



The Trans-Pacific Partnership Negotiations and Issues for Congress

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Summary

The Trans-Pacific Partnership (TPP) is a proposed regional free trade agreement (FTA) being negotiated among the United States, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. U.S. negotiators and others describe and envision the TPP as a “comprehensive and high-standard” FTA, presumably because they hope it will liberalize trade in nearly all goods and services and include commitments beyond those currently established in the World Trade Organization (WTO). The broad outline of an agreement was announced on the sidelines of the Asia-Pacific Economic Cooperation (APEC) ministerial in November 2011 in Honolulu, HI. If concluded as envisioned, the TPP potentially could eliminate tariff and non-tariff barriers to trade and investment among the parties and could serve as a template for a future trade pact among APEC members and potentially other countries. Congress has a direct interest in the negotiations, both through influencing U.S. negotiating positions with the executive branch, and by passing legislation to implement any resulting agreement.

The 16th round of negotiations will take place in Singapore, between March 4 and 13, 2013. Three negotiating rounds are scheduled this year prior to the October 2013 APEC summit in Indonesia, the current target for reaching an agreement. For this deadline to be achieved, outstanding negotiating positions may need to be tabled soon in order for political decisions to be made. The negotiating dynamic itself is complex: decisions on key market access issues such as dairy, sugar, and textiles and apparel may be dependent on the outcome of controversial rules negotiations such as intellectual property rights or state-owned enterprises.

Canada and Mexico participated for the first time in the 15th round of negotiations in Auckland, New Zealand in December 2012, after joining the talks in June 2012. Japan and the TPP partners are conducting bilateral consultations on its possible entrance as well. In addition, Thailand formally expressed its interest in joining the negotiations during President Obama’s trip to the country in November 2012.

The TPP originally grew out of an FTA among Brunei, Chile, New Zealand, and Singapore, which came into force in 2006. Fifteen rounds of negotiations have occurred since the beginning of formal talks in 2010. In addition to negotiations on new trade rules among all the parties, the talks include U.S. market access negotiations—seeking removal of quotas and tariffs on traded products—with New Zealand, Brunei, Malaysia, and Vietnam as well as market access negotiations among other parties. The United States has FTAs in force with Chile, Singapore, Australia, Peru, and with North American Free Trade Agreement (NAFTA) partners Canada and Mexico, although new disciplines may be negotiated in the course of the talks covering issues beyond those in the existing FTAs.

The TPP serves several strategic goals in U.S. trade policy. First, it is the leading trade policy initiative of the Obama Administration, and is a manifestation of the Administration’s “pivot” to Asia. It provides both a new set of trade negotiations following the implementation of the bilateral FTAs with Colombia, Panama, and South Korea and an alternative venue to the stalled Doha Development Round of multilateral trade negotiations under the WTO. If concluded, it may serve to shape the economic architecture of the Asia-Pacific region by harmonizing existing agreements with U.S. FTA partners, attracting new participants, and establishing regional rules on new policy issues facing the global economy—possibly providing impetus to future multilateral liberalization under the WTO.

The 11 countries that make up the TPP negotiating partners include advanced industrialized, middle income, and developing economies. While new market access opportunities exist among the participants with whom the United States presently does not have FTAs, the greater value of the agreement to the United States may be setting a trade policy template covering issues it deems important and which can be adopted throughout the Asia-Pacific region, and possibly beyond.

Twenty-nine chapters in the agreement are under discussion. Aside from market access negotiations in goods, services, and agriculture, negotiations are being conducted on intellectual property rights, services, government procurement, investment, rules of origin, competition, labor, and environmental standards and other disciplines. In many cases, the rules being negotiated are more rigorous than comparable rules found in the WTO's Uruguay Round Agreement. Some topics, such as state-owned enterprises, regulatory coherence, and supply chain competitiveness, break new ground in FTA negotiations.

As the negotiations proceed, a number of issues important to Congress are emerging. One is whether the United States can balance its vision of creating a "comprehensive and high standard" agreement with a large and expanding group of countries, while not insisting on terms that other countries will reject. Related to this may be what concessions the United States is willing to make to achieve a "comprehensive and high-standard" agreement overall. Another issue is how Congress will consider the TPP, if concluded. The present negotiations are not being conducted under the auspices of formal trade promotion authority (TPA)—the latest TPA expired on July 1, 2007—although the Administration informally is following the procedures of the former TPA. If TPP implementing legislation is brought to Congress, TPA may need to be considered if the legislation is not to be subject to potentially debilitating amendments or rejection. Finally, Congress may seek to weigh in on the addition of new members to the negotiations, before or after the negotiations conclude.

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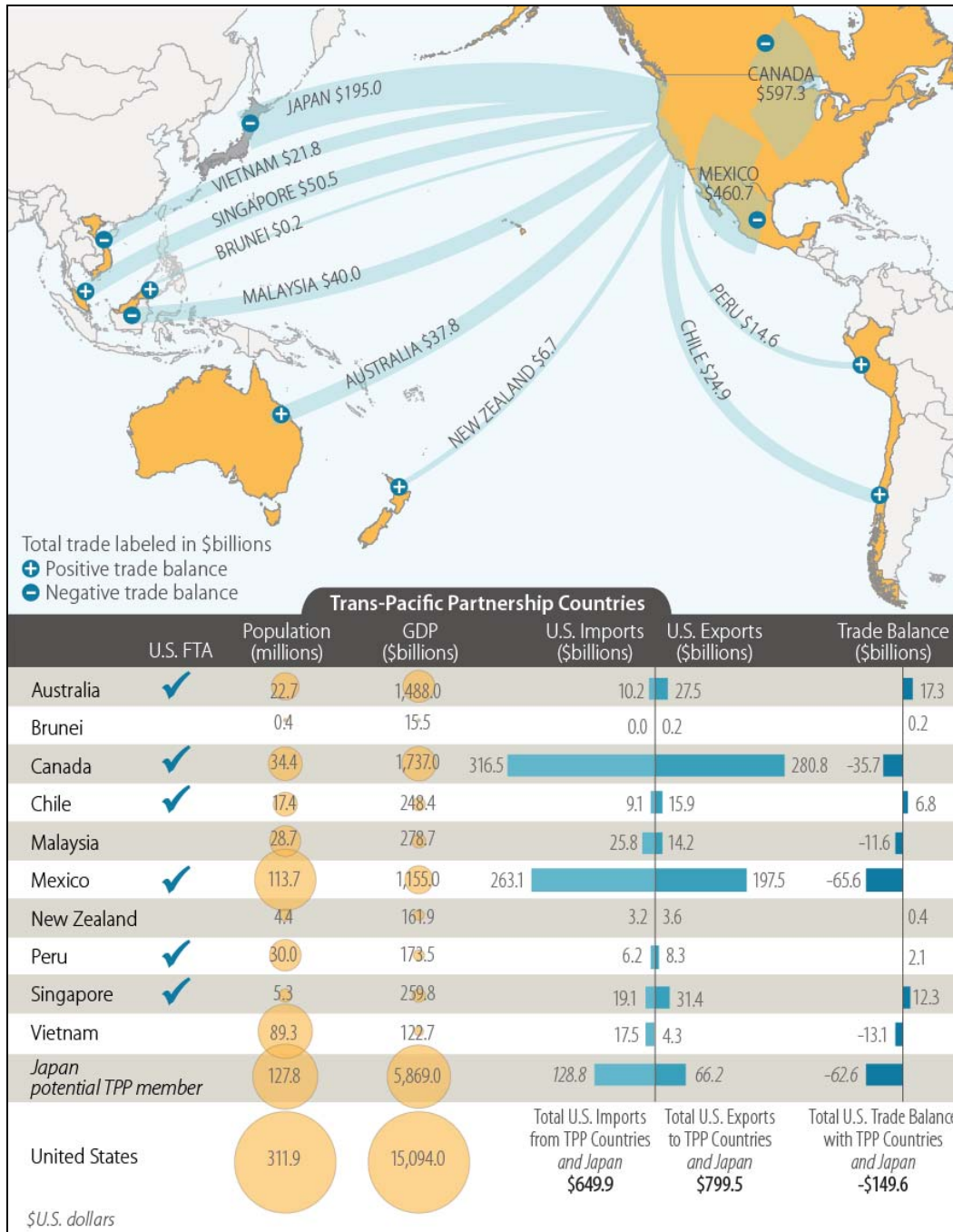
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Figure I. Trans-Pacific Partnership Countries
(trade, GDP, and population data from 2011)



Source: Analysis by CRS. FTA data from the United States Trade Representative (USTR). Population and GDP data from IMF, World Economic Outlook, April 2012. Trade data from the U.S. International Trade Commission (ITC). Total trade includes both imports and exports, but does not include services trade.

Introduction

The Trans-Pacific Partnership (TPP) is a potential free trade agreement (FTA) among 11, and perhaps more, countries. The United States and 10 other countries of the Asia-Pacific region—Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam—are negotiating the text of the FTA. Canada and Mexico participated for the first time in the Auckland round of negotiations in December 2012, and Japan and Thailand are also considering the possibility of joining. With 29 chapters under negotiation, the TPP partners envision the agreement to be “comprehensive and high-standard,” in that they seek to eliminate tariffs and non-tariff barriers to trade in goods, services, and agriculture, and to establish rules on a wide range of issues including foreign direct investment and other economic activities. They also strive to create a “21st-century agreement” that addresses new and cross-cutting issues presented by an increasingly globalized economy.

The TPP draws congressional interest on a number of fronts. Congress would have to approve implementing legislation for U.S. commitments under the agreement to enter into force. In addition, under long-established executive-legislative practice, the Administration notifies and consults with congressional leaders, before, during, and after trade agreements have been negotiated. Furthermore, the TPP will likely affect a range of sectors and regions of the U.S. economy of direct interest to Members of Congress and could influence the shape and path of U.S. trade policy for the foreseeable future.

This report examines the issues related to the proposed TPP, the state and substance of the negotiations (to the degree that the information is publically available), the specific areas under negotiation, the policy and economic contexts in which the TPP would fit, and the issues for Congress that the TPP presents. The report will be revised and updated as events warrant.

2011 TPP Leaders Statement

At the 2011 APEC Leaders meeting in Honolulu, the leaders of the of the (then) nine TPP countries agreed to the broad outlines of an agreement. In their statement, they categorized the TPP as “a comprehensive, next-generation regional agreement that liberalizes trade and investment and addresses new and traditional trade issues and 21st-century challenges.” TPP trade ministers also highlighted the following five key areas of the so-called historic and standard-setting agreement.

- **Comprehensive Market Access**—Removal of both tariff and non-tariff barriers is “comprehensive and ambitious in all areas.”
- **Regional Agreement**—“Fully regional agreement that facilitates trade and the development of production and supply chains among TPP members.”
- **Cross-Cutting Trade Issues**—Holistic, agreement-wide approach to specific areas: regulatory coherence, competitiveness and business facilitation, small- and medium-sized enterprises, and development.
- **New Trade Challenges**—Addresses emerging trade issues such as those caused by new technology (e.g., cloud-computing).
- **Living Agreement**—Agreement will “evolve in response to developments in trade, technology or other emerging issues” and expand “to include other economies from across the Asia-Pacific region.”

Source: TPP Leader’s Statement, Honolulu, Hawaii, November 12, 2011.

The Evolution of the TPP

The Trans-Pacific Strategic Economic Partnership, as it was originally known, was conceived in 2003 by Singapore, New Zealand, and Chile as a path to trade liberalization in the Asia-Pacific region. Brunei joined negotiations in 2005, and the Trans-Pacific Strategic Economic Partnership (P-4) agreement was concluded in 2006. In March 2008, the United States joined the negotiations to conclude the still outstanding investment and financial services provisions. President Bush notified Congress of his intention to negotiate with the existing P-4 members on September 22, 2008, and with other countries, Australia, Peru, and Vietnam, on December 30, 2008.

After a period of reflection on U.S. trade policy, the new Obama Administration decided to continue with the TPP negotiations. On November 14, 2009, President Obama committed the United States to engage with the TPP countries “with the goal of shaping a regional agreement that will have broad-based membership and the high standards worthy of a 21st-century trade agreement.”¹

President Obama formally notified Congress of his Administration’s intention to enter into negotiations with the TPP countries on December 14, 2009. That notification set off a 90-day timeline under the now expired 2002 trade promotion authority (TPA) legislation, for congressional consultations prior to the beginning of negotiations.² In October 2010, TPP participants agreed to by consensus to the inclusion of Malaysia as a negotiating partner.

The negotiating partners announced a framework for the agreement at the sidelines of the Asia-Pacific Economic Cooperation (APEC) Ministerial in Honolulu, HI, November 8-13, 2011. At this time, Canada, Japan, and Mexico started to consult with the existing TPP partners on joining the negotiations, and the United States Trade Representative (USTR) announced a 90-day comment period for those three countries in Federal Register notices of December 1 and 7, 2011. After several months of intense bilateral consultations with each of the current TPP countries, the TPP countries agreed by consensus to the inclusion of Mexico and Canada in the talks on June 18 and 19, 2012, respectively, pending the successful conclusion. Mexico and Canada began participating as negotiating partners in the December 2012 round in Auckland, New Zealand. Bilateral consultations between the parties and Japan on its interest in joining the talks continue. In addition, Thailand formally expressed its interest in joining the negotiations during President Obama’s trip to the country in November 2012. Fifteen rounds of negotiations have taken place with the 16th scheduled for March 4-13, 2013, in Singapore.

The TPP in Context

If completed as intended, the proposed TPP agreement would strengthen and deepen trade and investment ties among its participants. However, it could also have implications in larger, strategic contexts beyond the immediate participants: for U.S. trade policy in general; for the emerging trade architecture in the Asia-Pacific region; for the multilateral trade regime within the WTO; and for U.S. strategic interests in the Asia-Pacific region.

¹ Remarks of President Obama at Suntory Hall, Tokyo, Japan, November 14, 2009.

² Although TPA expired in 2007, both the Bush and Obama Administrations have continued to adhere to its notification and consultation requirements.

The TPP and U.S. Trade Policy

U.S. participation in TPP negotiations serves several strategic goals in U.S. trade policy. First, it continues and expands a U.S. trade policy strategy that began with the North American Free Trade Agreement (NAFTA), which entered into force in 1994, of using FTAs to promote trade liberalization and potentially to spark multilateral negotiations in the World Trade Organization (WTO). The George W. Bush Administration expanded the use of this strategy under the rubric of “competitive liberalization,” negotiating 11 FTAs with 16 countries. The last three of these FTAs—with Colombia, Panama, and South Korea—were approved by Congress in 2011.³ However, the future direction of this policy was uncertain, given the low commercial value of some of these agreements and lack of new obvious partner countries. Meanwhile, an increasing web of bilateral and regional FTAs, were being concluded among other parties in the Asia-Pacific region and worldwide. The Bush Administration’s and then the Obama Administration’s adoption of the TPP signaled that the United States remains engaged in regional free trade negotiations.

The TPP arguably provides the United States with the opportunity to project its trade interests by negotiating a “comprehensive and high-standard” FTA with provisions that build off those in FTAs the United States concluded throughout the 2000s, especially the most recent ones. The TPP partner countries, while not considered economic powerhouses individually, share a reliance on world trade and have been some of the greatest advocates for trade liberalization. While they differ in economic levels of development, they have committed themselves to negotiating a high-standard FTA. That, by itself is not new; the United States has often conducted asymmetrical negotiations with countries of differing levels of development in which it has dominated. This time, however, with more players at varied levels of development, the United States may not be able simply to impose its vision or standards on those countries, and they are likely to make demands for concessions from the United States.

Practically speaking, the TPP approach could eclipse the alternative model of narrower goods-based FTAs that are offered by China or somewhat more comprehensive agreements used by the European Union and Japan that, nonetheless, exclude sensitive agriculture products. Adoption of these other models, even if open to U.S. participation, could be seen as disadvantageous to U.S. businesses and workers because they exclude provisions important to U.S. commercial trade—disciplines on services, investment, and intellectual property rights, as well as enforceable provisions on labor and environment. In addition, the TPP aims to establish disciplines on new trade issues, such as state-owned enterprises or supply chain facilitation that could serve as a model for future negotiations bilaterally, regionally, or in the WTO.

The TPP and Other Asia-Pacific Trade Agreements

The current 11 TPP countries already form part of a growing network of Asia-Pacific FTAs (**Figure 2**).⁴ The United States has FTAs in place with six of the TPP countries: Australia, Canada, Chile, Mexico, Peru, and Singapore. In addition, the proposed TPP seeks to build on the existing Trans-Pacific Strategic Economic Partnership (P-4), a free trade area among Brunei,

³ The United States now has FTAs in force with 19 countries. These countries include Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, South Korea, and Singapore.

⁴ See CRS Report R42344, *Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis*, by Brock R. Williams.

Chile, New Zealand, and Singapore. The current TPP partners also include 4 of the 10 members of the Association of Southeast Asian Nations (ASEAN): Brunei, Malaysia, Singapore, and Vietnam.⁵ ASEAN countries have negotiated a free trade area amongst each other as well as several external FTAs. All 11 TPP negotiating partners are also members of the 21-member Asia-Pacific Economic Cooperation (APEC) forum, which does not negotiate FTAs among its membership, but serves as a forum for dialogue on and establishes non-binding commitments toward the goals of open and free trade and investment within the region.⁶

To some, the United States and its TPP partners are jump-starting the consensus-based approach of APEC.⁷ In the context of this forum for dialogue and non-binding commitments, APEC Leaders in 2010 agreed to push forward the creation of a Free Trade Area of the Asia-Pacific (FTAAP). They acknowledged the TPP as potentially one of a number of “ongoing regional undertakings” on which to build to eventually achieve an FTAAP.⁸ Other ongoing regional undertakings include potential trade agreements between ASEAN and other Asian countries.

Most recently, officials announced the launch of negotiations for the Regional Comprehensive Economic Partnership (RCEP). This agreement would join ASEAN and its six FTA partners—Australia, China, India, Japan, New Zealand, and South Korea—in one collective FTA. It is unclear how these two regional undertakings, RCEP and TPP, may impact one another and how they will affect the potential for an FTAAP.⁹ The RCEP may not aim for the same level of ambition in terms of tariff reduction and trade liberalization as the TPP. By allowing sensitive items to be left out of the negotiations, this platform could be more appealing to countries less inclined to the declared if yet unrealized high-standard ambitions of the TPP. Yet, several countries, including Australia, Brunei, Malaysia, New Zealand, Singapore, and Vietnam, are moving forward as negotiating partners in both the TPP and RCEP. The TPP partners, including

⁵ The 10 ASEAN members are Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam.

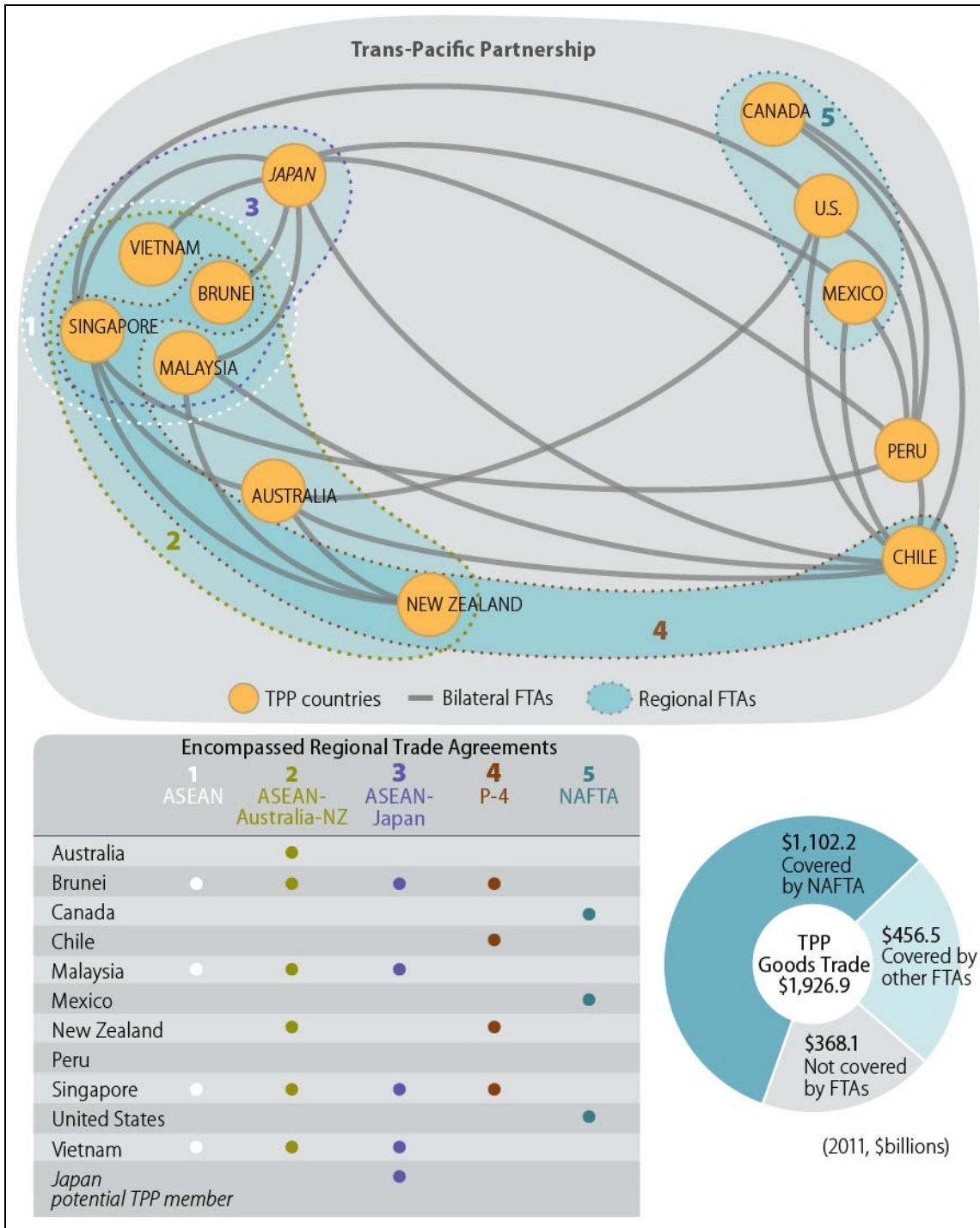
⁶ APEC consists of Australia, Brunei, Canada, Chile, China, Hong Kong (officially Hong Kong, China), Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, South Korea, Taiwan (officially, Chinese Taipei), Thailand, the United States, and Vietnam. The APEC goals are generally referred to as the “Bogor Goals” established by APEC Leaders in 1994.

⁷ This organization was famously described as “four adjectives in search of a noun” by former Australian Foreign Minister Gareth Evans, as quoted in “APEC: Successes, Weaknesses, and Future Prospects,” by John McKay, *Southeast Asian Affairs*, 2002, pp. 42-53.

⁸ Asia-Pacific Economic Cooperation, *2010 Leaders' Declaration*, November 2010, http://www.apec.org/Meeting-Papers/Leaders-Declarations/2010/2010_aelm.aspx

⁹ A recent quantitative study by the East-West Center considers the possibility of TPP and ASEAN+ agreements simultaneously expanding in the Asia-Pacific and models the welfare gains from each agreement eventually leading to an FTAAP. Due to the assumption that the TPP agreement would involve greater liberalization, the model predicts greater welfare benefits from an FTAAP based on the TPP. See Peter A. Petri, Michael G. Plummer, and Fan Zhai, *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment*, Peterson Institute for International Economics, Policy Analyses in International Economics, November 2012.

Figure 2. Existing FTAs among TPP Countries



Source: WTO FTA database and websites of TPP countries' trade ministries. Trade data from IMF.

Notes: TPP goods trade includes imports and exports. ASEAN also includes countries outside the TPP: Burma (Myanmar), Cambodia, Indonesia, Laos, the Philippines, and Thailand. TPP goods trade covered by existing FTAs as depicted above, reflects all goods trade between FTA partners. This measure slightly overstates trade covered under FTAs, as most FTAs exclude market access for at least some goods.

the United States, have also expressed an interest in expanding the TPP to additional countries across the Asia-Pacific region. They maintain that new members are welcome so long as they strive for the same level of trade liberalization as the current negotiating partners.

During the Auckland round in December 2012, Canada and Mexico participated in the negotiations for the first time, thus completing their year long quest to join the talks. Meanwhile, Japan continues to consider the possibility of joining. There is as yet no formal limit to the potential membership of the TPP, aside from excluding those countries unwilling to commit to the ambition of the proposed FTA. As mentioned, all current members of the TPP negotiations are also members of APEC, and the current TPP countries have publically stated that membership expansion will likely focus on other APEC members first, such as South Korea, though other non-APEC countries with a strong focus on trade liberalization, such as Colombia and Costa Rica, have also expressed an interest in joining TPP.

Many policy observers, however, note the absence of China, the region and world's second-largest economy, from ongoing negotiations. The degree to which a potential TPP agreement and its participants are prepared to include China, as well as China's willingness or interest in participating in a comprehensive, high-standard agreement, will help determine if the TPP truly has the potential to become an FTAAP. With the agreement's focus on expansion throughout the region, the current negotiating partners may wish to establish disciplines now on certain aspects of the Chinese and other Asia-Pacific economies. This may, in part, explain the push for potential new disciplines on State-owned enterprises inside the TPP.

The TPP and the WTO

Though structured as a regional agreement, the TPP may have an impact on the multilateral process of the WTO and the Doha Development Agenda (Doha Round) of multilateral trade negotiations. While the WTO ministers continue to discuss a Doha Round agenda that critics contend is increasingly irrelevant to the present trading system, the TPP represents a way for the United States and its partners to advance discussions of a "21st-century trade agenda."

The influence of the TPP impact could be great due to its potential expansion and, hence, the fact that it could eventually affect a substantial amount of world trade—over 60% of U.S. trade alone is with other APEC members. The debate over whether FTAs have a positive or negative effect on the multilateral system continues. Proponents of bilateral and regional agreements would argue that¹⁰

- successful negotiation and implementation of proposed new trade rules in the TPP, on such emerging issues as State-owned enterprises and regulatory coherence, could serve as a template for future WTO negotiations;
- a successful TPP agreement among the current negotiating partners could cause other regional economies to consider joining (as seen recently with the addition of Canada and Mexico) in order to ensure they remain competitive in TPP markets, thus furthering the WTO goal of greater global trade liberalization; and

¹⁰ These arguments regarding FTAs have been placed in a TPP context, but are drawn largely from Jeffrey J. Schott, "Free Trade Agreements: Boon or Bane of the World Trading System," in *Free Trade Agreements US Strategies and Priorities*, ed. Jeffrey J. Schott (Institute for International Economics, 2004).

- TPP could help promote and ensure the longevity of domestic economic policy reforms, particularly for countries such as Vietnam.

Opponents, however, would counter that

- efforts toward the TPP and other regional/bilateral FTAs may divert attention and resources from multilateral WTO efforts;
- increased trade among TPP members due to the preferential tariff structures of the agreement could simply be diverted from other regions rather than be newly created; and
- the spread of FTAs may actually make international commerce more difficult as companies must navigate varying rules and standards associated with different agreements.¹¹

This last issue of overlapping trade rules may be particularly relevant for the potential TPP agreement as it will encompass countries with numerous existing FTAs. The proposed TPP agreement could add another layer of complexity or it could simplify the existing trade rules in the region by unifying them under one agreement. For example, according to the USTR, the TPP countries have committed to establishing a common set of rules of origin for determining whether a product originates inside the TPP.¹² How these and other trade rules inside the potential TPP agreement relate to those in existing FTAs will be of interest moving forward.

Trade Promotion Authority

Trade Promotion Authority (TPA)—formerly fast track—is a statutory mechanism under which Congress defines negotiating objectives and consultative procedures for trade agreements, and authorizes the President to enter into reciprocal trade agreements governing tariff and non-tariff barriers. Under TPA, implementing bills for reciprocal trade agreements are considered under expedited legislative procedures, that is, limited debate, no amendments, and an up-or-down vote. The expedited consideration is conditioned on the President observing certain statutory obligations in negotiating trade agreements, including notifying and consulting Congress. The purpose of TPA is to preserve the constitutional role of Congress to regulate foreign commerce in consideration of implementing legislation for trade agreements that require changes in domestic law, while also bolstering the negotiating credibility of the executive branch by assuring that a trade agreement, once signed, will not be changed during the legislative process. TPA expired in 2007 and, as of this writing, has not been renewed by Congress.¹³

The TPP and the “Pivot” in the Asia-Pacific Region

The TPP could have implications beyond U.S. economic interests in the Asia-Pacific. The region has become increasingly viewed as of vital strategic importance to the United States. Throughout the post-World War II period, the region has served as an anchor of U.S. strategic relationships, first in the containment of communism and more recently as a counterweight to the rise of China.

¹¹ This is the so-called “spaghetti bowl” effect of FTAs put forward by Jagdish Bhagwati, Professor of Economics and Law at Columbia University. His view on the TPP agreement is expressed in his op-ed article on the Project Syndicate website at <http://www.project-syndicate.org/commentary/bhagwati20/English>.

¹² USTR, “Outlines of the Trans-Pacific Partnership Agreement,” fact sheet, November 2011, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

¹³ For more information, see CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by J. F. Hornbeck and William H. Cooper.

This trend has recently been accentuated by the Obama Administration's "pivot to Asia" along with the perception that the center of gravity of U.S. foreign, economic, and military policy is shifting to the Asia-Pacific region. The TPP is viewed as an important element in the U.S. "rebalancing" toward Asia.¹⁴

U.S. Economic and Trade Relations with TPP Countries¹⁵

The overall economic impact of the potential TPP agreement will depend on a number of factors, including the extent of the liberalization achieved in the agreement, as well as the current level and potential growth of trade and investment with TPP members. On both measures, the TPP appears significant given that the TPP region accounts for a large share of U.S. trade and TPP negotiators have expressed their intent to achieve a "comprehensive and high-standard" FTA that will broadly liberalize regional trade and investment. From the U.S. perspective, much of this liberalization has already occurred due to existing U.S. FTAs with 6 of the 10 TPP partners. These countries accounted for nearly 95% of total U.S.-TPP merchandise trade in 2011,¹⁶ though the potential disciplines in areas not covered in previous FTAs may be significant for some sectors. Of the current negotiating partners without U.S. FTAs, two countries, Malaysia and Vietnam, stand out in terms of their current trade and investment with the United States and their potential for future growth. Together these countries have a population of over 120 million and their economies have experienced rapid growth in recent years.¹⁷ Moreover, Malaysia's and Vietnam's average applied MFN tariffs—the average tariff on imports from other members of the WTO, such as the United States—are 8% and 9.8%, respectively, two of the highest levels among TPP members (**Figure 6**).

A full consideration of the potential economic impact of the TPP, however, requires examining potential, as well as current, member countries. In the TPP outline, announced in November 2011, the then-nine TPP countries highlighted the agreement's potential for expansion in the Asia-Pacific region. Japan and China, the two largest economies in the world after the United States and major U.S. trading partners, are both APEC members and potential candidates for TPP membership. As neither country has an FTA with the United States, the economic impact of one or both countries joining the agreement could be significant. Japan has already expressed an interest in joining the TPP. The possibility of China's participation in the near term is unlikely.

¹⁴ For more information, see CRS Report R42448, *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia*, coordinated by Mark E. Manyin

¹⁵ For more information on U.S. economic relations with each of the potential TPP countries, see CRS Report R42344, *Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis*, by Brock R. Williams.

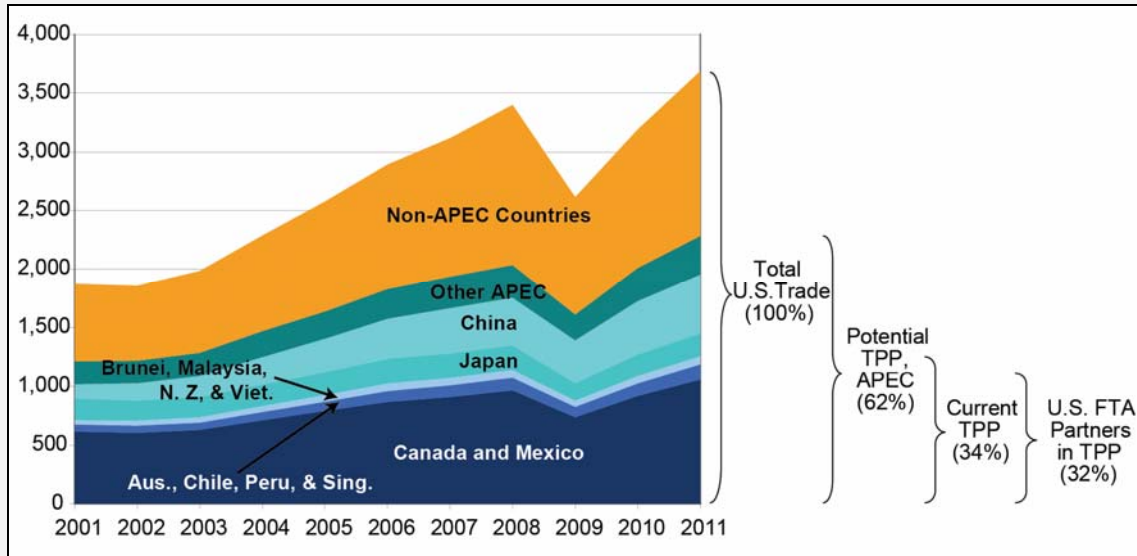
¹⁶ Analysis by CRS. Data from ITC.

¹⁷ Vietnam's GDP growth has slowed somewhat relative to the high rates it achieved during the past decade. In 2011 its growth rate was 5.9%, according to the International Monetary Fund's World Economic Outlook, compared to an average growth rate of 7.3% in the period 2001-2010.

Key U.S.-TPP Trade Statistics

- TPP countries collectively represent, by far, the largest U.S. trading partner, accounting for 34% of overall U.S. goods trade;
- U.S. FTAs already exist with the major U.S. trading partners among TPP participants, particularly Canada and Mexico, which account for almost 85% of U.S. goods trade with TPP partners; and
- the agreement has the potential to expand in a region that represents 62% of U.S. trade and could eventually include major economies with which the United States does not have FTAs such as China and Japan.

Figure 3. U.S.-World, APEC, and TPP Goods Trade
(in millions of U.S. dollars)



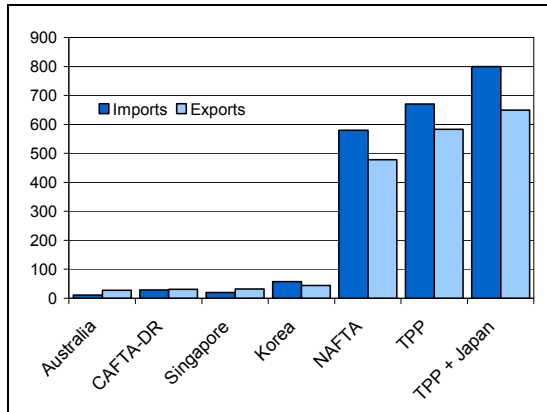
Source: Analysis by CRS. Data from the International Trade Commission.

Notes: Percent values represent the percentage of total U.S. goods trade, imports and exports. All APEC economies are considered potential TPP partners for the purposes of this figure.

U.S.-TPP Trade—Aggregate Overview

In 2011, total U.S. trade with TPP countries was more than \$1.25 trillion in merchandise and more than \$155 billion in services. Even before Canada and Mexico became negotiating partners in the TPP, the agreement had the potential to become the second-largest U.S. FTA by trade flows. Now with all NAFTA countries expected to participate, the TPP has the potential to become the largest U.S. FTA (Figure 54 & Figure 6).

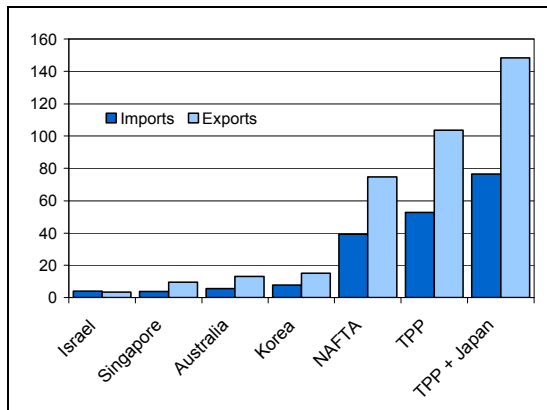
Figure 4. U.S. Goods Trade with Largest Current and Potential FTA Partners
(in billion of U.S. dollars)



Source: Analysis by CRS. Data from ITC.

machinery and autos/parts. Singapore and Malaysia both import and export the same major products to and from the United States—electrical machinery and machinery.

Figure 5. U.S. Services Trade with Largest Current and Potential FTA Partners
(in billions of U.S. dollars)



Source: Analysis by CRS. Data from BEA.

Notes: Services trade data not available for all FTA partners.

New Zealand; middle income countries such as Mexico, Chile, and Malaysia; and emerging economies such as Vietnam are participating in the talks. This section provides a snapshot of each country’s economic relationship with the United States and key bilateral negotiating topics. The

The current group of 11 countries is diverse in population, geographic location, and economic development, and U.S. trade relations with the countries reflect this diversity. The major U.S. merchandise exports to TPP countries are machinery (e.g., computers, turbines, and agricultural equipment), electrical machinery (e.g., integrated circuits, semiconductors, and cell phones), autos, and refined petroleum products. However, the top U.S. merchandise imports vary greatly by country. Agriculture and natural resources products are key U.S. imports from Australia, Chile, New Zealand, and Peru, while apparel products are the main U.S. imports from Vietnam. Canada and Mexico are both major suppliers of crude oil to the United States, but they also supply manufactured products like electrical

In terms of value, Canada and Mexico are by far the largest U.S. trading partners among TPP countries in both goods and services, and both are significant U.S. investment partners. Both countries share a large border with the United States and are among the oldest U.S. FTA partners. Considering the other eight TPP partners, Singapore and Australia are the top U.S. goods export markets and top overall services trade and investment partners with the United States, while Malaysia and Singapore are the top sources of U.S. goods imports.

U.S.-TPP Trade—Bilateral Trends¹⁸

Eleven countries, including highly developed economies such as Australia, Canada, and

¹⁸ The data for this section comes from the International Trade Commission’s trade database and the World Trade Organization’s Country Trade Profiles.

appendix includes additional information on bilateral trade flows between the United States and TPP countries (**Table A-1** and **Table A-2**).

Australia

Total goods trade between the United States and Australia was \$37.8 billion in 2011, while U.S.-Australia services trade totaled \$18.8 billion. It is the third-largest U.S. trading partner in services behind Canada and Mexico. The U.S. trade surplus with Australia in 2011 was the largest of any TPP country for both goods (\$17 billion) and services (\$7.6 billion). Part of this large surplus is due to quickly growing exports to Australia in both goods and services over the past decade. From January 1, 2005, when the Australian-U.S. FTA (AUSFTA) took effect, through 2011, U.S. agricultural exports to Australia more than doubled to \$200 million. The primary U.S. goods exports to Australia are machinery, vehicles, and optical/medical instruments, while the top U.S. imports are meat, precious stones/metals, and optical/medical instruments. Fuels and mining products make up the bulk of the Australia's exports to the rest of the world.

- The U.S.-Australian FTA (AUSFTA) took effect in 2005 and as a result most goods are or will eventually be exchanged tariff-free.¹⁹
- The AUSFTA does not contain an investor-state dispute mechanism, a prominent feature in bilateral and regional FTAs the United States has negotiated and a U.S. negotiating objective in the TPP talks. Australia has reportedly insisted on an opt-out from such a provision if it is included in a final TPP agreement.
- Australia may seek additional access for its sugar, which was excluded from AUSFTA. Australia may also seek to speed up the trade liberalization schedules for its beef and dairy products into the U.S. market. USTR maintains that it will not re-open the market access negotiations of AUSFTA.

Brunei

Brunei is by far the smallest U.S. trading partner among TPP countries. In 2011, total goods trade between the United States and Brunei was \$207 million. U.S. imports from Brunei have declined considerably over the past decade. In 2011, they were only \$23 million, or 4% of their 2005 level of \$562 million. The top U.S. import from Brunei was in the category of precious stones and metals, specifically scrap or waste products. However, in 2005 when U.S. imports were at their peak, oil made up almost 70% of total imports from Brunei. Oil products are crucial to Brunei's economy, where fuel and mining products make up over 96% of total exports. The United States exports primarily machinery and aircraft to Brunei.

- The United States does not currently have an FTA with Brunei.
- Brunei remained on the USTR IPR "watch list" in 2012, due to U.S. concern over intellectual property rights enforcement.²⁰

¹⁹ For more information on AUSFTA, see CRS Report RL32375, *The U.S.-Australia Free Trade Agreement: Provisions and Implications*, by William H. Cooper.

²⁰ U.S. Trade Representative, *2012 Special 301 Report*, http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf. Brunei, p. 42. Placement of a trading partner on the Priority Watch List or Watch List indicates that particular problems exist in that country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. Countries placed on the (continued...)

Canada

Canada is the largest trading partner of the United States, overall and among TPP participants with total trade in goods of nearly \$600 billion and total trade in services of \$76.1 billion.²¹ The U.S. trade deficit with Canada has been falling in recent years to \$35.7 billion in 2011. The United States recorded a substantial trade surplus in services trade with Canada of \$24.9 billion in 2010. Although rich in natural resources and energy, Canada is also part of an integrated North American supply chain and exchanges many manufactured products with the United States, especially autos, at different stages of production.

- The United States-Canada Free Trade Agreement entered into force on January 1, 1989, and was incorporated into NAFTA on January 1, 1994. As a result, nearly all trade is conducted tariff and restriction free between the two countries, and with Mexico.
- Canada's willingness to negotiate over its supply management programs for dairy and poultry were reported to be an obstacle for the United States, Australia, and New Zealand to allow Canada's participation in the TPP.
- For the past several years, the U.S. Trade Representative has placed Canada on its "priority watch list" of countries meriting bilateral attention over intellectual property rights enforcement.²² Just prior to joining the talks in June 2012, the Canadian House of Commons passed copyright modernization legislation.

Chile

U.S. trade with Chile has been growing over the past decade with U.S. exports more than quadrupling to nearly \$15.9 billion in 2011 from the advent of the U.S.-Chile FTA in 2004. Total U.S. services trade with Chile is \$3.5 billion. As with Australia and Brunei, Chile's major exports to the world are fuel and mining products, particularly copper. However, it also has a well-developed agriculture sector, which contributes to exports. Manufactured goods make up over 60% of its world imports. Chile-U.S. trade mirrors these world patterns. The top U.S. imports from Chile are copper, fruits/nuts, and seafood. Meanwhile, U.S. exports to Chile consist mostly of machinery, refined oil products, and vehicles. The United States is a major trading partner for the country, providing about 17% of Chile's total imports.

- The U.S.-Chile FTA entered into force on January 1, 2004, and as a result most goods are or will eventually be exchanged tariff-free.²³
- Despite welcoming Chile's "significant commitment" to address outstanding intellectual property rights (IPR) issues under the U.S.-Chile FTA, the country

(...continued)

Priority Watch List are the focus of increased bilateral attention concerning IPR protection, enforcement, or market access for persons relying on intellectual property.

²¹ For additional information, see CRS Report RL33087, *United States-Canada Trade and Economic Relationship: Prospects and Challenges*, by Ian F. Fergusson.

²² *2012 Special 301 Report*, Canada, p. 25

²³ For more information on this agreement, see CRS Report RL31144, *The U.S.-Chile Free Trade Agreement: Economic and Trade Policy Issues*, by J. F. Hornbeck.

remained on the United States “Special 301” ‘priority watch list’ of countries meriting bilateral attention.²⁴

Malaysia

Malaysia is the fourth-largest U.S. goods trading partner among TPP countries, behind Canada, Mexico, and its neighbor Singapore, totaling nearly \$40 billion in 2011. U.S. services trade with Malaysia was \$3.3 billion in 2010. The United States imports nearly twice as much as it exports to Malaysia, resulting in a large goods trade deficit of nearly \$11.6 billion in 2011. Over the past decade, U.S. imports from Malaysia have been somewhat volatile, though declining considerably in the past five years. From 2000 to 2006, imports increased from \$25 billion to over \$35 billion, then fell back to \$25.8 billion in 2011. Electrical machinery makes up nearly half of all U.S. imports from, and exports to, Malaysia. Some of this trade comprises the same product category flowing both in and out of the United States and may represent intermediate goods crossing borders at various stages of production.

- The United States and Malaysia previously engaged in FTA negotiations. Those negotiations stalled in 2008 due to disagreements over government procurement practices among other issues.²⁵
- In the TPP negotiations, Malaysia may seek additional access to the U.S. market for sugar and dairy products that now are subject to U.S. tariff-rate quotas.
- In 2012, Malaysia was dropped from the U.S. IPR watch list signifying legislative and regulatory improvements to the country’s IPR regime.²⁶

Mexico

Mexico is the third-largest trading partner of the United States, and the second-largest among the TPP participant countries.²⁷ Total U.S.-Mexico goods trade was \$460 billion in 2011 while services trade between the two countries was \$37.5 billion in 2010. Although Mexico’s reliance on the United States as an export market has diminished slightly, the United States remains Mexico’s largest trading partner by far. Among the TPP participants, the United States has its largest goods trade deficit with Mexico (\$65.6 billion) in 2011, but carried a large services surplus (\$10.7 billion) in 2010. As with Canada, Mexico is part of an integrated North American manufacturing supply chain and exchanges goods with the United States—and Canada—at different stages of production.

- NAFTA came into effect between Canada, Mexico, and the United States on January 1, 1994. As a result, nearly all trade between the three countries is now conducted duty and barrier free.²⁸

²⁴ 2012 *Special 301 Report*, Chile, p. 26.

²⁵ For more information, see CRS Report RL33445, *The Proposed U.S.-Malaysia Free Trade Agreement*, by Michael F. Martin.

²⁶ USTR, 2012 *Special 301 Report*, Malaysia, p. 8.

²⁷ See CRS Report RL32934, *U.S.-Mexico Economic Relations: Trends, Issues, and Implications*, by M. Angeles Villarreal.

²⁸ For more information on NAFTA issues related to Mexico, see CRS Report RL34733, *NAFTA and the Mexican Economy*, by M. Angeles Villarreal

- The TPP negotiations may provide a venue for addressing additional issues, such as reconsideration of Mexico's exclusion of foreign investment in its petroleum industry.
- The prospect of enhancing disciplines in a TPP agreement to address sanitary and phytosanitary (SPS) issues and non-tariff barriers would be welcomed by U.S. agricultural exporters. They have complained that Mexico has held up shipments without providing justification based on "sound science" and imposed burdensome prior inspection requirements.

New Zealand

U.S. trade with New Zealand was relatively small among TPP members in 2011, larger only than Brunei, with total goods trade of \$6.7 billion and total services trade of \$3.4 billion. U.S.-New Zealand trade is relatively balanced with a small U.S. trade surplus in goods (\$411 million) and a small U.S. deficit in services (\$112 million). With the rest of the world, New Zealand primarily exports agricultural products and imports manufactured goods. Its trade with the United States is quite similar to its world pattern with top exports to the United States in meat, dairy, and beverages, and imports from the United States in aircraft and machinery.

- The United States does not currently have an FTA with New Zealand, but New Zealand has long sought an FTA and improved access to the large U.S. market.
- The United States has expressed concern that the practices and procedures of the New Zealand Pharmaceutical Management Agency (Pharmac) put "innovative pharmaceutical products," often made in the United States, at a disadvantage to older, generic products.
- Increased dairy market access in the United States is both a top priority for New Zealand and a chief concern among U.S. dairy interests.

Peru

The U.S. trade relationship with Peru is similar to that of its Latin American neighbor, Chile, though on a smaller scale. U.S.-Peru trade totaled \$14.6 billion in goods in 2011. Relative to other TPP countries, Peru is the third-smallest U.S. trade partner, in front of New Zealand and Brunei. The United States had a goods trade surplus with Peru of \$2.1 billion in 2011, with U.S. exports to Peru increasing four-fold over the past decade. The major U.S. imports from Peru are oil and oil products, copper, and knitted apparel, whereas the major U.S. exports to Peru are machinery, refined oils, and electrical machinery. As with Chile, the United States is a major trading partner with Peru, providing nearly 20% of the country's total imports.

- The United States-Peru Trade Promotion Agreement (an FTA) entered into force on February 1, 2009.²⁹ As a result, nearly all trade between the two countries is or will soon be conducted tariff and restriction free.
- In its FTA with the United States, Peru agreed to IPR provisions—known as the May 10th agreement—that reflected certain lasting U.S. concerns regarding

²⁹ For more information, see CRS Report RL34108, *U.S.-Peru Economic Relations and the U.S.-Peru Trade Promotion Agreement*, by M. Angeles Villarreal.

accessibility to medicines. The IPR chapter proposed by the United States in the TPP negotiations reportedly reflects prior U.S. FTA provisions. Peru has expressed concerns that the new provisions would require it to adopt stricter patent protections, and would negate the previous FTA provisions.³⁰

- Peru remains on the U.S. IPR watch list due to concerns over the “widespread availability of counterfeit and pirated products in Peru” and its need to devote additional resources to IPR enforcement, among other issues.³¹

Singapore

Among TPP members, Singapore is a large U.S. trading partner in both goods and services. Total U.S.-Singapore trade was \$50.5 billion in goods and \$13 billion in services. The United States has a large surplus with Singapore in both goods (\$12.3 billion) and services (\$5.5 billion). Singapore imports primarily business/professional/technical services from the United States, unlike most countries whose services imports from the United States are mostly in travel/transportation. As an important trade and transshipment hub, Singapore’s world goods trade is dominated by manufactured goods, comprising over 70% of exports and 65% of imports. The United States’ goods trade with Singapore, as with Malaysia, is also mostly manufactured goods, primarily machinery and electrical machinery.

- The United States-Singapore Free Trade Agreement entered into force on January 1, 2004.³² As a result, nearly all their trade is conducted tariff and restriction free.
- Due to the importance of State-owned enterprises (SOE) in Singapore’s economy, its FTA with the United States contained provisions relating to SOEs. The United States is seeking further disciplines on SOEs in the TPP to ensure private actors can compete equally with state-backed entities. Temasek, Singapore’s investment holding company, reportedly has concerns that the disciplines proposed by the United States may put it at a disadvantage relative to private actors.³³

Vietnam

Vietnam’s trade with the United States has increased rapidly over the past decade to \$21.8 billion in goods in 2011. At least part of this increase is due to changes in the formal U.S.-Vietnamese trade relationship. In 2001, the United States granted Vietnam conditional normal trade relations, increasing that status to permanent normal trade relations in 2006 with Vietnam’s accession to the World Trade Organization (WTO).³⁴ While U.S. trade with Vietnam has increased in both directions, imports have risen much faster than exports. Hence, the United States had a relatively large (\$13.1 billion) goods trade deficit with Vietnam in 2011. Vietnam supplies the United States

³⁰ “USTR Says New TPP IPR Approach Still Achieves Goals Of ‘May 10’ Deal,” *Inside U.S. Trade*, October 28, 2011.

³¹ USTR, *2012 Special 301 Report*, Peru, p. 48.

³² For more information, see CRS Report RL31789, *The U.S.-Singapore Free Trade Agreement*, by Dick K. Nanto, and CRS Report RL34315, *The U.S.-Singapore Free Trade Agreement: Effects After Five Years*, by Dick K. Nanto.

³³ “U.S. SOE Proposal Raises Ire of Singapore State-Owned Investment Firm,” *Inside U.S. Trade*, May 13, 2012.

³⁴ For more information, see CRS Report R41550, *U.S.-Vietnam Economic and Trade Relations: Issues for the 112th Congress*, by Michael F. Martin.

with mostly labor-intensive products such as knitted and woven apparel. Meanwhile, its top U.S. imports are relatively more high-tech goods, including machinery and vehicles.

- There is no FTA currently in effect between the United States and Vietnam.
- Due to the high volume of U.S. imports of Vietnamese apparel and footwear, better market access in these areas is likely a top priority for Vietnam in the negotiations. Vietnam is seeking “cut and sew” rules of origin that would allow it to source textile inputs from non-TPP countries and still receive the preferences established under the TPP. Certain segments of the U.S. textile and apparel industry, meanwhile, have expressed their opposition to making such concessions to Vietnam in the negotiations.
- Vietnam reportedly has held off engaging in bilateral market access talks with the United States until U.S. negotiators show flexibility on crafting rules of origin for its textile and apparel exports. It has indicated it would not further open up its market to U.S. agricultural products if there is no change in the U.S. position. This concerns U.S. agricultural interests, which view this country as the most promising market among all current TPP participants. Progress on other U.S. negotiating objectives with Vietnam likely will depend also upon how both sides address the rules of origin issue.
- As mentioned above, the United States is seeking disciplines on SOEs to address possible unfair competitive advantages. Vietnam has publically expressed concerns over the proposed U.S. negotiating text on SOEs, and with SOEs accounting for perhaps 40% of its GDP, it is the country most likely to challenge the United States on its proposal.³⁵
- Additional issues regarding Vietnamese trade relations include U.S. restrictions on Vietnamese seafood and the United States’ continued designation of Vietnam as a “non-market economy.” While Vietnam has made large strides in liberalizing its economy and has been granted WTO membership, criticism of its standards on labor rights, intellectual property protection, and corruption has persisted in various quarters.
- Vietnam remains on the United States’ IPR watch list due, in part, to the continued existence of widespread counterfeiting and piracy, including internet piracy.³⁶

³⁵ “Vietnam Rejects U.S. Push on State Firms in Trade Talks,” *The Financial Express*, October 30, 2011.

³⁶ USTR, *2012 Special 301 Report*, Vietnam, p. 50.

Core Negotiating Issues: Market Access

Market access for goods, services, and agriculture often form the crux of FTA negotiations. However, non-tariff barriers such as technical barriers to trade and sanitary and phytosanitary standards, while considered rules, also have an impact on market access. Negotiations on these latter issues are designed to ensure that, as tariff barriers are reduced, they are not replaced by other forms of protection.

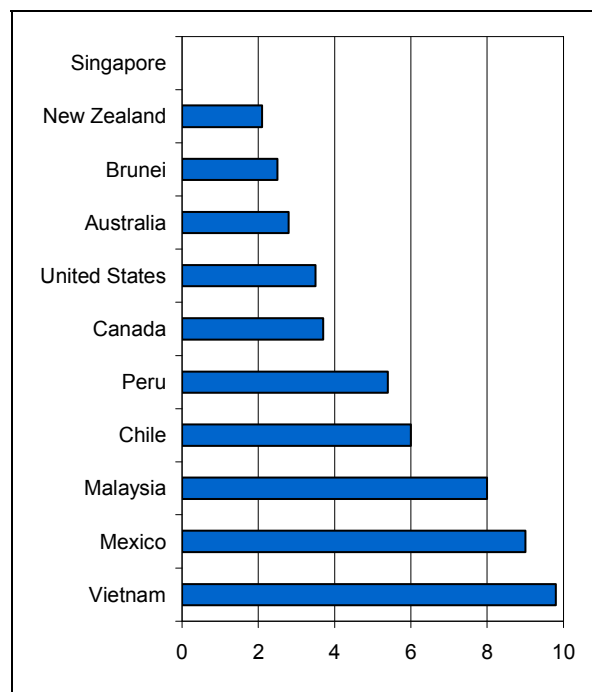
Market Access for Goods and Services

A fundamental element of most FTAs is commitments among FTA partners to eliminate most, if not all, tariffs and quotas on their trade in goods. Current average MFN tariff levels for TPP countries vary from 0% to nearly 10% (**Figure 6**). The TPP will include tariff phase-out schedules that cover more than 11,000 commodity categories for each of the partner countries. At their November 2011 meeting in Honolulu, the TPP trade ministers stated that they are aiming for duty-free access for trade in goods. The tariff schedules will likely provide for phase-out of tariffs, with tariffs on many products phased-out immediately when the agreement enters into force, and tariffs on more sensitive products phased out over varying periods of time. All of the current TPP countries are in the process of some tariff elimination as each has an FTA with one or more of the other TPP partners. As mentioned above, the United States has duty free agreements with Australia, Peru, Singapore, and Chile, and the original P-4 countries have already negotiated duty-free provisions among themselves. The TPP may build on these previous commitments and harmonize tariff elimination for all members. TPP partners are also discussing provisions that deal with export and import licensing procedures, customs issues, and trade facilitation.

Textiles, Apparel, and Footwear

Differences are likely to arise between the developed countries and some of the developing countries, including Vietnam, over elimination of tariffs on labor-intensive products, such as

Figure 6. Average MFN Applied Tariffs



Source: WTO Tariff Profiles, 2011.

Notes: These are the WTO-wide average MFN applied tariff rates, and hence do not reflect FTA tariff rates (e.g. the average tariff applied to U.S. exports to Canada and Mexico would be much lower due to NAFTA).

textiles and apparel and footwear. The United States, for example, has included in its FTAs, long tariff phase-out periods and also special safeguards to protect U.S. domestic producers from the adverse effects of import-sensitive products. For example, certain U.S. footwear manufacturers have argued for maintaining high tariffs on imported footwear, while Vietnam is pressing for lower tariffs to gain greater access to the U.S. market.³⁷ Developing countries have argued that they need preferential access to the large markets in order to compete with producers from other countries, such as China.³⁸

Trade in Services

A high priority for the United States in its negotiations of bilateral and regional free trade agreements has been increased market access for services providers, especially financial services, including insurance and banking; professional services, including legal services and private educational services; telecommunication services; express delivery; and e-commerce. In doing so, the United States has sought to expand on modest commitments that trade partners have made in the World Trade Organization (WTO) under the General Agreement on Trade in Services (GATS), especially in light of the perceived failure of WTO partners to expand on those commitments in the now dormant Doha Round.

U.S. FTAs with TPP partners Australia, Chile, Peru, and Singapore already cover trade in services, and the markets for services in the other four countries are relatively small. However, innovations regarding trade in services is a key part of the Obama Administration's vision of the TPP as a "21st-century model" for trade agreements, and the United States seeks TPP services provisions to be as broad as possible to cover trade with future entrants with large services markets, such as Japan.

Cross-border Services

According to the agreed outline, the TPP will cover services trade in several separate chapters, with some overlap. The section on cross-border trade in services—in which the buyer and seller are located in different territories—will employ the “negative list approach,” (as did the P-4 agreement), that is the provisions are to apply to all types of services unless specifically excluded by a partner country in an annex to the agreement. This approach is generally considered to be more comprehensive than the “positive list approach” used in the GATS that requires each covered service to be identified. The negative approach also implies that any new type of service that is developed after the agreement enters into force is automatically covered unless it is specifically excluded.

Most trade agreements on cross-border services trade, including U.S. FTAs and the original P-4 agreement, contain basic provisions on services that will likely be part of the TPP:

- non-discriminatory treatment of services from partner-country providers, including national treatment and most-favored-nation treatment;

³⁷ *World Trade Online*, March 5, 2012.

³⁸ For more information, see CRS Report R42772, *U.S. Textile Manufacturing and the Trans-Pacific Partnership Negotiations*, by Michaela D. Platzer.

- market access—no limitations on the number of service suppliers, the total value or volume of services provided, the number of persons employed, or the types of legal entities or joint ventures that a foreign service supplier may employ;
- prohibition on requirements that a partner-based service provider maintain a commercial presence in the country of the buyer;
- mutual recognition of professional qualifications for certification of service providers;
- transparency in the development and application of government regulations; and
- allowance for payments and transfers of capital flows in the provision of services.

In recent FTAs, including KORUS FTA, the United States has made market access of *express delivery services* a priority, which could also be the case in its negotiations on the TPP. Of particular concern are cases where a government-owned and operated postal system provides express delivery services competing with private sector providers. The KORUS FTA (Annex-12-B) stipulates that the postal system cannot use its monopoly power in providing postal services to give an express delivery subsidiary an unfair advantage. Nor should it divert revenues from its postal services to subsidize its express delivery services to the disadvantage of other providers.

Financial Services

The draft TPP outline indicates that financial services, including insurance and insurance-related services, banking and related services, as well as auxiliary services of a financial nature, will be addressed in a separate chapter as in previous FTAs. The original P-4 agreement did not include financial services provisions when it came into force in 2006. However, the P-4 partners committed to concluding a financial services (and investment) chapter within two years—a commitment that was overtaken by the launch of the TPP. The financial services chapter would adapt relevant provisions from the foreign investment chapter and the cross-border trade in services chapter. The KORUS FTA was the most recent U.S. FTA in which the United States negotiated provisions on financial services and which presumably will serve as a model for U.S. negotiations of the TPP in this area. The KORUS FTA distinguishes between financial services traded across borders and those sold by a provider with a commercial presence in the home country of the buyer. In the case of providers with a foreign commercial presence, the KORUS FTA applies the negative list approach; in the case of cross-border trade, the KORUS FTA limits coverage to specific banking and insurance services.³⁹

The KORUS FTA and other U.S. FTAs provide that nothing in the FTA would prevent a party to the agreement from imposing prudential measures to ensure the integrity and stability of the financial system. The KORUS FTA also addresses insurance sold by Korea Post, in particular that Korea Post is not regulated as other financial institutions. U.S. providers have argued that government-owned and operated insurance providers are not regulated as stringently and

³⁹ Regarding insurance, the FTA's coverage would be limited to cross-border trade in marine, aviation, and transit insurance; reinsurance; services auxiliary to insurance, such as consultancy, risk assessment, and actuarial and claim settlement services; and insurance intermediation services such as brokerage and agency services. Regarding banking and securities, the agreement's coverage in cross-border trade would be limited to providing financial information and data processing, advisory, and other auxiliary financial services.

therefore, have a competitive advantage over their privately owned counterparts. The KORUS FTA stipulates Korea Post insurance operations would be subject to tighter regulation. Another issue of U.S. concern regarding financial services was assurances that a U.S. financial service provider located in South Korea would be able to transfer information electronically or by other means from the host country where it is required in the ordinary course of business. Such information could include accounting information and human resources information that a company would want to transfer and process to a central location rather than having to process and keep at individual locations. The KORUS FTA indicates that South Korea would comply with this commitment two years after the agreement enters into force (2014). Host governments are cautious that such transfers of information might violate domestic privacy laws and considerations.

In addition, other chapters in the proposed agreement would affect trade in services because of the nature of services and their modes of delivery. Most services require the provider and buyer to be co-located, and the largest volume of services trade occurs when the provider has a commercial presence in the form of a direct investment in the country of the buyer and sells the service to the buyer. Therefore, provisions of the TPP that may pertain to foreign investments (discussed elsewhere) relate to trade in services. In addition, many service providers, such as sellers of entertainment programming, are intellectual property owners and argue for strong IP rights protection, the subject of another chapter in the proposed TPP (and discussed elsewhere). Furthermore, most of the barriers to trade in services are in the form of domestic regulations; therefore, the cross-cutting objective for regulatory coherence would affect trade in services.

According to the November 2011 outline, as in previous U.S. FTAs, the TPP will have a separate chapter on telecommunications trade. The TPP is to promote access to telecommunications networks for foreign services suppliers and transparency of regulations pertaining to telecommunications services. Along with these objectives, the United States sought and obtained in the KORUS FTA commitments to allow U.S. investment in foreign telecommunications companies.

Negotiations over the services provisions likely will lead to controversy between the developed countries, including the United States, Australia, Canada, New Zealand, and Singapore, and developing countries. Developed countries have pushed for greater market access for services. Developing countries have been more cautious on liberalization in services trade as they fear competition in sectors they view as a source of domestic employment and worry about the political implications forcing open sectors that are often controlled by politically powerful interests. Also, the United States may also be challenged to open its market to providers of maritime services. The United States has also been pressed to liberalize access to its market through the so-called mode-4 delivery—temporary entry of personnel to provide services. No U.S. FTA negotiated after the agreements with Chile and Singapore agreements includes provisions on the temporary movement of personnel.

Government Procurement

The United States is a member of the plurilateral WTO Government Procurement Agreement (GPA) and has sought the inclusion of government procurement provisions in its FTAs. Among TPP partner countries, only Singapore is also a member of the GPA, although New Zealand

announced on August 15, 2012, that it will seek to join the agreement.⁴⁰ New Zealand maintains certain government procurement preferences for its Maori population pursuant to the Treaty of Waitangi. In previous FTA negotiations with Malaysia, the United States had sought concessions on government procurement, a sensitive area for Malaysia which since 1969 has maintained preferences designed to assist the ethnic Malay population. U.S. FTAs with Australia, Peru, Chile, Singapore, and NAFTA include chapters on government procurement, which provide opportunities for firms of each nation to bid on certain federal and state contracts over a set monetary threshold on a reciprocal basis. A similar chapter has been proposed by U.S. negotiators in the TPP talks.

In 2011, 68 Members of Congress wrote to President Obama to urge the Administration not to negotiate government procurement provisions that would limit the application of Buy American provisions through extension of government procurement opportunities and obligations to TPP partner countries.⁴¹ Supporters argue that the reciprocal nature of the government procurement provisions will allow U.S. firms access to major government procurement programs overseas. This market potentially could be quite large. According to the WTO, government procurement accounts for 15%-20% of a country's GDP and the size of the government procurement market among GPA members was \$1.6 trillion in 2008.⁴²

At the Dallas round of negotiations, the United States reportedly proposed that TPP countries negotiate access commitments for central government procurement before addressing sub-federal or state level commitments.⁴³ This may be due to resistance among some U.S. states in providing access to their procurement markets. States must voluntarily opt in to government procurement commitments in FTA, but the number of states doing so has dropped substantially from the 37 states that signed up to the GPA to 8 states that have acceded to commitments under the most recent U.S. bilateral FTAs with South Korea, Panama, and Colombia.

Agriculture

Most attention in negotiating agricultural provisions in bilateral FTAs focuses on what additional market access the United States can secure for its farm commodities and food products in prospective partner countries. The outcome is usually reflected in a "National Treatment and Market Access for Goods" chapter and accompanying detailed tariff-line schedules. However, negotiators also address matters in other FTA chapters that affect commerce in agricultural products. The TPP agreement will similarly deal with a wide range of agricultural issues as described below.

Market Access

U.S. agriculture has both offensive and defensive interests in the TPP negotiations. Much of the U.S. agriculture and the agribusiness/food manufacturing sector positively view the prospect of

⁴⁰ "Press Release: NZ to Join WTO's Government Procurement Agreement," August, 15, 2012, <http://www.beehive.govt.nz/release/nz-join-wto%E2%80%99s-govt-procurement-agreement>

⁴¹ Letter available at: <http://donnaedwards.house.gov/uploads/Buy%20American%20TPP%20Ltr%20to%20Admin.pdf>.

⁴² Briefing Note: Government Procurement Agreement: http://www.wto.org/english/thewto_e/minist_e/min11_e/brief_gpa_e.htm

⁴³ "U.S. Seeks Delay in Addressing Sub-Central Procurement in TPP Talks," *World Trade Online*, May 14, 2012.

market openings in three countries with which the United States does not yet have an FTA (i.e., Brunei, Malaysia and Vietnam). These countries, due to their expanding populations and growing incomes, likely will continue to fuel demand for consumer-ready U.S. food products. U.S. cotton could see higher demand from Vietnam for its textile sector.

The U.S. dairy sector, however, has adopted a defensive posture, seeking to maintain existing protections on imports. It is most concerned about the competition that New Zealand’s dairy exporters would pose if granted preferential access to the U.S. market.

The U.S. sugar production sector similarly opposes both reopening the sugar market access provisions in any current FTA with a TPP country (e.g., Australia), and granting new market access concessions on sugar to any TPP participant.

Table I. U.S. Agricultural Trade with TPP Countries and World, 2011

million \$

Country	U.S. Agricultural Exports ^a	U.S. Agricultural Imports ^b	Total Two-Way Agricultural Trade ^c	U.S. Agricultural Trade Balance
Canada	18,996	18,918	37,914	77
Mexico	18,367	15,835	34,202	2,532
Vietnam	1,651	1,284	2,935	367
Australia	1,156	2,362	3,518	-1,206
Malaysia	1,016	2,424	3,440	-1,408
Peru	846	1,320	2,166	-475
Singapore	618	118	736	500
Chile	569	2,370	2,939	-1,801
New Zealand	302	1,968	2,270	-1,665
Brunei	5	0	5	5
TPP Countries	43,525	46,599	90,124	-3,074
World	136,345	98,946	235,291	37,400
TPP Countries’ Share of U.S. Agricultural Trade with World	31.9%	47.1%	38.3%	NA

Source: U.S. Department of Commerce, U.S. Census Bureau, Foreign Trade Statistics, as accessed at U.S. Department of Agriculture Foreign Agricultural Service’s Global Agricultural Trade System; ranked by export value.

- a. U.S. domestic exports (excludes re-exports)
- b. Imports for consumption
- c. Exports + imports

Also, U.S. agriculture and food processing sectors pressed the Obama Administration to accept Canada, Japan, and Mexico as full negotiating participants. They welcomed the decisions made to invite Canada and Mexico to join the talks, eyeing the prospect of seeing issues addressed that were not when the United States negotiated FTAs with each of them. Japan is viewed as the most

promising market for U.S. agriculture if it decides and is accepted to participate, should its high tariffs and restrictive quotas on agricultural imports be reduced and/or eliminated over time.

In 2011, two-way U.S. agricultural trade with the other 10 TPP countries totaled \$90 billion. This represented 38% of the combined total of U.S. agricultural exports and imports with the world (**Table 1**). U.S. agricultural exports to these 10 countries totaled almost \$44 billion in 2011, and accounted for 32% of all such exports worldwide. Of these, Canada ranked first, followed by Mexico and Vietnam. TPP partners also are significant sources of U.S. agricultural imports, accounting for 47% of such imports from the entire world. Looked at another way, shipments from four countries—Canada, Mexico, Malaysia, and Australia—accounted for 85% of the nearly \$47 billion in U.S. agricultural imports from the TPP countries in 2011. Altogether, the United States recorded a negative \$3 billion agricultural trade balance with the TPP country group in 2011.

Though U.S. agricultural trade with Canada is mostly free and with Mexico is completely free, some now view the participation of these two countries in the TPP talks as an opportunity to seek openings for U.S. dairy and poultry products in the restricted Canadian market and to address ongoing non-tariff barriers that arise at times in shipping agricultural commodities to Mexico.

Adding Japan as a participant would bring a major world importer of agricultural products to the TPP negotiating table. In 2011, two-way U.S. agricultural trade with Japan totaled \$14.7 billion, and represented another 6% of total U.S. agricultural exports and imports with the world. U.S. agricultural and food product exports to Japan alone totaled \$14.1 billion (i.e., more than 10% of such exports to the world).

Dairy

The U.S. dairy sector has three objectives in the TPP negotiations: (1) limit New Zealand's access to the U.S. market for its dairy products; (2) secure complete free access for U.S. dairy exports into Canada, and (3) the enforcement of food safety and health rules in traded agricultural products. It has signaled that its support for a final TPP deal depends on its assessment of the benefits and drawbacks of the final dairy and related provisions that U.S. negotiators reach.⁴⁴

While the National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) initially wanted to exclude dairy products in a bilateral market access agreement with New Zealand, their position shifted slightly in February 2012.⁴⁵ Both groups now state that if the terms of competition in bilateral dairy trade were addressed, they would revisit the issue of whether the United States should open its dairy market to New Zealand.

⁴⁴ *Inside U.S. Trade*, "Dairy Groups Seek Free Trade with Canada, But Not New Zealand, in TPP," June 22, 2012; "Observers See Increasing Link Between Dairy And PHARMAC Disciplines," December 7, 2012. See "**Error! Reference source not found.**" for discussion on the third objective.

⁴⁵ The NMPF is the trade association that represents dairy farmers and their marketing cooperatives. The USDEC's objective is to help promote dairy exports by helping member firms increase sales or reduce their costs of doing business. Its membership includes milk producers, dairy cooperatives, proprietary processors, export traders and industry suppliers.

The concern that dairy trade does not take place on a “level playing field” targets Fonterra, New Zealand’s leading dairy cooperative, which purchases about 90% of the country’s milk output. They argue that Fonterra’s domination of New Zealand’s market provides it with a privileged position and makes fair competition impossible. To counteract Fonterra’s status, the NMPF and USDEC want the United States to negotiate tough competition disciplines in the TPP. In preliminary discussions earlier in 2012, New Zealand negotiators stated that their objective is immediate and complete access to the U.S. dairy market. Such access is their primary negotiating objective for the country’s agricultural sector. In March 2012, U.S. negotiators presented New Zealand with an initial dairy market access offer, reportedly covering non-controversial dairy tariff lines and shortening their phase-out periods. New Zealand recognized that this was an initial offer, and has noted their commitment to comprehensive market access across the agreement.

USTR is studying whether to seek provisions to address the “competition” concerns raised about Fonterra. New Zealand has countered that its strong competition regulatory policy applies to all economic sectors, including dairy, and that the “government has no concerns about Fonterra’s operations within that framework.” Its dairy sector plans to encourage New Zealand’s negotiators to highlight aspects of U.S. competition policy that benefit the U.S. dairy sector in their discussions with USTR. Fonterra and other dairy firms point to the anti-trust exemptions available to U.S. dairy cooperatives (owned by farmers) and to export trading companies that are allowed to coordinate prices and allocate export markets.⁴⁶ More recently, press accounts have raised the possibility that New Zealand may be willing to make changes in its national drug pricing and reimbursement program (Pharmac)—a stance that would be politically controversial—in return for securing additional dairy product access into the U.S. market. A reported shift in New Zealand’s stance on patenting software may also be part of its strategy to advance its dairy access objective.⁴⁷ Because of the sensitivity of these issues, observers do not expect U.S. and New Zealand negotiators to substantively address them until the TPP talks are close to being concluded.

Under the U.S.-Canada FTA, Canada retained the use of tariff-rate quotas to limit imports of dairy products from the United States. Imports above quota levels are subject to prohibitively high tariffs (e.g., 245% for cheese, 298% for butter). These quotas and tariffs are an integral component of Canada’s dairy supply management program, which supports milk prices by limiting production to meet domestic demand at a cost-determined price.⁴⁸ In addition to seeking the elimination of these quotas, the NMPF and USDEC want U.S. negotiators to tackle outstanding non-tariff measures that have limited, and could further restrict, access for U.S. fluid milk and cheese in the Canadian market. Also, New Zealand sees an opportunity to negotiate openings for its dairy products into Canada’s market.

⁴⁶ *Inside U.S. Trade*, “USTR Tables Initial TPP Dairy Proposal, Offers Little New to New Zealand,” March 23, 2012; “U.S., New Zealand Still Making Little Headway in TPP Dairy Negotiations,” June 15, 2012; “USTR Mulls Possible TPP Disciplines For Fonterra, But No Proposal Yet,” August 3, 2012.

⁴⁷ World Trade Online-Daily News, “Groser: NZ Seeking Reasonable Compromises On PHARMAC, GIs,” December 3, 2012; *Inside U.S. Trade*, “Observers See Increasing Link Between Dairy And PHARMAC Disciplines,” December 7, 2012; “NZ Government New Position On Software Patents Seen As TPP Tradeoff,” December 14, 2012.

⁴⁸ For background, see CRS Report 96-397, *Canada-U.S. Relations*, coordinated by Carl Ek and Ian F. Fergusson, ‘Canada’s Supply Management Programs for Dairy, Poultry, and Eggs,’ pp. 49-51 (pdf).

Sugar

In negotiating market access, U.S. business interests argue that the United States must not exclude any product from TPP coverage. They highlight pertinent text in the TPP leaders' November 2011 framework, which identifies "comprehensive market access: to eliminate tariffs and other barriers to goods and services trade and investment" as one of the features that "will make TPP a landmark, 21st-century trade agreement," and the statement that the "TPP tariff schedule will cover all goods." They are joined by food manufacturers that use sugar as a key ingredient in their products, urging USTR not to replicate what occurred in concluding the Australia FTA. In that agreement, U.S. negotiators succeeded in excluding additional access for Australian sugar into the U.S. market. The concern expressed by broad business groups and food sector firms is that U.S. efforts to exclude sugar or any other product from TPP coverage would prompt other countries to refuse to open up their markets to competition from U.S. exports or to place on the negotiating table issues not previously addressed in FTAs. The result, they note, would be a trade agreement that falls short of the high standards contemplated in a 21st century agreement.⁴⁹

U.S. food manufacturers want to see sugar included in the TPP, in order to can gain access to additional imports of sugar and get closer to attaining a more market oriented U.S. sugar policy. They list the potential benefits associated with such a step—increased competition in the U.S. market associated with diversifying the sources of imported sugar to meet U.S. sugar demand; a stemming of job losses in sugar-using food processing sectors, particularly the confectionery industry which claims to have moved operations offshore to take advantage of lower-priced sugar; the generating of foreign exchange by sugar exporting countries that can be used to buy U.S. agricultural and food products; and gains that U.S. consumers and businesses would realize with lower sugar prices.⁵⁰

Sugar producers and processors oppose both reopening the sugar market access provisions in any current FTA with a TPP country (e.g., Australia), and granting new market access concessions on sugar to any other TPP participant with which the United States does not yet have an FTA (e.g., Vietnam). They point out that when additional sugar supplies are needed, provisions in the 2008 farm bill allow USDA to increase existing import quotas to meet domestic demand.⁵¹ Producers and processors argue that granting additional or new duty-free access to sugar from current and prospective TPP partners (e.g., Thailand) would instead result in an oversupply of sugar in the U.S. market, depress U.S. prices below loan rate levels, cause a major decline in the incomes of U.S. sugar producers, and trigger large federal outlays.⁵²

Australia, at the urging of its sugar sector, is seeking to reopen the issue of sugar access to the U.S. market.⁵³ Bilateral discussions on this matter are likely to be deferred until the TPP talks

⁴⁹ *Inside U.S. Trade*, "Business Groups Urge USTR To Offer Australia More Sugar Access In TPP," May 4, 2012, p. 15.

⁵⁰ Sweetener Users Association, "Pre-Hearing Brief Submitted to the U.S. International Trade Commission [USITC]," Investigation Nos. TA-131-034 and TA 2104-026 on the "U.S.-Trans-Pacific Free Trade Agreement: Advice on Probable Economic Effect of Providing Duty-Free Treatment for Imports," February 18, 2010, p. 3.

⁵¹ For background on how U.S. sugar policy operates, see CRS Report R42535, *Sugar Program: The Basics*, by Remy Jurenas.

⁵² American Sugar Alliance (ASA), Submission to the USITC, Investigation Nos. TA-131-034 and TA 2104-026 on the "U.S.-Trans-Pacific Free Trade Agreement: Advice on Probable Economic Effect of Providing Duty-Free Treatment for Imports," March 2, 2010, pp. 3, 5-6.

⁵³ ABC (Australian Broadcasting Corporation) Online, "Sugar a sticking point for Pacific free trade," September 20, (continued...)

near conclusion, when negotiators work through possible tradeoffs on the most sensitive issues. USTR continues to assert that the United States will not reopen market access provisions in the existing FTAs, including Australia. A top USTR official at a sugar production industry meeting in August 2012 stated “[t]here is no intention at this time to be negotiating any further with Australia on market access tariff issues” and that the Administration is “very cautious of what we negotiate” in future trade agreements and works “very closely with USDA to make sure that any commitments ... made will not have a negative impact on the sugar program.”⁵⁴

Agricultural Issues in Other TPP Chapters

In TPP’s “Rules” chapter, negotiators are seeking to address: how to better address disputes that can arise over differences on how to handle human health and animal/plant safety issues (i.e., sanitary and phytosanitary standards (SPS)) associated with trade in agricultural products, and the possible ramifications of regulating the sale of some tobacco products on trade in tobacco. The “Intellectual Property Rights” chapter could include provisions to prescribe how agricultural products with a “geographical indications” designation and traded in the TPP region are to be treated. The “Competition” chapter may address objectives sought by Australia and New Zealand to secure disciplines on TPP countries’ use of export subsidies, export credits, and food aid to promote their agricultural sectors. How negotiators address some of these issues could influence the degree to which markets are opened.

Sanitary and Phytosanitary Standards

Efforts to resolve outstanding bilateral sanitary and phytosanitary (SPS) disputes with some TPP partners, if successful, can be expected to lead to additional U.S. agricultural exports above and beyond what U.S. negotiators might secure in market access talks alone. In negotiating its bilateral FTAs, though, the United States has pursued a two track process. Each concluded FTA includes a chapter that reaffirms multilateral commitments made in the World Trade Organization’s (WTO’s) SPS Agreement. This Agreement lays out the rules and disciplines to be followed by all WTO members to ensure that each country's food safety and animal and plant health laws and regulations are transparent, scientifically defensible, and fair. Also, U.S. negotiators have also sought to address outstanding bilateral SPS disputes in parallel talks, using them as leverage to cut deals on sensitive matters in FTA talks or to secure political support back home for a concluded trade agreement.

As part of the effort to make the TPP a 21st-century agreement, the United States, with other TPP partners, is reportedly negotiating an SPS chapter laying out more detailed commitments relating to human health and animal/plant safety issues which would go beyond those found in the WTO SPS Agreement. At the same time, USTR reportedly is working bilaterally to resolve existing SPS disputes, aiming to bring home breakthroughs to garner support for an eventual TPP agreement.

(...continued)

2012, accessed at <http://www.abc.net.au/rural/news/content/201209/s3594165.htm>; *Inside U.S. Trade*, “Australian Opposition On Key U.S. Priorities Emerges As Hurdle In TPP,” September 21, 2012.

⁵⁴ ASA, “No Additional Sugar Access for Australia in TPP,” August 8, 2012, accessed at <http://www.sugaralliance.org/newsroom/no-additional-sugar-access-for-australia-in-tp.html>.

Earlier in 2012, several U.S. agricultural and food groups offered to USTR a number of recommendations that prescribe a process, timetable, and other ways to address SPS matters. Their recommendations call for promoting trade-facilitating measures such as equivalence, recognition of inspection systems, and the harmonization of trade certificates; requiring the notification of all new SPS measures; strengthening the thresholds used to conduct science-based risk assessments and risk management measures; and others. Most significant is their request that these enhanced rules be “fully enforceable” or binding upon on all TPP countries. By contrast, the FTAs that the United States has negotiated over the last decade do not include any new SPS dispute settlement, or enforcement, provisions beyond those already laid out in WTO’s SPS Agreement. USTR reportedly has not decided whether to seek a stronger enforcement mechanism, amid talk also over whether SPS issues should be subject to the TPP’s general dispute settlement provisions or a separate enforcement mechanism. USTR as of early-January 2013 was reported to be still working on a new SPS proposal with an enforcement component, seeking to reconcile concerns on including such disciplines that other federal agencies with regulatory responsibilities in this area have expressed.⁵⁵ Negotiators have combined SPS proposals from seven countries into a consolidated text, and reportedly are making some progress toward closure. Earlier, a letter from 24 Members of Congress called for the inclusion of “effective and enforceable rules” to strengthen the role of science in resolving differences; one agricultural group leader stated efforts to deal with strengthening SPS rules are a waste of time without enforceable rules.⁵⁶ But a dairy sector representative expects that the issue of a binding SPS dispute mechanism likely will not be resolved until the TPP talks near their conclusion.⁵⁷

Tobacco Regulation

Controversy has surfaced over a USTR draft proposal to TPP’s “General Exceptions” chapter to allow public health authorities in TPP countries to adopt regulations that “impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health.”⁵⁸ The Administration’s objective is to create a “safe harbor” for the Food and Drug Administration (FDA) to regulate tobacco products under the Family Smoking Prevention and Tobacco Control Act of 2009. This law gives FDA broad new regulatory authority over the manufacture, distribution, marketing, and sale of tobacco products in order to improve public health.⁵⁹ USTR’s proposal is intended to protect that authority and reduce the likelihood that the final-negotiated TPP agreement is used in a manner that would prevent FDA from regulating tobacco products. The proposal would not cover market access and therefore not prevent tobacco products (and reportedly leaf tobacco) from being subject to the phase-out and elimination of tariffs and quotas. This is to avoid placing U.S. products at a competitive disadvantage and setting

⁵⁵ “TPP Countries Aiming To Table Remaining Proposals Soon, USTR Says,” *Inside U.S. Trade*, January 11, 2013, pp. 1, 21

⁵⁶ Letter to USTR Ron Kirk from Members of the House Agriculture and Ways and Means Committees, August 3, 2012; “TPP’s Biggest Benefit for Agriculture is Binding SPS Rules, Stallman Says,” *Inside U.S. Trade*, November 16, 2012.

⁵⁷ “Canada, Mexico’s Inclusion in 15th Round Brings Momentum, U.S. TPP Negotiator Says,” *Bloomberg BNA International Trade Daily*, December 11, 2012

⁵⁸ Office of the United States Trade Representative, “Fact Sheet: TPP Tobacco Proposal,” May 2012, at <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/may/tpp-tobacco-proposal>.

⁵⁹ For a brief summary of the Tobacco Control Act, see CRS Report R41304, *FDA Final Rule Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco*, by C. Stephen Redhead and Jane M. Smith. More information is available on FDA’s tobacco products website at <http://www.fda.gov/TobaccoProducts/default.htm>.

a precedent to exclude tobacco or other products in future trade agreements that the United States negotiates.

Reactions to the USTR's proposal have been mixed. Some Members of Congress have expressed concerns that the proposal would prejudice the interests of tobacco producers and cigarette manufacturers seeking export openings in the other TPP countries. Business groups argue that it would undermine the longstanding claim made by USTR that provisions in previous FTAs grant governments sufficient flexibility to issue regulations to protect public health objectives. Other Members and anti-tobacco groups have criticized the proposal as not going far enough to protect public health, and want to see the USTR proposal include tobacco control laws, as well as regulatory rules, and to exclude tobacco products from trade liberalization. In light of these expressed concerns and complaints that the Administration has not sufficiently consulted Members and stakeholders on its proposal, the USTR has held off tabling this proposal.

Geographical Indications

The WTO's intellectual property rights agreement and related provisions in the FTAs negotiated by the United States recognize the use of geographical indications (GIs) to protect the quality and reputation of a distinctive product produced in a particular region of a country. The use of GIs applies primarily to agricultural products, wines, and spirits. Examples of geographical indications are Roquefort cheese, Idaho potatoes, Champagne, or Tuscan olive oil. Products so designated are eligible for relief from acts of infringement and/or unfair competition under a country's trademark laws and regulations. The GI designation (similar to a registered trademark) protects consumers from the use of deceptive or misleading labels, and provides them with choices among products and with information on which to base their purchase decisions. Producers benefit because a GI designation recognizes the distinctiveness of their products in the marketplace.⁶⁰

Because GIs are commercially valuable, the European Union (EU) and some developing countries sought to establish tougher restrictions in the Doha Round and place limits on the use of geographical names for products, while the United States and other countries argued that the existing level of protection of such terms is adequate.⁶¹ To counter the EU's objective in negotiating bilateral trade agreements to broaden the scope of agricultural products that benefit from a GI designation, the United States has sought to protect its interests in concluding FTAs (e.g., the U.S.-Korea FTA) with countries that also have a trade agreement with the EU.

In May 2012, a group of U.S., Australian and New Zealand food and commodity organizations presented recommendations to TPP negotiators to limit the protection of products with geographic names.⁶² One recommendation calls for a GI protected by a TPP country in a trade agreement with a third party (e.g., the European Union) to be limited to compound phrases that include the

⁶⁰ Article 22.1 of the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) refers to a GI as a mark or label that "identifies a good as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." For background, see CRS Report RS21569, *Geographical Indications and WTO Negotiations*, by Charles E. Hanrahan.

⁶¹ *Ibid.*

⁶² World Trade Online, "U.S., NZ, Australian Industry Demand More Protection from GIs Than USTR," May 14, 2012. Background on this group—Consortium for Common Food Names—can be accessed at <http://www.commonfoodnames.com/>.

name of the region or sub-region where the product is produced together with the name of the product. For example, GI protection would extend to cheese marked Parmigiano Reggiano—a compound term—but not to parmesan, which would be considered a common name not eligible for special protection. The group states that limiting GI designations only to compound names would prevent confusion with the use of related common or generic terms. This proposal’s intent is to challenge the EU’s efforts to protect its expansive system of GIs in negotiating FTAs with other TPP countries, by creating exclusive rights for products that this group considers to have common names.

The differing perspectives on the use of GIs reportedly surfaced among TPP countries at the Auckland Round. Canada and Singapore, which are negotiating FTAs with the EU, are seeking strong GI protections on its dairy products (e.g., cheeses), and are reported to have sensitivities on this issue. Australia, and New Zealand, and the United States, though, favor the less specific naming approach.⁶³

Agricultural Competition

One of Australia’s TPP negotiating objectives, supported by New Zealand, is to secure disciplines on other TPP countries’ use of export subsidies, official export credits, and food aid in support of their agricultural sectors. Its negotiators have argued for years in the multilateral Doha Round that these programmatic tools distort agricultural trade and should be modified when negotiating trade agreements in order to minimize such impacts. They highlight the widely held view that the use of these tools provides a competitive edge to agricultural exporters in those countries. Australia’s negotiator has linked movement on including disciplines on agricultural “export competition” to the U.S. proposal to set disciplines on the competitive advantages held by state-owned enterprises (SOE).⁶⁴

Australia’s proposed text on agricultural export competition reportedly reflects in part the rules proposed in the 2008 Doha text on the use of export financing and international food aid.⁶⁵ In that draft, developed countries would agree to phase out export subsidies, curtail the use of export credits, and prescribe under what circumstances food aid is to be provided.⁶⁶ With the Doha Round stalled, Australia and New Zealand view the TPP as a venue to incorporate these features in some way “to address these issues that can cause negative effects on agricultural exporters.”⁶⁷

In the Leesburg talks, Australia reportedly continued to press its position. At their conclusion, USTR’s lead negotiator acknowledged that this issue “is extremely sensitive” and made clear it is “not [one the United States is] inclined to address in this negotiation.” U.S. negotiators in previous FTA negotiations have always maintained that export competition issues should be

⁶³ *Inside U.S. Trade*, “TPP Countries Aiming To Table Remaining Proposals Soon, USTR Says,” January 11, 2013, p. 21; “Groser: NZ Seeking Reasonable Compromises On PHARMAC, GIs,” December 7, 2012, pp. 7-8.

⁶⁴ *Inside U.S. Trade*, “Australia, New Zealand Seek to Address Export Competition in TPP Deal,” May 25, 2012, pp. 1, 20-21. See “**Error! Reference source not found.**” section for additional information.

⁶⁵ *Inside U.S. Trade*, “Australian TPP Proposal Could Impact U.S. GSM 102, Food Aid Programs,” October 12, 2012, pp. 1, 18.

⁶⁶ For background, see “Export Competition” in CRS Report RS22927, *WTO Doha Round: Implications for U.S. Agriculture*, by Randy Schnepf and Charles E. Hanrahan.

⁶⁷ *Inside U.S. Trade*, “Australia, New Zealand Seek to Address Export Competition in TPP Deal,” May 25, 2012, pp. 1, 20-21.

addressed in the multilateral context, and succeeded in keeping them out of final trade agreements. But in light of continued interest in including these issues in the TPP negotiations, she stated USTR would begin consultations with domestic stakeholders and Congress on this matter.⁶⁸ Just before the Auckland Round, the United States signaled its opposition to any effort to include food aid disciplines in the TPP, reiterating that such rules should be developed on a multilateral basis.⁶⁹

Observers offer various views on Australia's motivations. Some characterize its position as a tactical maneuver to advance one of its priority objectives in the Doha Round. Others view the export competition/SOE linkage as part of Australia's strategy to see the United States address its other priorities (e.g., obtaining additional sugar and dairy product access into the U.S. market, securing an exclusion for Australia from TPP's final investor-state dispute settlement mechanism).⁷⁰

Core Negotiating Issues: Rules

In addition to market access, the TPP contains several provisions that build upon disciplines contained in the World Trade Organization's Uruguay Round agreements. Many of these provisions have become part of the standard template for U.S. FTAs. The chief U.S. negotiator on the TPP, Assistant USTR Barbara Weisel, reportedly indicated that the current TPP participants are open to allowing developing countries in the TPP to have longer phase-in periods for rules-based commitments. She stated that those countries would eventually have to adhere to all of the obligations of the agreement.⁷¹

Intellectual Property Rights (IPR)

The United States has sought increased intellectual property rights (IPR) protection in its FTAs. IPR negotiating objectives in the last U.S. trade promotion authority (P.L. 107-210) in effect between 2002 and 2007 included, among others (1) the application of existing IPR protection to digital media; and (2) negotiation of trade agreements in terms of IPR that "reflect a standard of protection similar to that found in U.S. law." This phrase opened the door to the negotiation of provisions that go beyond the level of protection provided in the WTO Trade Related Aspects of Intellectual Property (TRIPS) Agreement, most recently with the TPP negotiations. For example, the United States has sought to have its partner countries sign the World Intellectual Property Organization's (WIPO) Performances and Phonograms Treaty, an agreement to which Brunei, Malaysia, New Zealand, and Vietnam are not parties. For its part, New Zealand reportedly floated a discussion document that favors a "TRIPS-aligned" position, one that would be consistent with, but not go beyond, international standards already found in the TRIPS Agreement. In contrast,

⁶⁸ *Inside U.S. Trade*, "U.S. To Consult on Ag Export Competition; Next TPP Round in Auckland," September 21, 2012.

⁶⁹ "USTR Says It Will Oppose Inclusion Of Food Aid Disciplines In TPP Talks," *Inside U.S. Trade*, December 7, 2012, pp. 10-11.

⁷⁰ *Inside U.S. Trade*, "Australian Opposition on Key U.S. Priorities Emerges as Hurdle in TPP," September 21, 2012.

⁷¹ *World Trade Online*, July 4, 2012.

U.S. business groups have favored the TRIPS-plus provisions found in the KORUS FTA as a baseline for future negotiations.⁷²

Enforcement

The U.S. text, parts of which have been released unofficially, call for criminal penalties for “willful” trademark counterfeiting and copyright piracy on a “commercial scale.” Commercial scale includes acts that result in no direct or financial gain, such as file sharing. It would also require criminal penalties for importing counterfeit labeling and packaging whether done willfully or not, and it would require criminal penalties for cam-cording in movie theatres.

Some countries, notably Australia, New Zealand, and Singapore, reportedly have sought to replace U.S. text on criminal enforcement with that of the Anti-Counterfeiting Trade Agreement (ACTA), which was signed last year.⁷³ Although both ACTA and the U.S. proposal, which largely track the IPR provisions in the U.S.-Korea FTA, provide stricter criminal enforcement measures than the World Trade Organization (WTO) Trade-Related Intellectual Property Agreement (TRIPS), ACTA provides greater flexibility than what is reportedly contained in the U.S. text regarding a country’s enforcement of IPR. For example, in ACTA, financial gain is necessary to be considered commercial scale for prosecution, and willfulness is required for importation of trademark infringing goods.

Internet Providers

One area where traditionally there has been a difference of opinion among U.S. stakeholders relates to copyright enforcement and the internet, especially between internet service providers (ISP) and traditional content providers. ISPs have been concerned that while other countries do not often have so-called “fair use” copyright provisions that are enshrined in U.S. law, U.S. negotiators are not sufficiently advocating for that position in FTAs.⁷⁴ Internet providers and other activists are seeking to provide a more explicit balance in the agreement text between the rights of content providers and users of copyright material.

The United States reportedly proposed such language to the IPR chapter at the San Diego round of negotiations just concluded in July 2012.⁷⁵ The proposal places certain limitations on the copyrights consistent with the so-called “three-step test”: that the exception (1) is consistent with domestic copyright law; (2) does not conflict with the normal exploitation of the work; and (3) does not unreasonably prejudice the interest of the rights holder. The proposal also reportedly obligates each country to provide for such exceptions, known as fair use, in their domestic copyright laws.

⁷² “New Zealand IPR Stance in TPP at Odds with Past U.S. FTA Provisions,” *Inside U.S. Trade*, December 10, 2010.

⁷³ “Countries Offer ACTA Language to Replace U.S. IPR Proposal,” *Inside U.S. Trade*, May 14, 2012.

⁷⁴ Jonathan Band, Computer and Communications Industry Association, in “Lessons for TPP Negotiators Can Be Found in ACTA’s IP Woes, Stakeholders Forum Told,” *International Trade Reporter*, March 8, 2012. Fair use is a legal doctrine codified in the Copyright Act of 1976 that allows for certain unauthorized use of a copyrighted work.

⁷⁵ “U.S. Tables New Proposal in TPP Outlining Broad Copyright Exceptions,” *Inside U.S. Trade*, July 6, 2012.

Trade Enhancing Access to Medicines (TEAM)

The debate over the IPR provisions in the TPP relating to pharmaceuticals and access to medicines, some of the more controversial provisions in U.S.-negotiated FTAs in recent years, revolves around whether to assert the more far-reaching IPR provisions of the KORUS FTA or to adopt the somewhat looser “May 10th Agreement” provisions found in the Colombia, Peru, and Panama FTAs.⁷⁶ Based on published reports, it appears that U.S. negotiators are trying to develop an approach that would build on the May 10th agreement, which sets different standards for developed countries (as found in the KORUS FTA) than developing countries (as in the Colombia, Panama, and Peru FTAs).

The U.S. IPR proposal relating to pharmaceuticals was tabled in the September 2011 Chicago round of TPP negotiations. Known as the Trade Enhancing Access to Medicines (TEAM) initiative, it reportedly would encourage companies to market innovations in TPP markets more quickly by making stronger patent term extensions, data exclusivity, and patent linkage provisions available to firms who apply for marketing approval for their products through a “TPP Access Window” of an, as yet, unspecified time period, although the pharmaceutical manufacturing group PhRMA released a study calling for a six year period.⁷⁷ If they brought their drugs to market within the window, companies reportedly would receive a KORUS FTA standard of five years of data exclusivity, mandatory patent linkage and patent term extension provisions. Developing countries under the May10th agreement had commitments that capped data exclusivity at five years from U.S. market approval, had optional patent linkage and patent term extension provisions.

According to the USTR, this provision would allow for expedited introduction of generic medicines.⁷⁸ The U.S. pharmaceutical industry, while putting forth the abovementioned study, has not publicly embraced the TEAM approach with PhRMA. The pharmaceutical industry is known to favor the replication of U.S.-Korea FTA standards, rather than any approach that would allow any weakening of these standards for developing countries.⁷⁹ However, opponents of this approach fear that it would delay the introduction of generic medicines by delaying the submission of new products for marketing approval under the access window as long as possible. According to one opponent, the plan “puts forth the fundamentally flawed premise that speeding up market entrance of brand-name, monopoly-priced drugs will, in itself, solve the challenge of access to affordable medicines.”⁸⁰ Peru publicly has indicated that it will not agree to proposed IPR provisions that go beyond the May 10, 2007, provisions that are enshrined in the U.S.- Peru FTA.⁸¹ In addition, the TEAM initiative proposes to

- Eliminate tariffs on medicines and medical devices;

⁷⁶ The May 10th provisions, which applied to the Colombia, Peru, and Panama FTAs, among other issues, relaxed IPR provisions on patent term extensions, patent linkages, and data exclusivity. For more information about these provisions, see CRS Report RL34292, *Intellectual Property Rights and International Trade*, by Shayerah Ilias and Ian F. Fergusson.

⁷⁷ “PhRMA Floats Study to USTR, Congress Backing Six-Year TPP Window,” *Inside U.S. Trade*, May 4, 2012.

⁷⁸ USTR, “Trans-Pacific Partnership Trade Goals to Enhance Access to Medicines,” (USTR white paper), at http://www.ustr.gov/webfm_send/3059.

⁷⁹ “USTR Plan to Table Full TPP IPR Proposal Spurs Pharmaceutical Lobbying,” *Inside U.S. Trade*, April 28, 2011.

⁸⁰ Judit Rius Sanjuan, *Medicins Sans Frontieres*, in “Trans-Pacific Talks Move Forward at Chicago Meeting,” *Bridges Weekly Trade News Digest*, September 21, 2011.

⁸¹ “Democrats Flag Objections to U.S. TPP IPR Proposal, Opposition Growing,” *Inside U.S. Trade*, October 21, 2011.

- Reduce customs obstacles and internal barriers to distribution of medicines;
- Curb trade in counterfeit medicine; and
- Reaffirm TPP Parties' commitment to the Doha Declaration on TRIPS and Public Health.⁸²

Biologics

The United States seeks coverage of biologics under the proposed TPP, but it has yet to make a specific proposal regarding the length of coverage for data protection. U.S. biotechnology industry groups seek a 12-year data exclusivity provision for biologic products. Biologics are medical preparations derived from living organisms, but generally are not considered distinct from traditional pharmaceuticals in U.S. IP law.⁸³ Biotechnology groups claim that the development and approval process for large molecule biologics—as opposed to small molecule pharmaceuticals—are more complex and require longer exclusivity periods for a product to be commercially viable. Under the 2010 Affordable Care Act, biologics are given a 12-year exclusivity period, but it is unclear whether biologics will be dealt with separately under the TPP. Various groups of Senators, totaling 40 in number, have written to the President supporting the 12 year exclusivity period, as have a group of 40 Representatives.⁸⁴ Separately, a letter signed by 7 Representatives requests the President refrain from introducing a 12-year exclusivity provision in the negotiations.⁸⁵

Trade Secrets

The United States is reportedly seeking language to improve protections for trade secrets, especially as USTR describes protection of U.S. trade secrets as a growing challenge in its 2012 Special 301 report on IPR protections abroad.⁸⁶ This text responds to the concerns of U.S. business that governments have pressured them to reveal trade secrets or transfer technology to further a country's 'indigenous innovation' policies. Companies are also reportedly increasingly victimized by outright theft of their trade secrets, and have decried the often lax remedies available to combat such theft. The U.S. trade secret proposal reportedly includes language that would prohibit countries from: (1) conditioning market access on technology transfer; (2) seeking concessional terms for acquiring or licensing IPR by SOEs; (3) requiring the use of locally owned or developed IPR; (4) promoting the development of local standards to unfairly advantage local firms; and (5) requiring the unnecessary disclosure of confidential business information, or failing to protect that information.⁸⁷ It is not thought that these practices are particularly egregious in any

⁸² USTR White Paper, (http://www.ustr.gov/webfm_send/3059).

⁸³ For more information on biologics, see CRS Report R41483, *Follow-On Biologics: The Law and Intellectual Property Issues*, by Wendy H. Schacht and John R. Thomas.

⁸⁴ Hatch-Kerry Letter to Ambassador Ron Kirk, September 12, 2011, <http://www.finance.senate.gov/newsroom/ranking/release/?id=9fc0a1bb-e420-418a-835c-14512434a436>; House letter of July 27, 2011, available at: <http://infojustice.org/wp-content/uploads/2011/07/40-Members-of-Congress-07272011.pdf>.

⁸⁵ "Waxman Wants Biologic Drugs Kept Out of Trade Talks," *The Hill*, August 4, 2011.

⁸⁶ USTR, 2012 Special 301 Report, pp. 17-19. available at: http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf

⁸⁷ This non-exclusive list of possible negotiating objectives was drawn from the U.S. Trade Representative's 2012 Special 301 Report section of trade secrets and forced technology transfer, pp. 17-18.

of the countries currently negotiating the TPP, but may become more salient if other nations accede to the agreement.

“The May 10th Agreement”

On May 10, 2007, a bipartisan group of congressional leaders and the Bush Administration released a statement on agreed principles in four policy areas: worker rights, environment protection, intellectual property rights, and foreign investment. The principles were to be reflected in provisions in four U.S. FTAs—with Colombia, Panama, Peru, and South Korea. Regarding worker rights, the May 10th Agreement (the Agreement) required the United States and FTA partners to commit to enforcing the five international labor principles enshrined in International Labour Organization’s (ILO) 1998 Declaration on Fundamental Principles and Rights At Work and that the commitment be enforceable under the FTA. These rights are the freedom of association, the effective recognition of the right to collective bargaining, the elimination of all forms of compulsory or forced labor, the effective abolition of child labor and the elimination of discrimination in respect of employment and occupation.

The Agreement also required FTAs to adhere to seven major multilateral environmental agreements: The seven agreements are the Convention on International Trade in Endangered Species; the Montreal Protocol on Ozone Depleting Substances; the Convention on Marine Pollution; the Inter-American Tropical Tuna Convention; the Ramsar Convention on the Wetlands; the International Convention for the Regulation of Whaling; and the Convention on Conservation of Antarctic Marine Living Resources.

Furthermore, the parties are not to waive or otherwise derogate from their labor or environmental protection laws in a manner that would affect trade or investment with the FTA partner(s). In addition, the labor and environment provisions must be enforceable, if consultation and other avenues fail, through the same dispute settlement procedures that apply to the other provisions in the FTA.

The Agreement also required the FTAs to include provisions related to patents and approval of pharmaceuticals for marketing exclusivity with different requirements for developed and developing countries. Specifically, the Agreement requires provisions dealing with the effective period of data exclusivity—the restrictions on the use of test data produced for market approval by generic drug producers; patent extensions; linkage of marketing approval of generic drugs to determination of possible patent infringement; and reaffirmation of adherence to Doha Declaration on compulsory licensing of drugs to respond to public health crises.

Regarding foreign investment, the Agreement required each of the FTAs to state that none of its provisions would accord foreign investors greater substantive rights in terms of foreign investment protection than are accorded U.S. investors in the United States.

Rules of Origin

Rules of origin (ROO) define those goods that originate in the FTA region and therefore are eligible for preferential treatment under the agreement. The negotiating teams are far along in their consideration of product-specific rules, seeking a single TPP rule of origin to the extent possible.⁸⁸ The TPP participants have already agreed that the ROO would be “objective, transparent, and predictable.” Negotiators reportedly also have agreed that inputs produced in any TPP country may be cumulated so that a product produced with components made in multiple TPP countries can be claimed as originating within the TPP region and therefore be eligible for preferential treatment.

A debate has developed between the United States and some TPP countries on special rules of origin for textiles and apparel.⁸⁹ In all previous FTAs, the United States has used the “yarn forward” rule. This rule requires that an apparel product could be considered from within the FTA

⁸⁸ Conversation with Assistant U.S. Trade Representative Barbara Weisel

⁸⁹ For more information, see CRS Report R42772, *U.S. Textile Manufacturing and the Trans-Pacific Partnership Negotiations*, by Michaela D. Platzer.

area, and therefore eligible for preferential treatment, if the entire manufacture of the product, from the spinning of the yarn to final assembly, has occurred within the FTA region. Representatives of the U.S. textile industry have argued for the tighter “yard forward rule” to be included in the TPP.⁹⁰ Some U.S. apparel firms, retailers, and distributors, as well as some TPP countries, including Vietnam, seek a less restrictive “cut and sew,” or single transformation, rule which would allow its products manufactured from materials of non-TPP origin to benefit from the TPP. Reports from December 2012 Auckland round indicate that, while U.S. negotiators remained committed to the yarn-forward rule, the United States and other TPP partners have been discussing compromise positions. For example, “short-supply rules” to allow a certain amount of non-originating inputs in apparel assembly may be utilized. These short-supply rules could be temporary or permanent in duration. Alternatively, some have proposed regional value content ROOs which would allow for certain non-originating inputs to be used as long as originating inputs made up a certain percentage of the value of the product.⁹¹ However, a more liberalized ROO may be opposed by U.S. FTA partners such as Mexico and Peru, where textile and apparel industries have been oriented to trade with the United States through the yard-forward standard.⁹²

Technical Barriers to Trade

Technical barriers to trade (TBT) are standards and regulations that are intended ostensibly to protect the health and safety of consumers and for other legitimate purposes, but through design or implementation, discriminate against imports. In order to minimize trade distortion, WTO members must adhere to the Agreement on Technical Barriers to Trade. The TBT Agreement covers voluntary standards that industries apply, technical regulations that governments impose for health and safety purposes, and assessment procedures that governments employ to determine that a product meets required standards. The TBT Agreement establishes rules and procedures for member countries to follow, including making sure that standards, technical regulations, and conforming assessment procedures are applied non-discriminately and in a manner not more trade restrictive than necessary. In addition, it requires that members practice transparency as regulations are developed and applied, that international standards are used where appropriate, and that the domestic technical regulations of trading partners are recognized as equivalent to domestic regulations when possible. A key provision of the agreement is that WTO members have a central point of inquiry from which firms can ask for information on standards and regulations. U.S. FTAs, including the U.S.-South Korea FTA (KORUS), expanded on the TBT agreement by, among other things, providing opportunities for partner countries to comment on proposed standards and regulations and the implementation of regulations. TPP negotiators are seeking to build on the KORUS FTA as a model in developing TBT provisions and are including annexes on sector-specific TBT commitment to harmonize their approaches to regulations in key areas.

Transparency in Health Care Technology and Pharmaceuticals

Several TPP participants, including Australia, Canada, and New Zealand, administer a national formulary for medicines purchased by the government for its national health service.⁹³ The United

⁹⁰ Textile and Apparel Alliance for TPP, letter to USTR Ambassador Ron Kirk, February 29, 2012.

⁹¹ “Negotiators Signal Start of Process for Resolving Apparel Rules of Origin,” *Inside U.S. Trade*, December 14, 2012.

⁹² Jeffrey J. Schott, *et al*, *Understanding the Trans-Pacific Partnership*, Peterson Institute of International Economics, Policy Analysis #99, January 2013, p. 24

⁹³ A formulary is a list of medicines approved for prescription under a medical plan.

States has expressed concern that the practices and procedures such national healthcare programs, including New Zealand's Pharmaceutical Management Agency (Pharmac), which maintains the formulary, put "innovative pharmaceutical products," often made in the United States, at a disadvantage because access to the country's health care technology markets can be blocked by government's use of procedures that are non-transparent or do not provide due process.⁹⁴ In negotiations with Australia over a similar system, the United States and Australia agreed to a series of consultation and transparency mechanisms, designed to afford U.S. manufacturers an opportunity to make their case for inclusion in the formulary. New Zealand reportedly has ruled out changes to PHARMAC absent "reciprocal" concessions by the United States to federal or state-level drug pricing or reimbursement programs such as Medicaid.⁹⁵ In Canada, each province maintains its own pharmaceutical formulary.

Foreign Investment

Foreign investment has been a high priority for the United States in its FTA negotiations, especially regarding the right of establishment by foreign goods and services providers in the territory of a partner-country. They are discussing such issues as non-discriminatory treatment of foreign investments and investors; minimum standard of treatment; rules on expropriation; transfer of payments of the foreign investor out of the host territory; exceptions for identified non-conforming measures; state-to-state and investor-state dispute settlement procedures; and prohibitions on performance requirements, such as mandatory export levels and local content stipulations.

One issue that has become contentious is whether to include an investor-state dispute settlement provision, which allows for private foreign investors to seek international arbitration against host governments to settle claims over alleged violations of foreign investment provisions under the agreement. Except for the FTA with Australia, U.S. FTAs have included an investor-state provision. The investor-state provision is designed to protect foreign investors from the vagaries of domestic judicial systems, particularly in developing countries, in such cases as government expropriation of foreign-held assets. Critics have argued that investor-state procedures give foreign investors greater protection than domestic investors and infringes on the sovereignty of the host government in protecting the health and safety of its citizens.⁹⁶

On the other hand, Australia has strongly argued against including an investor-state dispute settlement mechanism—although it too has investor-state provisions in many of its FTAs—thus generating a clash with other TPP partners. The Australian position is in line with a basic trade policy position that the government of Prime Minister Gillard promulgated in 2011. Australia's strong opposition also has been re-enforced by an attempt by the Philip Morris Tobacco Company to use an investor state provision in an Australian-Hong Kong bilateral investment treaty to sue the Australian government for its requirement for plain packaging for cigarettes. Philip Morris filed the suit from its Asian operations headquartered in Hong Kong.⁹⁷

⁹⁴ *FTB report*, New Zealand, p. 263

⁹⁵ "U.S. Leaked TPP Proposal on Drug Pricing Sets Up Fight with New Zealand," *Inside U.S. Trade*, November 3, 2011.

⁹⁶ Proponents argue that these provisions are modeled after U.S. laws and an interpretation of the "takings clause" of the U.S. Constitution.

⁹⁷ *International Trade Daily*, March 6, 2012.

Another investment-related issue that has raised some concerns relates to the ability of governments to impose controls on capital outflows, particularly in times of financial crises. Previous U.S. FTAs contain clauses which call for the free flow of capital in order to facilitate trade and investment. They also allow for exceptions where controls are imposed to alleviate short-term balance of payments problems in order to protect the stability of the financial system. Some Members of Congress have raised concerns that in light of global financial crises, that the language in FTAs might not adequately preserve governmental discretion to impose controls when they see fit.⁹⁸ A new approach to capital controls by the International Monetary Fund (IMF), which has pointed to usefulness of capital controls in ameliorating the effects of capital volatility during periods of economic instability, may also affect the outcome of the negotiations.⁹⁹

Competition Policies

National competition laws and regulations are intended to protect consumers by ensuring that one firm does not so dominate a sector of the economy as to inhibit market entry and stifle competition. Some U.S. FTAs have included provisions to limit the trade-distorting effects of such laws. Among other things, U.S. FTAs require that the United States and the partner country(ies) inform persons from a partner country, who may be subject to administrative actions under domestic antitrust laws, of related hearings and provide them the opportunity to make their case. Under these FTAs, the partner countries agree to cooperate in enforcing competition laws through the exchange of information and consultation. In addition, designated monopolies and state-enterprises are to operate in conformance with the agreement and in accordance with commercial considerations.

The November 2011 framework indicates that the TPP partners are discussing language for a chapter on competition policy to “promote a competitive business environment, protect consumers and ensure a level playing field for TPP companies.” The text will include language “on the establishment and maintenance of competition laws and authorities, procedural fairness in competition law enforcement, transparency, consumer protection, private rights of action, and technical cooperation.” The U.S. business community has indicated that the provisions on competition policy will be critical in dealing with state-owned enterprises (SOEs), particularly in addressing issues concerning their financing, regulation, and transparency, to ensure that they are not provided an unfair competitive advantage.¹⁰⁰

Trade Remedies

Trade remedies are measures designed to provide relief to domestic industries that have been injured or threatened with injury by imports. They are regarded by many in Congress as an important trade policy tool to mitigate the adverse effects of unfairly traded-imports and import surges on U.S. industries and workers.

The three most commonly used trade remedies are (1) *antidumping* (AD) remedies that are designed to provide relief from the adverse price effects of imports sold at less than fair-market

⁹⁸ *International Trade Daily*, May 29, 2012.

⁹⁹ “New IMF View on Capital Controls Raises Questions for U.S. Approach in TPP,” *Inside U.S. Trade*, January 4, 2013.

¹⁰⁰ Briefing by members of the Emergency Committee for American Trade (ECAT).

value; (2) *countervailing duty* (CVD) remedies, which are used to counter the adverse effects of foreign government subsidies to imports; and (3) *safeguard* actions, which are employed to permit temporary relief so that domestic industries can adjust to the adverse effects of surges in fairly traded imports. These actions are sanctioned by the WTO as long as they are undertaken in a fair manner and are consistent with rules specified in WTO agreements.

Congress has insisted that the United States retain the right to use trade remedies to counter unfair trade practices and import surges and has expressed this requirement as a priority in trade negotiating authority legislation. It is also reflected in existing U.S. FTAs.

TPP participants are discussing the possibility of including such provisions in the TPP that make trade remedy investigations and actions more transparent and provide due process in their implementation.

Labor

One of the more controversial issues that the TPP partner countries are addressing pertains to the scope and depth of provisions on worker rights. Supporters of strong worker rights, such as labor unions and certain non-government organizations (NGOs), are concerned that failure to promote and implement these rights, including collective bargaining, could lead to the imposition of low wages and poor conditions for workers by firms in those countries. In so doing, U.S. workers would be placed at a competitive disadvantage as they compete against low-cost, low-standard labor practices.

The November 2011 TPP framework for negotiations indicates that the agreement will have a separate labor chapter. The language in the framework is ambiguous, stating only that the chapter would “include commitments on labor rights protection and mechanisms to ensure cooperation, coordination, and dialogue on labor issues of mutual concern.” The original P-4 agreement includes commitments to cooperate on labor issues.

The scope and depth of worker rights provisions in U.S. trade agreements have evolved over time.¹⁰¹ The North American Free Trade Agreement (NAFTA), included labor provisions in a side letter requiring all Parties to enforce their own labor standards. The provisions are enforced under a special dispute settlement procedure attached to, but outside of, the main agreement. Based on the 2002 Trade Act, all subsequent FTAs, included a similar provision, but within the body of the agreement. Their provisions are enforceable under the agreement’s dispute settlement mechanism and violations are subject to potential trade sanctions.

Under the May 10th Agreement, new labor principles were included in FTAs with Peru, Panama, South Korea, and Colombia (see text box above). The agreement stipulated that the four FTAs would require each of the Parties to adopt and to maintain five internationally accepted labor rights that are contained in the ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (1998) (ILO Declaration)—the freedom of association; the effective recognition of the right to collective bargaining; the elimination of all forms of compulsory or forced labor; the effective abolition of child labor; and the elimination of discrimination in respect

¹⁰¹ For more information, see CRS Report RS22823, *Overview of Labor Enforcement Issues in Free Trade Agreements*, by Mary Jane Bolle.

of employment and occupation. These provisions are enforceable under FTA dispute settlement procedures.

The issue of the treatment of worker rights in the TPP has provoked debate among TPP partners and among U.S. stakeholders. In late December 2011, the United States reportedly submitted a proposal on labor issues to the other TPP partners. According to one report, the proposal largely reflects the requirements contained in the May 10th Agreement that countries should uphold core ILO principles. The proposal reportedly would go further by indicating how these principles would be implemented by requiring countries to have labor laws related to minimum wage requirements, work time, and occupational health and safety. The U.S. proposal reportedly would also require TPP countries to take measures to reduce trade in products made through forced or child labor and to apply labor laws to export processing zones and free trade zones.¹⁰² To date, none of this information has been corroborated publically by U.S. officials.

In a December 21, 2011, letter to Ambassador Ron Kirk, the chairmen of the House Ways and Means Committee and Trade Subcommittee and the ranking Members of the Senate Finance Committee and Trade Subcommittee raised concerns about expanding labor-related obligations in the TPP and, instead, argued for “improving the labor-related capacity building provisions in past trade agreement.” Referring to the May 10th Agreement, the letter states:

While some of us still have serious doubts about the approach followed in the Peru, Colombia, Panama, and South Korea agreements, we recognize that it reflected a careful balancing of interests. We caution that any move to further expand the scope of the labor provisions would seriously undermine support for the TPP negotiations.

Moreover, further expanding the scope of obligations could unduly expose the United States to potential unwarranted litigation and trade sanctions on a new and broader array of its labor laws and policies in this new forum.

On the other hand, representatives of the labor community have called the proposal a “move in the right direction,” but have said it does not meet all of their demands. For example, labor groups have called for the elimination of the requirement, included in the four most recent U.S. FTAs (and noted above), that the worker rights obligations only apply to the ILO 1998 Declaration and not to the ILO conventions.¹⁰³

Worker rights may also be controversial among the TPP partners. For example, Vietnam and Brunei reportedly have expressed opposition to having worker rights provisions subject to binding dispute settlement procedures. The issue is likely to continue to evolve as the negotiations proceed.

Environment

Like the U.S. position on worker rights, environmental provisions in U.S. FTAs have evolved. As with worker rights, environmental provisions were originally placed in side letters in the NAFTA agreement, and “enforce your own laws” provisions were placed in subsequent FTAs with limited dispute settlement based on Trade Act of 2002. The May 10, 2007, understanding added an

¹⁰² *World Trade Online*, January 5, 2012.

¹⁰³ *Ibid.*

affirmative obligation to adhere to multilateral environmental agreements (MEA), backed by potential resort to the dispute settlement provisions of the agreement, as well as a binding commitment to prevent countries from relaxing their environmental standards to promote trade or investment.

The U.S. environment proposal was tabled at the Chicago negotiating session in September 2011. It reportedly contains three main components: conservation, core commitments, and public participation. The first component reportedly contains specific new provisions on illegal logging, marine fisheries, and endangered species, as well as obligations to enforce domestic laws or regulations on illegal trade in plants and wildlife. The second proposal would require the parties to uphold their commitments to any of the MEAs they have signed. The third proposal would allow for stakeholder participation to challenge member state's adherence to the provisions—including the possibility of binding dispute settlement across the disciplines.¹⁰⁴ Subjecting the provisions of the environmental chapter to binding dispute settlement has proved controversial, reportedly even among countries that have signed FTAs with—albeit narrower—environmental chapters with dispute settlement provisions.¹⁰⁵

In addition to the U.S. proposals, New Zealand and Chile reportedly have tabled trade and climate change submissions. New Zealand and Chile have tabled marine fisheries and fishing subsidies proposals, respectively. Australia has proposed the full removal of tariffs on environmental goods and green technology, a goal the United States supports and which received broad support among APEC members at the November 2011 APEC summit.¹⁰⁶

Horizontal and Cross-Cutting Issues

In addition to treating certain existing issues in new or different ways, the TPP also seeks disciplines on certain activities not heretofore addressed in FTAs. These include not only horizontal or cross-cutting issues that address best practices in several negotiations, such as with regulatory coherence, but also issues not generally addressed in previous U.S. FTAs, such as regulatory coherence, supply chain competitiveness, and small- and medium-sized enterprises. While some of the commitments relating to these issues are in stand-alone chapters, others are included, as appropriate, in other chapters of the agreement.

Regulatory Coherence

The issue of regulatory coherence represents one of the new cross-cutting trade issues added to the TPP negotiations. The goal of regulatory coherence is to ease the conditions and costs of trade between TPP countries while affirming the rights of TPP countries to regulate their economies to promote legitimate policy objectives. According to the USTR, this initiative stems from the proliferation of regulatory and non-tariff barriers, which have become a major hurdle for business

¹⁰⁴ “USTR Green Paper on Conservation and the Trans-Pacific Partnership,” (<http://www.ustr.gov/about-us/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership>); “USTR Touts TPP Environmental Proposal, But Acknowledges Challenges,” *Inside U.S. Trade*, December 9, 2011

¹⁰⁵ “USTR Confirms Objections On Enforceability In TPP Environmental Talks,” *Inside U.S. Trade*, June 29, 2012.

¹⁰⁶ “Marantis Says TPP Advances Conservation; USTR Releases TPP Environmental Provision,” *International Trade Daily*, December 9, 2011; “U.S. Pushes Conservation Initiatives for Proposed Trans-Pacific Pact,” *Bridges Weekly Trade News Digest*, December 7, 2011.

gaining access to foreign markets. Some of the goals of the effort are to “improve regulatory practices, eliminate unnecessary barriers, reduce regional divergence in standards, promote transparency, conduct regulatory processes in a more trade-facilitative manner, eliminate redundancies in testing and certification, and promote cooperation on specific regulatory issues.”¹⁰⁷

Issues related to regulatory coherence are covered in various chapters, including a stand-alone chapter on regulatory coherence as well as in SPS, TBT and other chapters. The regulatory coherence chapter recommends that TPP partner countries “endeavor” to establish domestic regulatory structures similar to the U.S. Office of Information and Regulatory Affairs in the Office of Management and Budget, a venue to vet proposed regulations, and their compliance with domestic law and policy, as well as with trade agreements and other international obligations. Aside from seeking to assure regulatory consistency among various domestic agencies, the proposed mechanism would be encouraged to conduct regulatory impact assessments (RIA) that would assess the need for a given regulation, conduct cost-benefit analysis, and assess alternatives to regulation. The established body, process, or mechanism would also seek to assure transparency and openness in the rule-making process. The draft also recommends the establishment of a regulatory coherence committee among TPP members. It is unclear, how much, if any, of these provisions would be subject to dispute settlement.¹⁰⁸

State-Owned Enterprises

Broadly speaking, state-owned enterprises (SOEs) are businesses directly or indirectly owned or influenced by a government. As such, governments may provide these businesses with advantages—such as subsidies, low cost credit, preferential access to government procurement, and trade protection—not enjoyed by their private counterparts, thereby hindering competition. Such advantages may also be directed toward companies not owned but significantly favored or supported by the government. This concern over potential anti-competitive behavior and restrictive trade has shaped texts by the United States regarding SOEs in the proposed TPP agreement. In the context of the current TPP negotiations, the SOE presence in Vietnam—estimated to represent 40% of output—may warrant particular attention, although Malaysia and Singapore also have important SOE sectors.¹⁰⁹ In addition, as the TPP could become a template for a larger Asia-Pacific FTA or future WTO negotiations, wider applicability of these provisions to SOEs in other countries, particularly China, may be envisioned.

In light of these concerns about fair competition, SOEs are addressed, though not extensively, in several existing U.S. FTAs. NAFTA and subsequent U.S. FTAs with Australia, Chile, Colombia, Peru, and South Korea have similar language on SOEs. Though the specific details vary among these agreements, most contain national treatment, non-discrimination, and transparency provisions, while upholding the prerogative of countries to establish and maintain SOEs. The

¹⁰⁷ “Trans-Pacific Partnership (TPP) Trade Ministers’ Report to Leaders,” November 12, 2011, available at: <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re>.

¹⁰⁸ The draft text is available at:

<http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf>; See also “U.S. Proposal for TPP Regulatory Coherence Chapter Mostly Non-Binding,” November 4, 2011.

¹⁰⁹ Economist Intelligence Unit, *Vietnam Country Report*, March 2012, p. 12.

U.S.-Singapore FTA includes somewhat more extensive provisions on SOEs, but they largely apply only to Singapore and not the United States.¹¹⁰

Though some business groups, government officials, and labor groups have all expressed an interest in strong SOE provisions in the TPP, it remains unclear what form such provisions may take.¹¹¹ Such measures may include provisions that seek to ensure that SOEs operate on a commercial basis, and to address potential trade and investment barriers. SOE disciplines may be enforced based on a harm test similar to that used in the WTO subsidies agreement.¹¹² Broadly, these provisions will likely seek to achieve competitive neutrality with regard to SOEs. Competitive neutrality, a concept supported by both U.S. government and business groups, refers to an environment in which SOEs receive no competitive advantages beyond those enjoyed by private sector companies.¹¹³

Not all policy observers, however, agree on the appropriate strength or even necessity of SOE provisions in the TPP. Though the scale and the nature of their behavior differ, SOEs exist in some form in all TPP countries. In the United States for example, organizations such as the Federal National Mortgage Association (Fannie Mae), and the U.S. Postal Service are operated by the government and provide market-oriented products.¹¹⁴ Therefore, as with most trade negotiations, the U.S. position on SOEs likely seeks to balance both U.S. defensive and offensive interests.¹¹⁵ Some observers suggest that existing regulations may already adequately temper advantages of SOEs (e.g., subsidies, financing), while others maintain that additional provisions, particularly regarding transparency, will only make existing disciplines more effective.¹¹⁶

The United States tabled its SOE proposal last year. USTR negotiators have suggested that TPP countries generally support the idea of SOE provisions in the FTA, but all parties have not yet agreed on specific language.¹¹⁷ The lack of precedent for strong SOE provisions in FTA negotiations and the prevalence of SOEs in some TPP countries suggests that the negotiating

¹¹⁰ For instance, the agreement states that Singapore's government must ensure that any government enterprise "acts solely in accordance with commercial considerations in its purchase or sale of goods or services" and that Singapore must make public a listing of organizations that satisfy the agreement's definition of a "covered entity," essentially any company organized in Singapore above a certain size and with a sufficient level of government influence. This list is also to include the ownership structure of the organization, members of government that serve on the board of directors, and total revenue or assets; USTR, *United States-Singapore Free Trade Agreement*, May 2003, pp. 133-140, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf.

¹¹¹ Labor groups are particularly concerned with SOE investment in the United States and potential unfair competition in the domestic market. "Brown, Kyl Urge Disciplines on SOE U.S. Investments as Part of TPP Deal," *World Trade Online*, August 17, 2011.

¹¹² "USTR Expected to Clarify Provision in SOE Proposal on 'Harm Test' Soon," *Inside U.S. Trade*, March 22, 2012.

¹¹³ Deborah A. McCarthy, Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, U.S. Department of State, "State Capitalism and Competitive Neutrality" (speech, APCAC 2012 U.S.-Asia Business Summit, March 2, 2012), <http://www.state.gov/e/eb/rls/rm/2012/181520.htm>; and Coalition of Service Industries; U.S. Chamber of Commerce, *State-Owned Enterprises: Correcting a 21st Century Market Distortion*.

¹¹⁴ For more information, see CRS Report RL30365, *Federal Government Corporations: An Overview*, by Kevin R. Kosar.

¹¹⁵ "U.S. Fixes Future-SOE 'Loophole,' Sends TPP Partners Proposed Text," *Inside U.S. Trade*, October 20, 2011.

¹¹⁶ "Stakeholders Urge USTR to Make Changes to SOE Proposal in TPP Talks," *Inside U.S. Trade*, September 29, 2011.

¹¹⁷ Amy Tsui, "Some TPP Groups Finish Talks in San Diego; Other Groups Beginning to Meet Mid-Round," *International Trade Daily*, July 7, 2009.

partners will be taking their time to carefully consider how these new provisions may constrain their own SOEs and address trade-related barriers.

E-Commerce

According to the November 2011 framework, the TPP partners are negotiating provisions that would establish rules and procedures for trade in goods and services conveyed by the internet and other electronic means. The text of the framework states that the provisions would address impediments to such trade, including customs duties, the digital environment, authentication of electronic transactions, consumer protection, localization requirements, and other provisions to ensure the free flow of information.

The United States considers these provisions important with the growth of the use of electronic commerce in an increasingly globalized economy. Recently concluded U.S. FTAs, such as the U.S.-South Korea FTA, included e-commerce provisions. They are designed to ensure that services distributed electronically benefit from the same protections as services distributed by other means. In addition, no customs duties are to be imposed on digital products, whether distributed electronically or via a physical medium, such as a disk, and digital products are to be treated in a non-discriminatory manner. The agreement also includes provisions prohibiting unnecessary barriers to the free flow of information.

In the TPP talks, the U.S. proposals reportedly contain language that would prohibit countries from blocking cross-border flows of data over the Internet.¹¹⁸ If adopted, these provisions could also have implications for a member state's ability to engage in censorship of the internet. U.S. high technology groups have supported unfettered cross-border data flows and opposed local requirements for data storage or server location in order to promote Internet-based services and cloud-computing. They claim that companies already have their own mechanisms in place to protect privacy and that privacy would not be undermined by open borders on data flows.¹¹⁹

However, TPP partners, such as Australia and New Zealand, reportedly have expressed concern that prohibitions on local data storage could run up against their national privacy laws. Australia reportedly has argued that private-sector based controls would not be sufficient to protect privacy and has suggested alternative language to the U.S. proposal that would give governments more discretion on controlling data flows across borders.¹²⁰ Vietnam and Malaysia reportedly have local content restrictions, either for mercantile or censorship reasons.

Competitiveness and Supply Chains

Trade in intermediate goods is an increasingly important component of international trade for many firms. These intermediate goods, which serve as inputs in the production of final goods, accounted for more than half of all non-fuel merchandise traded in 2009.¹²¹ Such intermediate

¹¹⁸ "Internet Companies, Copyright Holders Clash Over Free Flow of Data Principles," *Inside U.S. Trade*, October 20, 2011.

¹¹⁹ See, for example, letter from the Coalition of Services Industries and other business groups to USTR Kirk on June 9, 2012.

¹²⁰ *World Trade Online*, July 5, 2012.

¹²¹ World Trade Organization and the Institute of Developing Economics, *Trade Patterns and Global Value Chains in* (continued...)

goods represent stages along a global supply chain—the path a good takes as it is transformed from its basic components into a final product used by consumers. This path often crosses multiple international borders, sometimes more than once. U.S. imports from China, for example, may contain components sourced from other parts of East Asia, Europe, Latin America, and elsewhere, including from the United States. The U.S. International Trade Commission (USITC) estimates that 8.3% of the value of U.S. imports is actually U.S. components that have been incorporated into other goods abroad and re-imported into the United States.¹²²

It is unclear exactly how the TPP will address supply chains, although the issue will be addressed in a stand-alone chapter as well as in other chapters covering issues related to supply chains. The broad range of issues affecting supply chains involve many chapters already included in U.S. FTAs. Business groups have encouraged negotiators to consider several aspects that may affect the flow of goods into and out of TPP countries, and, hence the competitiveness in global supply chains of firms in TPP countries. These include harmonization of standards, adequate infrastructure (ports, roads, etc.) to facilitate trade; simplification of rules of origin; and greater customs efficiency.¹²³

Competitive supply chains and strong rules of origin may not always be mutually consistent goals. As a regional FTA, some international supply chains may be entirely encompassed by the current negotiating partners. Other supply chains, however, may incorporate intermediate goods that have moved into TPP countries at some point in the production process. These supply chains that incorporate goods originating outside TPP countries, such as apparel production in Vietnam that uses Chinese fabric, may present a challenge to negotiators as they try to develop rules of origin that balance a desire for a TPP that ensures competitiveness and cost efficiency with concerns over outside countries benefitting from the TPP agreement without adhering to its requirements.

Small- and Medium-Sized Enterprises

Small- and medium-sized enterprises (SMEs) (firms with less than 500 employees by the U.S. definition) account for the majority of firms involved in international trade (about 97%), but they account for a much smaller share of the value of U.S. trade (about 30%).¹²⁴ In fact, in 2009, eight firms alone accounted for more than 10% of all U.S. exports.¹²⁵ SMEs, however, also participate in trade indirectly as suppliers, feeding parts and components into the supply chain of larger, finished products that can be exported. Though SMEs represent a relatively small share of U.S. trade, they employ approximately half of the U.S. workforce in the non-farm private sector.¹²⁶ In

(...continued)

East Asia: From Trade in Goods to Trade in Tasks, 2011.

¹²² USITC, *The Economic Effects of Significant U.S. Import Restraints*, Investigation No. 332-325, Publication 4253, August 2011, p. xv, <http://www.usitc.gov/publications/332/pub4253.pdf>.

¹²³ Emergency Committee for American Trade, *ECAT 2011 Agenda*, June 14, 2011, p. 76.

¹²⁴ In the U.S. the typical definition for an SME is a firm with fewer than 500 employees. Other countries use different employment cutoffs or other metrics to delineate SMEs.

¹²⁵ The trade statistics in this section come from: U.S. Census Bureau, Department of Commerce, *A Profile of U.S. Importing and Exporting Companies, 2008-2009*, CB11-60, April 12, 2011, p. 25, <http://www.census.gov/foreign-trade/Press-Release/edb/2009/text.pdf>. Not all U.S. exports and imports can be matched to specific companies. In 2009, this “unidentified” trade accounted for 11% of exports and 13% of imports.

¹²⁶ Firm and employment share data from U.S. Census Bureau, Department of Commerce, *Statistics of U.S. Businesses*: (continued...)

addition, academic studies have shown that small businesses create disproportionately more jobs than large businesses, though this may be due more to their age than their size—small firms are typically also young firms.¹²⁷

The characteristics of SMEs and their relatively small presence in U.S. trade have led to government efforts to improve SME access to international markets. The USTR commissioned a series of reports from the ITC regarding the role of SMEs in U.S. exporting activities.¹²⁸ Those reports identified barriers limiting SME access to foreign markets, and surveyed SMEs for suggestions on policy changes that could ease SME exporting activities. An increased focus on FTAs and other trading agreements was among the top three most frequent responses provided.¹²⁹

The proposed TPP agreement includes a stand-alone chapter on SMEs, although provisions related to SMEs are included in other chapters. This chapter may focus on SME's capacity to take advantage of the enhanced trading opportunities gained through the potential FTA. Though details of the agreement remain sparse, the TPP country trade ministers' statement suggests that the agreement will address concerns SMEs "have raised about the difficulty in understanding and using FTAs."¹³⁰ For example, a representative from USTR suggested that the agreement will attempt to address informational challenges SMEs have cited, such as access to foreign country tariff schedules and regulations affecting imports.¹³¹ The negotiations on the SME chapter were concluded during the Dallas round in May 2012.¹³² The quick conclusion on this topic may represent both a broad consensus among the negotiating partners and relatively uncontroversial provisions.

Institutional Issues

The proposed TPP likely will contain provisions related to dispute settlement and governance of the agreement. Given that the proposed TPP is being touted as a "living agreement," being open to new members, formal procedures may be established for new members to accede to the agreement.

(...continued)

Statistics about Business Size, <http://www.census.gov/econ/smallbus.html#RcptSize>.

¹²⁷ David Neumark, Brandon Wall, and Junfu Zhang, "Do Small Businesses Create More Jobs? New Evidence for the United States from the National Establishment Time Series," *Review of Economics and Statistics*, vol. 93, no. 1 (February 2011), pp. 16-29; John C. Haltiwanger, Ron S. Jarmin, and Javier Miranda, *Who Creates Jobs? Small vs. Large vs. Young*, National Bureau of Economic Research, NBER Working Paper 16300, August 2010, <http://www.nber.org/papers/w16300>.

¹²⁸ These reports can be found at http://www.usitc.gov/research_and_analysis/small_med_enterprises.htm.

¹²⁹ USITC, *Small and Medium-Sized Enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms*, Investigation No. 332-509, USITC Publication 4169, July 2010, p. 3-27.

¹³⁰ USTR, "Outlines of the Trans-Pacific Partnership Agreement," fact sheet, November 2011, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/trans-pacific-partnership-tpp-trade-ministers'-re>.

¹³¹ Comments from Ambassador Demetrios Marantis at the Wilson Center event, *The Trans-Pacific Partnership and the Future of International Trade*, August 8, 2012.

¹³² Amy Tsui, "Good Progress Being Made in TPP Dallas Round, U.S. Negotiator Says," *International Trade Daily*, May 5, 2012.

Secretariat

The existence or characteristics of a secretariat for the proposed TPP may be under consideration during the negotiations. Generally, U.S. FTAs have had minimal structures. From NAFTA onward, they have included a free trade commission co-chaired by USTR and trade ministers of the respective parties. Primarily, they have been tasked with (1) supervising the implementation of the agreement; (2) resolving disputes arising from its interpretation or application (see dispute settlement, below); and (3) supervising work of committees established under the agreement. The commission meets regularly once a year, and by special session at the request of a party. The agreements often have created committees on specific issues. The U.S. Korea FTA has committees on outward processing zones and fisheries. However, U.S. agreements do not have free-standing secretariats, and activities are carried out by staff in member's respective trade ministries.¹³³ Similarly, the P-4 agreement has a commission, but does not have a standing secretariat, although New Zealand serves a repository of documents. However, other economic organization's in the Asia-Pacific region, such as ASEAN and APEC do have secretariats that engage in trade capacity building and technical assistance activities, as well as conduct studies for and about their members. Negotiators may debate the question of whether having a formal secretariat is necessary or desirable to implement this agreement.

Dispute Settlement

Previous U.S. FTAs as well as the P-4 agreement provide options to resolve disputes arising under the agreement. These are in addition procedures with regard to investor-state dispute resolution (discussed above), or specialized provisions for certain disputes—for example, motor vehicles in the U.S.-Korea FTA.¹³⁴ In general, these agreements are designed to resolve disputes in a cooperative manner. A party first seeks redress of a grievance through a request for consultation with the other party. These steps include

- initial consultations,
- meeting of the joint committee representing cabinet level trade officials of each parties,
- establishment of a dispute settlement panel.

In previous agreements, panels have been composed of three arbiters, of which each side appoints one and the third is appointed by mutual consent, or failing that, by lot from a list of individuals not nationals of either side. After the panel makes its decision, the unsuccessful party would be expected to remedy the measure or practice under dispute. If it does not, compensation, suspension of benefits, or fines have been traditional remedies. In addition, WTO dispute settlement may also be used in instances where the dispute is common to both WTO and FTA rules. Although State-State dispute settlement has been infrequent under U.S. FTAs, the size of the potential agreement, the inclusion of new members, and the negotiation of new provisions, may cause negotiators to scrutinize existing models of FTA dispute settlement to meet the challenges this agreement may bring.

¹³³ The NAFTA Commissions for Labor Cooperation and on Environmental Cooperation are an exception as they do have free-standing secretariats.

¹³⁴ For more detailed information on the U.S.-South Korea FTA dispute settlement process, see CRS Report R41779, *Dispute Settlement in the U.S.-South Korea Free Trade Agreement (KORUS FTA)*, by Brandon J. Murrill.

One question is whether dispute settlement will cover all the provisions of the agreement. The May 10th Agreement stipulated that labor and environmental provisions would be fully enforceable under U.S. FTAs, and dispute settlement to those provisions in the Colombia, Peru, Panama, and South Korea FTAs. Whether these provisions apply to the TPP have proven controversial both domestically, and among TPP partners in the negotiations.

A “Living Agreement”

The TPP has been envisaged as a “living agreement,” one that is both open to new members willing to sign up to its commitments and open to addressing new issues as they evolve. Thus far, the manner in which new members are added while the negotiations are still under way, as with the case of Canada and Mexico, and possibly Japan, has followed a process agreed by current members informally, with each aspiring candidate being approved with the consensus of the other parties. In practice, the aspiring participant must not only agree to negotiate saying that “everything is on the table,” but must show in words, deeds, or perception that there is a genuine willingness to negotiate on issues sensitive to others and to commit to a high-standard agreement overall. This has led to months of bilateral consultations on issues of interest to the other parties, and in the case of Japan, discussion of possible confidence building measures in areas of the greatest sensitivity.

In the case of Canada, the United States, Australia, and New Zealand had concerns about Canada’s supply management system for dairy and poultry. The United States was also interested in leveraging action on Canada’s long languishing legislation to modernize its copyright laws. In return for entry in the talks, Canada and Mexico reportedly agreed not to seek to reopen chapters already agreed in the TPP, or possibly, sub-chapters that contained areas of agreement. In the end, because of the sensitivity of the issues under discussion to the countries involved, outside of the negotiators themselves, it may never be known what commitments were made to gain participation in the talks, if any.

While the expansion of the group has been publicly contemplated, as a trans-Pacific agreement, to date it has focused first on APEC countries. Of these, there are many potential candidates, from relatively advanced economies such as South Korea or Taiwan, to middle-income states with dynamic economies and youthful populations like Thailand or Philippines. Other countries beyond APEC, such as Colombia and Costa Rica, have expressed interest, and it is conceivable that other countries or trade blocs beyond the Pacific shores could link up to the agreement in the future.

Aside from Japan (see below) and perhaps Korea, no new members are expected to seek to join at this stage, but may accede later to the final agreement. Such an accession process raises the question of whether a country, especially one with political or economic heft, can be expected to simply join an agreement already negotiated or whether it should have input on the existing agreement, especially if the goal is to produce a free trade area for the Asia-Pacific, or beyond. Yet, reopening the agreement’s substantive provisions with each new entrant—as opposed to its market access provisions which presumably would need to be negotiated with each existing member anyhow—offers up its own difficulties.

Japan¹³⁵

The bilateral consultations with Japan on its possible participation in the TPP negotiations have been ongoing since Japan announced its preliminary interest in the TPP. U.S.-Japan bilateral trade challenges are long-standing because they are deep-seated and difficult to resolve. For example, U.S. auto manufacturers have argued for many years that the Japanese market is inhospitable to imports of cars made by the big three Detroit-based auto manufacturers. The manufacturers cite, in particular, Japanese tax regimes and safety regulations that discriminate against imported vehicles.¹³⁶ U.S. insurance providers have asserted that they are at a competitive disadvantage vis-a-vis the insurance subsidiary of Japan Post, the government-owned postal system, in marketing some types of insurance. Industry representatives and some Members of Congress have stated that the United States should not welcome Japan into the TPP unless Japan deals with the issues satisfactorily. However, other sectors, such as agriculture, see TPP as an opportunity to improve their access to the large Japanese market, and at the same time, create a more significant agreement with Japan's entrance.

Japanese domestic politics have also complicated the issue. For years, opposition from a vocal agricultural sector and political paralysis prevented the left-of-center Democratic Party of Japan (DPJ), which ruled from 2009-12, from reaching a final agreement on whether to pursue Japan's participation in the TPP negotiations. Similar considerations are expected to affect the Liberal Democratic Party (LDP), which came to power after December 2012 elections for Japan's Lower House of parliament. The LDP, which is heavily reliant upon support from agricultural interests, has said it is opposed entering the agreement if it does not allow for some exemptions. Many observers believe that Prime Minister Shinzo Abe, who has made strengthening the U.S.-Japan relationship his top foreign policy priority, personally would like Japan to join the talks. However, he is unlikely to try to do so before Japan's next elections (for Japan's Upper House) in July 2013. A decision to push for TPP participation would likely galvanize the TPP's well-organized opponents in Japan and split the LDP, leading to its defeat in the Upper House.

The "Noodle Bowl"

Differences of opinion exist among the participants as to how best and to what extent the TPP will serve to harmonize trade rules among the parties. They have agreed to pursue a single set of TPP rules of origin, which will be key to achieving this goal. However, they are pursuing different approaches to developing a TPP tariff schedule. The United States has maintained that it is negotiating market access bilaterally and only with the TPP participants with which it does not have FTAs: Brunei, Malaysia, New Zealand, and Vietnam. Other participants have sought to negotiate plurilateral market access schedules. While the participants have agreed to conduct the tariff negotiations as they choose, they have agreed to develop a single TPP tariff schedule that will support the goal of facilitating trade. However, it is known that some participants seek to

¹³⁵ For more information, see CRS Report R42676, *Japan's Possible Entry Into the Trans-Pacific Partnership and Its Implications*, by William H. Cooper and Mark E. Manyin.

¹³⁶ The Center for Automotive Research produced a study sponsored by Ford Motor Co. that suggests that including Japan in the TPP would lead to the loss of 3 million U.S. jobs. Center for Automotive Research, *The Effects a U.S. Free Trade Agreement Would Have on the U.S. Automotive Industry*, August 21, 2012.

reopen the market access provisions of their prior FTAs with the United States or others. For example, Australia is known to seek a better market access for its sugar in the United States than it received in its FTA. Through TPA, or other vehicle, Congress may wish to make its views known about the architecture of the agreement.

Issues for Congress

Congress has already taken a strong interest in the TPP negotiations even before a substantive agreement has been reached. Hearings have been held, and some Members have expressed views on the negotiations. As the negotiations proceed, a number of issues important to Congress are emerging.

Negotiating a Comprehensive, High-Standard Agreement

An issue for U.S. policymakers in general, and Congress in particular, is whether the United States will be able to achieve its objective of creating a comprehensive, high-standard agreement that encompasses a broad spectrum of trade and trade-related issues. As the largest FTA negotiated by the United States, it brings together a large and expanding group of countries representing various levels of development. Likewise, with 29 chapters under negotiations, it is the most comprehensive agreement in terms of breadth and depth of commitment undertaken by the United States. At the same time, the United States and the other TPP partners are aiming for a high-standard agreement to provide a structure for trade within the Asia-Pacific region in the 21st century. Members of Congress have already presented differing views on which countries should be included in a TPP, and on what constitutes “high-standards” in such areas as worker rights, intellectual property rights, protection for pharmaceuticals, and investor rights. Likewise, outside the United States, the course of the negotiations have revealed differences on the meaning of “high-standard” among the negotiating partners. This emerging debate may presage a vigorous debate within Congress on the TPP as the process proceeds and Members weigh in with their views.

The Role of Trade Promotion Authority (TPA) and Congressional Trade Negotiating Objectives

Any trade agreement that the United States reaches with TPP partners would have to be approved by Congress through the passage of implementing legislation, presumably under TPA procedures. (see text box on TPA). The latest TPA expired on July 1, 2007, although the Obama Administration has proceeded to negotiate the proposed TPP as if TPA were in effect. It has consulted with Congress and followed TPA’s procedural steps. For example, U.S. Trade Representative Ron Kirk formally notified Congress of the Administration’s intention to enter into negotiations with the TPP countries on December 14, 2009, 90 days prior to beginning the negotiations, as stipulated under the expired TPA. Nevertheless, some observers, including Members of Congress, have asserted that TPP partners will not engage in serious negotiations on sensitive issues without the assurance that U.S. commitments are credible and cannot be amended by Congress, although negotiators have not experienced this problem to date.¹³⁷

¹³⁷ Conversation with Assistant U.S. Trade Representative Barbara Weisel, September 27, 2012.

In addition, even though the Administration has been consulting Members and congressional staff, Congress, as a whole, formally has yet to weigh in on the form of negotiating objectives embedded in TPA authorizing statutes. In the past, these objectives have included reducing barriers to various types of trade (e.g., goods, services, agriculture, electronic commerce); protecting foreign investment and intellectual property rights; encouraging transparency, fair regulatory practices, and anti-corruption; ensuring that countries protect environment and worker rights; providing for an effective dispute settlement process; and protecting the U.S. right to enforce its trade remedy laws. However, over the years, Congress has revised and expanded the negotiating objectives as policy issues have evolved and the global trading system has become more complex. In any renewal of TPP, Congress may wish to establish new negotiating objectives to reflect 21st Century trade policy including issues currently under negotiation such as state-owned enterprises, regulatory coherence, digital technology, and trade in green technologies, among other areas. At the same time, the objectives would likely have to be flexible enough to allow the Administration to negotiate a “living agreement” that can change and be kept current with an evolving international trading system. It is unclear at this time if and when the Administration and Congress will take up the issue of TPA renewal.

Institutional Issues

In addition, Congress may wish to consider the institutional structure of a future TPP agreement. It may wish to consider the manner in which the agreement can be expanded, or upon the terms to which it is willing to agree to expand new members. As well as attracting new members, new content may be negotiated, or existing content renegotiated. In the manner of accession of new members, Congress may consider whether it would approve each new member, or whether U.S. approval would be handled in a manner similar to WTO accessions. In terms of content, Congress may also wish to consider whether the TPP, if concluded, would have a Secretariat or other body that could serve as a venue for continuing negotiations.

Relationship with the Multilateral System

A successfully concluded TPP agreement may shape the future course of multilateral trade liberalization. After 10 years of negotiations, the Doha Round of multilateral trade negotiations is at an impasse, and WTO members are developing new approaches to address global trade issues.¹³⁸ TPP may offer an opportunity for a group of countries dedicated to concluding a comprehensive, high-standards FTA to break new ground on issues thus far not negotiated at the multilateral level.

Past FTAs, such as NAFTA, incorporated new trade policy ideas, such as dispute settlement and intellectual property rights, that were concurrently being negotiated in the Uruguay Round. NAFTA was approved first, and the approval of NAFTA among Canada, Mexico and the United States helped push the Uruguay Round to conclusion. Today, the approval of a comprehensive, high-standard TPP agreement could signal to recalcitrant members of the WTO that trade liberalization can proceed without them and might spur action at the multilateral level.

¹³⁸ Preliminary discussions for a plurilateral agreement to update the commitments in the General Agreement on Trade in Services have been held.

However, the world trading system is much different than it was in the early 1990s when NAFTA signatories (United States and Canada) made up half of the so-called “Quad-countries” (United States, Canada, the European Union, and Japan) that decided the Uruguay Round. Developing countries, such as Brazil, India, and China, that now exercise their interests in the WTO, may be more assertive in pursuing their own interests. Yet, as an alternative venue promoting trade liberalization at the time when the WTO is not seen to be doing so, it may attract additional countries to the negotiations.

The Potential Impact of the TPP on U.S. Trade Policy

The U.S. pursuit of the TPP and the possible outcome of the negotiations raises other questions regarding its possible impact on the status and shape of current and future U.S. trade policy. For example, should the TPP preclude the United States from considering negotiating bilateral FTAs or other regional FTAs, such as an FTA with the EU? On the one hand, the USTR has limited resources so additional negotiations may become problematic. On the other hand, U.S. trade policymakers need to initiatives protect and advance U.S. economic interests around the globe, especially, as other countries continue to pursue their own FTAs.

Similarly, the TPP raises the issue of the United States and the future of the WTO as a major force for trade liberalization. Some may argue, for example, that the United States has signaled the death knell of future rounds of multilateral agreements in favor of regional pacts. Others might assert that the TPP could serve as a building bloc for a more viable multilateral trade system that responds to trade challenges of the 21st century. Some may even say that the TPP may become the predominant force for trade liberalization going forward, that is, if it can agreed to by the current parties.

Another issue for possible consideration is: What would be the impact on U.S. trade policy if the TPP negotiations are not completed successfully or are delayed indefinitely? Some could argue that such an outcome would indicate that it is not feasible to negotiate a comprehensive set of rules with a diverse group of countries and that the United States would have to tailor its ambitions. In addition, some might assert that such an outcome would signify a temporary, if not permanent setback to the notion of a Free Trade Area of the Asia-Pacific? (FTAAP). Still others may conclude that such result could force the United States to retreat from negotiating trade agreements altogether.

Conclusion

The potential Trans-Pacific Partnership agreement may have a large impact on U.S. trade and trade policy, but much of its substance and its future remains undecided. The agreement is ambitious in at least three ways: (1) in terms of its size—it would be the largest U.S. FTA by trade flows and could expand in a region that represents over half of all U.S. trade; (2) the scope and scale of its liberalization—the negotiating partners have expressed an intent to comprehensively reduce barriers in goods, services, and agricultural trade as well as rules and disciplines on a wide range of topics including new policy issues that neither the WTO nor existing FTAs yet cover; and (3) its flexibility—this “living agreement” has been and may continue to be expanded in terms of its membership and its trade and investment disciplines.

Due to this level of ambition, however, achieving such an agreement may be difficult. Differences in opinion exist, both domestically and among the negotiating partners, on precisely what form the agreement's provisions should take. A broad range of U.S. interests groups view the TPP as a way to "correct" flaws in previous U.S. FTAs, but changes that some groups consider improvements to U.S. trade policy others see as unwarranted intrusions into other aspects of public policy, or may contribute to economic insecurity for some Americans. Even challenges with "20th-century" trade issues, such as market access for goods, have yet to be resolved among the TPP partners.

Yet, the partner countries have expressed their commitment to achieving this ambitious agreement and the negotiators remain positive about the progress being made. This group of countries have self-selected into the negotiations presumably because they see the TPP as a catalyst to greater economic growth and prosperity, especially if it is expanded to include other countries. In addition, the large network of existing FTAs among the members could be seen as an indicator of their willingness to cooperate on trade issues and may imply that some of the challenging issues have already been addressed.

Appendix.

Table A-1. U.S. Goods Trade with TPP Countries, 2011

(in millions of U.S. dollars, ordered by total trade)

Country	Rank	Imports	Exports	Total	Balance
Canada	1	316,511	280,764	597,275	-35,747
Mexico	3	263,106	197,544	460,650	-65,562
Singapore	15	19,111	31,393	50,504	12,282
Malaysia	22	25,772	14,218	39,990	-11,554
Australia	24	10,240	27,516	37,756	17,276
Chile	29	9,069	15,873	24,942	6,804
Vietnam	30	17,485	4,341	21,826	-13,144
Peru	42	6,236	8,319	14,555	2,083
New Zealand	56	3,160	3,571	6,731	411
Brunei	146	23	184	207	161
TPP11	1	670,713	583,723	1,254,436	-86,990
APEC		1,388,914	894,324	2,283,238	-494,590
<i>Japan</i>	4	128,811	66,168	194,979	-62,643

Source: U.S. International Trade Commission

Notes: Rank based on total trade (imports + exports); U.S. general imports, U.S. total exports

Table A-2. U.S. Private Services Trade with TPP Members, 2010

(in millions of U.S. dollars, ordered by total trade)

Country	Exports	Imports	Total	Balance
Canada	\$50,521	\$25,579	\$76,100	\$24,942
Mexico	24,110	13,370	37,480	10,740
Australia	13,168	5,600	18,768	7,568
Singapore	9,292	3,771	13,063	5,521
Chile	2,324	1,155	3,479	1,169
New Zealand	1,643	1,755	3,398	-112
Malaysia	2,096	1,243	3,339	853
Total	103,154	52,437	155,591	50,717
<i>Japan</i>	44,750	23,541	68,291	21,209

Source: Bureau of Economic Analysis, Survey of Current Business, October 2011.

Notes: BEA does not collect services trade data from every partner country.

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