agreement in that the breadth of subject coverage is broad, and the extent of commitments is deep. Unlike many FTAs, the P-4 does not have any major sectoral exclusions, providing comprehensive coverage even for sectors many countries protect such as agriculture. Instead, the agreement provides for the removal of all tariffs applied by any of the members with respect to products being imported from any other P-4 member. Most tariffs were lowered to zero upon the entry into force of the Agreement,<sup>8</sup> with any remaining tariffs to be reduced to zero by 2017.

Notwithstanding the broad coverage, the parties have provided for a fairly broad set of exceptions provisions. In addition to importing the GATT Article XX exemptions wholesale into the agreement, the agreement provides that these exceptions are applicable not just in the traditional goods context, but also to the chapters on, *inter alia*, trade remedies, sanitary and phytosanitary measures, and technical barriers to trade. The P-4 also provides, as do most of New Zealand’s FTAs, an exception that allows New Zealand to discriminate in favour of its indigenous Māori population if necessary to fulfil New Zealand’s obligations pursuant to the Treaty of Waitangi.<sup>9</sup> There is also a broader cultural exception than that provided for in GATT Article XX.<sup>10</sup>

While the P-4 Agreement is comprehensive in its scope, particularly now that the financial services and investment negotiations have taken place, it is unique more for its structure than its content. First, although all of the participants are members of APEC, the Agreement is decidedly not regional in nature. By drawing together members from all across the globe the Agreement establishes strategic linkages across the Pacific, joining Latin America, South East Asia, and Oceania. To be sure, the participating economies are not especially large; however, the alliance is far more important and relevant strategically than as a means for generating

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<sup>8</sup> TRANS-PACIFIC BOOKLET, *supra* note 5, at 18. Singapore and New Zealand had already removed all tariffs on goods traded bilaterally as a result of the New Zealand and Singapore Closer Economic Partnership formed in 2001.

<sup>9</sup> The Treaty of Waitangi was entered into between representatives of the British Crown and the various Maori iwi (tribes) present in New Zealand in 1840.

<sup>10</sup> Brunei is availing itself of the moral, health and security exceptions to maintain tariffs on a short list of products including alcohol, tobacco and firearms. TRANS-PACIFIC BOOKLET, *supra* note 5, at 18 n.2.

economic synergies amongst the member countries. From a strategic standpoint however, the Agreement, along with its labour and environmental provisions, is seen within APEC as a model for a broader APEC-wide agreement.<sup>11</sup>

In addition to the strategic selection of participating countries, the P-4 Agreement is also relatively unusual amongst free trade agreements in that it is open to accession “on terms to be agreed among the parties, by any APEC economy or other state”.<sup>12</sup> This “open accession” provision thus provides the opportunity for interested countries not currently party to the agreement to be able to negotiate with the current members with an eye towards joining into the agreement. This provision further positions the P-4 Agreement to serve as a potential model or template for a Free Trade Area of the Asia-Pacific (FTAAP).

Previously, it has been assumed that efforts to attain an FTAAP would require either a large-scale negotiation amongst all APEC members to amalgamate the various existing bilateral agreements or that a particular style of free trade agreement would need to be accepted as the model for all of APEC. Neither of these paths has appeared particularly likely to bear fruit. There is no consensus amongst APEC members that an FTAAP is even desirable, and merging the various regional FTAs into one agreement would be quite challenging given the different rules of origin, sectoral exclusions, and differences in scope.<sup>13</sup> And the United States, Japan, and China have all pursued distinct styles of FTAs, making it unlikely that one of these would emerge as the clear favored choice of APEC members.<sup>14</sup> However, the expansion of the P-4 is poised to proceed according to a different path – by the incremental addition of interested countries. This methodology – which is possible due to the P-4 Agreement’s open accession provision – avoids the problems of the above-mentioned paths

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<sup>11</sup> TRANS-PACIFIC BOOKLET, *supra* note 5, at 13. In its official publication on the P-4 Agreement, the New Zealand Ministry of Foreign Affairs and Trade (MFAT) states that “[b]ecause of the low barriers to trade between the partners to the Trans-Pacific SEP, a key objective of the negotiations, from the start, was the potential strategic benefits.” *Id.*

<sup>12</sup> Open accession provisions are unusual but not unheard of. They are more common amongst APEC partners than elsewhere. Agreements featuring such provision include the Thailand – New Zealand FTA; the Thailand – Australia FTA; the North American Free Trade Agreement (NAFTA) and the Armenia – Moldova FTA. Within APEC, agreements centred in Oceania all have open accession provisions; of the agreements centred around the United States, some have open accession provisions (e.g. the United States – Australia FTA and the United States – Singapore FTA) but others do not (e.g. the United States – Chile FTA); and among agreements centred in East Asia, very few FTAs contain open accession provisions. See Christopher M. Dent, *Full Circle? Ideas and Ordeals of Creating a Free Trade Area of the Asia-Pacific*, 20(4) THE PACIFIC REVIEW 447, 459 (2007).

<sup>13</sup> See, e.g., JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 92-96 (2008).

<sup>14</sup> Dent, *supra* note 12, at 464-66.

yet over time may accomplish the parties' goal of expanding the membership and influence of the agreement.

### III. PROSPECTS FOR EXPANDING THE P-4 AGREEMENT INTO A BROADER TRANS-PACIFIC PARTNERSHIP

On February 4, 2008, the United States Trade Representative initiated the process contemplated by the P-4 Agreement's open accession provision, announcing that the United States would join in negotiations on investment and financial services set to begin in March between Singapore, Chile, New Zealand and Brunei.<sup>15</sup> On September 22, 2008, comprehensive negotiations for the United States to join the Trans-Pacific Agreement were launched. The first round of negotiations was scheduled to commence in March 2009, with Australia, Peru and Vietnam also intending to participate in negotiations from the first round.<sup>16</sup> This first round of negotiations has been deferred while the new Obama administration conducts a general review of United States trade policy. However, it seems highly likely that following its review the Obama administration will elect to pursue these negotiations, and this article proceeds on that assumption.

The concept of a Pacific FTA did not first occur to the United States upon seeing the P-4 Agreement; instead, this concept was discussed as early as 1998 when the United States, Singapore, Chile, Australia and New Zealand engaged in informal discussions regarding the possibility of forming a "Pacific-5" free trade agreement. Although these discussions did not take off at the time due to the United States executive branch's lack of fast-track negotiating authority and the fact that Australia and Chile were prioritizing other issues, the idea had been hatched. Out of that idea sprang the agreement between New Zealand and Singapore on a Closer Economic Partnership (NZSCEP) which entered into force in 2001, and NZSCEP in turn served as the model for the P-4 Agreement. Thus while the negotiations to expand the P-4 are of recent origin, the concepts and goals underlying those negotiations have been in place for some time.

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<sup>15</sup> Press Release, United States Trade Representative [USTR], United States to Join Sectoral Negotiations with Four Asia-Pacific Countries Will Explore Participation in Broader Strategic Partnership Agreement (Feb. 4, 2008), available at [http://www.ustr.gov/sites/default/files/uploads/pdfs/press\\_release/2008/asset\\_upload\\_file806\\_14451.pdf](http://www.ustr.gov/sites/default/files/uploads/pdfs/press_release/2008/asset_upload_file806_14451.pdf) (last visited Sept. 23, 2009). The original P-4 Agreement provided that negotiations on financial services and investment would begin within two years of the entry into force of the Agreement. Those negotiations commenced in March 2008, with the United States participating while weighing whether to negotiate its comprehensive accession into the agreement. *See generally* New Zealand Ministry of Foreign Affairs & Trade, Trans-Pacific Strategic Economic Partnership Agreement Between Brunei Darussalam, Chile, New Zealand and Singapore, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/index.php> (last visited Sept. 23, 2009).

<sup>16</sup> *Id.*



#### IV. IMPLICATIONS OF TPP EXPANSION FOR EAST ASIAN REGIONALISM

##### A. Regionalism Models

There have been many different proposed models for East Asian regionalism, but a unified region is far from a reality. There are historical, cultural, political, and economic reasons why this is the case. Nonetheless, within the region at present there are a variety of associations, regional groupings, and FTAs. Among others, there is the Asia Pacific Economic Cooperation (APEC), the Association of South East Asian Nations (ASEAN), and a multitude of free trade agreements, some between two Asian countries, others between ASEAN and one other Asian country, and some that involve one or more Asian countries and one or more parties from outside the region.

Discussions regarding Asian economic integration offer several different formulations as potential paths forward for the region. In the early 1990s many expected that APEC would be the mechanism through which deeper Asian integration would occur. However, due in part to the Asian financial crisis of the late 1990s as well as other factors, APEC's role has diminished over time. During the same period, the Japanese economy underwent a lengthy period of stagnation while China's economy has grown exponentially, increasing China's power in the region. However, China has been cautious about the level of commitments it makes in its free trade agreements, calling into question the suitability of these agreements to serve as a basis for forming an eventual FTAAP.<sup>17</sup>

More recent possibilities raised have included ASEAN+3, whereby ASEAN would enter into a free trade agreement with China, Japan, and Korea;<sup>18</sup> ASEAN+6, which would see Australia, New Zealand, and India added to the ASEAN+3 formulation;<sup>19</sup> and an East Asian Free Trade Area (comprising China, Japan, and Korea).<sup>20</sup> What is notable about these proposals is the assumption that the major players will not include the

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<sup>17</sup> It is of course a separate question as to whether it would be desirable for an FTAAP to be formed. See, e.g., Dent, *supra* note 12 at 469-70 (arguing that an FTAAP could destabilize the world trading system and would perhaps make the WTO appear redundant).

<sup>18</sup> Another possibility is that there will be a series of ASEAN+1 individual agreements, including with Japan, China, and Korea individually, before there is an ASEAN+3 agreement.

<sup>19</sup> See, e.g., Masahiro Kawai & Ganeshan Wignaraja, ASEAN+3 or ASEAN+6: Which Way Forward?, presented at the Conference on Multilateralising Regionalism (Sept. 10-12, 2007), available at [http://www.wto.org/english/tratop\\_e/region\\_e/con\\_sep07\\_e/kawai\\_wignaraja\\_e.pdf](http://www.wto.org/english/tratop_e/region_e/con_sep07_e/kawai_wignaraja_e.pdf) (last visited Sept. 23, 2009); EDWARD J. LINCOLN, EAST ASIAN ECONOMIC REGIONALISM 140-58 (2004).

<sup>20</sup> See, e.g., DEVELOPMENT RESEARCH CENTER (CHINA) ET AL., JOINT POLICY REPORT AND POLICY RECOMMENDATIONS CONCERNING A FREE TRADE AGREEMENT AMONG CHINA, JAPAN AND KOREA (2006).

United States. Each formulation raises its own balance of power concerns, but all arising from within the Asian region. For example, ASEAN+3 has raised some concerns within ASEAN that the balance of power would shift from Southeast Asia to Northeast Asia.<sup>21</sup>

The ASEAN+6 formulation arose in part to keep the power balance from shifting north, but also because Japan wanted to include India, Australia and New Zealand as a counterbalance to China.<sup>22</sup> This Asia-only focus is consistent with the efforts of the last two decades – originally spearheaded by Malaysia’s former Prime Minister Mohamad Mahathir – to develop a collaborative East Asian economic grouping that would by design exclude the United States.<sup>23</sup>

An East Asian FTA would likely see a power shift from South to North as with ASEAN+3. It could give rise to a world with three major trading blocs; the Americas, the EU, and East Asia. Critics of regionalism are particularly concerned by the implications such a tripolar system would have for the multilateral trading system.<sup>24</sup>

The TPP expansion may reflect a different path towards Asian economic integration, one which would in the first instance neither have ASEAN nor the three major East Asian economies at its core, and which would instead have the United States as a central participant. If the expanded TPP becomes the basis for a Free Trade Area of the Asia Pacific (FTAAP), Asian integration will develop along lines more similar to those envisioned – even if primarily in an aspirational sense – by the members of the Asia Pacific Economic Cooperation (APEC) than those being contemplated in the context of ASEAN expansion.<sup>25</sup>

Of course it is not a given that TPP expansion will lead to an FTAAP. Within APEC supporters of an FTAAP include the P-4 Agreement member countries, as well as the United States, Canada, and Taiwan.<sup>26</sup> However, China, Japan, Thailand, Malaysia, Indonesia and the Philippines all oppose

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<sup>21</sup> Barry Desker, *Prospects for East Asia Community*, in CHALLENGES TO TRILATERAL COOPERATION: THE TRILATERAL COMMISSION TOKYO PLENARY MEETING 2006 66, 66 (Trilateral Commission ed., 2006).

<sup>22</sup> Takashi Terada, *Forming an East Asian Community: A Site for Japan-China Power Struggles*, 26(1) JAPANESE STUD. 5, 16 (2006).

<sup>23</sup> For a discussion of the origins of East Asian regionalism and the formation of APEC, see EAST ASIAN MULTILATERALISM: PROSPECTS FOR REGIONAL STABILITY 5-8 (Kent E. Calder & Francis Fukuyama eds., 2008).

<sup>24</sup> See, e.g., Bernard K. Gordon, *U.S. Perspectives on East Asian Economic Integration*, 31(2) J. ECON. DEV. 149, 152 (2006).

<sup>25</sup> For a discussion of APEC’s consideration of a Free Trade Area of the Asia Pacific (FTAAP), see C. Fred Bergsten, *Toward a Free Trade Area of the Asia Pacific*, presented at a Joint Conference of the Japan Economic Foundation and Peterson Institute for International Economics on “New Asia-Pacific Trade Initiatives” (Nov. 27, 2007), available at <http://www.iie.com/publications/papers/bergssten1107.pdf> (last visited Sept. 23, 2009).

<sup>26</sup> Dent, *supra* note 12, at 456.

the idea of an FTAAP.<sup>27</sup> The incremental way in which the TPP is going to expand may force some of the countries in opposition to rethink their positions. Regardless of whether an FTAAP is the ultimate outcome, an expanded TPP will affect the APEC countries that are not members.

### B. China

The implications of an expanded TPP for the region are significant. With respect to China, an expanded TPP could diminish China's ability to set its own trade agreement agenda. China's FTA policy has been somewhat inconsistent, with agreements of differing ambition and detail.

China formed a free trade agreement with ASEAN that took effect in 2003.<sup>28</sup> This Framework Agreement on Comprehensive Economic Cooperation (FACEC) is intended to lead to a China-ASEAN Free Trade Area with different subject coverage and effectiveness dates for different ASEAN members.<sup>29</sup> The earliest benchmark is to negotiate an FTA on trade in goods with the so-called ASEAN 6 (the original six members of ASEAN – Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand) to be in place by 2010 and a similar agreement for the remaining, less-developed ASEAN members Cambodia, Laos, Myanmar, and Vietnam by 2015.<sup>30</sup> The details of the FTA – including the scope of goods covered and the rules of origin to apply – were not elaborated upon in the Framework Agreement but instead left to future negotiations. Perhaps with the exception of its FTA with New Zealand, China's FTAs – the one with ASEAN included – are generally viewed as being largely political in nature and of low economic quality.<sup>31</sup> China has not been particularly active in attempting to spur on the Doha Round of WTO negotiations and has expressed scepticism about the APEC FTAAP concept; the latter possibly because of Taiwan's inclusion in APEC for economic purposes.<sup>32</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> The members of ASEAN negotiated an FTA amongst themselves – known as the ASEAN Free Trade Area or AFTA – in 1992. Tariff elimination amongst the original six members of ASEAN (Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand) is scheduled to be completed by 2010, and by 2015 for the newer four members (Cambodia, Laos, Myanmar, and Vietnam).

<sup>29</sup> For commentary on the China-ASEAN FTA (FACEC), see generally CHINA-ASEAN RELATIONS: ECONOMIC AND LEGAL DIMENSIONS (John Wong et al. eds., 2006).

<sup>30</sup> For a discussion of the formation of the FACEC, see Zeng Huaqun, *WTO Rules and China-ASEAN FTA Agreement*, in CHINA-ASEAN RELATIONS: ECONOMIC AND LEGAL DIMENSIONS 93, 93-94 (John Wong et al. eds., 2006); Qingjiang Kong, *China's WTO Accession and the ASEAN China Free Trade Area: The Perspective of a Chinese Lawyer*, 7(4) J. INT'L ECON. L. 839, 852 n.30 (2004).

<sup>31</sup> Bergsten, *supra* note 25, at 4. For a discussion of the variation amongst China's agreements, see Agata Antkiewicz & John Whalley, *China's New Regional Trade Agreements* (Can. Agric. Trade Pol'y Res. Network, Working Paper 2004-1, Nov. 2004), available at <http://www.uoguelph.ca/~cat/prn/PDF/Working%20Paper%202004-1.pdf> (last visited Sept. 23, 2009).

<sup>32</sup> Bergsten, *supra* note 25, at 4.

If the TPP expansion proceeds, China will no longer be in as good a position to control whether an FTAAP is created, and concomitantly may have less control over the participation of Taiwan, should the inclusion of all APEC members become more likely. Alternatively it may be the case that the TPP will morph into an FTAAP but with APEC members not all acceding at once.<sup>33</sup> Nonetheless, if the FTAAP arises out of an expanded TPP, China's ability to control the agenda will be diminished. That said, should China choose to make the requisite levels of commitments, it will be well-placed to join the expanded TPP as it already has FTAs itself with New Zealand, Chile, and effectively with Singapore by virtue of its FTA with ASEAN.

### *C. Japan*

Japan currently has FTAs with P-4 members Singapore and Brunei. It also has a number of other FTAs with Asian countries, as well as an agreement with ASEAN as of 2008. As with China, an expanded TPP would likely reduce Japan's ability to establish the breadth and depth of its FTA commitments. Japan would likely have some difficulties in acceding to an expanded TPP due to the high level of commitments in agriculture that would be expected. Japan may therefore ultimately find itself in a difficult position of having to decide whether to accede to an agreement that differs from its preferred FTA model, or to instead stay outside of an agreement that could end up comprising a very significant percentage of world trade.

### *D. Korea*

Korea's regional position could be enhanced relative to the other East Asian powers Japan and China, should TPP expansion proceed. Korea and the United States have negotiated an FTA that now awaits approval from the United States Congress. Should that approval be forthcoming – which is not a given, as the Obama Administration is substantively reviewing the pending agreements negotiated by the Bush Administration – Korea would be in a good position to accede to the TPP. By virtue of having reached agreement with the United States already on the issues the U.S. prioritizes, it would presumably find it easier to reach commonality with the expanded TPP partners than would either Japan or China. However, should the

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<sup>33</sup> Bergsten, *supra* note 25, at 11. Sheng Bin predicts that China might not initially join an FTAAP, but might join at a later time. See generally Sheng Bin, *The Political Economy of an Asia Pacific Free Trade Area: A China Perspective*, in *AN APEC TRADE AGENDA? THE POLITICAL ECONOMY OF A FREE TRADE AREA OF THE ASIA PACIFIC* 53 (Charles Edward Morrison & Eduardo Pedrosa eds., 2007).

current P-4 members succeed in keeping the coverage of the agreement comprehensive, Korea will – like Japan – have difficulties agreeing to the agricultural liberalization that may be required of it.

### ***E. ASEAN***

As signalled above, TPP expansion will likely result in a somewhat diminished regional role for ASEAN as an association. Many of the members of ASEAN – particularly those that are WTO members – may find it appealing and not overly challenging to accede to the TPP. Singapore and Brunei are already a part of the P-4, and Vietnam is entering the TPP negotiations at the ground floor. Thailand has FTAs with New Zealand and new participants Australia and Peru, so would also be a likely country to join the agreement sooner rather than later, notwithstanding its overall lack of support for an FTAAP. On the other hand, Indonesia, the Philippines, and Malaysia have fewer institutional links to the P-4 partners aside from their ASEAN ties. As an association, ASEAN is facing pressure from some of its members to defer the implementation dates of the ASEAN Free Trade Agreement due to the global economic crisis.<sup>34</sup> It is thus not in the strongest position to lead a broadened regional undertaking; and with the involvement of the United States, will likely have less of a role in setting terms in any case.

### ***F. The United States***

The decision of the United States to negotiate to join the TPP was a very savvy one, and as noted above reflects a longer history of seeking to create a Pacific free trade agreement. By joining the TPP the U.S. will not only ensure it is not excluded from an enlarged Asian regional agreement, but will also cement its ability to be a leader in setting the terms of any future FTAAP. Instead of a world with three major economic blocs – the Americas, Europe, and East Asia – in which the American bloc likely would not be the most economically powerful of the three, there would instead be a world with two blocs. Europe would represent one of these blocs, and the Asia-Pacific, defined broadly to include Asia, the United States, Oceania, and much of South America, the other. By virtue of joining the TPP at this early stage, the United States is improving its prospects of controlling the regional power balance and of securing its position in what may expand to become the stronger of two power blocs as

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<sup>34</sup> Marianne V. Go, *RP Seeks Delay in ASEAN Free Trade Agreement*, THE PHILIPPINE STAR, Mar. 23, 2009, <http://www.philstar.com/Article.aspx?articleid=451001> (last visited Sept. 23, 2009).

opposed to placing itself in the second or third position out of three more equally-weighted blocs.

## V. TPP EXPANSION AND MULTILATERALISM: STUMBLING BLOCK OR STEPPING STONE?

### A. *General Critique of FTAs*

In addition to the implications an expanded TPP will have for Asian regionalism and economic integration, it will also have implications for the broader multilateral trading system. As a general matter free trade agreements are often seen as a bane rather than a boon for the multilateral trade agenda. Although the World Trade Organization (WTO) rules on their face only permit FTAs that cover substantially all the trade between the parties to an agreement,<sup>35</sup> in practice the WTO has not been able to effectively monitor FTAs and the vast majority of agreements enter into force notwithstanding the fact that they almost certainly do not satisfy the “substantially all the trade” requirement, regardless of how one defines that term. While there is some debate over whether comprehensive FTAs are a positive in that they chip away at trade barriers to a degree, or a negative in that they are discriminatory and undermine the ability to make progress multilaterally, it is widely believed that agreements that are not comprehensive – i.e. do not comply with the “substantially all the trade” requirement – are more likely to be stumbling blocks to further multilateral trade liberalization than stepping stones.<sup>36</sup> If WTO members reach bilateral agreements that liberalize certain sectors but leave sensitive sectors protected, it makes it all the harder to then negotiate reductions in trade barriers in those sensitive sectors in the context of WTO negotiating rounds, because there is less available to “give” in exchange for making the remaining, most difficult concessions.<sup>37</sup> The United States has been a

<sup>35</sup> See General Agreement on Tariffs and Trade art. XXIV, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

<sup>36</sup> For a recent comprehensive critique of FTAs, see BHAGWATI, *supra* note 13. While GATT Article XXIV-compliant FTAs can lead to a degree of trade diversion (see, e.g., JACOB VINER, *THE CUSTOMS UNION ISSUE* 44 (1950)), this is less likely to be an issue for open-access FTAs such as the P-4 Agreement. See, e.g., Negotiating Group on Rules, *Background Note by the Secretariat: Compendium of Issues Related to Regional Trade Agreements: Background Note by the Secretariat (Revision)*, at 27, TN/RL/W/8/Rev/1 (Aug. 1, 2002). (“[T]he lack of flexible accession provisions in many RTAs hampers their effectiveness in contributing to the growth of world trade . . .”).

<sup>37</sup> See generally Nuno Limão, *Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the United States*, 96(3) AM. ECON. REV. 896 (2006) (finding that FTAs have impeded multilateral trade liberalization); Meredith Kolsky Lewis, *The Prisoners’ Dilemma and Free Trade Agreements: An Application of Game Theory to Trade Liberalization Strategy*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 21 (Laurence Boule et al. eds., 2008); see also Thomas Cottier, *The*

strong proponent in recent years of the theory of “competitive liberalization”, whereby it is believed that the creation of FTAs will serve as a catalyst to spur progress in the multilateral negotiation setting. However, there is doubt whether competitive liberalization will be the result of increasing FTAs, as the process of harmonizing FTAs will be difficult given the disparate provisions and standards used.<sup>38</sup> There thus may be uneasiness that TPP expansion will just be another example of a subset of WTO members devoting energies to negotiations other than the WTO’s fraught Doha Round, with the result that it will become even more difficult to make progress in the multilateral setting.

### ***B. Will the TPP Take the Shape of the U.S. FTA Template?***

One concern that may arise as a result of the United States entering the TPP negotiations is whether the Agreement will morph from its current coverage to look more like the fairly uniform United States free trade agreements. The U.S. agreements are sufficiently similar in certain respects that there is often reference to a “U.S. template” agreement and to “cookie cutter” provisions. Some of the common provisions in the United States FTAs have been the subject of a variety of criticisms.<sup>39</sup> The heightened intellectual property provisions, often referred to as “TRIPS-Plus” provisions, have particularly raised concerns about affordable access to medicines and other health issues.<sup>40</sup>

The political reality for the existing members of the P-4 is that the United States will likely be able to dictate the terms of the expanded agreement both because of its overall negotiating strength and by virtue of the terms it has already negotiated in its free trade agreements with P-4

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*Erosion of Non-Discrimination: Stern Warning Without True Remedies*, 8(3) J. INT’L ECON. L. 595, 597 (2005) (noting problem of noncompliant FTAs as stumbling blocks); Meredith Kolsky Lewis, *The Free Trade Agreement Paradox*, 21 N.Z. UNIV. L. REV. 554, 557-59 (2005).

<sup>38</sup> See, e.g., Dent, *supra* note 12, at 467; BHAGWATI, *supra* note 13, at 82-85.

<sup>39</sup> See, e.g., Andrew D. Mitchell, *The Australia-United States Free Trade Agreement*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS (Laurence Boule et al. eds., 2008).

<sup>40</sup> See, e.g., Thomas A. Faunce et al., *The Trans-Tasman Therapeutic Products Authority: Potential AUSFTA Impacts on Safety and Cost-Effectiveness Regulation for Medicines and Medical Devices in New Zealand*, 37 VICTORIA U. WELLINGTON L. REV. 365 (2006); Prabodh Malhotra & Bhajan Grewal, *TRIPS-Plus: Free Trade Agreements Jeopardizing Public Health in Developing Nations*, in REGIONAL TRADE AGREEMENTS IN ASIA (Tran Van Hoa & Charles Harvie eds., 2008); Thomas A. Faunce & Joel Lexchin, “Linkage” *Pharmaceutical Evergreening in Canada and Australia*, 4(8) AUSTL. & N.Z. HEALTH POL’Y (2007), available at <http://www.anzhealthpolicy.com/content/4/1/8> (last visited Sept. 23, 2009); Bryan Mercurio, *The Impact of the Australia-United States Free Trade Agreement on the Provision of Health Services in Australia*, 26 WHITTIER L. REV. 1051 (2005); Robert Chalmers, *Evergreen or Deciduous? Australian Trends in Relation to the “Evergreening” of Patents*, 30 MELB U. L. REV. 29 (2006); Anna Kingsbury, *Intellectual Property Provisions in Bilateral and Regional Free Trade Agreements: What Should New Zealand Expect from a New Zealand/United States Free Trade Agreement?*, 10 N.Z. BUS. L.Q. 222 (2004).

partners Chile and Singapore.<sup>41</sup> Adding Australia and Peru to the negotiations makes this even more likely, as the U.S. has FTAs with these countries as well.<sup>42</sup> Oona Hathaway has explained this phenomenon in terms of sequencing path dependence: “The power to set the agenda can thus become, in a very real sense, the power to determine the result.”<sup>43</sup> It is unclear how much push back, if any, the P-4 partners will attempt. New Zealand has been anxious to enter into an FTA with the United States for several years, but has not attracted the U.S.’s interest until now. Having seen the concessions Australia made in its FTA with the United States, New Zealand has a good understanding of what the U.S. is likely to demand, and is presumably willing to accept those consequences. That said, the P-4 members have consciously negotiated an agreement that has comprehensive coverage, particularly with respect to trade in goods. The members may push hard to maintain the coverage of agriculture for example, though it seems likely the U.S. would insist at a minimum on lengthy phase out periods for the most sensitive agricultural products.

### C. *TPP as Stepping Stone?*

While the United States may have significant sway in dictating the terms of the TPP to the extent there are new sectoral commitments (as in the recent financial services and investment negotiations), the P-4 Agreement itself already contains significant liberalization commitments which it seems likely the United States would have to commit to as a condition of accession. Even if these commitments are made in exchange for TRIPS-plus provisions and other concessions, the current partners – particularly New Zealand – would stand to benefit significantly.

As noted above, the P-4 Agreement is already highly comprehensive in its coverage. Unlike many FTAs it does not have major carve outs for agricultural products and instead provides for liberalization of sectors such as dairy which many countries have traditionally protected.<sup>44</sup> Indeed the

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<sup>41</sup> The U.S.-Singapore FTA and the U.S.-Chile FTA both came into effect on January 1, 2004.

<sup>42</sup> The U.S.-Australia Free Trade Agreement (AUSFTA) entered into force on January 1, 2005. The U.S.-Peru Trade Promotion Agreement (U.S.-Peru TPA) entered into force on February 1, 2009.

<sup>43</sup> Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 618-19 (2000-2001). See also Jane Rennie, *Competition Provisions in Free Trade Agreements: Unique Responses to Bilateral Needs or Derivative Developments in International Competition Policy*, 15(2) INT. TRADE L. & REG. 57, 71 (2009) (noting path-dependent nature of bilateral FTA provisions whereby terms become a reflection of common practice rather than the particular needs of the parties). As an example of this, in the case of pharmaceuticals protection the United States has negotiated similar terms to the AUSFTA provisions in its FTA with Korea.

<sup>44</sup> Many of the EU’s FTAs include significant exclusions for agricultural products and likely fall afoul of the “substantially all” requirements of Article XXIV. See, e.g., James Farnsworth, *United States Department of Agriculture GAIN Report: EU-25 Trade Policy Monitoring, Least Favored*



United States tends to carve dairy commitments largely out of its FTAs. New Zealand in particular would reap substantial gains if the United States accession includes commitments on dairy liberalization in accordance with the commitments already made by the existing P-4 members. This would result in far more comprehensive market access to the United States for New Zealand's dairy products than New Zealand could ever have hoped to have negotiated in the bilateral context (assuming that the United States had ever become interested in a bilateral FTA with New Zealand, which is a big if). It remains to be seen how hard the P-4 members will try to require the U.S. to liberalize dairy and other sensitive sectors. However, while these are difficult domestic political issues for the United States, if the U.S. is thinking strategically about positioning the TPP as a model for an FTAAP, it may be willing to make new concessions in agriculture in hopes that the payoff will ultimately be that Japan, Korea, and other APEC economies will accede to these terms as well in the future.

Now that the United States has entered the expansion discussions, the agreement is on track to encompass a broader range of commitments, with coverage extended to financial services and investment. To the extent the expanded agreement is likely to serve as the model for a Free Trade Area of the Asia-Pacific, it is a positive that the coverage, already broad, is going to become even more comprehensive.

In addition, the fact that the Agreement contains an open accession provision will facilitate its expansion to include more and more countries. Already a queue of interested parties is developing, and it is useful that the Agreement already has procedures in place for incorporating new members. While open accession provisions have featured prominently in New Zealand's FTAs and in a number of other agreements, it is interesting to note that Taiwan has proposed that it be a WTO requirement that FTAs contain such provisions.<sup>45</sup>

In the past some have suggested that the P-4 could serve as a "dock" for other interested APEC members, with there being resultant scepticism that the P-4 "is clearly too small provide a foundation for APEC-wide arrangements."<sup>46</sup> Whether this critique is accurate or not for the P-4 as currently configured, it is evident that adding the United States to the

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*Nation: Impact of EU Trade Agreements on US Agriculture 2005*, <http://www.fas.usda.gov/gainfiles/200504/146119474.pdf> (last visited Sept. 23, 2009). Japan's FTAs with Singapore and Mexico similarly exclude a wide range of agricultural products. See Jayant Menon, *Bilateral Trade Agreements and the World Trading System*, [http://www.bilaterals.org/article.php3?id\\_article=6528](http://www.bilaterals.org/article.php3?id_article=6528) (last visited Sept. 23, 2009).

<sup>45</sup> See generally Paper by the Separate Custom Territory of Taiwan, Penghu, Kinmen and Matsu, *Submission on Regional Trade Agreements by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, TN/RL/W/186 (Aug. 3, 2005); see also the discussion in Matthew Paul Schaefer, *Ensuring that Regional Trade Agreements Complement the WTO System: US Unilateralism a Supplement to WTO Initiatives?*, 10(3) J. INT'L ECON. L. 585, 595 (2007).

<sup>46</sup> Bergsten, *supra* note 25, at 14 n.16.

grouping (and to a lesser extent, Australia, Peru and possibly Vietnam) alters the analysis considerably. It in fact seems quite likely that if the negotiations proceed and the United States, Australia, Peru and Vietnam join, there will quickly be many other countries in the Asia-Pacific region clamouring to join as well.

The combination of a high standards, comprehensive agreement with an open accession provision and the United States as a party is a heady prospect. Countries will want to join this agreement, and doing so will require very significant liberalization commitments. As a result, it is possible that the TPP will lead ultimately to an FTAAP. If continued agreement can be reached on rules of origin and other issues that tend to render FTAs inconsistent with one another and create the infamous spaghetti bowl of clashing commitments, there may even be a prospect that the FTAAP could drive progress in the Doha Round rather than hinder it. As a general proposition I believe that FTAs are stumbling blocks in the path of multilateral trade liberalization. And competitive liberalization seems unlikely to materialize as a result of the proliferation of the usual non-comprehensive FTAs. However, comprehensive, open accession agreements may provide the best possibility to prove the exception to the rule as they provide a more realistic opportunity to “multilateralize” regionalism.<sup>47</sup> This could particularly take hold in the APEC context where open regionalism has long been a central tenet, even if never fully defined.<sup>48</sup>

## VI. CONCLUSION

The expansion of the P-4 Agreement into a Trans-Pacific Partnership that includes the United States may serve as the template agreement for an ultimate Free Trade Area of the Asia-Pacific. The decision by the United States to seek to join the TPP is a savvy move as it will give the U.S. a role in shaping what is likely to become the most important trade agreement in the Asia-Pacific – and if it ultimately becomes the basis for an FTAAP (or even just a significantly-expanded agreement) perhaps in the world. In

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<sup>47</sup> See generally Sungjoon Cho, *Defragmenting World Trade*, 27(1) NW. J. INT'L L. & BUS. 39 (2006); Joost Pauwelyn, *Legal Avenues to “Multilateralizing Regionalism”: Beyond Article XXIV*, presented at the Conference on Multilateralising Regionalism (Sept. 10-12, 2007), available at [http://www.wto.org/english/tratop\\_e/region\\_e/con\\_sep07\\_e/pauwelyn\\_e.pdf](http://www.wto.org/english/tratop_e/region_e/con_sep07_e/pauwelyn_e.pdf) (last visited Sept. 13, 2009). See also Robert Z. Lawrence, *Regionalism and the WTO: Should the Rules be Changed?*, in *THE WTO AND RECIPROCAL PREFERENTIAL TRADING ARRANGEMENTS* 490, 494 (Caroline Freund ed., 2007) (“[D]ynamics of regional groups that are open to all newcomers will differ from those of exclusive or selective ones.”).

<sup>48</sup> E.g. Srikanta Chatterjee, *Regionalism, Open Regionalism, the APEC and the WTO: An Economic Perspective from New Zealand* (Dep’t of Applied and Int’l Econ., Massey Univ., Discussion Paper No. 99.03, April 1999), available at <http://econ.massey.ac.nz/publications/discuss/dp99-03.pdf> (last visited Sept. 23, 2009).

addition, it will put the United States in a strong position relative to the EU should the agreement expand to include the major Asian economies. The inclusion of the United States is also of potential importance as the U.S. may serve as a counterweight to the other potential regional kingpins, Japan and China. The TPP expansion also has significant implications for the WTO.

While FTAs generally undermine the goal of multilateral trade liberalization because they usually do not comply with the GATT Article XXIV mandate of covering “substantially all” the trade between the agreement members, the P-4 Agreement, with its open accession provision and broad coverage, may have more potential than most agreements to serve as a stepping stone rather than a stumbling block, at least towards increased regional liberalization. In the multilateral context an expanded TPP could result in renewed commitment to Doha by countries not party to the TPP. However, there is also the risk that a very strong regional grouping may serve to marginalize the importance of the WTO for TPP members. Regardless of the outcome, it seems clear that as the P-4 expands into the TPP, it will be an agreement that significantly influences regional and multilateral trade liberalization dynamics.

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