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**No. 232**

**The Trans-Pacific Partnership  
Agreement (TPP) Negotiations:  
Overview and Prospects**

**Deborah Elms and C.L. Lim**

**21 February 2012**

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## Abstract

The Trans-Pacific Partnership (TPP) is a trade agreement currently under negotiation between nine countries in three continents, including Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, United States and Vietnam. In late 2011 three additional countries--Japan, Canada and Mexico--announced their intention to join as well. The TPP has always been called a "high quality, 21st century" agreement that covers a range of topics not always found in free trade agreements. This includes not just trade in goods, services and investment, but also intellectual property rights, government procurement, labor, environment, regulations, and small and medium enterprises. This paper traces the complex negotiations and evolution of the talks since the early 2000s to the present.

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# The Trans-Pacific Partnership Agreement (TPP) Negotiations<sup>1</sup>: Overview and Prospects

## 1 Starting with the 'P4' Agreement

The Trans-Pacific Partnership (TPP) trade negotiations grew out of an earlier preferential trade agreement (PTA) now colloquially known as the 'Pacific 4' or 'P4'. At several Asia Pacific Economic Cooperation (APEC) meetings in the 1990s, the United States, Australia, Singapore, Chile and New Zealand held informal 'P5' discussions to explore mechanisms for creating a new type of trade agreement among 'like-minded' states.<sup>2</sup>

These early discussions lead officials from Singapore, New Zealand and Chile to launch negotiations on the sidelines of the APEC Leaders Summit in 2002 and hold four rounds of negotiations on the Pacific Three Closer Economic Partnership (P3 CEP) between 2003-2005. At the fifth meeting of the interested parties in April 2005, Brunei joined the negotiations with the intention of becoming a founding member state of the agreement.<sup>3</sup>

The successful conclusion of talks in the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP, more commonly known as the 'P4') was announced at the APEC Trade Ministers meeting in June 2005. The 20 chapters in the Agreement were accompanied by two memoranda of understanding (MOUs) on environmental and labor cooperation. Although the environmental and labor agreements were announced as separate

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<sup>1</sup> This paper is a forthcoming chapter in the book, *The Trans-Pacific Partnership (TPP): The Quest for Quality in a 21<sup>st</sup> Century Trade Agreement*, to be published by Cambridge University Press, Summer 2012.

<sup>2</sup> The United States and Australia did not share the same level of enthusiasm for launching official talks at the time, so the other three members moved ahead on their own in 2002. Interview with New Zealand officials, Wellington, October 2009.

<sup>3</sup> Brunei became a member on July 12, 2006, when the agreement came into force, although the late entry into negotiations meant that Brunei was not subject to all the original deadlines imposed on the other three states in the agreement. Instead, it was granted longer implementation periods. The market in Brunei was also considerably less open than the markets of the other three states. Brunei also had additional negotiations on government procurement and trade in services, as neither of these commitments had been concluded at the time the P4 agreement was completed.

documents, any state wishing to exit any one of the three agreements automatically exits the other two. The Agreements came into force in 2006.

At the outset of negotiations, officials at the Ministry of Foreign Affairs and Trade in New Zealand announced three primary objectives for the talks:

- ‘Concluding a high quality, comprehensive agreement that will contribute to liberalization and cooperation within the Asia-Pacific region and support trade liberalization through the WTO;
- Making Pacific Three (P3) a business-friendly agreement that provides an enabling framework for development of commercial and broader linkages; and
- Ensuring that P3 reflects New Zealand’s overall public policy and social objectives.’<sup>4</sup>

These objectives were nearly identical to the objectives expressed in Singapore and Chile at the launch of talks. Singapore had for some time been interested in establishing a true free trade area in Asia through either the ten member Association of Southeast Asian Nations (ASEAN) process or the 21-member APEC. The P4 was negotiated from the beginning with an eye to having an accession clause included to allow other states the opportunity to join in the future. An accession clause is a highly unusual feature of a PTA.

This clause was viewed, in part, as a ‘back door’ means of getting to a larger trade agreement with a larger coalition of states.

The bargaining over a Free Trade Area of the Asia-Pacific (FTAAP) in the 21 member APEC was stalled. Negotiating with a smaller, enthusiastic group of economies over further liberalization was viewed as a more viable strategy towards a broader trade area than engaging in endless - and likely fruitless in the near term - negotiations with some APEC member economies who were proving unwilling to open further in a meaningful way. It also provided another avenue for trade liberalization, given the difficulties of concluding the Doha

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<sup>4</sup> ‘New Zealand’s Objectives for the Pacific Closer Economic Partnership, 2002.’ Not mentioned at the outset was the government’s objective of building up credibility as a PTA partner for future agreements. See ‘Trans-Pacific Strategic Economic Partnership Agreement: National Interest Analysis,’ New Zealand’s Ministry of Foreign Affairs and Trade, July 2005, 14.

round negotiations in the WTO. This is not to say, however, that any of the states involved in the P4 or the TPP have abandoned the multilateral approach to trade liberalization.

A focus on these broader objectives meant that Singapore and New Zealand (in particular) could overlook the extremely modest economic outcomes of the original P4 deal. The agreement is broadly comprehensive and viewed as ‘high quality.’<sup>5</sup> The P4 included liberalization on all tariff lines for Chile, Singapore and New Zealand, and 99 percent for Brunei (phased in over time).<sup>6</sup> The services chapter contained a negative list - broadly viewed as more trade liberalizing than the alternative formulations in some other PTAs. Additional chapters included sanitary and phytosanitary standards (SPS), technical barriers to trade (TBT), competition policy, intellectual property rights, government procurement, and dispute settlement. It contained some labor and environmental provisions in a separate MOU. Two chapters on financial services and investment were to be completed within two years of the agreement.<sup>7</sup>

Critically, and unusually, the document - as we have noted - also included an accession clause to allow other economies to join the agreement in the future. As the document states, ‘The Agreement is open to any APEC economy or any other State (Article 20.6), subject to terms to be agreed among the Parties.’ The term ‘any other State’ is noteworthy, for accession is therefore not limited to APEC economies only.<sup>8</sup>

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<sup>5</sup> The extent that this is really true is debatable as Gao and Capling have made clear. Nonetheless, this is the rhetoric most frequently employed to describe this PTA agreement. See Henry Gao, ‘The Trans-Pacific Strategic Economic Partnership Agreement: High Standard or Missed Opportunity?’ and Ann Capling, ‘Multilateralising PTAs in the Asia-Pacific Region: A Comparison of the ASEAN-Australia-NZ PTA and the P4 Agreement.’ Both papers were presented at the ARTNeT conference, ‘Trade Led Growth in Times of Crisis,’ Bangkok, Thailand, November 2, 2009.

<sup>6</sup> The exceptions for Brunei include alcohol and tobacco products, which are excluded on health and religious grounds.

<sup>7</sup> The United States joined discussions on these chapters. The process was disbanded without results when the P4 expanded to include more members in 2009.

<sup>8</sup> For a proposal that would extend what essentially would be the FTAAP beyond the APEC economies, and to include India within it, see ‘Australia’s ‘Rudd Proposal’: Business As Usual’, (2008) 14 *Asian Yearbook of International Law* 287.



The anticipated gains from trade as a result of the P4 were expected to be modest.<sup>9</sup> As the agreement came into force in 2006, Brunei's total imports and exports of merchandise trade in goods to other P4 partners were \$299 million and \$417 million, for 17.9% of total imports and 5.5% of total exports.<sup>10</sup> Chile had imports of \$71 million and \$77 million in exports to P4 partners, representing 0.2% of total imports and 0.1% of exports.<sup>11</sup> New Zealand imported \$1.5 billion and exported \$452 million to P4 members, for 5.7% of total imports and 2% of total exports.<sup>12</sup> Singapore imported \$731 million and exported \$2 billion to P4 members, for 0.3% of total imports and 0.7% of total exports.<sup>13</sup>

By the time the scheduled elimination of tariffs comes into force, however, there may still be some gains from trade, as each member will receive a margin of preference off most favored nation (MFN) rates that can be quite substantial.<sup>14</sup> Importantly, many of these gains will come in the categories of the top 25 exports for each country. For example, Brunei faces duty in 59 tariff lines from Chile across its top 25 export categories. By 2015, all 59 will be duty free. New Zealand saw duty rates fall from 39 tariff lines to 27 by 2010.

Even off a very modest base, the potential is there for economic gains from trade among the members especially for some sectors. New Zealand noted that while dairy into Chile was generally subjected to a low, six percent tariff prior to the P4, this still placed their

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<sup>9</sup> In fact, one member of parliament in New Zealand, John Hayes, said, 'it will make not the slightest bit of difference to anybody—and it will make no practical difference to the people in my electorate. But it is a good idea.' See the Debates in Parliament, 'Free-trade Agreement—New Zealand-United States,' September 23, 2008.

<sup>10</sup> *Factual Presentation, Trans-Pacific Strategic Economic Partnership Agreement Between Brunei Darussalam, Chile, New Zealand and Singapore (Goods and Services)*, WTO Secretariat, May 9, 2008, WT/REG229/1, 1. Hereafter, 'WTO Factual Presentation.' All figures are U.S. dollars. Brunei has limited services trade with the P4 partners, but was granted two additional years to complete its services schedule after the agreement went into force (because of the late entry into negotiations).

<sup>11</sup> WTO Factual Presentation, 2.

<sup>12</sup> WTO Factual Presentation, 2.

<sup>13</sup> WTO Factual Presentation, 2. Singapore's services trade with the partners averaged \$136.5 million in imports and \$435.5 million in exports. See p. 19.

<sup>14</sup> See Annex 1, WTO Factual Presentation, p. 61-68. The amount is still small. New Zealand, for example, had duty-free access to Singapore already prior to signing the P4 agreement. In 2004, New Zealand paid a total of NZ\$2.2 million in duty to Chile (mostly on coal exports) and NZ\$50,000 in duty to Brunei. The government estimated it would lose NZ\$320,000 a year in tariff revenue from Chile and NZ\$1,800 a year from imports from Brunei. See 'Trans-Pacific Strategic Economic Partnership Agreement: National Interest Analysis,' New Zealand's Ministry of Foreign Affairs and Trade, July 2005, 6 and 10.

exporters at a disadvantage relative to exporters from the United States, European Union and Mercosur. These other exporters were all covered under different PTAs with Chile with tariffs closer to (or at) zero. The reduction in tariffs could help small and medium exporters find a market in Chile.<sup>15</sup>

Officials in Brunei used the P4 agreement, in part, to catalyze changes in the domestic economy. For example, developing and enforcing comprehensive changes in domestic legislation for intellectual property rights had not been viewed as a priority before Brunei signed on for P4 talks.<sup>16</sup>

The P4 came into force with very little fanfare. The two states with the most trade between them - Singapore and New Zealand - already had a PTA pact (NZSCEP) in place.<sup>17</sup> Part of the P4 talks included the understanding that businesses in these two states could opt to use either the P4 terms of reference in seeking market access or the bilateral PTA deal, as outlined in a side letter with the P4 agreement. Firms can opt for whichever arrangement provides them the most benefits.<sup>18</sup> This included the ability to use either the positive list for services (NZSCEP) or the negative list (P4) as well as differing rules of origin calculations in each agreement. Using both agreements instead of allowing one to supersede the other, argued New Zealand, would give greater flexibility to traders.<sup>19</sup>

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<sup>15</sup> 'Trans-Pacific Strategic Economic Partnership Agreement: National Interest Analysis,' New Zealand's Ministry of Foreign Affairs and Trade, July 2005, 13.

<sup>16</sup> Interview with officials, Geneva, October 1, 2009.

<sup>17</sup> By 2010, Singapore and New Zealand had three different PTA agreements: P4, NZSCEP and the Australia-New Zealand-ASEAN agreement, in addition to MFN under the WTO. Business remained free to use whatever provisions of whatever agreement they wanted. Since neither New Zealand nor Singapore track the usage of PTAs by agreement, neither country can say which agreement is more attractive to business. The one study produced so far about the uptake rates of PTAs in Asia by the Asian Development Bank showed limited utilization, although the Singapore leg of the study is less robust than the rest of the data. For the study, see Asian Development Bank, 2008, *Emerging Asian Regionalism*, Manila, Asia Development Bank. Discussions about quality, personal correspondence with author, September 2009.

<sup>18</sup> However, some trade remedies provisions in the New Zealand-Singapore Closer Economic Partnership (NZSCEP) prevail over the P4 (paragraphs 63 and 66).

<sup>19</sup> See the report to WTO members on the P4, 'Consideration of the Trans-Pacific Strategic Economic Partnership Agreement Between Brunei Darussalam, Chile, New Zealand and Singapore, Goods and Services, WTO, September 18-19, 2008, WT/REG229/M/1/Rev.1, p. 3.

## 2 Expanding to the ‘TPP’

In September 2008 the Office of the U.S. Trade Representative (USTR) of the outgoing George W. Bush Administration made the announcement that the United States would seek to join the P4 agreement.<sup>20</sup> USTR Susan Schwab said, ‘This high-standard regional agreement will enhance the competitiveness of the countries that are part of it and help promote and facilitate trade and investment among them, increasing their economic growth and development.’<sup>21</sup>

Phil Goff, New Zealand’s Trade Minister, greeted the statement warmly, saying, ‘Securing an FTA negotiation with the U.S., the world’s largest economy, has been a key trade objective for more than decade.’<sup>22</sup> His enthusiasm was not equally shared. One Chilean trade official complained that, with a PTA already in place with the United States, he could only expect more politically, and perhaps economically difficult, demands from the Americans in a TPP.<sup>23</sup> Brunei expressed similar concerns about upcoming demands, particularly in areas like labor or the environment where their trade officials had limited experience in negotiations.<sup>24</sup>

The official press release for the American statement of participation noted, ‘Ultimately, the objective is to expand the membership of the Agreement to other nations that

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<sup>20</sup> Claude Barfield called this, ‘throwing a trade policy dart to the incoming Obama administration.’ See ‘The Trans-Pacific Partnership: A Model for Twenty-First-Century Trade Agreements?’ *International Economic Outlook*, American Enterprise Institute, No. 2, June 2011.

<sup>21</sup> United States Trade Representative Statement, Press Release, September 2008. There was a recognition that moving ahead in the final days of the George W. Bush Administration was problematic, Schwab argued afterwards at a meeting in Singapore on November 10, 2009. However, she said that USTR staff (who are largely non-partisan) had accepted at any incoming administration would want to be involved in these talks. Her objective was to start the process moving without unduly hampering the room for maneuver for the next batch of officials.

<sup>22</sup> Remarks at the P4 trade minister’s meeting in New York, Nevil Gibson, ‘Goff Welcomes US PTA Negotiations,’ *National Business Review-New Zealand*, September 23, 2008. Not everyone was so enthusiastic. The New Zealand Not for Sale Campaign urged members to post letters to their MP in opposition.

<sup>23</sup> Interview with officials, Geneva, October 1, 2009.

<sup>24</sup> Interview with officials, Geneva, October 2, 2009. The same official noted the struggles within Brunei to fully implement existing agreements, given capacity problems in the trade ministry and elsewhere.

share our vision of free and fair trade.<sup>25</sup> This had the effect that officials were hoping for, as Australia and Peru also quickly announced their interest in joining the talks. Vietnam asked for observer status. Other states, including Japan, also suggested a willingness to consider joining the talks in the future.

The P4 had become the P7 or the Trans-Pacific Partnership (TPP) talks. The United States immediately joined in the negotiations on the two missing chapters from the P4 on financial services and investment.<sup>26</sup> Initial talks with potential TPP member states were scheduled for March 2009. These were postponed, pending a broader trade policy review within the United States under the incoming Obama Administration. New United States Trade Representative (USTR) Ron Kirk announced that the United States would ‘pick up’ the TPP talks possibly in May 2009. He was quickly corrected by USTR.<sup>27</sup>

Instead, it took until November 2009 for President Obama to make his first statement on the TPP. At a stop in Tokyo on his way to the APEC meeting in Singapore, the President said, ‘The United States will also be engaging with the Trans Pacific Partnership countries with the goal of shaping a regional agreement that will have broad-based membership and the high standards worthy of a 21<sup>st</sup> century trade agreement.’ It was left to Kirk to clarify what it meant to ‘engage with’ TPP partners during the APEC meetings in Singapore the next morning. When he unambiguously announced that the United States was going to participate in formal negotiations, his statement was met with applause from the trade officials and business leaders in the room.

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<sup>25</sup> ‘United States to Negotiate Participation in Trans-Pacific Strategic Economic Partnership,’ USTR, September 2008.

<sup>26</sup> Three rounds of negotiations were held in 2008, before the talks were abandoned, pending the expansion of the P4 into the TPP in 2009/2010.

<sup>27</sup> See *Inside U.S. Trade*, May 20, 2009.

### **3 The start of official talks**

The first round of negotiations in the TPP was held in Melbourne in March 2010 among seven members: Australia, Brunei, Chile, New Zealand, Peru, Singapore, and the United States. Vietnam participated as an observer.<sup>28</sup> This meeting featured a new institutional approach. Instead of meeting around the topics of traditional PTA chapters like goods, services, investment or intellectual property rights, officials were split into ‘clusters.’<sup>29</sup> Each cluster was tasked with thinking about how they might address cross-cutting, overlapping issue areas in an agreement. The first meeting, as might be expected, made limited progress towards imagining a new approach to negotiations. It probably did not help that most of the mid-level officials in the room had previous experience in negotiating ‘traditional’ PTAs. Once you have experience at one or more of these agreements, it is hard to reorient thinking to new approaches. Since many of the biggest decisions were still pending (like membership, scale and scope of negotiations), progress was always going to be limited in Melbourne.

As negotiations continued, they grew larger and longer. The cluster approach quickly gave way to more conventional ‘chapters’ including market access for goods, services, telecommunications, financial services, investment, technical barriers to trade (TBT), sanitary and phytosanitary (SPS) barriers to trade, intellectual property rights and government procurement.

Table 1 lists the schedule of official meetings. In the third round of negotiations in Brunei in October 2010, Malaysia officially joined to become the ninth TPP member country.

During the protracted negotiation period, each member country has used different methods to reach out and engage with various domestic stakeholders. These range from encouraging public submissions and comments for officials to small, private sessions

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<sup>28</sup> Vietnam joined as a full member prior to the October 2010 meeting in Brunei.

<sup>29</sup> There were six ‘cluster’ groups at the meeting—a figure dictated by the number of rooms available in the conference setting, rather than by any carefully calculated thoughts about the appropriate number of clusters. Interviews with Singapore officials, April 2010.

arranged by industry or by government. In addition, TPP officials have encouraged participation by stakeholders in conjunction with negotiating rounds from the very beginning. In the Auckland meeting, for example, 112 registered stakeholders were organized into sessions featuring short briefings.<sup>30</sup> Similar stakeholder meetings were subsequently continued at future negotiating rounds.

It was not until early 2011 that the official meetings took on more substance. The February 2011 meeting in Chile featured 675 officials meeting for a week.<sup>31</sup> The agenda expanded considerably as well, with the exchange of draft offers and early progress on drawing up legal texts. Work began on exchanging specific offers for market access in goods, telecommunications, customs cooperation, financial services, technical barriers to trade (TBT), legal and institutional issues as well as the environment.<sup>32</sup>

Heading into the sixth round of negotiations in Singapore, officials were very conscious of the promise to complete the agreement before the APEC Leaders Meeting in Honolulu, Hawaii, in November 2011. This put additional pressure on officials to keep moving ahead in a rapidly expanding agenda. The length of the sessions expanded to nearly two weeks. More official offers were exchanged in the days leading up to the Singapore meeting, including services, investment, government procurement, and product-specific rules of origin. Regulatory coherence, supply chain management, enhancing regional competitiveness, promoting development, and engagement with small and medium enterprises (SMEs) were all grouped together into one issue area called either 'horizontal' issues or 'new' issues.

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<sup>30</sup> Mark Sinclair, 'Is TPP Shrouded in Secrecy?' *TPP Talk*, July 5, 2011.

<sup>31</sup> Speech of Tim Groser, 'US-NZ Partnership Forum,' February 21, 2011.

<sup>32</sup> 'USTR Says Fifth TPP Round Made Progress; Services, Investment Offers to be Exchanged,' *International Trade Reporter*, February 24, 2011.

#### **4 New members**

Although the original P4 included the accession clause for new entrants, it did not specify the mechanism for doing so. As the negotiations moved forward, it was necessary to establish that procedure. Existing members agreed that aspiring members needed to hold a series of bilateral meetings with each existing TPP member country. These bilateral meetings were intended to determine the level of interest and commitment from the aspiring state as well as discuss some of the more sensitive bilateral issues that would come up in official negotiations. After all TPP members approved of the new member on a bilateral basis, the potential new member had to attend a formal meeting of all TPP member countries and seek official approval from the collective whole.

One early ‘rule’ adopted by TPP negotiators prohibited observers. Vietnam had initially asked to join the talks as an observer, rather than as a full member. The group accepted this position, provided that Vietnam announced its intention to continue as a full member within three rounds of negotiations. Vietnamese negotiators were told that they must either join or remove themselves from the discussions at that point.<sup>33</sup> Vietnam officially joined the talks as a full member with an announcement by State President Nguyen Minh Triet at the APEC Leaders’ Meeting in Yokohama in November 2010.

For most of the other TPP member states, the addition of Vietnam as a formal member was important for two primary reasons. First, the market opportunities in Vietnam with a population of 85 million people and growth rates approaching 10% per year could be substantial. This consideration was especially important for the United States, which does not have an FTA in place with Vietnam. Many of the other TPP members receive economic benefits through their participation in various ASEAN FTA agreements, as Vietnam is an

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<sup>33</sup> Interview with TPP negotiators, November 2009. The same ‘rule’ was repeatedly mentioned for Japan - there was to be no ‘fly on the wall’ observation as talks were reserved only for committed members.

ASEAN member, and Australia and New Zealand are covered under the Australia/New Zealand/ASEAN agreement.

Second, negotiators like to present the TPP as an agreement that ties together not only three different continents, but also countries at different levels of development. It should not be seen simply as a ‘rich country’ club. If Vietnam did not join the agreement in the early stages, it would be harder to make a claim for diverse membership that pulls in developed and developing countries alike.

The chief obstacle to early Vietnamese entry was the level of sacrifice that Vietnam would have to make as a full member in the TPP. As a late-entrant into the WTO in January 2007, Vietnam had to commit to significant and often painful economic reforms at the domestic level. Implementation of all these commitments takes time. Many Vietnamese officials were concerned about adding another layer of promises for reform too quickly.<sup>34</sup> This was particularly true as other TPP states have always been clear that membership would entail change in favor of greater trade liberalization from every participant. It was not obvious just how many additional commitments Vietnam would have to make as a member.

The demands for greater liberalization have not stopped other countries from expressing an interest in the talks. Malaysia took all the formal steps necessary to join the group, including bilateral meetings with each member. Malaysian government officials argued that they were, indeed, prepared to take radical steps in liberalizing their domestic economy. This included opening up previously sensitive areas like government procurement and considering changes to the *bumiputra* policy that favors ethnic Malays. These two issues were largely responsible for the postponement of bilateral free trade talks with the United States in 2009. These reforms had already been planned as part of a broader overall program

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<sup>34</sup> Interviews with Vietnamese officials in Geneva, September 2009. Of course, some see external pressure as a desirable way to keep momentum behind domestic level reforms that can stall.



of domestic economic reorientation.<sup>35</sup> As a result of this seriousness of intent, Malaysia scheduled a group meeting at the third round of talks in Brunei in October 2010 and formally became a TPP member after approval of the membership.

Further expansion of TPP membership at the end of 2010 had looked increasingly likely. Canada was one of the first potential members approached to join the original P4 agreement. At that time Canadian officials did not take up the offer.<sup>36</sup> In August 2010, Canada sent a team of negotiators to conduct bilateral negotiations with member countries, but was rebuffed in October. The message given to Canadian diplomats noted that Canada still had a 'range of issues' that had not yet been addressed to the satisfaction of the existing TPP membership.<sup>37</sup>

There are at least two reasons given for this rejection. First, Canada has a complicated system in place at the domestic level to manage trade in dairy and poultry products. These systems, of long-standing design, were implemented originally to encourage the survival of Canadian farmers in the face of fierce competition from the United States. The supply management system for dairy, for example, includes both tariff protection as well as quotas for individual farmers. Specific items subject to supply management include dairy, eggs and egg hatching, chicken and turkey. The initial position of the Canadian government was to request that the dairy sector be exempted from market access discussions in the TPP. This was viewed as unacceptable, especially to New Zealand, which is the world's most competitive dairy exporter.<sup>38</sup> Second, the United States objected to Canadian membership in

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<sup>35</sup> See 'With Elections in Mind, Najib Unveils Reforms', *South China Morning Post*, 6 July 2011.

<sup>36</sup> Yuen Pau Woo, 'Canada Risks Being Left Out of Trans-Pacific Trade Deal,' Asia Pacific Foundation of Canada, November 14, 2008.

<sup>37</sup> See 'Canada Still In No Position to Join TPP Talks,' *Inside U.S. Trade*, October 25, 2010.

<sup>38</sup> See, for example, the remarks by New Zealand Prime Minister John Key in Ottawa, 'Key at Odds with Canada Over Trade Protectionism,' *New Zealand Herald*, April 16, 2010.

the TPP either because of issues with intellectual property rights or complications related to membership in NAFTA.<sup>39</sup>

## 5 Structural issues

One of the most vexing early issues in the TPP revolved around how to relate the new agreement to existing PTAs. The nine countries involved already have a dense web of trade agreements between them, as shown in Table 2. This is part of the ‘spaghetti or noodle bowl’ problem of proliferating trade agreements.<sup>40</sup>

Of the 36 bilateral preferential arrangements possible between the nine TPP members, only eleven are not covered by existing agreements, most with Peru and the United States.<sup>41</sup> Because each agreement has different rules, it is not so easy to simply ‘stitch them all together’ in a new agreement. The treatment of sugar in existing PTAs serves as an example. Sugar is included in some existing bilaterals, ignored in others, and specifically excluded in some like the U.S.-Australia agreement. It is not possible for the United States to create a unified commitment on sugar that matches the treatment of all existing agreements without replacing all existing agreements with a completely new set of rules.

As an additional complication, several TPP countries already have multiple agreements in place. Singapore and New Zealand currently have three different PTA agreements in force: the New Zealand-Singapore Closer Economic Partnership (NZSCEP), the P4, and the Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand

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<sup>39</sup> Both interpretations have been given to the authors by non-American TPP participants, October 2010-February 2011. Two Canadian trade experts, Wendy Dobson and Diana Kuzmanovic, have argued that NAFTA itself could be strengthened by TPP participation. Dobson and Kuzmanovic, ‘Differentiating Canada: The Future of the U.S.-Canada Relationship,’ SPP Research Papers, University of Calgary, Vol. 3, Issue 7, November 2010.

<sup>40</sup> The term was first coined by Jagdish Bhagwati in a 1995 book chapter, ‘U.S. Trade Policy: The Infatuation with Free Trade Agreements’ in Bhagwati and Anne O. Krueger, *The Dangerous Drift to Preferential Trade Agreements*, (Washington: AEI Press). Bhagwati was talking about how complex rules of origin, intended to determine that only firms from relevant countries in a PTA receive benefits from the agreement, create new trade patterns that are frequently inconsistent with economic efficiency. Under the noodle bowl, products and parts are shipped from country to country before finally ending up in the consumer marketplace. Each of these transactions could be visualized as a piece of string, tangled up together in increasingly complex arrangements.

<sup>41</sup> The ‘missing’ dyads are: Peru/Australia, Brunei, Malaysia and New Zealand; United States/Brunei, Malaysia, New Zealand and Vietnam; and Vietnam/Chile, New Zealand, Peru and the United States. Malaysia/Chile is signed but not yet in force. Vietnam/Chile is still under negotiation.

agreement (AANZFTA), in addition to most favored nation (MFN) treatment under the WTO. Each of these agreements has slightly different rules. For example, services trade is handled under both a negative list (everything except the listed sectors is open to trade) and a positive list (nothing except the listed sectors is open to trade) approach. New Zealand and Singapore business can choose to use whichever rules they like.

Negotiators in both countries have argued that allowing business to use whatever agreement gives them the greatest benefits will result in more trade between the two countries. This may be true. It does, however, come at a cost, especially for smaller and medium-sized enterprises. Any business that wishes to take advantage of the preferences granted under one agreement has to wade through complex information about all of them to find out what options exist. The paperwork requirements, for example, in preparing customs forms properly to qualify for advantages in any goods shipment can be daunting, although lucrative for consultants and customs specialist firms. Such complexity is surely part of the reason for the relatively low utilization rates among businesses of different PTA provisions.

Overlapping agreements created many issues for TPP negotiators. One important debate was how the new agreement would relate to existing PTAs. From the beginning, three broad models were possible: 1) the TPP agreement would supersede existing bilateral PTAs between members; 2) the TPP would exist side-by-side with all the existing agreements (and, like Singapore and New Zealand, business will be allowed to choose whichever agreement gives them the greatest benefits; or 3) the TPP would become a hybrid agreement in which some sections of the TPP replaced existing agreements in some areas while other portions of existing PTAs that were not covered or covered differently would continue to exist.

Early discussions in the TPP suggested that the first option was preferable. A new TPP agreement would replace existing arrangements. This meant replace in the practical sense, however, as existing PTAs would not be revoked. Assuming that the new TPP deal

provides better, wider ranging liberalization and coverage than existing agreements, business would likely take advantage of the TPP preferences. The net effect would be the replacement of existing deals with a new agreement.

This outcome would clearly help in untangling the noodle bowl, as businesses across the nine member countries would be working from the same agreement. This would streamline trade flows by allowing exporters to, for example, make only one rule of origin (ROO) calculation before shipping goods to multiple TPP members. The payoff from a comprehensive agreement would be even greater if the TPP expands in the future to include more members.

The ‘replacement model’ for the TPP would also help negotiators in reaching a ‘21<sup>st</sup> century’ standard for the agreement, as ‘best practices’ learned through experience in different PTA settings could be incorporated into the TPP. Although PTAs have a clause allowing for regular reviews, existing agreements are almost never ‘reopened.’ Modifications to existing deals are rare and usually quite limited. If negotiators have failed to ‘get it right’ the first time or if modalities in negotiations have changed substantially over time, there are few mechanisms for large-scale changes in the future. This may be a function of the relatively short history of PTA negotiations.

Another argument for a wholly new agreement is that it would increase incentives for government officials and business leaders to take the talks seriously. The document would replace a host of existing agreements - it would focus and sharpen minds. Ignoring existing agreements and starting over with new negotiations might be easier for negotiators who could then aim for an ideal outcome from the beginning.

These initial impulses, however, gave way to economic and political realities in some member countries. Many of the provisions in existing PTA agreements were carefully crafted compromises, offering a balance of benefits, opportunities and cost to the economic interests

in each member state. Under an expanded TPP, even if the original PTA arrangements remain in place, some of these previous agreements would be altered or even undermined. The same favorable deal struck with one state in a PTA might not be extendable to the larger membership. This would unravel the partnerships in place between some states from previous deals (although setting up new potential coalitions). For example, although sugar would still be officially excluded from a preferential deal under the existing U.S.-Australian PTA, Australia might be able to export sugar to the United States under a new TPP agreement. Attempting to fix this ‘back door channel’ into the U.S. market and keep out Australian sugar in the future would create a much more complicated TPP agreement.

As a result of the problems of replacing existing PTAs, by the beginning of 2011, the United States began to argue against ‘reopening’ existing agreements.<sup>42</sup> For the United States, the best outcome for narrow individual objectives was likely obtained by bilateral negotiations. As the most powerful country in the talks with a market size that dominates the rest of the group, the United States can largely get what it wants in bilateral settings. (It may, of course, also dominate in larger group settings, although this is likely to be more difficult, especially if the remaining eight members remain united in opposition.) It has demonstrated this ability repeatedly vis-à-vis this group of countries and can be seen by examining the existing PTA arrangements. Because the U.S.-Peru agreement was negotiated most recently, it contains some of the strongest rule provisions to date - some of which intrude deep into Peruvian domestic arenas. Even Australia, regarded as the second most powerful state at the TPP table, was unable to prevail over the U.S. in bilateral negotiations. We have already discussed the sugar issue. Of greater importance to Australia, however, was the set of new

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<sup>42</sup> See ‘TPP Negotiators Unable to Reach Consensus on Key Structural Issues,’ *Inside U.S. Trade*, Vol. 28, No. 24, June 18, 2010.

rules governing intellectual property rights and the abilities of public health authorities in Australia to regulate pharmaceutical products.<sup>43</sup>

In the TPP, therefore, the United States proposed that it conduct negotiations by opening bilateral talks with countries with which it does not already have a PTA. It would then attempt to get an agreement that includes the most critical items on its agenda. At the end of the day, the eight different bilateral deals with the Americans will be put onto the table. Anything not already covered in these bilateral agreements could be addressed multilaterally among the nine. The final document, then, would include a partial ‘common’ agreement that applied to all nine countries as well as some separate annexes and schedules with specific commitments for individual countries.

In practice, this means that the TPP will simply be another PTA added to the mix of potential rules governing trade with members. The second round of TPP talks in San Francisco in June 2010 failed to settle the issue of how the TPP would sit in relation to other PTAs. The United States came out as a strong supporter of keeping existing market access agreements from bilateral PTAs. Singapore, Australia and New Zealand argued hard for a comprehensive agreement in the TPP that would supersede existing PTA agreements.<sup>44</sup>

The issue is most stark in market access for goods, since all of the existing PTAs contain various provisions for reducing barriers to trade in goods. (This is different from services, for example, since not all existing PTAs have rules covering services or offer the same comprehensive approach to liberalizing trade in services between partners.) The lead negotiators and heads of trade departments dealing with goods met formally three times between March and August 2010 in an attempt to deal with the vexing issue of how to negotiate. At the end of the third ‘inter-sessional’ meeting in Peru, the group essentially

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<sup>43</sup> For a discussion of the deal for Australia, see Ann Capling, 1995, *All the Way with the U.S.A.: Australia, the U.S., and Free Trade* (Sydney: University of New South Wales).

<sup>44</sup> See ‘TPP Negotiators Unable to Reach Consensus on Key Structural Issues,’ *Inside U.S. Trade*, Vol. 28, No. 24, June 18, 2010.

decided not to decide.<sup>45</sup> Instead of agreeing to negotiate bilaterally or multilaterally, officials reached an interim ‘agreement’ to avoid discussing it any longer. They agreed to ‘skip over’ the issue and focus instead on offering specific market access deals to various members.<sup>46</sup>

This agreement to not agree was packaged as offering the most ‘flexibility’ and ‘ambiguity.’ The parties involved admitted privately that the best outcome for the institution would be a single, unified market access schedule that would be applied evenly to all TPP member countries.<sup>47</sup>

This is not simply a theoretical argument. On a practical level, the amount of work it will take to manage a ‘hybrid’ system will be significant. The United States has had some experience with the added complexity of such a system. When Mexico joined the existing U.S.-Canada PTA to form the North American Free Trade Agreement (NAFTA), officials had to devise a scheme to keep in place the existing PTA benefits of the U.S.-Canada agreement that was already in force while simultaneously phasing in tariff reductions for Mexican goods. As an example, suppose a manufacturer of nails was eligible for zero tariffs under the Canada-U.S. PTA while Mexican nails were still subject to an interim tariff of six percent. Officials had to create a rule that all incoming products needed to be marked with a country of origin label in order to differentiate between Canadian, American and Mexican nails crossing the border.<sup>48</sup> Customs officials could subsequently apply the correct tariff rates to the particular shipment. However, the calculation of tariffs was made more difficult, and

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<sup>45</sup> ‘TPP Countries Reach Initial ‘Deal’ on How to Handle Market Access Talks,’ *Inside U.S. Trade*, Vol. 28, No. 37, September 24, 2010.

<sup>46</sup> The United States tabled its first market access offers to Brunei, Malaysia, New Zealand, and Vietnam in mid-January. These confidential offers were viewed with a great deal of interest by other TPP members, as it gave the first concrete glimpse of how expansive the Americans were really willing to be in negotiations. Despite early promises of full market access with no preconditions, the initial offers placed several sensitive items into a basket labeled as ‘undefined.’ See Chapter 6 and ‘U.S. TPP Goods Market Access Offer Leaves Some Questions Unanswered,’ *Inside U.S. Trade*, February 4, 2011.

<sup>47</sup> Interviews, 2010.

<sup>48</sup> The marking rule still exists for most products in NAFTA, although the tariffs are now harmonized across all three countries. The issue could be minimized in the TPP by the use of a single rule of origin (ROO) calculation method, but since this will conflict with some of the ROOs currently contained in existing PTAs, it is also likely that some product-specific, country-specific ROOs will continue in the TPP if existing agreements are not replaced. See ‘U.S. Mulls NAFTA-like Marking Rules to Determine Tariffs under TPP,’ *Inside U.S. Trade*, Vol. 28, No. 37, September 24, 2010.

more complex, in the meantime. Furthermore, as tariffs were phased out over time, the calculations for our hypothetical example of nails would change from year to year across the time period of the phase out. To expand this system across nine or more TPP member countries will be logistically difficult, time consuming and cumbersome.

A related issue has had to do with criticism of country labeling. However, the inconvenience could pale in comparison if we were to compare the situation where there is no TPP labeling regime. Deciding origin would fall under the substantial transformation rule under the US law. Because substantial transformation is a common law rule (i.e. it is judge-made), there is an element of uncertainty within it which is best avoided by having a more clear-cut labeling regime and practice instead.<sup>49</sup>

## **6 The race to Hawaii**

Despite valiant efforts by officials in trying to narrow gaps and get agreement on the wide range of issues under consideration in Singapore, by the conclusion of the meetings in early April 2011 it was clear that the full deal would not be wrapped up by November's APEC meeting. The final press briefing by the Singapore Chief Negotiator promised only 'substantial' completion of the round by that date.

Up to 800 officials participated in meetings in Ho Chi Minh City in June 2011 across a two-week time period. As with the previous Singapore meeting, the negotiating period had been extended to allow for intensified work. The negotiators discussed some new proposals, including additional sections on intellectual property, services, transparency, telecommunications, customs and the environment.<sup>50</sup> The horizontal issues were refined into

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<sup>49</sup> 'U.S. Mulls NAFTA-like Marking Rules to Determine Tariffs under TPP', *Inside US Trade*, 24 September 2010. For the substantial transformation rule under U.S. law, see *Superior Wire, A Div. of Superior Products Co. v. United States*, 669 F. Supp. 472 (1987) (USCIT's approach to 'name, character or use' test); *Boltex MFG Co. v. U.S.*, 24 C.I.T. 972, 140 F. Supp.2d 1339 (2000) (USCIT upholding producers' goods/consumers' goods – the so-called 'Midwood distinction').

<sup>50</sup> Media briefing, Vietnam's Chief Negotiator, June 24, 2011. Some chapters were still missing draft texts, as everyone waited for the American draft to begin the discussions. The U.S. was unable to table new texts in some of the most controversial areas, like sections of the intellectual property rights or investment chapters, as well as



four cross-cutting issues: competitiveness and business facilitation, small and medium enterprise (SMEs) support, regulatory coherence, and economic development. Some of the chapter negotiators met in joint sessions to ensure that officials were aware of progress made in other, parallel sessions.

Although it was clear that the deadline for a completed agreement was going to be missed, officials continued to meet in intense sessions through a ninth round in Peru in October 2011. At the APEC Leader's Meeting in Honolulu on November 12, 2011, officials released a five-page 'broad outlines' of the agreement to the public. The statement noted the following defining features for the TPP: comprehensive market access; fully regional agreement; cross cutting trade issues (the 'horizontal issues'); new trade challenges (digital economy and green technology); and a living agreement.

In alphabetical order, the document noted that legal texts had been prepared in the following areas: competition; cooperation and capacity building; cross-border services; customs; e-commerce; environment; financial services; government procurement; intellectual property; investment; labor; legal issues; market access for goods; rules of origin; sanitary and phytosanitary standards (SPS); technical barriers to trade (TBT); telecommunications; temporary entry; textiles and apparel; and trade remedies. These texts were nearly completed in some areas but had many brackets indicating disagreements in other areas.

## **7 Add in Japan, Canada and Mexico**

Overshadowing the presentation of the framework, however, was the announcement of the Prime Minister Yoshihiko Noda that Japan would seek entry into the TPP. His statement was quickly followed by a renewed expression of interest by Canada and a new announcement of intent to join by Mexico.

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proposed texts for labor pending the resolution of America's three unratified PTAs (Korea, Panama, and Columbia) waiting for Congressional approval.

Japan, the Prime Minister argued, need to move ahead with membership in the TPP. This was true even though it meant taking on some powerful domestic interests. Indeed, the statement on Japanese intent was made after a long week of intense discussions inside the political system in Tokyo in the run up to the Honolulu meeting. A press conference had to be postponed several times and the Prime Minister's statement was only made as he departed for Hawaii.

Adding Japan to the TPP changes the nature of the PTA considerably. It brings the world's third largest market into the mix. Although Japan has a PTA with ASEAN and another with Peru, it does not have an agreement with the United States or New Zealand. An agreement with Australia is under negotiation. Many of the existing partnership agreements with Japan, however, carve out sensitive sectors, especially agriculture, which will not be possible under the TPP. It is for this reason that Japanese farmers were out in strong protest in early November 2011 in Tokyo.

The government has recognized that current agricultural practices are unsustainable in Japan.<sup>51</sup> It has pledged to put all issues on the table in the negotiation. This means that many of the topics that have nearly led to trade wars in the past with the Americans – including beef, autos, insurance, postal services – will be up for negotiation as part of the TPP in the future, which should make for some lively discussions.

The timing of entry for the new members is uncertain. The November APEC statement mentioned a deadline of June 2012, which most observers immediately dismissed as unrealistic (even before the potential addition of new members). One additional complication is the lack of Trade Promotion Authority (TPA) in the United States for talks with Japan. As discussed in Chapter 3, the Americans have been negotiating throughout the TPP 'as if' TPA is in effect. USTR has argued that it has Congressional approval for talks

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<sup>51</sup> See, for example, the Interim Report for the Revitalization of Japan's Food, Agriculture, Forestry and Fisheries, August 2, 2011, The Council to Promote the Revitalization of Food, Agriculture, Forestry and Fisheries.

with all the other countries – but there is no authorization for conducting negotiations with Japan.<sup>52</sup> This makes it unclear how soon Japan (and Canada and Mexico) could join the talks.

It also remains unclear whether Japan, Canada and Mexico are going to be allowed to join the negotiations as they are underway or are being asked to accede to the existing texts. At the time of the announcements in November, the governments of the three new aspiring members clearly anticipated joining negotiations in progress.

What is certainly true is that the addition of other new members to the eventual agreement is critical. Even the most enthusiastic supporters of the TPP recognize limited economic benefits in the current configuration. The agreement will not really make a difference until and unless at least one other major economy joins - especially from Northeast Asia. This means that every clause in the TPP has to be negotiated with one eye on potential members. If the agreement is too restrictive, burdensome, or delivers too few benefits, other states will not bother to apply for membership. This will dilute the importance of the whole agreement. Negotiators must continuously remember not only their own narrow interests or even the interests of the bigger, existing group, but also consider the interests of a potentially much larger future institutional grouping.

Although the TPP is being designed to allow other states to join, the entire agreement cannot be renegotiated for each new member. At a certain point, the agreement will have to be closed for new membership - after that, economies could still elect to accede, but they would have to accept the deal on the table as given (subject, presumably, to minor modifications and certain conditions for entry). In this regard, it will be like new members joining the WTO. Each time a new state joins the WTO, it does not renegotiate all the previously existing commitments, but rather negotiates over the specific terms of admission for itself.

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<sup>52</sup> TPA was active when the TPP began with the seven original countries. Malaysia was added under the argument that USTR had prior authorization under the now-dormant bilateral PTA dialogue. Canada and Mexico could presumably be added by invoking NAFTA authorization. There is nothing comparable for Japan.

This view towards potential members significantly complicates the negotiations. It is not just managing the complexities of the current nine who need to be accommodated, but also potential future members. It is this kind of deep complication that have drawn out the negotiations in the TPP well past the original, November 2011, deadline.

Table 1: Rounds of TPP Negotiations

Round	Date Started	Location
1	March 15-18, 2010	Melbourne, Australia
*	June	APEC Trade Ministers Meeting, Sapporo, Japan
2	June 14-18, 2010	San Francisco, USA
3	October 4-9, 2010	Brunei Darussalam, Brunei
+	November 2010	APEC Leaders Meeting, Japan
4	December 6-10, 2010	Auckland, New Zealand
5	February 14-18, 2011	Santiago, Chile
6	March 28-April 2, 2011	Singapore
*	May 2011	APEC Trade Ministers Meeting, Big Sky, Montana, USA
7	June 20-24, 2011	Ho Chi Minh City, Vietnam
8	September 6-16, 2011	Chicago, USA
9	October 24-28, 2011	Lima, Peru
+	November 2011	APEC Leaders Meeting, Honolulu, USA

\* APEC Trade Minister Meeting

+ APEC Leaders Meeting

Table 2: Overlapping PTA Structures in TPP Member Countries

	Australia	Brunei	Chile	Malaysia	New Zealand	Peru	Singapore	United States	Vietnam
Australia		• AANZFTA (2010)	• ACiFTA (2009)	• AANZFTA (2010)	• ANZCERTA (1983) • AANZFTA (2010)		• SAFTA (2003) • AANZFTA (2010)	• AUSFTA (2005)	• AANZFTA (2010)
Brunei	• AANZFTA (2010)		• P4 (2006)	• AFTA (1982) • AANZFTA (2010)	• P4 (2006) • AANZFTA (2010)		• AFTA (1982) • P4 (2006)		• AFTA (1982) • AANZFTA (2010)
Chile	• ACiFTA (2009)	• P4 (2006)		• MCFTA (2011)	• P4 (2006)	• Peru-Chile (2009)	• P4 (2006)	• US Chile (2004)	
Malaysia	• AANZFTA (2010)	• AFTA (1982) • AANZFTA (2010)	• MCFTA (2011)		• MNZFTA (2010) • AANZFTA (2010)		• AFTA (1982) • AANZFTA (2010)		• AFTA (1982) • AANZFTA (2010)
New Zealand	• ANZCERTA (1983) • AANZFTA (2010)	• P4 (2006) • AANZFTA (2010)	• P4 (2006)	• MNZFTA (2010) • AANZFTA (2010)			• ANZSCEP (2001) • P4 (2006) • AANZFTA (2010)		• AANZFTA (2010)
Peru			Peru-Chile (2009)				• PeSFTA (2009)	• PTPA (2009)	
Singapore	• SAFTA (2003) • AANZFTA (2010)	• AFTA (1982) • P4 (2006)	• P4 (2006)	• AFTA (1982) • AANZFTA (2010)	• ANZSCEP (2001) • P4 (2006) • AANZFTA (2010)	• PeSFTA (2009)		• USSFTA (2004)	• AFTA (1982) • AANZFTA (2010)
United States	• AUSFTA (2005)		• US - Chile (2004)			• PTPA (2009)	• USSFTA (2004)		
Vietnam	• AANZFTA (2010)	• AFTA (1982) • AANZFTA (2010)		• AFTA (1982) • AANZFTA (2010)	• AANZFTA (2010)		• AFTA (1982) • AANZFTA (2010)		

- AANZFTA: ASEAN-Australia-New Zealand Free Trade Area, January 1, 2010
- ACiFTA: Australia Chile Free Trade Agreement, March 6, 2009
- AFTA: ASEAN Free Trade Agreement, January 28, 1992
- ANZCERTA: Australia New Zealand Closer Economic Relations Trade Agreement, January 1, 1983
- AUSFTA: Australia United States Free Trade Agreement, January 1, 2005
- MCFTA: Malaysia-Chile Free Trade Agreement, Signed November 28, 2010, (expected implementation in 2011)
- MNZFTA: Malaysia-New Zealand Free Trade Agreement, August 1, 2010
- P4: Trans-Pacific Strategic Economic Partnership Agreement, May 28, 2006
- Peru Chile Free Trade Agreement, March 1, 2009
- PeSFTA: Peru Singapore Free Trade Agreement, August 1, 2009
- PTPA: United States Peru Trade Promotion Agreement, February 1, 2009
- SAFTA: Singapore Australia Free Trade Agreement, July 28, 2003
- United States-Chile Free Trade Agreement, January 1, 2004
- USSFTA: United States Singapore Free Trade Agreement, January 1, 2004

Note: Chart does not include ASEAN-China, ASEAN-India, ASEAN-South Korea or ASEAN-Japan which would connect ASEAN members Brunei, Malaysia, Singapore and Vietnam together again

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