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THE TRANS-PACIFIC PARTNERSHIP: JAPAN, CHINA, THE U.S., AND THE EMERGING SHAPE OF A NEW WORLD TRADE REGULATORY ORDER

LARRY CATÁ BACKER*

ABSTRACT

The role and shape of international trade agreements is changing. No longer simple devices for easing the movement of goods across borders, they are becoming both an instrument of integrated economic regulation at the supranational level and a tool of international relations within the emerging global economic order. The recently expanded scope of negotiations over the Trans-Pacific Partnership (“TPP”) serves as a case in point, one that focuses both on the trilateral relations between Japan, the United States, and China, and on the form of competition for control of the language of supranational economic regulation. The focus of this Article is on the decision by Japan to join the U.S.-led negotiations for a Trans-Pacific Partnership, even as it pushes ahead with a Free Trade Agreement with China and Korea. This decision represents a critical new aspect of Japanese trade relationships that is likely to have significant economic and geopolitical effects. I will first describe the TPP from its genesis as an effort by Brunei, Chile, New Zealand, and Singapore to better integrate their economic relationships into current efforts to create a powerful free trade area of the Pacific that excludes China. I will then elaborate on the central strategic considerations that follow from this important decision in the relationships between Japan, the United States, and China, with emphasis on the way in which this affects contests for control of international rulemaking within the structures of economic globalization. For Japan, the TPP may represent a means to use a necessary containment of its own policy autonomy within complex

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networks of multilateral arrangements to protect its sizeable investment in China, at least temporarily, and to permit it to leverage its power to influence global trade rules. For the United States, the TPP presents an opportunity to leverage power as well, by creating an alternative to the World Trade Organization (“WTO”) for moving trade talks forward in ways that serve U.S. governance interests more comprehensively. For China, the TPP represents an additional layer of containment, meant to constrain its economic power and to limit the value of the country’s form of state capitalism. The TPP represents the next wave of plurilateral comprehensive agreements that will shape the framework of global economic governance. It also suggests the growing importance of international agreements as the space within which the structures of economic regulation will be determined, to the detriment of state power. Within these structures, the TPP also reaffirms that Japan stands uncomfortably close to the fissure that separates the United States from Chinese interests, and must continue to rely on the internationalization of rulemaking to protect its interests. An independent path for Japan is unlikely to be an option worth considering.

INTRODUCTION

International trade agreements were once the province of politics and only incidentally of interest to lawyers. These instruments have now evolved into increasingly important sources of rulemaking affecting both domestic and international legal orders.¹ To that end, they are no longer treated as simple devices for easing the movement of goods across borders. Instead, trade agreements are increasingly considered instruments of integrated economic regulation at the supranational level and a tool of international relations within the emerging global economic order.²

The recently expanded scope of negotiations over the Trans-Pacific Partnership (“TPP”) serves as a case in point—one that focuses both on the trilateral relations between Japan, the United States, and China, and on

1. See, e.g., Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 6 (2005) (evolution of trade agreements from essentially political to more regulatory); Patrick Specht, *The Dispute Settlement Systems of WTO and NAFTA—Analysis and Comparison*, 27 GA. J. INT’L & COMP. L. 57 (1998).

2. See, e.g., Stephen Joseph Powell & Ludmila Mendonça Lopes Ribeiro, *Managing the Rule of Law in the Americas: An Empirical Portrait of the Effects of 15 Years of WTO, Mercosul, and NAFTA Dispute Resolution on Civil Society in Latin America*, 42 U. MIAMI INTER-AM. L. REV. 197, 198 (2011) (trade dispute settlement contributes to the management and perfection of the rule of law in support of democratic governance for civil societies in Latin America).

the form of competition for control of the language of supranational economic regulation. The relationship between Japan and China remains complex and antagonistically competitive.³ History both joins and divides them.⁴ The specter of the century before 1949⁵ in their relations continues to affect elite and popular perceptions in ways that sometimes drive policy and culture. The October 2012 anti-Japanese riots in China were the first significant expressions of anti-Japanese popular opinion since 2005. The riots demonstrated the way in which passions, both managed and unmanaged, can be inflamed.⁶ Indeed, popular sentiment has become a critical factor driving those relations.⁷ The Japanese have not been passive either. After the October riots the Japanese press countered with the suggestion of a mass pull out of Japanese investment in China.⁸

Currently, that cooperative and sometimes antagonistic relationship is making itself felt in two important respects. The first is in territorial claims of the two states, especially with respect to the Senkaku Islands (known to the Chinese as the Diaoyu Islands). The second, to some extent tied to the first, are the efforts to control or at least influence the structures of trade in the Pacific region, efforts pushed into high gear with the election of Prime Minister Shinzo Abe. The two are linked from the Japanese and Chinese

3. For current thinking in the popular press, see, e.g., Gideon Rachman, *The Shadow of 1914 Falls Over the Pacific*, FIN. TIMES (Feb. 4, 2013), <http://www.ft.com/intl/cms/s/0/e29e200a-6ebb-11e2-9ded-00144feab49a.html#axzz2OBoyj8tY> (“US is concerned that the new Japanese cabinet is full of hardline nationalists, who are more inclined to confront China. Shinzo Abe, the new Japanese prime minister, is the grandson of a wartime cabinet minister and rejects the ‘apology diplomacy,’ through which Japan tried to atone for the war. . . . The Chinese military is also increasingly influential in shaping foreign policy.”).

4. See, e.g., RICHARD C. BUSH, *THE PERILS OF PROXIMITY: CHINA-JAPAN SECURITY RELATIONS* (2010).

5. See, e.g., RICHARD J. SAMUELS, *SECURING JAPAN: TOKYO’S GRAND STRATEGY AND THE FUTURE OF EAST ASIA* (2011); JOHN DEWEY, *CHINA, JAPAN AND THE U.S.A.: PRESENT CONDITIONS IN THE FAR EAST AND THEIR BEARING ON THE WASHINGTON CONFERENCE* (1921).

6. *Rattling the Supply Chains*, ECONOMIST (Oct. 20, 2012), <http://www.economist.com/news/business/21564891-businesses-struggle-contain-fallout-diplomatic-crisis>.

7. Nozomu Hayashi, the Beijing Bureau correspondent for the *Asahi Shimbun*, noted:

Small anti-Japan rallies, which started near the Japanese Embassy in Beijing and elsewhere, spread to many places across the country toward the weekend. CCTV kept fanning anti-Japanese sentiments.

A retired official from China’s Foreign Ministry said that anti-Japan rallies, which he said was ignited by Japan’s actions, were not the same as those in the past.

“If the Chinese government stopped the Hong Kong activists, the people’s criticism would have quickly turned toward the central government,” the former official said. “Anti-Japan sentiments, which began after (Tokyo Governor Shintaro) Ishihara’s announcement of a plan to purchase the islands, reached a different level from those in the past.”

Nozomu Hayashi, *@Beijing: Why Have China’s Anti-Japan Sentiments Heightened?*, ASAHI SHIMBUN (Oct. 25, 2012), <http://ajw.asahi.com/article/views/column/AJ201210250004>.

8. *Rattling the Supply Chains*, *supra* note 6.

perspectives. In an editorial published for English-speaking readers in the *People's Daily* in January 2013, Chinese authorities made it clear that they view Japanese economic and diplomatic policies as aimed potentially to further a strategy of encircling and containing Chinese economic ambitions and territorial claims.⁹

Indeed, Shinzo Abe himself has described Japan's policies so as to corroborate these concerns. During an address to the Center for Strategic and International Studies ("CSIS") on February 22, 2013, Prime Minister Abe explained where he thought Japan should stand in the future by referencing three principal tasks it faced:

Firstly, when the Asia-Pacific or the Indo-Pacific region becomes more and more prosperous, Japan must remain a leading promoter of rules. By rules, I mean those for trade, investment, intellectual property, labor, environment and the like. Secondly, Japan must continue to be a guardian of the global commons, like the maritime commons, open enough to benefit everyone. Japan's aspirations being such, thirdly, Japan must work even more closely with the United States, Korea, Australia and other like-minded democracies throughout the region.¹⁰

According to the Prime Minister, the most effective use of Japanese power was on rules promotion, guardianship of open seas and other global common spaces, and for Japan to serve as an active partner of democratic states in the Pacific region.¹¹ This approach to successful assertion of Japanese power was echoed recently by Foreign Affairs Minister Fumio Kishida's speech to the 183rd Session of the Diet in which he identified the three pillars of Japanese foreign policy as "strengthening the Japan-U.S. Alliance, deepening our cooperative relations with neighboring

9. Editorial, *Encircling China Just Japan's Wishful Thinking*, PEOPLE'S DAILY ONLINE (Jan. 17, 2013), <http://english.peopledaily.com.cn/90883/8095303.html>. The editorial stated:

The Japanese media have described the Abe administration's diplomatic moves as new attempts to contain and encircle China.

It is fine if Japan's "strategic diplomacy" is simply aimed at improving its relations with the above countries, promoting its foreign trade and investment, creating favorable external conditions for domestic economic recovery, and enhancing its international status and clout.

Japan will be disappointed if it really hopes to work with the above countries to contain, isolate, and encircle China through "strategic diplomacy," and gain a strategic advantage over China in the dispute over the Diaoyu Islands.

Id.

10. Shinzo Abe, Japan is Back, Speech to the Center for Strategic and International Studies (CSIS) (Feb. 22, 2013) (transcript available at http://www.mofa.go.jp/announce/pm/abe/us_20130222en.html).

11. *Id.*

countries, and strengthening economic diplomacy as a means to promoting the revitalization of the Japanese economy.”¹²

Japan is pushing ahead with a Free Trade Agreement with China and Korea,¹³ but has also decided to join the U.S.-led negotiations for a Trans-Pacific Partnership (“TPP”).¹⁴ This decision presents a new aspect of Japanese trade relationships that is likely to have significant economic and geopolitical effects. I will first describe the TPP from its genesis as an effort by Brunei, Chile, New Zealand, and Singapore to better integrate their economic relationships into current efforts to create a powerful free trade area of the Pacific that excludes China. I will then suggest some important strategic considerations that may follow from this important decision in the relationships between Japan, the United States, and China, with emphasis on the way in which this affects contests for control of international rulemaking within the structures of economic globalization.

I. THE TRANS-PACIFIC PARTNERSHIP

The TPP has evolved from a modest effort to secure regionalized trade into a politically criticized grasp for economic regulatory power. Originally the TPP represented efforts of a few Pacific Basin states—Brunei, Chile, New Zealand, and Singapore—to develop a modest framework for trade liberalization in the shadow of larger Asia-Pacific multilateral trade organizations. Originally known as the Pacific Three Closer Economic Partnership (“PO3-CEP”), negotiations commenced in 2002 in the shadow of the Asia-Pacific Economic Cooperation (“APEC”) forum.¹⁵ It was signed in 2005 as a free trade-type agreement among these states. The United States was not invited to TPP talks until 2008. By 2011, TPP had grown to nine—Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States.¹⁶ It has been

12. Fumio Kishida, Foreign Policy Speech by Minister for Foreign Affairs Fumio Kishida to the 183rd Session of the Diet (Feb. 28, 2013) (transcript available at http://www.mofa.go.jp/announce/fm/kishida/speech_130228.html).

13. *See, e.g.*, Joint Declaration on the Enhancement of Trilateral Comprehensive Cooperative Partnership, China-S. Kor.-Japan, May 13, 2012, http://www.mofa.go.jp/region/asia-paci/jck/summit1205/joint_declaration_en.html; Press Release, Japan Ministry of Foreign Affairs, Preparatory Meetings for the Negotiation of a Free Trade Agreement (FTA) among Japan, China and the ROK (Feb. 21, 2013) (available at http://www.mofa.go.jp/announce/announce/2013/2/0221_01.html).

14. *See, e.g.*, Joshua Meltzer, *Japan Joins the Trans Pacific Partnership—Finally!*, BROOKINGS INST. (Mar. 18, 2013), <http://www.brookings.edu/blogs/up-front/posts/2013/03/18-japan-joins-trans-pacific-partnership-meltzer>.

15. For a history of the Asia Pacific Economic Cooperation (“APEC”), see *History*, APEC, <http://www.apec.org/About-Us/About-APEC/History.aspx>.

16. OFFICE OF THE U.S. TRADE REP., THE UNITED STATES IN THE TRANS-PACIFIC PARTNERSHIP

reported in influential outlets of the European press that “[m]any believe that other members of the APEC bloc may also join the agreement in the coming years, making it an even more important pact.”¹⁷

TPP has three principal objectives: increasing markets for exports, providing a basis for broad Asia-Pacific regional economic integration, and increasing the competitiveness of the participating states.¹⁸ There are five key features that the U.S. Trade Representative suggested “will make TPP a landmark, 21st-century trade agreement, setting a new standard for global trade and incorporating next-generation issues that will boost the competitiveness of TPP countries in the global economy.”¹⁹ These include, first, the provision of comprehensive market access by eliminating tariffs and other barriers to trade. Second, TPP will be structured to make possible full regionalization that embeds within it the development of production and supply chains among TPP members. Third, TPP focuses on inter-agreement coherence. This requires integrating work done through APEC with a focus on regulatory coherence, enhancing competitiveness, a focus on small business (thus the reference to supply chains), and market liberalization. Fourthly, TPP would help develop trade in emerging technologies, including digital and green technologies. Lastly, TPP is designed to be a so-called “living agreement.”²⁰ Like the WTO (but ideally more successful), it is meant to remain a work in progress.²¹ The scope of TPP is also meant to be fairly comprehensive.²²

(Nov. 2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>.

17. *TPP: What Is It and Why Does It Matter?*, BBC NEWS (Mar. 14, 2013), <http://www.bbc.co.uk/news/business-21782080>.

18. OFFICE OF THE U.S. TRADE REP., *supra* note 16.

19. OFFICE OF THE U.S. TRADE REP., ENHANCING TRADE AND INVESTMENT, SUPPORTING JOBS, ECONOMIC GROWTH AND DEVELOPMENT: OUTLINES OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

20. *Id.* The living agreement aspect of TPP might be attacked as not very sensible, precisely because it would require a mechanism either for constant renegotiation for the development of a supranational legislative apparatus to deal with changes in trade and economic activities. It is likely that any sort of structure that might explicitly cede governance authority out of the United States might raise opposition and be attacked as anti-democratic. The living agreement aspect of TPP might well also require an institutional infrastructure to make it work. That may be a tall order. The creation and deployment of a Secretariat structure, especially one with potentially important remediation structures, like ICSID, may be difficult to sell to Congress or to the United States’ partner states. Yet MERCOSUR has suggested that even an agreement with strong inter-governmental character can sustain a useful secretariat structure. *See, e.g.*, LUIZ OLAVO BAPTISTA, FOREIGN TRADE INFORMATION SYSTEMS, MERCOSUR, ITS INSTITUTIONS AND JURIDICAL STRUCTURE (1998), available at http://ctr.sice.oas.org/geograph/south/mstit2_e.pdf.

21. OFFICE OF THE U.S. TRADE REP., *supra* note 19.

22. *Id.* Issues covered include (1) regulation of competition (antitrust) issues, (2) cooperation and

TPP is still very much a work in progress.²³ The Sixteenth Round of TPP talks were held in Singapore from March 4–13, 2013,²⁴ and the Seventeenth Round was held from May 15–24 in Lima, Peru.²⁵ One of the principal objectives was the integration of Japan into the talks. There was also a nod toward stakeholder engagement.²⁶ Yet the way this engagement was described was curious indeed: the U.S. Trade Representative described the event as causing the temporary suspension of the negotiation “so negotiators could meet with the 300 stakeholders from the United States and other TPP countries.”²⁷ The Eighteenth Round of negotiations

capacity building (based on a demand driven and flexible institutional mechanism), (3) cross border services (fair open and transparent markets for services), (4) customs, (5) e-commerce, (6) environmental issues (including effective provisions on trade-related issues that would help to reinforce environmental protection and discussing an effective institutional arrangement to oversee implementation and a specific cooperation framework for addressing capacity building needs), (7) financial services regulation (investment in financial institutions and cross-border trade in financial services will improve transparency, non-discrimination, fair treatment of new financial services, and investment protections and an effective dispute settlement remedy for those protections), (8) government procurement, (9) intellectual property (reinforcing and developing existing World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) rights and obligations), (10) investment (transforming bi-lateral trade agreement terms into a multilateral framework, substantive legal protections for investors and investments of each TPP country in the other TPP countries, including ongoing negotiations on provisions to ensure non-discrimination, a minimum standard of treatment, rules on expropriation, and prohibitions on specified performance requirements that distort trade and investment), (11) labor issues, (12) legal issues (dispute resolution), (13) market access for goods, (14) rules of origin, (15) sanitary and phytosanitary standards (animal and plant health and food safety), (16) technical barriers to trade issues, (17) telecommunications, (18) temporary entry, (19) textiles and apparel, and (20) trade remedies. *Id.*

23. Summaries of earlier rounds of TPP negotiations may be found on the blog at the Office of the U.S. Trade Representative web site. Office of the U.S. Trade Rep., *TPP Blog*, U.S. TRADE REP., <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-outreach-and-updates> (last updated Jan. 15, 2014).

24. These continued a pattern of very well managed stakeholder engagement events designed for maximum formal effect and unknown functional effect. These are organized as pauses from negotiations with several hundred civil society representatives. For the Singapore Round, “[t]he negotiators also had the opportunity to listen to [sixty] lecture-style stakeholder presentations.” Office of the U.S. Trade Rep., *Direct Stakeholder Engagement*, U.S. TRADE REP., <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/direct-stakeholder-engagement> (last updated Feb. 25, 2014).

25. Press Release, Office of the U.S. Trade Rep., *Trans-Pacific Partnership Negotiations Maintain Strong Momentum* (May 24, 2013) (available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/may/tpp-negotiations-strong-momentum>). “During the 17th round of Trans-Pacific Partnership (TPP) negotiations, which ended today, officials reported that they continued to forge ahead toward their goal of concluding an ambitious 21st-century agreement in the timeframe envisioned by President Obama and the Leaders of the other ten TPP countries.” *Id.*

26. *Id.* This stakeholder intervention did not produce much engagement. Stakeholders appear to have been given the opportunity to present their views and in turn “Barbara Weisel, U.S. chief TPP negotiator, and the chief negotiators from the other 10 countries also briefed stakeholders on the status of the negotiations and responded to their questions on specific issues and the process going forward.” *Id.*

27. *Id.*

took place July 15–25, 2013, in Malaysia.²⁸ For this round, “the negotiating groups covering market access, rules of origin, technical barriers to trade, investment, financial services, e-commerce, and transparency reached agreement on a wide range of technical issues in the legal texts of these chapters, which set the rules that govern the conduct of their trade and investment relations.”²⁹ Like the Seventeenth Round, the Eighteenth Round followed the pattern of breaking for a short time to ingest a well-managed stakeholder interaction session.³⁰ There is no evidence, however, that these highly publicized and well-arranged affairs have produced any sort of effective or deep engagement with the civil society sector.³¹ The Nineteenth Round took place from August 22–30, 2013. A Ministerial Statement was released on August 23, 2013.³² In it, the parties expressed their intent to move toward final round talks.³³ The Ministerial Statement also noted that “[p]articular areas of focus have included matters related to market access for goods, services-investment, financial services, and government procurement as well as the texts

28. Press Release, Office of the U.S Trade Rep., Statement on the 18th Round of Trans-Pacific Partnership Negotiations (July 25, 2013) (available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/july/statement-18th-round-tp>).

29. *Id.*

30. *Id.* This was described in language almost identical to the form language used to describe the Seventeenth Round engagement:

The TPP negotiations were temporarily adjourned on July 20 so the delegates could listen to and share information with more than 200 stakeholders from the United States and across the TPP region. Stakeholders also met informally with U.S. and other negotiators to provide further detailed information. U.S. chief negotiator Barbara Weisel and her fellow TPP chief negotiators also briefed stakeholders on the status of the negotiations and responded to their questions on specific issues and the process going forward.

Id. For this session, 180 parties had registered, including 51 from Malaysia, who would be given one half day “to present their views and concerns.” S.B. Toh, *MITI: 180 Stakeholders to Present Views at Trans Pacific Partnership Talks*, STAR ONLINE (Malaysia) (July 10, 2013), <http://www.thestar.com.my/Business/Business-News/2013/07/10/MITI-says-stakeholders-to-present-views-at-Trans-Pacific-Partnership-talks.aspx>.

31. See discussion *infra* notes 62 and 105 and accompanying text, noting continuous criticism about negotiation and drafting secrecy.

32. Press Release, Office of the U.S. Trade Rep., Joint Press Statement TPP Ministerial Meeting Bandar Seri Begawan, Brunei Darussalam (Aug. 2013) (available at <http://www.ustr.gov/Joint-Press-Statement-TPP-Ministerial-Brunei>).

33. See *infra* note 35 and accompanying text. It was reported that Burham Irwan Cheong, lead IP negotiator for the Malaysian TPP team, said that “of the 29 chapters under negotiation, 14 have been ‘substantively concluded’ and their technical aspects agreed upon. The ‘sensitive’ issues as well as the remaining 15 or so chapters have yet to see substantive agreement and conclusion, with the IP Rights chapter being one of them.” Gabey Goh, *IP Rights Chapter of TPP Far from Final, Says Ministry*, MALAY MAIL ONLINE (Aug. 2, 2013), <http://www.themalaymailonline.com/tech-gadgets/article/ip-rights-chapter-of-tpp-far-from-final-says-ministry>.

covering intellectual property, competition, and environmental issues.”³⁴ The purpose of this Ministerial meeting was “to offer guidance to negotiators and help drive the negotiations to conclusion on the 2013 timeframe instructed by our Leaders.”³⁵ For this event, the “Government of Brunei host[ed] a Stakeholders’ Forum on August 27, 2013, at the International Convention Centre.”³⁶ However, civil society actors complained that the now traditional “stakeholder engagement day” was reduced in scope from that held in past TPP Rounds.³⁷ Beyond the Nineteenth Round, the TPP parties expected “to maintain our active engagement in the lead-up to the APEC Leaders meeting in Bali, Indonesia, on the margins of which TPP Leaders are expected to meet This meeting will be an important milestone as the 12 countries work intensively to conclude this landmark agreement.”³⁸ However, by the end of the Nineteenth Round negotiations, several states leaked reports of “turbulence amid protectionist reflexes, casting doubt on hopes of concluding the pact by year-end.”³⁹

The United States’ entry into TPP has not gone without controversy in the United States. For example, one commentator noted that “[f]or import-sensitive US sectors, Japan’s participation in the TPP also could mean increased competition from Japanese products including in certain agriculture sectors and in the US auto and auto parts sector.”⁴⁰ Some civil society organizations suggest that the TPP project itself continues the

34. “We also discussed the remaining outstanding issues on labor, dispute settlement, and other areas.” Office of the U.S. Trade Rep., *supra* note 32.

35. *Id.*

36. Office of the U.S. Trade Rep., *Trans-Pacific Partnership (TPP): 19th Round of Negotiations Set for Bandar Seri Begawan, Brunei—August 23–30, 2013*, U.S. TRADE REP., <http://www.ustr.gov/tpp> (last visited Aug. 30, 2013).

37. Krista Cox, *19th Round of TPP Negotiations: Reduced Engagement for ‘Stakeholder Engagement’ Day*, KNOWLEDGE ECOLOGY INT’L (Aug. 27, 2013), <http://keionline.org/node/1791> (“Usually, these days involve presentations by stakeholders to negotiators followed shortly by an hour long briefing by chief negotiators. . . . This round, there was no briefing from the chief negotiators. I find this quite appalling, particularly in light of the rumors that this will be the last official round of negotiations and all work moving forward will simply be meetings of individual chapters and that we may not see chief negotiators at intersessionals.”).

38. U.S. Trade Rep., *supra* note 32.

39. *TPP Negotiators Finish ‘Difficult’ Round of Talks*, JAPAN TODAY (Aug. 31, 2013), <http://www.japantoday.com/category/politics/view/tpp-negotiators-finish-difficult-round-of-talks> (“‘I don’t think it is a realistic timeline,’ the Malaysian official said, adding that the country’s government was yet to decide whether it would ultimately remain in the effort. ‘We have reached a critical stage. So now we need to assess, to take stock—what if we continue, what if we don’t.’”).

40. Jay L. Eizenstat, Carolyn B. Gleason & Pamela D. Walther, *Japan’s Entry Into Trans-Pacific Partnership Free Trade Agreement (FTA) Raises Opportunities and Risks for US Companies*, NAT’L L. REV. (Mar. 31, 2013), <http://www.natlawreview.com/article/japan-s-entry-trans-pacific-partnership-free-trade-agreement-fta-raises-opportunitie>.

process of power shifting from out of nation states and into a politically unaccountable international sector,⁴¹ and in the process further undermines democratic values and national supremacy.⁴²

It is certainly true that the TPP will accelerate trends, now almost a generation old, that are shifting the frame of power reference up from the people of states safely contained within their borders to the communities of states in which states begin to assume the role that individuals once were said to hold within democratic states. That is a cause of great worry among those who seek to resist this trend at the heart of economic globalization.⁴³ Indeed, opponents use the language of sovereignty, and appeal to its preservation, to rally opposition to what they believe will effectively be the internationalization of law frameworks. This attack on state sovereignty through a TPP framework will not only reduce the connection between people and accountable governments, but it will also weaken connections between inferior governments and the now internationalized sources of rules.⁴⁴ This line of opposition is current not just in the United States.⁴⁵

41. For example, members of participating civil society organizations have complained:

On critical issues, the massive Trans-Pacific Partnership (TPP) being negotiated in secret by the Obama administration will undermine democracy in the United States and around the world and further empower transnational corporations. It will circumvent protections for health care, wages, labor rights, consumers' rights and the environment, and decrease regulation of big finance and risky investment practices.

Margaret Flowers & Kevin Zeese, *TransPacific Partnership Will Undermine Democracy, Empower Transnational Corporations*, PEOPLE'S VOICE (Mar. 31, 2013), <http://www.thepeoplesvoice.org/TPV3/Voices.php/2013/03/31/transpacific-partnership-will-undermine->

42. "The only way this treaty, which will be very unpopular with the American people once they are aware of it, can be approved is if the Obama administration avoids the democratic process by using an authority known as 'Fast Track,' which limits the constitutional checks and balances of Congress." *Id.*

43. The reactions are usually framed in the traditional language of sovereignty, though it is not clear that these critics understand the full extent of the power transfers being effected. "The trade deal is essentially the kill shot for what remains of legal democratic accountability in the United States and will allow the rootless global elite and their transnational corporations to dictate the daily lives and laws of the American people." D.S. Wright, *Trans-Pacific Partnership Will Remove What's Left of American Democracy*, FDL (Aug. 20, 2013), <http://news.firedoglake.com/2013/08/20/trans-pacific-partnership-will-remove-whats-left-of-american-democracy/>. This, I think, nicely evidences the form of current disquiet but it does not accurately describe it. Democracy is not so much being threatened as the connection between sovereign people in states and the sites where governance is occurring is being attenuated.

44. For an example, see Jane Slaughter, *TPP Free Trade Deal Threatens Democracy, Jobs*, GREEN LEFT WEEKLY (Aug. 13, 2013), <http://www.greenleft.org.au/node/54739>.

45. *TPP Gets Hostile Response During Public Meeting*, STAR ONLINE (Malaysia) (Aug. 2, 2013), <http://www.thestar.com.my/News/Nation/2013/08/02/Consumers-laud-move-to-block-stolen-handphones.aspx/>.

The TPP has been criticized as a vehicle for undermining efforts to revive and push forward the WTO agenda, substantially stalled since 2008. For example, it has been argued that “[t]he main responsibility for this failure falls on the US, which believes the system of multilateral trade no longer offers the advantages it used to.”⁴⁶ The United States now appears poised to fracture the WTO model in favor of regionally specific but more comprehensive agreements that together might provide a substitute for WTO multilateralism. This shift in U.S. policy was emphasized in President Obama’s 2013 State of the Union address, where the President highlighted the new policy focus on regional but comprehensive trade agreements.⁴⁷ TPP, and the related Transatlantic Trade and Investment Partnership for Europe,⁴⁸ represents an alternative track for the development of the governance framework for international trade, one in which smaller groups of individual states combine to forge common language that include harmonized general principles along with specific provisions to reflect the priorities of the member states.⁴⁹ These provide a plurilateral template for continuing to move forward the work of the WTO among powerful like-minded states even as the multilateral processes of the WTO prove difficult to engage. For some, this suggests the end of the WTO as the vessel for developing the rules of global engagement in favor of smaller groups of states that together would produce a layered substitute for the WTO process. “If the TPP or TTIP

46. Zaki Laïdi, Opinion, *Trade Deal Show Power Politics is Back*, FIN. TIMES (Mar. 31, 2013), <http://www.ft.com/intl/cms/s/0/e2aae9f4-9254-11e2-851f-00144feabdc0.html#axzz2PGbI4Atv>.

47. President Obama said:

To boost American exports, support American jobs, and level the playing field in the growing markets of Asia, we intend to complete negotiations on a Trans-Pacific Partnership. And tonight, I’m announcing that we will launch talks on a comprehensive Transatlantic Trade and Investment Partnership with the European Union, because trade that is fair and free across the Atlantic supports millions of good-paying American jobs.

Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>).

48. See *Final Report of the United States-European Union High Level Working Group on Jobs and Growth*, at 6 (Feb. 11, 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf (“the HLWG recommends to U.S. and EU Leaders that the United States and the EU launch, in accordance with their respective domestic procedures, negotiations on a comprehensive, ambitious agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules.”).

49. See the useful discussion in *FAQ: Transatlantic Trade and Investment Partnership (TTIP)*, MARIETJE SCHAAKE (Mar. 21, 2013), <http://www.marietjeschaake.eu/2013/06/faq-transatlantic-trade-and-investment-partnership-ttip/> (“From a global perspective a renewed transatlantic partnership would be able to set standards for future world trade—and it would be an incentive for (re)emerging economies or developing countries to step up their game, improve their competitiveness and prosperity by opening up markets and working towards meeting the new TTIP global standards.”).

come into being, they will kill the WTO. For better or for worse, the organisation will cease to be the place where trade standards are negotiated.”⁵⁰

The TPP process has also been criticized for being among the most opaque in the international arena.⁵¹ The lack of transparency has been particularly annoying to the critics of the TPP process because of the way it has deviated from the usual pattern of permitting a lively engagement by civil society. The Sixteenth Round, for instance, included a very limited space for stakeholder engagement.⁵² The U.S. Trade Representative’s blog and related postings tend to be generally descriptive of events with considerably limited substantive information.⁵³ Others have suggested that even where the U.S. government has established processes of “engagement,” these have tended to favor business interests.⁵⁴

A group of international law professors severely criticized the negotiation process. They argued that the “functional and theoretical impact of the lack of transparency and accountability in the TPP and other trade negotiations institutionalizes the kind of process that the late Senator Daniel Patrick Moynihan criticized as policy making through ‘ignorant

50. Laïdi, *supra* note 46.

51. Sean Flynn, *Law Professors Call for Trans-Pacific Partnership (TPP) Transparency*, INFOJUSTICE.ORG (May 9, 2012), <http://infojustice.org/archives/21137>.

Over 30 legal academics from current or potential future Trans-Pacific Partnership Agreement (TPP) negotiating countries wrote to United States Trade Representative Ron Kirk today. The letter, the text of which is posted below, criticizes the USTR decision to cancel full day stakeholder presentations for the current round of negotiations being held in Dallas, Texas. The letter calls on the administration to “reverse course” and work to expand participation and transparency by giving the general public the same rights to see US proposals in the negotiation as cleared corporate advisers now have.

Id.

52. As described by the U.S. Trade Representative on his website,

On Wednesday, March 6, negotiators from the 11 Trans-Pacific Partnership Countries paused talks to meet with more than 300 global stakeholders at an engagement event hosted by the Government of Singapore. . . . Following the 3 hour engagement event, the TPP chief negotiators convened a stakeholder briefing session at which they provided updates on the ongoing negotiations and answered questions related to the subject matter of the proposed agreement.

Office of the U.S. Trade Rep., *supra* note 24. The United States also keeps a web page for posting public comments—the effect of which is unclear. *See* Comments on “Trans Pacific Partnership,” REGULATIONS.GOV, <http://www.regulations.gov> (search “Trans Pacific Partnership”; then filter for “Public Submission”).

53. *See, e.g.*, Office of the U.S. Trade Rep., *supra* note 23.

54. This engagement through advisory committees, it has been suggested, has been structured to amplify business’ voice. “The advisory committees within the United States Trade Representative are part of a three-level structure. Privileged corporate interests dominate both the first level and the crucial third level.” Thomas B. Edsall, Opinion, *Free Trade Disagreement*, N.Y. TIMES (Feb. 4, 2014), http://www.nytimes.com/2014/02/05/opinion/edsall-free-trade-disagreement.html?_r=0.

armies clash[ing] by night.’’⁵⁵ The professors also called for greater and timelier information sharing.⁵⁶ A similar letter was delivered by elements of Peruvian civil society to the Peruvian Minister of External Commerce.⁵⁷ These criticisms are particularly trenchant since the way in which TPP is being negotiated appears to run counter to one of its core objectives—to spread democratic-based processes for engaging in regulatory programs.

That contradiction between TPP development and objective might itself produce political backlash at home.⁵⁸ One can get a sense of the form of this backlash by some of the reactions of U.S. elected officials. For example, Representative Darrell Issa (Republican from California) and Senator Ron Wyden (Democrat from Oregon) recently repeated these criticisms.⁵⁹ Senator Elizabeth Warren (Democrat from Massachusetts) has sought the bracketed text of the TPP in June 2013 in a letter that criticized the lack of transparency that has marked the progress of negotiation.⁶⁰

Criticism along these lines continues, and not just in the United States. The Council of Canadians, one of Canada’s largest citizens’ organizations, led a charge to compel greater transparency in TPP negotiations in late August 2013. Particularly galling for NGOs is that despite the state-managed stakeholder engagements of 2013,⁶¹ the evolving text of the TPP

55. Flynn, *supra* note 51.

56. *Id.*

57. Letter from Roberto López et al. to José Luis Silva Martinot, Minister of Foreign Commerce of Peru, (Oct. 14 2011) (available at <http://www.citizen.org/documents/peru-transparency-letter-2011.pdf>).

58. Letter from David S. Levine et al. to Ambassador Ron Kirk (May 9, 2012), *quoted in* Flynn, *supra* note 51.

There has been no publicly released text of what USTR is demanding in these negotiations, as there would be in policy making by regulation, in Congress or in multilateral forums. Reviews of leaked proposals show that the US is pushing numerous standards that are beyond those included in any past (i.e. publicly released) agreement and that could require changes in current US statutory law.

Id.

59. Joe Wolverton II, *U.S. Lawmakers Demand Transparency in Secret Trans-Pacific Partnership Talks*, NEW AM. (Sept. 14, 2012), <http://www.thenewamerican.com/usnews/item/12838-us-lawmakers-demand-transparency-in-secret-trans-pacific-partnership-talks>.

60. Letter from Elizabeth Warren, U.S. Senator, to Michael Froman, Asst. to the President (June 13, 2013) (available at http://images.politico.com/global/2013/06/12/ew_ltr_to_froman_61313.html). A similar letter was sent to Sander Levin, Ranking Member of the U.S. House Ways and Means Committee, by a group of 35 Congresspersons. *See* Letter from Mark Pocan et al., Congresspersons, to Sander Levin, Ranking Member, U.S. House Ways & Means Comm. (June 11, 2013) (available at <http://pocan.house.gov/media-center/press-releases/pocan-calls-for-increased-transparency-on-trans-pacific-partnership-free>).

61. *See supra* note 25 (discussing stakeholder engagement during the Seventeenth Round).

has yet to be made public.⁶² These groups remind current leaders of Robert Zoellick, who, in 2001 during his time as U.S. Trade Representative, noted that releasing the text of the draft of the Free Trade Area of the Americas constituted “an unprecedented effort to make international trade and its economic and social benefits more understandable to the public.”⁶³ Since at least the middle of 2013, the negotiators have sought to suggest that stakeholder voices have meant something to the negotiations.⁶⁴ The well staged shareholder engagement feature of the TPP process has also been criticized as hiding more than it reveals and, more significantly, as a vehicle through which transparency is limited to pre-cleared civil society actors acceptable to the negotiating governments.⁶⁵ Elected officials continue to find it difficult to obtain much information from administration officials, even in the United States.⁶⁶ In 2012 one group sought to offer a reward to WikiLeaks should it leak the document.⁶⁷

62. Council of Canadians, *Trans-Pacific Partnership: Canadian Groups Demand End to Secrecy*, COUNCIL OF CANADIANS' BLOG (Aug. 23, 2013), <http://rabble.ca/blogs/bloggers/council-canadians/2013/08/trans-pacific-partnership-canadian-groups-demand-end-to-sec>. They explain:

“It is a scandal that a far-reaching deal like the TPP could be signed in the coming months without anyone across the 12 participating countries having seen or had a chance to challenge some of the many new restrictions an agreement will put on our ability to govern in the public interest. The only acceptable road forward for the TPP is for ministers to publish the text now before it's too late,” says Stuart Trew, trade campaigner with the Council of Canadians, a national grassroots activist and social justice organization.

Id. The Canadian government had conducted what was, for that government, a comprehensive consultation process in December 2011. See *Trans Pacific Partnership Free Trade Agreement Negotiations*, FOREIGN AFF., TRADE & DEV. CAN. (Aug. 2013), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-tp/index.aspx>.

63. Council of Canadians, *supra* note 62.

64. “Throughout the talks, negotiators reflected the wide range of views provided to them by their stakeholders on the best pathway to promote trade and investment, regional integration, and jobs in the United States and the other TPP countries.” Office of the U.S. Trade Rep., *supra* note 28.

65. William F. Jasper, *Regional Scheme for the Pacific Rim*, NEW AM. (Aug. 23, 2013), <http://www.thenewamerican.com/world-news/item/16347-regional-scheme-for-the-pacific-rim>.

The USTR “Fact Sheet” cites as evidence of its transparency efforts the number of consultations it has held with its selected trade advisory committees and privileged “Civil Society stakeholders.” . . . This transparency boast actually exposes a dangerous feature of the TPP process: The TPP documents are not available to the average American citizen, only to “cleared trade advisors.”

Id.

66. *Id.*

67. See Just Foreign Policy, *Wikileaks, We Have a Job for You*, http://org.salsalabs.com/ol1439/content_item/freetpp (last updated 2013). “On 13 November 2013 WikiLeaks released the draft text of the crucial Trans-Pacific Partnership Agreement (TPP) Intellectual Property chapter during the lead-up to a TPP chief negotiators’ meeting in Salt Lake City on 19-24 November 2013. Today, 9 December 2013, WikiLeaks has released two more secret TPP documents that show the state of negotiations as the twelve TPP countries began supposedly final negotiations at a trade ministers’ meeting in Singapore this week.” *Second Release of Secret Trans-Pacific Partnership Agreement*

Despite the criticism, high governmental officials continue to view TPP as a socio-political tool with a value beyond its important objective of regulating economic globalization.⁶⁸ President Obama has said, “the TPP could serve as a model for other trade pacts,” but he did not provide further details.⁶⁹ A cornerstone of the Obama Administration’s policy is to use agreements like TPP as a “component of an integrated approach to development policy.”⁷⁰ But the critics of the Obama Administration’s approach understand the breadth of TPP correctly as a “super-sized” next generation trade deal that is meant to institutionalize current developments in free movement of goods, services and capital, and to some extent, labor.⁷¹ Not merely limited to the usual provisions of trade deals, this one is meant to provide a basis for pushing forward the work of the World Trade Organization, but now in reduced multilateral form. To that end, it serves to regulate transnational economic activity in a way that is essentially regulatory. Moreover, because of the economic power of its participants, the TPP will likely serve as an instrument for effectively coercing compliance among other actors. It falls within the larger U.S., and, to some extent, Japanese agendas of creating increasingly larger multilateral webs of free trade areas, some not yet successful,⁷² that can serve as the basis of regulatory systems for integrating economic activities among member states. TPP means to set the social, political, and economic tone of the conversation about the methods and values of transnational economic activity.⁷³ As such, it represents global regulatory

Documents, WIKILEAKS (Dec. 9, 2013, 2:40 GMT), <https://wikileaks.org/Second-release-of-secret-Trans.html>.

68. See usefully Meredith Kolsky Lewis, *Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?*, 34 B. C. INT’L & COMP. L. REV. 27 (2011).

69. *Obama Outlines Pan-Pacific Trade Plan at APEC Summit*, BBC NEWS (Nov. 13, 2011), <http://www.bbc.co.uk/news/world-asia-15704358>.

70. OFFICE OF THE U.S. TRADE REP., NEW U.S. INITIATIVES TO BOOST TRADE AND INVESTMENT OPPORTUNITIES FOR LEAST DEVELOPED COUNTRIES (2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/new-us-initiatives-boost-trade-and-investment-opportunities-l>.

71. Raul Burbano, Kristen Beifus & Manuel Pérez-Rocha, *Facing the Threat of the Trans-Pacific Treaty*, TYEE (Mar. 8 2013), <http://theyee.ca/Opinion/2013/03/08/Trans-Pacific-Treaty-Threat/>.

72. The stalled efforts to create a Free Trade Area of the Americas provides a case in point. See, e.g., J. F. HORNBECK, CONG. RESEARCH SERV., RS20864, A FREE TRADE AREA OF THE AMERICAS: MAJOR POLICY ISSUES AND STATUS OF NEGOTIATIONS (2005), available at <http://www.fas.org/sgp/crs/row/RS20864.pdf>. See also Larry Catá Backer, *ALBA, Latin American Integration, and the Construction of Regional Political Power*, LAW AT THE END OF THE DAY (Nov. 6, 2010), <http://lcbackerblog.blogspot.com/2010/11/alba-latin-american-integration-and.html>.

73. As its opponents correctly note:

Only five of the TPP’s 29 chapters pertain to traditional trade matters. The rest would set policies, to which the U.S. Congress and state legislatures would be required to conform, relating to regulation of energy and other services, financial regulation, food safety,

power in its current form. For states, it represents a means of leveraging power and participating in emerging global conversations about the structures of acceptable behavior in ways that are difficult to ignore.

On March 15, 2013, Prime Minister Abe, in what was described as an impassioned televised address, announced that Japan would join the TPP.⁷⁴ He argued that TPP is “Japan’s last chance to remain an economic power in Asia and shape the region’s future.”⁷⁵ Despite the expected opposition from the farming sector, the Japanese Prime Minister emphasized his determination to enhance Japanese influence in the region. “Japan must remain at the center of the Asian-Pacific century,” Mr. Abe said. “If Japan alone continues to look inward, we will have no hope for growth. This is our last chance. If we don’t seize it, Japan will be left out.”⁷⁶ Acting U.S. Trade Representative Demetrios Marantis immediately welcomed the announcement, noting that “[s]ince early last year, the United States has been engaged with Japan in bilateral TPP consultations on issues of concern with respect to the automotive and insurance sectors and other non-tariff measures, and also conducting work regarding meeting TPP’s high standards.”⁷⁷

Initial reaction among the Japanese was cautiously positive, with an *Asahi Shimbun* poll indicating 71% favoring the decision.⁷⁸ But there was also anxiety about Japan’s influence to shape the course of TPP negotiations:

Tempering the positive survey results for Mr. Abe, however, the poll also showed that support for actually joining the TPP trade

procurement policy, patents and copyright policy, and other non-trade issues. The draft pact also includes NAFTA-style foreign investor rules that facilitate job offshoring by removing many of the risks and costs of relocating U.S. production to low-wage countries. Among TPP negotiating countries is Vietnam, the lower-cost offshoring alternative to China.

Press Release, Public Citizen, With No Text Agreed for Several Entire Chapters and Most Tough Political Decisions Unresolved, the So-Called ‘Final Round’ of Trans-Pacific Partnership (TPP) Talks Will Not Be the End of Negotiations (Aug. 21, 2013) (available at <http://www.citizen.org/documents/press-release-tpp-round-19.pdf>).

74. Hiroko Tabuchi, *Japan Moves to Enter Talks on Pacific Trade*, N.Y. TIMES (Mar. 15, 2013), http://www.nytimes.com/2013/03/16/world/asia/japan-aims-to-join-trans-pacific-partnership-talks.html?pagewanted=all&_r=0.

75. *Id.*

76. *Id.* It appears that Japan may get agricultural concessions from the United States as part of the price for Japanese participation.

77. Press Release, Office of the U.S. Trade Rep., Statement by Acting U.S. Trade Representative Demetrios Marantis on Japan’s Announcement Regarding the Trans-Pacific Partnership (Mar. 15, 2013) (available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/amb-marantis-statement-japan-tpp>).

78. Paul Jackson & Toko Sekiguchi, *Support for Abe Grows in Japan*, WALL ST. J. (Mar. 18, 2013), <http://online.wsj.com/article/SB10001424127887323415304578367751057274398.html>.

pact, not just the talks, is lower at 53%, compared with 23% against participation, as voters still wonder if the prime minister can secure terms that will favor Japan. More respondents said he would be unable to achieve favorable terms, at 40%, than those who said he could, at 39%.⁷⁹

II. STRATEGIC IMPLICATIONS FOR JAPAN-CHINA-U.S. RELATIONS

Each of the participants in the TPP brings its own agenda. However, those of the United States and Japan are particularly strategic in the sense that they mean to use the TPP not just for economic purposes, but also to further political and regulatory objectives at the international level. While the Japanese and U.S. agendas share some similarities, they are sufficiently distinct to merit separate consideration. Both strategic agendas, however, are directed against China as a common target, even as they also focus on the construction of a harmonized global architecture for economic activity that crosses borders.

The Japanese see the TPP as a counterweight to recent aggressive Chinese efforts to take the lead in determining the scope and shape of bilateral and multilateral relationships in the Pacific. Japanese goals are both economic and strategic.⁸⁰ But perhaps more important is the way these objectives can be furthered through the TPP project. Among the most important of these—the value of which is sometimes underestimated—is the ability of Japan to use TPP as a driver of domestic reform.⁸¹ TPP's strategic value lies in its use for refining the basic nature of Japan's relationship with China and the United States, but in unequal

79. *Id.*

80. Hiroko Tabuchi describes this nicely:

Japan also sees a leadership role in the partnership as a way to return to center stage after being eclipsed in the region by the rise of China, which many in Tokyo view as jeopardizing Japan's economic interests and security. China, which is pursuing its own bilateral and multilateral trade agreements in the region, is unlikely to join the agreement soon because of the concessions on state-owned enterprises, intellectual property and labor that the pact would require. That has, in effect, made the partnership a vehicle of sorts for the United States, and now Japan, to counter China's influence.

Tabuchi, *supra* note 75.

81. For example, it has been noted that:

[T]he TPP will lower tariff rates on goods and liberalize Japan's services sector, which constitutes 72 percent of Japan's GDP. The TPP will also eliminate many nontariff barriers—behind the border regulations that act as barriers to trade. These measures will lead to greater competition which should increase the productivity of the Japanese economy, improving its competitiveness, including in its export sector and boosting GDP.

Meltzer, *supra* note 14.

ways. To China, the Prime Minister offers a Japanese framework for framing China-Japan relations, which is referred to as the policy of a “mutually beneficial relationship based on common strategic interests.”⁸² But that is tempered by the effects of what Japan sees as the core of its strategic relationship with the United States. That core of the relationship is grounded in a shared effort to maintain superiority in setting the terms of the economic, social, and political rules of the game that will support globalization and the relationships among states. Yet this relationship also requires an economically and militarily strong Japan. Thus, the Prime Minister has emphasized that “Japan’s relations with China stand out as among the most important.”⁸³ However, he offers a deeper relationship with the United States, one grounded in coherent and mutually reinforcing development. “In order for us, Japan and the United States, to jointly provide the region and the world with more rule of law, more democracy, more security and less poverty, Japan must stay strong.”⁸⁴ Yet all of these goals are closely aligned with the broader strategic objectives of the Japanese government, only one of which directly touches on trade.

The importance of a successfully concluded TPP cannot be underestimated. Commentators already note that

The TPP aims to be the 21st century trade agreement that sets the rules for trade and investment in the Asia-Pacific region going forward. Achieving this goal will require other major economies in the Asia-Pacific region to join the agreement with the intention of the TPP ultimately becoming a Free Trade Agreement of the Asia-Pacific (FTAAP), and Japan’s participation in the TPP will give added momentum towards this goal.⁸⁵

Participation in TPP is the instrument that might define the parameters of trade within the Pacific basin. The value of that exercise may be of enough strategic importance to Japan to make economic concessions worthwhile. In this respect, Japan’s position is very much like that of

82. Press Release, Ministry of Foreign Affairs of Japan, Joint Statement between the Government of Japan and the Government of the People’s Republic of China on Comprehensive Promotion of a “Mutually Beneficial Relationship Based on Common Strategic Interests” (May 7, 2008) (available at <http://www.mofa.go.jp/region/asia-paci/china/joint0805.html>). These are based on five pillars: “enhancement of mutual trust,” “promotion of people-to-people . . . exchange[s],” “enhancement of mutually beneficial cooperation,” “contribution to the Asia Pacific region” for political stability, and “contribution to the resolution of global issues.” *Id.*

83. Abe, *supra* note 10.

84. *Id.*

85. Meltzer, *supra* note 14.

Norway⁸⁶ and other small powerful states, but effectuated in different ways. The object is to use internationalization both as a means of leveraging power for states like Japan and Norway, as well as to temper the ability of the most powerful states, like the United States and China, to act unilaterally. Undertaken through its sovereign wealth fund, Norway is seeking not merely to project public wealth into private global markets, but also to construct a complex rule-of-law-centered framework that blends the imperatives of a state-based public policy with a rules-based governance system that incorporates domestic and international norms.⁸⁷ In a similar way, Japan is now seeking to use its participation in the TPP to leverage its power to help shape the architecture of transnational economic transactions. But Japan may also be using TPP participation as a means of reverse leveraging by making concessions in some areas to protect against a larger group of states whose key sectors have a substantial effect on Japanese internal politics. Among the most important of these, of course, is the agricultural sector. Reports in August 2013, on the eve of the Nineteenth Round of TPP negotiations, suggested this negotiating strategy by Japan.⁸⁸

The U.S. objectives are not entirely straightforward, though in large part they are not surprising. One commentator suggested what might be American strategic objectives.⁸⁹ These include building the regional trade architecture in the Pacific basin, opening export markets, and building an alliance network around China.⁹⁰ These goals parallel Japanese objectives

86. See Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Legislative Power: The Norwegian Sovereign Wealth Fund in Global Markets*, (Consortium for Peace & Ethics, Working Paper No. 2012-11/11, 2012), available at <http://ssrn.com/abstract=2177778>.

87. *Id.*

88. Reports from Japan provides some specifics:

Japan plans to reserve decision on whether to remove tariffs on about 940 items whose tariffs have never been eliminated, the sources said. Japanese representatives are not expected to discuss these items during the meeting in Brunei. They include 586 items of agricultural products in the “five important sectors”: rice; barley and wheat; dairy products; beef and pork; and sweetening resource crops.

Tomoya Fujita & Yuriko Suzuki, *Japan to Propose Lifting Tariffs on 85% of Items Under TPP, but Not Farm Produce*, ASAHI SHIMBUN (Aug. 19, 2013), <https://ajw.asahi.com/article/economy/business/AJ201308190064>.

89. Chen-Dong Tso, *Trans Pacific Partnership and China-Japan-Korea FTA: Implications for Taiwan*, STIMSON CENTER (Dec. 12, 2012) http://www.stimson.org/images/uploads/Trans_Pacific_Partnership_and_China_Japan_Korea_FTA.pdf. Tso is the Executive director, Centre for China Studies and Associate Professor in the Department of Political Science, National Taiwan University.

90. *Id.* at 1–2. Others have noted the importance of the economic considerations: “Japan’s participation in the TPP is also of economic significance for the U.S. Without Japan’s participation in the TPP the market access opportunities for the U.S. are limited because the U.S. has FTAs with six of the 10 TPP parties.” Meltzer, *supra* note 14.

in joining TPP negotiations.⁹¹ Together, these objectives/goals would build a set of double walls around China. The first is military, and centers on the creation of a ring of security arrangements of various sorts around China. The second is economic, and aimed at creating a ring of multilateral and bilateral trade arrangements around China that set the economic rules of the game in a way that reflects the preferences of TPP states. More importantly, TPP would add a layer of control to the discourse of international trade regulation that would make it harder for the Chinese to participate effectively in moving the regulatory environment to better align it with its own objectives.

Yet TPP efforts are not meant simply to target powerful developing states like China while developing a trade and economic policy template. The TPP framework would provide the United States and its partners with a substantially more powerful and comprehensive structure through which to pressure other states to conform their behavior to TPP standards. One commentator noted:

China wants to lead the effort to integrate Asia's economies through ASEAN + 3. Beijing is not asking for binding commitments with labor and environmental standards, and some Southeast Asian nations find this more palatable. But it also sets a low trajectory and puts Asian markets out of step with Europe and the United States. In the long run, Asian nations interested in making the jump out of the middle-income trap will move toward TPP, and China will realize TPP presents more of an opportunity than a threat.⁹²

In effect, TPP would serve the important secondary purpose of coercing weaker non-TPP states to conform to TPP standards as a condition for trading with TPP states. For instance, TPP states could require non-TPP trading partners to agree to conform to TPP standards as a condition of entering into bilateral agreements.⁹³ This “imposition model” is already in use in efforts to shape a comprehensive financial markets governance structure through the standard-setting role of the

91. See discussion above and note especially the policy drivers identified in Abe, *supra* note 10.

92. CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, THE EVOLVING ECONOMIC PICTURE IN ASIA: A CONVERSATION WITH ERNEST Z. BOWER, MEREDITH BROADBENT, AND MATTHEW P. GOODMAN, GLOBAL FORECAST 2012 44, 45 (discussion by Ernest Z. Bower), available at http://csis.org/files/publication/120413_gf_bower_goodman_broadbent.pdf.

93. *Trans Pacific Partnership Agreement, What's Wrong With TPP*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/tpp> (last updated Feb. 24, 2014).

Financial Stability Board.⁹⁴ That strategy is sufficiently evidenced through the side negotiations attendant on the TPP rounds,⁹⁵ and the bilateral negotiations built into the TPP talks.⁹⁶ But having committed to retaining a global leadership role in setting the terms of the architecture of globalization, the United States has also increased both the risk that the TPP negotiations will fail, and the costs to the United States of a failure to successfully conclude the TPP negotiations successfully.⁹⁷ As one commentator noted,

The TPP is a game-changer, economically and diplomatically. If it fails, the recent ‘pivot’ to Asia will be seen as military in nature and America’s value as a friend or ally would be high only in case of potential conflict. The U.S. should conclude and implement a high-quality agreement as soon as possible.⁹⁸

94. See Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751 (2011).

95. For example, immediately before the Nineteenth TPP Round:

Acting Deputy United States Trade Representative Wendy Cutler will visit Tokyo August 7-9 to lead bilateral negotiations with Japan on autos, insurance, and non-tariff measures being held in parallel to the Trans-Pacific Partnership (TPP) talks. While in Tokyo, she also plans to meet with her Japanese counterparts to discuss the overall TPP negotiations.

Press Release, Office of the U.S. Trade Rep., Acting Deputy U.S. Trade Representative Wendy Cutler to Visit Japan, Initiate Bilateral Negotiations on Autos, Insurance, Non-Tariff Measures (July 31, 2013) (available at <http://www.ustr.gov/acting-deputy-ustr-wendy-cutler-to-visit-japan-initiate-bilateral-negotiations-on%20autos-insurance-non-tariff-measures>). Even more interesting have been the intensification of relations with Vietnam through the TPP framework. See, e.g., Press Release, Office of the U.S. Trade Rep., United States Advances Trans-Pacific Partnership Goals With Vietnam (Apr. 24, 2013) (available at <http://www.ustr.gov/about-us/press-office/press-releases/2013/april/US-advances-TPP-goals-Vietnam>).

96. See, e.g., Kyodo News International, *Bilateral Sessions Continue as Ministers Seek Progress in TPP Talks*, GLOBAL POST (Aug. 22, 2013, 11:45 PM), <http://www.globalpost.com/dispatch/news/kyodo-news-international/130823/bilateral-sessions-continue-ministers-seek-progress-tp>.

97. As one commentator put it near the end of 2013,

But it is the TPP that really matters most to U.S. trade policy. Much time, effort, and credibility have been invested in the TPP negotiations—the economic arm of the administration’s “pivot” to Asia. If TPP fails to produce a comprehensive, ambitious agreement, the economic and diplomatic consequences will be far reaching. Not only would a U.S. reputation already sullied by scandal, equivocation and hypocrisy slip further, but an alternative model for economic integration in the dynamic Asia-Pacific region driven by Chinese priorities would emerge to fill the void.

Dan Ikenson, *The President's Indifference Imperils the Trans-Pacific Partnership*, FORBES (Dec. 6, 2013), <http://www.forbes.com/sites/danikenson/2013/12/06/the-presidents-indifference-imperils-the-trans-pacific-partnership/2/>.

98. Derek Scissors, *What a Good Trans-Pacific Partnership Looks Like*, HERITAGE FOUND. (Mar. 8, 2013), <http://www.heritage.org/research/reports/2013/03/what-a-good-trans-pacific-partnership-looks-like>.

The risk of failure is very real. The United States failed to push forward the Free Trade Area of the Americas. It has not been able to move the Doha Round of WTO negotiations to a successful conclusion, and it faces substantial opposition to these sorts of trade pacts domestically, an opposition that is likely to grow given the comprehensive nature of TPP.⁹⁹ Yet even failure may move trade pact forms forward, if only to be driven further down into individual bilateral arrangements, for example.

This strategic objective makes the inclusion of Japan within the TPP framework critically important, especially because alongside Japan, the United States can also leverage authority in Asia to build a comprehensive trade platform.¹⁰⁰ But it also underlines the thinking behind U.S. efforts to bring the Republic of Korea into the TPP orbit as well.¹⁰¹ Thus, leverage grounded in the control of an internationalized discourse can be as essential to the strongest states as it is for smaller states seeking to amplify power. Xiangfeng Yang has suggested that even within a system of the decline of a unipolar power, one that might describe the position of the United States in the first decade of the twenty-first century, the United States may well be able to sustain its leadership position among its allies, secure their allegiance, and extract resources from them.¹⁰²

Interestingly, one of the most profound strategic implications of the methodologies used to negotiate the TPP, especially within the democratic state members, is the way in which it has shifted the locus of engagement and accountability from a focus on the relationship between citizens and their governments to one much more transnational in character in which the individual citizen has been de-centered from the channels of

99. See, e.g., Ed O’Keefe, *The Trans Pacific Partnership Is in Trouble on Capitol Hill: Here’s Why*, WASH. POST FIX BLOG (Feb. 19, 2014, 2:55 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/02/19/why-the-trans-pacific-partnership-is-in-trouble-on-capitol-hill/>.

100. See Mireya Solis, *Japan’s Big Bet on the Trans Pacific Partnership: The TPP Nations Should Reciprocate*, BROOKINGS INST. (Mar. 25, 2013), <http://www.brookings.edu/research/opinions/2013/03/25-transpacific-partnership-solis>.

101. But later accession comes with a price—no participation in the construction of TPP rules. “‘There’s no formal deadline,’ Acting U.S. Trade Representative Demetrios Marantis said at a press conference for foreign journalists in Washington. ‘The idea is that if economies aren’t ready right now, that they’ll be able to join once it’s done and essentially accede to the TPP.’” Lee Chi-dong, *No Deadline for S. Korea to Decide on TPP Talks: USTR Chief*, YONHAP NEWS AGENCY (Mar. 21, 2013), <http://english.yonhapnews.co.kr/national/2013/03/21/26/0301000000AEN20130321000200315F.HTML>.

102. Xiangfeng Yang, *What Can China’s Past Tell Us About America’s Future?* (APSA 2011 Annual Meeting Paper 29), available at <http://ssrn.com/abstract=1901965> (“elongated unipolarity is both possible and feasible, but it is predicated upon a robust inter-state hierarchical authority structure with the hegemon at the top.”).

accountability.¹⁰³ In less abstract terms, this means that the old dynamics of mass mobilization within states meant to influence legislators holding governmental power along with exercise of voting power has been rendered less relevant by a system in which the legislative power has moved up to the transnational level and is exercised there on behalf of national legislatures by the executive power of the state. While it is true enough that national legislatures will have some sort of approval power,¹⁰⁴ national legislatures have effectively been excluded from the negotiation process itself,¹⁰⁵ which is being conducted in a representative capacity by the trade ministers of participating states. Likewise, mass mobilization is now dependent on transnational civil society actors, the only organizations that can match the transnational power of the states negotiating the agreement.¹⁰⁶ And more importantly, it shifts the arenas in which large global economic actors now seek to manage their engagements with governance regimes.¹⁰⁷ The democratic deficit has now come to comprehensive trade pacts beyond the European Union.¹⁰⁸ The TPP will not only change the shape of trade and trade relations, but it will also

103. See, e.g., Larry Catá Backer, *Democracy Part XXVI: Democratic Accountability—From Voter to Managed Mob*, LAW AT THE END OF THE DAY (June 3, 2012), <http://lbackerblog.blogspot.com/2012/06/democracy-part-xxvi-democratic.html>.

104. See, e.g., Vicki Needham, *Froman: Obama 'Ready to Engage' With Congress on Fast Track*, HILL ON MONEY BLOG (June 24, 2013), <http://thehill.com/blogs/on-the-money/1005-trade/307503-president-ready-to-engage-with-congress-on-fast-track>.

105. "Congress itself hasn't heard much about the TPP; the negotiating process has been characterized by extreme secrecy and the Obama administration has denied repeated calls from legislators to make the process more transparent, while pressing to finalize the agreement this year." Zoë Carpenter, *Keeping a Massive Trade Deal Out of the Fast Lane*, NATION BLOG (Aug. 22, 2013), <http://www.thenation.com/blog/175865/keeping-massive-trade-deal-out-fast-lane#>. A group of Peruvian legislators have also sought greater transparency in TPP negotiations. Mike Palmedo, *Peruvian Legislators File Motion Seeking Public Debate on the Trans Pacific Partnership*, INFOJUSTICE (Sept. 4, 2013), <http://infojustice.org/archives/30645> (noting also a similar Chilean legislative effort). To that end they have filed a motion which in part requests the Foreign Minister and the Peruvian TPP team report to the Peruvian legislature. See *Moción de Orden del Día No. 8067*, 29 de agosto de 2013 (Peru), [http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc02_2011_2.nsf/d99575da99ebfbc305256f2e006d1cf0/9bf1d1955d167e2805257bd60078d3ca/\\$FILE/MC08067290813.pdf](http://www2.congreso.gob.pe/Sicr/TraDocEstProc/Contdoc02_2011_2.nsf/d99575da99ebfbc305256f2e006d1cf0/9bf1d1955d167e2805257bd60078d3ca/$FILE/MC08067290813.pdf).

106. See, e.g., Rep. of the Panel of Eminent Persons on United Nations–Civil Society Relations, transmitted by letter dated June 7, 2004 from the Chair of the Panel of Eminent Persons on United Nations–Civil Society Relations addressed to the U.N. Secretary-General 8, U.N. Doc. A/58/817 (June 11, 2004) ("citizens increasingly act politically by participating directly, through civil society mechanisms, in policy debates that particularly interest them. This constitutes a broadening from representative to participatory democracy.").

107. See, e.g., Needham, *supra* note 104.

108. See, e.g., *Democratic Deficit*, EUROPA, http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm (last visited Feb. 24, 2013). See Andrew Moravcsik, *In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603 (2002), available at <http://www.princeton.edu/~amoravcs/library/deficit.pdf>.

change the shape of the governance structures of many TPP states, including the United States. These states may move closer to an EU model, in which the logic of globalization will effectively transfer governance power up from out of member states to the governance institutions of supranational organizations or the norms developed therein.¹⁰⁹

Commentators have also identified some of the principal consequences of TPP from the Chinese perspective. Yang suggests that rule making competition and access to U.S. markets as the two principal effects of TPP expansion on China.¹¹⁰ He notes that China has not yet settled on a response to the potential threat posed by TPP. He identifies two schools of thought.¹¹¹ The first sees TPP as a potential threat, but discounts the effects of TPP principally because they do not believe that the conflicting interests of the parties will permit much coherence or discipline.¹¹² Another group sees TPP as an opportunity for Chinese expansion rather than as a means of containment. This expansion is to be realized by such projects as the newly established Shanghai Free Trade Zone.¹¹³

In either case, China is particularly sensitive to any action or policy that can be understood as fostering Chinese containment. To that end, China is seeking to resist policies that might produce containment to the advantage of its trade competitors. More importantly, China is also seeking to avoid containment through its own trade strategies. These

109. See generally Larry Catá Backer, *Economic Globalization Ascendant: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17 BERKELEY LA RAZA L.J. 141 (2006).

110. Tso, *supra* note 89, at 3–4.

111. *Id.* at 4–5 and sources cited. Xiangyang Li (李向陽), *Kuà Tàipíngyáng Huòbàn Guānxi Xiédìng: Zhōngguó Juéqǐ Guòchéng de Zhòngdà Tiǎozhàn* (跨太平洋伙伴关系协定: 中国崛起过程中的重大挑战) [*Trans-Pacific Partnership Agreement: A Major Challenge to China's Rise*], GUÓJÌ JINGJÌ PÍNLUN (國際經濟評論) [INT'L ECON. REV.], Iss. 2 (2012); Yunling Zhang (張蘊嶺), *Měiguó Zhǔdǎo Fàn Tàipíngyáng Xuéyì Duì Zhōngguó de Yǐngxiǎng* (美國主導泛太平洋夥伴協議對中國的影響) [*Impact of U.S.-Led Trans-Pacific Partnership Agreement on China*], JINGJÌ YÁNJIŪ CĀNKǎO (經濟研究參考) [REV. ECON. RES.], Iss. 1 (2012). Tso argues that TPP is in China's long term interests and that indeed China should seek to join TPP. See Tso, *supra* note 89, at 10.

112. One ought to recall the difficulty of multilateral trade negotiations in general. See, e.g., GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 52–56 (1992) (description of difficulty of trade agreement negotiation).

113. See He Wei & Wei Tian, *Time of Opportunities, Challenges*, CHINA DAILY (Sept. 13, 2013), http://www.chinadaily.com.cn/china/2013-09/13/content_16966598.htm (“Experts say the FTZ also represents a counter-challenge to other recent developments such as the Trans-Pacific Partnership. This US-led initiative is widely seen as a move to curtail China's growing influence on global trade. Wei Jianguo, secretary-general of the China Center for International Economic Exchanges, said the partnership could be seen as the first step toward establishing an Asia-Pacific Free Trade Zone. As such, he said China could take the initiative in joining it to maximize the benefits for the region as a whole.”).

include expanding FTA-type relations within the Association of Southeast Asian Nations (“ASEAN”) group, strengthening trade with Canada, and aggressively pursuing FTA agreements with Japan and Korea.¹¹⁴ Chinese military arrangements are also growing through the Shanghai Cooperation Group and similar strategies.¹¹⁵ This may be a harder policy to operationalize now as China begins its transition to status as a developed state, and with it a substantially higher cost of labor and a switch in the mix of industrial production.

The shift—illustrated in weakened foreign investment in China—has pluses and minuses for an economy key to global growth. Beijing wants to shift to higher-value production and to see incomes rise. But a de-emphasis on manufacturing puts pressure on leaders to make sure jobs are created in other sectors to keep the world's No. 2 economy humming.¹¹⁶

But that may matter less as investment increasingly becomes internally generated in China.¹¹⁷ Concern over China's growing military power may also drive its neighbors to establish alliances with the United States, as demonstrated by Vietnam.¹¹⁸

But the issues run much deeper than economic policy for China. The fear of encirclement runs deep in Chinese strategic thinking, whether that encirclement is military, economic, or related to governance.¹¹⁹ Official Chinese media sources speak to these fears:

114. WINHAM, *supra* note 112, at 5–6. ASEAN, the Association of Southeast Asian Nations, includes many of the TTP participants. See *ASEAN Member States*, ASEAN, <http://www.asean.org/asean/asean-member-states> (last visited Feb. 25, 2014).

115. See, e.g., SHANGHAI COOPERATION ORGANIZATION, www.sectso.org/EN123/ (last visited Feb. 25, 2014).

116. Yayun Zhang, *China Begins to Lose Edge as World's Factory Floor*, WALL ST. J. (Jan. 16, 2013), <http://online.wsj.com/article/SB10001424127887323783704578245241751969774.html>.

117. *Id.* (“With the lion's share of investment in China now coming from domestic sources, the impact of falling foreign investment on growth will be limited. But an erosion of manufacturing's importance underlines the challenge for China's leaders in finding new sources of growth in domestic consumption and higher-level industry.”).

118. See, e.g., JAMES BELLACQUA, CNA CHINA STUDIES, *THE CHINA FACTOR IN U.S.-VIETNAM RELATIONS* (2012), available at <http://www.cna.org/research/2012/china-factor-us-vietnam-relations>; John Roberts, *The U.S.-Vietnam Alliance Against China*, AXIS OF LOGIC (July 30, 2013), http://axisoflogic.com/artman/publish/Article_65866.shtml (citing John Roberts, *Vietnam's President Visits White House*, WORLD SOCIALIST WEBSITE (July 30, 2013), <http://www.wsws.org/en/articles/2013/07/30/veus-j30.html>).

119. Larry Catá Backer, *Encircling China or Embedding It?*, LAW AT THE END OF THE DAY (Nov. 8, 2010), <http://lcbackerblog.blogspot.com/2010/11/encircling-china.html>.

For a considerable period of time, Chinese officials have been focusing on the possibility that the United States intends to surround it to prevent it from more forcefully asserting its own interests in the region. Echoing similar concerns of the Russians, the Chinese suggest that

On a strategic level, Washington wants Southeast Asia to form the center of an “Asian strategic alliance” that includes Northeast Asia, Southeast Asia and India. On a political level, the US continues to export “democracy” and Western values to Southeast Asian countries. On the economic level, the US has close ties with Southeast Asia in terms of trade, finance and investment and considers the latter an important overseas market, resource supplier and investment destination. At a military and security level, the US wants to set up more military bases and positively interfere in security affairs in the Asia-Pacific region.¹²⁰

The need to avoid American encirclement is particularly acute for the Chinese when it comes to the building of a governance web through rules of global engagement. The latter point was brought home in Hu Jintao’s Report to the Eighteenth Chinese Communist Party Congress in November 2012. He highlighted a Chinese policy objective of projecting power beyond economics to the fields of international regulatory development and made it clear that China intends to have a greater say in what global rules are going to be:

We will actively participate in multilateral affairs, support the United Nations, G20, the Shanghai Cooperation Organization, BRICS and other multilateral organizations in playing an active role in international affairs, and work to make the international order and system more just and equitable. We will take solid steps to promote public diplomacy as well as people-to-people and cultural exchanges, and protect China’s legitimate rights and interests overseas.¹²¹

American policy has been to engage China economically while creating an effective military encirclement that would enhance the American position in the event of conflict.

Id.

120. Li Bing, *Time to Counter US Ploys*, XINHUANET (July 29, 2010), http://news.xinhuanet.com/english2010/indepth/2010-07/29/c_13420374.htm. Related fears were repeated to the press in 2013. “Ding Gang, a well-known journalist for the People’s Daily, who specialises in international affairs, commented ‘the US does not want to be squeezed out of the Asia-Pacific region by China. The (TPP) is superficially an economic agreement but contains an obvious political purpose to constrain China’s rise.’” Toh, *supra* note 30.

121. Hu Jintao, Report to the 18th Chinese Communist Party National Congress, Section XI (Nov. 17, 2012) (translation available at http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_12.htm). “The BRIC [Brazil, Russia, India, and China] idea was first conceived in 2001 by Goldman Sachs as part of an economic modeling exercise to forecast global economic trends over the next half century.” *About BRICS*, FIFTH BRICS SUMMIT (Mar. 2013), <http://www.brics5.co.za/about-brics/> (“BRIC Foreign Ministers at their meeting in New York on 21st September 2010

It is in this light that one can understand the more energetic approach of Chinese participation both in ASEAN and in seeking to procure free trade agreements within the Asia Pacific Basin. These agreements are designed to reconfigure the basic operating rules of international trade and national engagement, one that substantially protects its state-owned enterprises and permits it a certain latitude with its program of sovereign investing.¹²² This, of course, is something that influential policy makers in the United States oppose as a basis for ordering the framework of global trade.¹²³ It is also important to understand that China, like the United States, is painting with a broader brush.

Just as the United States may have Latin American and African trade in mind as it works through a TPP template, China may well have the BRICS and Africa in mind as it seeks to find supporters for an alternative structure for framing trade.¹²⁴ Additionally, China may be looking to expand its influence in the construction of soft law, a critical component of the emerging structures of global law.¹²⁵ China appears ready to participate in the development of customary practices and governance standards within soft law frameworks of international organizations and private

agreed that South Africa may be invited to join BRIC. Accordingly, South Africa was invite to attend the 3rd BRICS Summit in Sanya on 14 April 2011.”)

122. Larry Catá Backer, *Michael Komesaroff on Chinese Investments in Afghanistan and the Changing Face of Global Mining*, LAW AT THE END OF THE DAY (Mar. 17, 2013), <http://lcbackerblog.blogspot.com/2013/03/michael-komesaroff-on-chinese.html>.

123. Robert Zoellick recently argued:

The increased importance of SOEs in the world economy—in financial services, telecommunications, steel, chemicals and energy, and other natural resources—requires new rules so that private businesses can compete fairly with state capitalism. The rules need not push privatisation or rollbacks of state enterprises, but they should require transparency, commercial behaviour, declarations of subsidies, nondiscrimination and open procurement.

Robert Zoellick, Opinion, *Questions for the World's Next Trade Chief*, FIN. TIMES (Apr. 1, 2013), <http://www.ft.com/intl/cms/s/0/5f9f5ece-923a-11e2-851f-00144feabdc0.html#axzz2PGbI4Atv>.

124. See Xinhua, *Chinese President Participates In BRICS Leaders-Africa Dialogue Forum*, QIUSHI (Mar. 27, 2013), http://english.qstheory.cn/news/201303/t20130328_219352.htm.

Chinese President Xi Jinping and leaders of the other major emerging economies met a group of African leaders in Durban, South Africa, Wednesday to discuss cooperation between the BRICS nations and Africa. . . . Xi said the world cannot enjoy stability and prosperity without the peace and development of Africa and international affairs cannot be properly dealt with without Africa's participation, adding that the global governance system would lose vitality without Africa's saying. BRICS and African countries are like-minded friends with extensive common interests, he said, noting that the rising of Africa brings opportunities to BRICS countries, likewise, the development of BRICS countries brings opportunities to the continent.

Id.

125. See, e.g., Larry Catá Backer, *Governance Without Government: An Overview*, in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 87–123 (Günther Handl, Joachim Zekoll & Peer Zumbansen Eds., 2012).

enterprises.¹²⁶ It is willing to put up substantial amounts of money to make good on its efforts to increase its influence in all organizations that help shape international discourse on rules. “China is doing it to increase its say; it’s playing the part of investor in many international organizations in the hope of being able to formulate things, even rewrite the rules of the game,” Mr. Ye was quoted as saying.¹²⁷

Indeed, Wen Jin Yuan notes the sense among Chinese academic and policy circles that “the main reason behind the Obama Administration’s support for the TPP agenda is the US’s desire to use the TPP as a tool to economically contain China’s rise.”¹²⁸ Wen notes, for example, reports published in the *People’s Daily*, the official organ of the Chinese Communist Party, that refer to TPP as “superficially an economic agreement but contain[ing] an obvious political purpose to constrain China’s rise.”¹²⁹ More importantly, a successfully negotiated TPP would result, according to other Chinese scholars, in trade diversion to the detriment of Chinese economic interests.¹³⁰ Yet, according to Wen’s research, United States officials insist that the ultimate goal of the United States was not containment, but incorporation. The “U.S.’s ultimate goal is to integrate China into this regional trade system, rather than keeping China out, and the TPP initiative is actually similar to the strategy led by several U.S. agencies to incorporate China into the WTO system.”¹³¹ Yet incorporation can be understood from the Chinese side as another form of containment. Rather than have China lead a new effort at refining the rules and culture of trade in the Pacific, it would be forced to participate as a

126. “We will give further play to the role of trade associations. In recent years, MOFCOM has been committed to establishing China-funded enterprises associations or chambers of commerce in the key investment countries, and standardizing the companies’ behavior in the local investment.” Press Release, Chinese Ministry of Commerce, MOFCOM: Further Enhancing CSR Awareness of Chinese Companies Operating Abroad, Sino-Swedish Corporate Social Responsibility Cooperation (Mar. 19, 2013) (available at <http://csr2.mofcom.gov.cn/article/cooperation/201303/20130300059556.shtml>).

127. Didi Kirsten Tatlow, *BRIC, BRICS or BRICSI? The Growing Challenge*, INT’L HERALD TRIB. RENDEZVOUS BLOG (Mar. 31, 2013), <http://rendezvous.blogs.nytimes.com/2013/03/28/first-bric-then-brics-now-bric-si-the-world-financial-orders-challenge/>. “As the leaders of the BRICS nations met in South Africa this week and announced they would establish a development bank to help fund five-year infrastructure investment sums, plans for a financial ‘safety net,’ or reserve, and a string of councils to add business and intellectual heft to the group, some are wondering if Indonesia should be in.” *Id.* (quoting in part Xia Yeliang, an economics professor at Peking University).

128. WEN JIN YUAN, CSIS FREEMAN BRIEFING: THE TRANS-PACIFIC PARTNERSHIP AND CHINA’S CORRESPONDING STRATEGIES 2–4 (June 20, 2012), http://csis.org/files/publication/120620_Freeman_Brief.pdf.

129. *Id.* at 2 (citing Ding Gang & Ji Peijuan, *Mei Licu Fan Taipingyang Huoban Guanxi [The US Attaches Great Importance to the Pan-Pacific Partnership]*, RENMIN RIBAO [PEOPLE’S DAILY] (July 27, 2011), http://news.xinhuanet.com/world/2011-07/27/c_121725596.htm).

130. *Id.* at 5.

131. *Id.* at 4.

junior partner in a regulatory exercise directed by the United States and its principal ally, Japan. For the Chinese, the substantial effect might well be understood as containment, though that view/perception is lost on the United States.¹³²

As a consequence, Wen argues, Chinese policy will continue to push its own trade agenda as a means of countering the perceived political and economic effects of TPP on its interests. First among its strategies will be an acceleration of its efforts to secure free trade agreements with its neighbors.¹³³ To the extent that these then hamper further TPP negotiations, all the better.¹³⁴ A possible consequence would be trade and regulatory system competition, as the United States and China fight for control of the discourse of trade rules, with the objective measured by the participation of the Pacific Basin's most important economies. A March 21, 2013, report noted,

Following Japan's recent announcement that it will join in negotiations of the US-led Trans-Pacific Strategic Economic Partnership (TPP), the US and China are picking up the pace in staking their claims on Asian economic territory. The US is encouraging South Korea to join in the TPP, which has pressured China into spurring discussions of a trilateral free trade agreement (FTA) between China, Japan, and South Korea.¹³⁵

More importantly, China will accelerate the creation of its own enhanced free trade area, one in which it will play the dominant role. China is "also putting work into the Regional Comprehensive Economic Partnership for East Asia (CEPEA), which would include not only China, Japan, and South Korea but also the ten countries in the Association of Southeast Asian Nations (ASEAN), along with India, Australia, and New

132. Backer, *supra* note 119.

133. YUAN, *supra* note 128, at 6.

134. However, it should be noted that internal Chinese politics may make these agreements easier to speak about than to negotiate. FTAs require cooperation among a number of ministries within China, some of which are not known for sharing the same views. *See id.* at 8–9.

135. Park Hyun, Seong Yeon-cheol & Lee Jeong-hun, *US Hoping South Korea Will Join Trans-Pacific Partnership*, HANKYOREH (Mar. 21, 2013), http://english.hani.co.kr/arti/english_edition/e_international/579052.html.

At a Korea Society lecture in New York on Mar. 19 (EST), Assistant US Trade Representative for Korea, Japan and APEC Affairs Wendy Cutler said, "We believe that Korea could be a natural member of the TransPacific Partnership negotiations. We look forward to continuing our working relationship with Korea and keeping them updated" In response, China is pulling out all the stops in pursuit of the China-Japan-South Korea FTA.
Id.

Zealand.”¹³⁶ There is irony here: the Comprehensive Economic Partnership for East Asia (“CEPEA”) is a Japanese-led proposal for trade cooperation and free trade agreement among the sixteen present member countries of the East Asia Summit.¹³⁷

Second, according to Jianmin Jin, would be the encirclement and containment of Japan and the constraining of U.S. influence in the region, especially for setting the terms of trade policy. Jianmin Jin “groups China’s current and potential FTA partners into four different categories: (1) greater China economic region (four cross-strait regions: mainland China, Hong Kong, Taiwan, Macau); (2) surrounding regions (ASEAN, Pakistan); (3) resource-rich regions (GCC, Australia); and (4) developed countries (Switzerland, etc.).”¹³⁸ Jin suggests that “as the central country tying together the China-Japan-South Korea FTA and the TPP, Japan should not choose between the two, but balance them with each other.”¹³⁹ Japan is likely to engage in this tactic, but it is clear that given Prime Minister Abe’s recent remarks about the ties with the United States, and the congruence of Japanese and U.S. military and economic interests, Japan’s balancing may be skewed toward greater reliance on TPP. It might follow that Japan would see any Chinese free trade agreement, or additional multilateral trade arrangements, as a means of protecting its interests in China, at least in the short run.

Third, the short run ends when China is itself invited to join TPP. As such, Chinese policy circles misunderstand one threat of TPP. Chinese analysts correctly perceive the threat of TPP in terms of its ability to

136. *Id.* For a Japanese perspective on CEPEA, see Risaburo Nezu, *Why CEPEA Makes Sense to Asia*, FUJITSU RES. INST. (Apr. 9, 2010), <http://jp.fujitsu.com/group/fri/en/column/economic-topics/2010/2010-04-09.html>.

137. The CEPEA proposal was advanced by Japan in conjunction with the establishment of the Economic Research Institute for ASEAN and East Asia (ERIA). The two mechanisms are designed to be mutually supporting liberalization and cooperation. See Mohit Anand, *Towards Comprehensive Economic Partnership in East Asia*, INST. PEACE & CONFLICT STUD. (Oct. 12, 2008), http://www.ipcs.org/article_details.php?articleNo=2702 (“Japan’s emphasis on such a framework rests on its attempt to ensure that prosperity accruing from effective economic integration of East Asia will connect Japan’s economy with Asia’s growth.”)

138. YUAN, *supra* note 128, at 7. See also Jianmin Jin, *China’s Concerns Regarding TPP No More than Empty Worries?*, FUJITSU RES. INST. (Jan. 11, 2012), <http://jp.fujitsu.com/group/fri/en/column/message/2012/2012-01-11.html>. Jin suggests that:

China takes into account the strategic economic, political, and diplomatic significance of FTAs and aims to 1) realize scale merit of economic development, 2) obtain resources necessary for its own economic growth, 3) erase the “China Threat” doctrine, 4) suppress separate independence movements like “Taiwan Independence”, and 5) improve the international environment, especially the surrounding environment.

Id.

139. Jin, *supra* note 138.

change the balance of influence from China to Japan through its American alliance. But it is a mistake to think that this change of balance will be effectuated through Japanese inclusion and Chinese exclusion from TPP. Instead, the United States will seek to contain China through inclusion in the disciplinary procedures and structures of the TPP rather than by excluding it.¹⁴⁰ Perhaps President Obama put it best when he remarked in his 2011 meeting with the Trans-Pacific Partnership:

In a larger sense, the TPP has the potential to be a model not only for the Asia Pacific but for future trade agreements. It addresses a whole range of issues not covered by past agreements, including market regulations and how we can make them more compatible, creating opportunities for small and medium-sized businesses in the growing global marketplace. It will include high standards to protect workers' rights and the environment.¹⁴¹

The stakes for control might be significant, especially for China. Some commentators in the United States see the TPP as a means of managing the ability of states, principally China, to blend state and private power through state-owned enterprises.¹⁴²

Trade policy and the regulatory environment will continue to develop as complex overlapping circles of trade regimes, roughly similar, but designed to assert strategic regulatory and political objectives in addition to economic aims. Indeed, one of the side benefits of the TPP for the

140. According to reports,

“Whether it’s China, whether it’s the Philippines, whether it’s Thailand . . . it’s incumbent upon those economies to be able to convince the other TPP partners that they are capable of meeting the high standards that we’re negotiating,” Marantis told reporters from foreign media outlets at a briefing on the US trade agenda for 2013.

Joseph Boris, *US Says Trade Talks Are Ajar for China*, CHINA DAILY (Mar. 21, 2013), http://usa.chinadaily.com.cn/epaper/2013-03/21/content_16329114.htm.

141. Barack H. Obama, President of the United States, Remarks by the President in Meeting With Trans-Pacific Partnership (Nov. 12, 2011) (transcript available at <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2010/november/remarks-president-barack-obama-meeting-tran>).

142. Derek Scissors, *What a Good Trans-Pacific Partnership Looks Like*, HERITAGE FOUND. (Mar. 8, 2013), <http://www.heritage.org/research/reports/2013/03/what-a-good-trans-pacific-partnership-looks-like>. Scissors explains:

[T]he very existence of SOEs should be understood as an effort by governments to limit market competition and increase state control in a particular sector. That is: an effort precisely to retain sector participants which do not operate on a commercial basis. . . . Where TPP member states insist on retaining SOEs, their market share should be capped at as low a level as possible, to forestall absurd claims that state firms completely dominate markets due to competitive superiority. . . . Because SOEs represent circumscribed competition at home, their investments overseas can properly be considered by host countries as different from investment by companies that earn commercial profits at home.

Id.

United States is that it might provide a back door method for reviving the abandoned Free Trade Area of the Americas by including those states in Latin America within the TPP framework.¹⁴³ Within a global order in which the basics of transnational trade is still sometimes contested,¹⁴⁴ the real prize is influence over the language of control and the development of polycentric alignment of states that increasingly work with and compete against each other through harmonized and coherent rules frameworks designed to provide marginal advantage to their particular national circumstances.¹⁴⁵ This is something Korea and Japan understand well.¹⁴⁶

CONCLUSION

Japan remains steadily fixed between the United States and China. With the election of Prime Minister Abe, Japan has chosen a middle course, but one that pushes it further into the complex entanglements between the United States and China. Japan's decision to participate in TPP negotiations drives Japan more closely to the center of current efforts to define and control the regulatory structures of trade in the Pacific basin. By extension, TPP may also control the shape of legitimate government and government policy among TPP states and those who trade with them. This represents a closer alignment of Japan with the United States. But it represents a threat to the People's Republic of China as well. That threat is direct—representing to the Chinese what may appear as another piece of the U.S. strategy to encircle China militarily and economically and to isolate it from the center of current efforts to develop transnational regulatory structures. To that extent, Japan's commitment to the TPP represents a direct threat to emerging Chinese interests, a threat that China will respond to against the United States and Japan.

143. "The TPP is seen in Latin America as a second attempt by the United States to push a Free Trade Area of the Americas (FTAA) in the region with help from countries whose governments are subservient to the U.S. led neoliberal ideology and 'free trade' economics." Burbano et al., *supra* note 71.

144. See, e.g., Larry Catá Backer & Augusto Molina, *Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas*, 31 U. PA. J. INT'L L. 687, 687–95 (2010).

145. See generally Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 TILBURG L. REV. 177, 177–99 (2012).

146. "South Korea will monitor Trans-Pacific Partnership negotiations while it pursues competing free trade pacts with Asian partners, but Seoul hopes the various regional trade agreements will one day merge, Trade Minister Taeho Bark said on May 16." *South Korea Prioritizes Asia Trade Pacts Over Pacific Partnership*, ASAHI SHIMBUN (May 17, 2012), http://ajw.asahi.com/article/behind_news/politics/AJ20120517002.

Ironically the greater threat is indirect—to the extent that Japan and the United States join together under the TPP umbrella and invite China to participate as well, China will find itself constrained by the development of group norms with respect to which it will be able to participate, but not dominate. For Japan, this may represent containment that protects its sizeable investment in China, at least temporarily. TPP may also permit Japan to leverage its power to influence global trade rules. But it also reaffirms that Japan stands uncomfortably close to the fissure that separates the United States from Chinese interests, and must continue to rely on the internationalization of rulemaking to protect its own interests. An independent path for Japan is unlikely to be an option worth considering. To a large extent, Zaki Laïdi’s recent suggestion resonates well here: “Since the end of the cold war, Europeans have believed deeply in the existence of a global commons—and the declining importance of national sovereignty. The conduct of both the US and emerging countries suggests the opposite. Power politics is back. Multilateralism is dying.”¹⁴⁷

147. Laïdi, *supra* note 46.