TPP-11 AS A MEANS TO REVIVE THE TPP AFTER U.S.' WITHDRAWAL

Junji Nakagawa*

ABSTRACT

This article analyzes the means of reviving the Trans-Pacific Partnership (hereinafter "TPP") from its frustration as a result of the withdrawal of the U.S. in January 2017. After briefly tracing the history of the TPP from its inception as a Pacific four (hereinafter "P4") agreement between Brunei Darussalam, Chile, New Zealand and Singapore in the early 2000s to its enlargement in 2008 by the United States (hereinafter "U.S.") declaration to join the TPP negotiation, the conclusion of the negotiation with its signature in February 2016, and then through the U.S. withdrawal, the article traces the developments after the U.S. withdrawal to revive the TPP without the U.S., focusing on the TPP-11 Trade Ministers' pledge to revive the TPP in May and the following Chief Negotiators' Meeting in July. The article then explores the possible options for realizing the TPP with its original 11 negotiating parties excepting the U.S. It concludes with the assertion that the TPP should be entered into force even without the U.S., as it should become a model of the 21st century regional trade agreement, as envisioned by the U.S.

* Professor of International Economic Law, Institute of Social Science, The University of Tokyo. The author can be reached at: nakagawa @iss.u-tokyo.ac.jp. The author would like to express his sincere gratitude to Chang-fa Lo, Meredith Kolsky Lewis, Yuka Fukunaga, Tomohiko Kobayashi, Fernando Diaz Simoes, Andrew Mitchel, Tsai-yu Lin, Jun'ichi Sugawara, Mitsuo Matsushita, and Osamu Umejima for their insightful comments on the earlier version of this article. The author takes sole responsibility for the content of this article.

臺灣大學國際經濟法學術資料庫

KEYWORDS: *TPP (Trans-Pacific Partnership), mega-FTAs, P4 (Pacific four), President Trump, U.S. trade policy, APEC (Asia-Pacific Economic Cooperation), RCEP (Regional Comprehensive Economic Partnership)*

臺灣大學學術期刊資料庫

I. INTRODUCTION

U.S. President Donald Trump issued a Presidential Memorandum on Jan. 23, 2017, immediately after his inauguration, regarding withdrawal of the U.S. from the Trans-Pacific Partnership negotiations and agreement,[1] and directed the U.S. Trade Representative (hereinafter "USTR") to withdraw the U.S. from the TPP negotiating process. The Office of the USTR sent a letter to the signatories of the TPP and to the Depositary of the TPP, namely New Zealand, notifying them that the U.S. had formally withdrawn from the agreement following guidance from the U.S. President on Jan. 30, 2017.[2]

President Trump's withdrawal from the TPP was the fulfillment of his campaign promise. In his 7 Point Plan to Rebuild the American Economy by Fighting for Free Trade, he pledged to withdraw from the TPP.[3] On Nov. 21, 2016, soon after he was elected the U.S. President, in his video message, Mr. Trump pledged to withdraw from the TPP "from day one".[4] That was exactly what he did for the TPP. With this, the TPP could not

---

[1] *See* Office of the Press Secretary, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, WHITE HOUSE (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific.

[2] *See The United States Officially Withdraws from the Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE (Jan. 30, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.

[3] *See* Stars and Stripes Forever Pac, *Donald J. Trump's Vision*: *Donald J. Trump's 7 Point Plan to Rebuild the American Economy by Fighting for Free Trade*, FACEBOOK (Oct. 1, 2016), https://www.facebook.com/notes/the-2016-committee/donald-j-trumps-vision/1251246731604221/:

> 1. Withdraw from the Trans-Pacific Partnership, which has not yet been ratified.
> 2. Appoint tough and smart trade negotiators to fight on behalf of American workers.
> 3. Direct the Secretary of Commerce to identify every violation of trade agreements a foreign country is currently using to harm our workers, and also direct all appropriate agencies to use every tool under American and international law to end these abuses.
> 4. Tell NAFTA partners that we intend to immediately renegotiate the terms of that agreement to get a better deal for our workers. If they don't agree to a renegotiation, we will submit notice that the U.S. intends to withdraw from the deal. Eliminate Mexico's one-side backdoor tariff through the VAT and end sweatshops in Mexico that undercut U.S. workers.
> 5. Instruct the Treasury Secretary to label China a currency manipulator.
> 6. Instruct the U.S. Trade Representative to bring trade cases against China, both in this country and at the WTO. China's unfair subsidy behavior is prohibited by the terms of its entrance to the WTO.
> 7. Use every lawful presidential power to remedy trade disputes if China does not stop its illegal activities, including its theft of American trade secrets – including the application of tariffs consistent with Section 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962.

[4] *See* Going Viral, *President-Elect Trump Outlining Plans for First 100 Days*, YOUTUBE (Nov. 21, 2016), https://www.youtube.com/watch?v=u2Z_4z1EWAY.

臺灣大學學術期刊資料庫

enter into force, as the withdrawal of the U.S. made it impossible for the TPP to satisfy any of the three possible conditions for entry into force.[5]

The Japanese government initially took the position that it would try to persuade the Trump Administration to back off and to return to the TPP, by tenaciously explaining the strategic and economic significance of the TPP to President Trump.[6] However, it abandoned this position in April and steered itself in the direction of reviving the TPP with 11 negotiating members without the U.S.[7] Trade ministers and vice ministers of the 11 countries met in Hanoi on May 21, 2017 and agreed to launch a process to assess options to bring the TPP into force expeditiously. They tasked their senior trade officials to complete the assessment before they met in the margins of the Asia-Pacific Economic Cooperation (hereinafter "APEC") Economic Leaders Meeting on 10-11 November in Da Nang, Vietnam.[8]

This article explores the means by which the TPP can be revived with 11 negotiating members without the U.S. (hereinafter "the TPP-11"). After briefly tracing the history of the TPP from its inception as a Pacific Four among Brunei Darussalam, Chile, New Zealand and Singapore in the early 2000s, to its enlargement in 2008 by the U.S. declaration to join the TPP negotiation, the conclusion of the negotiation with its signature in February 2016, and through the U.S. withdrawal (Section II), it traces the developments after the U.S. withdrawal to revive the TPP without the U.S., focusing on the TPP-11 Trade Ministers' pledge to revive the TPP in May and the following Chief Negotiators' Meeting in July (Section III). The paper then explores the possible options for realizing the TPP with its original 11 negotiating parties excepting the U.S. (Section IV). It concludes with the assertion that the TPP should be entered into force even without

---

[5] According to Article 30.5 of the TPP, there are three options for the TPP to enter into force. First, it shall enter into force 60 days after the date on which all original signatories have notified the Depositary of the completion of their applicable domestic legal procedures for ratification (Article 30.5(1)). Secondly, in the event that not all signatories have notified the Depositary of the completion of their ratification procedures within two years of the date of its signature, it shall enter into force 60 days after the expiry of this period if at least six signatories, which together account for at least 85 per cent of the combined GDP of the original signatories of 2013 have notified the Depositary of the completion of their ratification procedures (Article 30.5(2)). Thirdly, in the event that TPP does not enter into force under Article 30.5(1) or Article 30.5(2), it shall enter into force 60 days after the date on which at least six signatories, which together account for at least 85 per cent of the combined GDP of the original signatories of 2013 have notified the Depositary of the completion of their ratification procedures (Article 30.5(3)). As the U.S. accounts for 65% of the combined GDP of the original signatories of 2013, the U.S. withdrawal from the TPP made it impossible for any of these three options to be implemented.

[6] *See* Prime Minister Abe's Speech at the Plenary Session of the House of Councilors, RECORD OF THE PLENARY SESSION, HOUSE OF COUNCILORS 1, 7 (Jan. 24, 2017) (in Japanese).

[7] *See Japan Steered Itself in the Direction of Promoting the TPP Without the U.S.: 11 Countries Are Going to Hold a Ministerial Meeting in May*, NIKKEI NEWSPAPER, Apr. 15, 2017 (in Japanese).

[8] *See* TRANS-PACIFIC PARTNERSHIP (TPP) AGREEMENT: MINISTERIAL STATEMENT (May 21, 2017), http://www.cas.go.jp/jp/tpp/naiyou/pdf/hanoi/170521_tpp_hanoi_statement_en.pdf.

the U.S., as it should become a model of the 21st century regional trade agreement, as envisioned by the U.S. (Section V).

II. THE WAY TO THE TPP, AND BEYOND

The origin of the TPP was a Trans-Pacific Strategic Economic Partnership Agreement, or Pacific Four, among Brunei Darussalam, Chile, New Zealand and Singapore.[9] Chile, New Zealand and Singapore announced their intention to initiate negotiations towards a trilateral closer economic partnership agreement, the P3 (Pacific Three), at the APEC meeting in Los Cabos, Mexico in October 2002.[10] Negotiations began in September 2003, and the P3 accepted Brunei Darussalam as a founding member of the Agreement in June 2004, thus becoming P4. Negotiations were concluded in June 2005, and the four countries signed the Agreement from July to August, 2005. The P4 entered into force on May 1, 2006.[11]

The Agreement was comprehensive in scope, including rules of origin (Chapter 4), customs procedure (Chapter 5), trade remedies (Chapter 6), sanitary and phytosanitary measures (Chapter 7), technical barriers to trade (Chapter 8), competition policy (Chapter 9), intellectual property (Chapter 10), and government procurement (Chapter 11). It also covers trade in services (Chapter 12).[12] While the Agreement did not include chapters on investment and financial services, its Articles 20.1 and 20.2 provided that the parties shall commence negotiations on these chapters no later than two years after the entry into force of the Agreement. In addition, Article 20.6 provided that the Agreement is open to accession by any APEC economy or other State. The negotiations were duly initiated in March 2008. The U.S. expressed its intention to join the negotiations according to Article 20.6 shortly before the initiation of the negotiation,[13] attended the negotiation in March 2008, and formally joined the negotiations in September 2009. Vietnam, Australia and Peru soon announced their intention to join, but it was not until late 2009 that the Obama Administration confirmed its

---

[9] *See* Meredith Kolsky Lewis, *Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities*, 4(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 401, 404-05 (2009).

[10] *See generally Trans-Pacific Strategic Economic Partnership Agreement (P4) Chile-Brunei Darussalam-New Zealand-Singapore: Background and Negotiations*, ORG. AM. STATES, http://www.sice.oas.org/TPD/CHL_Asia/CHL_Asia_e.ASP.

[11] TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP (P4), N.Z. FOREIGN AFF. & TRADES, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/p4/ (last visited Aug. 29, 2017).

[12] On the content of the P4 Agreement, see Lewis, *supra* note 9.

[13] *United States to Join Sectoral Negotiations with Four Asia-Pacific Countries Will Explore Participation in Broader Strategic Partnership Agreement*, OFF. U.S. TRADE REPRESENTATIVE (Feb. 3, 2008), https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2008/february/united-states-join-sectoral-negotiations.

臺灣大學學術期刊資料庫

participation. The Letters of Ambassador Ronald Kirk to the U.S. Congressional leaders, dated Dec. 14, 2009,[14] that announced the Obama Administration's intention to join the negotiations, clearly stated the U.S. goal for the negotiations of the Trans-Pacific Partnership, namely "to shape an eventual Trans-Pacific Partnership Agreement that is a new kind of trade agreement for the 21st century". The negotiations of the Trans-Pacific Partnership commenced in March 2010 with 8 members.[15] Malaysia joined during the third round in October 2010, followed by Mexico and Canada in June 2012, and by Japan in July 2013. The 12 members finally concluded the negotiations in November 2015, and signed the Agreement on February 6, 2016.

What was the U.S. goal for the TPP negotiations to "shape . . . a new kind of trade agreement for the 21st century"? The TPP Trade Ministers' Report to the Leaders, prepared by the trade ministers of the nine negotiating members on Nov. 11, 2011,[16] concisely expressed the content of the U.S. goal. First, it aimed at comprehensive market access to trade in goods and services and investment. Secondly, it aimed at constructing a regional agreement that facilitates the development of production and supply chains among TPP members. Thirdly, it aimed at dealing with cross-cutting trade issues, including regulatory coherence, competitiveness and business facilitation, small and medium-sized enterprises (SMEs), and development. Fourthly, it aimed at dealing with new trade challenges such as digital economy, green growth and pro-competitive business environment. Fifthly, it aimed at developing the TPP as a living agreement, that allows itself to evolve in response to developments in trade, technology or other emerging issues and challenges.

So as to understand these goals that the U.S. contemplated for the negotiation of the TPP, one must look at the developments in the governance of global trade and investment since the 1990s. Supply chains have been increasingly globalized since the 1990s. This new type of international division of labor is characterized by the unbundling of stages of production across borders.[17] Globalization of supply chains required a set of rules and policies that were different from those required by the

---

[14] *See Letters of Ambassador Ronald Kirk to the Speaker of the House Nancy Pelosi and Senate President Pro Tempore Robert Byrd*, OFF. U.S. TRADE REPRESENTATIVE (Dec. 14, 2009), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/december/trans-pacific-partnership-announcement.

[15] They were the original P4 countries and the U.S., Australia, Vietnam and Peru.

[16] *See Trans-Pacific Partnership (TPP) Trade Ministers' Report to the Leaders*, OFF. U.S. TRADE REPRESENTATIVE (Nov. 11, 2011), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re.

[17] As an indicator of the globalization of supply chains, world exports of intermediate goods represented 51 per cent of non-fuel merchandise exports in 2009. *See* TRADE PATTERNS AND GLOBAL VALUE CHAINS IN EAST ASIA: FROM TRADE IN GOODS TO TRADE IN TASKS 81 (Hubert Escaith & Satoshi Inomata eds., 2011).

traditional Ricardian international division of labor, that is, reduction of tariffs and other non-tariff measures. They included not only trade liberalization in goods and services and protection of intellectual property rights, which are covered by the WTO, but also trade facilitation, a wide range of trade liberalization in services, investment liberalization and facilitation, and harmonization in a broad range of economic regulation.[18] As the WTO could not provide for this new set of rules in a timely manner due mainly to the stalemate of the Doha Development Agenda, major trading countries shifted their trade policy priority to the negotiation of the so-called mega-FTAs with comprehensive market access liberalization and a wide range of trade/investment rules. TPP was the first mega-FTA to be negotiated to conclusion.

Were the U.S. goals for the TPP negotiation accomplished? Although space precludes this article from making an overall assessment of the TPP,[19] a brief overview of TPP, including its text and Annexes, enables us to give an affirmative answer to this question. On market access, the TPP eliminates most tariffs quickly with a few notable exceptions. It opens up avenues for greater trade in services and investment through a negative list approach. While the U.S. and other developed country parties made modest market access commitments in trade in services and investment, developing country parties such as Malaysia and Vietnam made substantive commitments. They also made commitments for access to government procurement, with fairly long transition periods. On rules, the TPP provides for rules that update and expand WTO rules into such fields as trade facilitation, state-owned enterprises and intellectual property rights. It also provides for a wide range of rules that fill the gap in the WTO in such fields as e-commerce, labor and the environment and anti-corruption. On cross-cutting issues such as regulatory coherence, competitiveness and business facilitation, the provisions of the TPP are hortatory at best, but their implementation at the domestic level of each TPP party is expected to be monitored by the institutional mechanisms under the TPP.

The TPP is a living agreement, and with its accession clause (Article 30.4), it is expected to accept additional members. Several countries have already expressed their intention or interest in joining the TPP, namely, Korea, Indonesia, Thailand, Taiwan, the Philippines and Columbia. With these applicants in line, there was a prospect of TPP enlargement once it entered into force, with the ultimate goal of becoming a Free Trade Area of the Asia-Pacific (hereinafter "FTAAP") or even beyond it.[20] This is why

---

[18] *See* Junji Nakagawa, *The WTO at a Critical Juncture*, *in* INTERNATIONAL ECONOMIC LAW: THE ASIA-PACIFIC PERSPECTIVES 22, 30-31 (Won-mog Choi ed., 2015).

[19] For an overall assessment of the TPP, see TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT (Cathleen Cimino-Isaacs & Jeffrey J. Schott eds., 2016).

[20] Note that Article 30.4 provides that the TPP is open to accession by any State or separate

臺灣大學國際經濟法資料庫

the Chinese government has been doing "due diligence" on whether or not China should join the TPP since well before the completion of the TPP negotiation.[21]

The prospect of the TPP becoming an FTAAP or beyond it seems to have disappeared with the U.S. Trump Administration's withdrawal from the TPP in January 2017, as this has made it impossible for the TPP to satisfy any of its three possible conditions for entry into force.[22]

III. DEVELOPMENTS TO REVIVE THE TPP AFTER U.S. WITHDRAWAL

Initial reactions of the 11 negotiating parties to the U.S. withdrawal were mixed. As described above, Japan initially took the position of trying to persuade the Trump Administration to back off and to return to the TPP. It became the first negotiating party to complete its domestic procedure to ratify the TPP in December 2016, and it notified the completion to New Zealand, the depositary of the TPP, on Jan. 20, 2017,[23] shortly before the U.S. withdrawal. New Zealand followed suit and completed its domestic procedure to ratify the TPP on May 11, 2017.[24] On the other hand, Australia took the stance of considering "TPP minus one" or TPP-11.[25] Chile and Peru, in contrast, suggested reviving the TPP by inviting China.[26] At the TPP ministerial meeting held in Viña del Mar, Chile on Mar. 15, 2017, trade ministers of the 11 negotiating parties discussed means of promoting regional integration after the U.S. withdrawal from the TPP. It is reported that Australia and New Zealand called for a "TPP minus one" or TPP-11, but Japan sought not to narrow down the options, and to discuss every possible option.[27] The Joint Statement by TPP Partners, released

---

customs territory that is a member of the APEC, and by any other State or separate customs territory as the Parties may agree.

[21] *See, e.g.*, Shannon Tiezzi, *China's Vice Foreign Minister Says Beijing Is Interested in Joining TPP as Its Own Economic Reforms Take Shape*, DIPLOMAT (Oct. 10, 2014), http://thediplomat.com/2014/10/will-china-join-the-trans-pacific-partnership/.

[22] *See supra* note 5.

[23] *See Notification of Completion of Domestic Procedures for the Trans-Pacific Partnership (TPP) Agreement*, MINISTRY FOREIGN AFF. JAPAN (Jan. 20, 2017), http://www.mofa.go.jp/press/release/press4e001443.html.

[24] *See* Todd McClay, *McClay Says TPP Ratification Keeps Options Open*, BEEHIVE.GOVT.NZ (May 11, 2017), https://www.beehive.govt.nz/release/mcclay-says-tpp-ratification-keeps-options-open.

[25] *See, e.g.*, *TPP Signatories Consider Next Steps Following US Withdrawal*, 21(4) BRIDGES (2017), https://www.ictsd.org/bridges-news/bridges/news/tpp-signatories-consider-next-steps-following-us-withdrawal.

[26] *See Chilean Official Hopes Upcoming Summit Will Provide Avenue for TPP-Like Deal, Chinese Involvement*, WORLD TRADE ONLINE (Feb. 3, 2017), https://insidetrade.com/daily-news/chilean-official-hopes-upcoming-summit-will-provide-avenue-tpp-deal-chinese-involvement.

[27] *See Mixed Opinions Expressed Towards "TPP Minus One"*, NIKKEI NEWSPAPER, Mar. 17, 2017, at 8 (in Japanese).

臺灣大學圖書館資料庫

after the meeting, read that "[t]he high level representatives exchanged views on their respective domestic process regarding the TPP and canvassed views on a way forward that would advance economic integration in the Asia Pacific".[28]

However, the situation changed in April, when Japan steered itself in the direction of reviving the TPP with 11 negotiating members without the U.S. Two factors pushed Japan to change its initial stance. First, Japan confirmed that the U.S. would not challenge promotion of the TPP-11. At the Japan–U.S. Summit Meeting held on Feb. 10, 2017, Prime Minister Abe and President Trump agreed to explore how best to promote trade, economic growth, and high standards throughout the Asia-Pacific region. The Joint Statement of February 10 said that this would include "discussions between the United States and Japan on a bilateral framework as well as *Japan continuing to advance regional progress on the basis of existing initiatives*" (emphases added).[29] According to a Japanese high-ranking official, the passage in italics meant that Japan may promote the TPP-11.[30] Secondly, Japan realized the need to promote the TPP-11 as a counterweight against U.S. pressure in the Japan–U.S. Economic Dialogue envisioned in the Joint Statement above. The first meeting of the Dialogue was to be held on Apr. 18, and the U.S. was expected to demand improved access to Japan's market of rice, beef and dairy products that Japan had committed within the framework of the TPP. Promoting the TPP-11 might not only raise the cost of U.S. withdrawal but also enable Japan to use the TPP commitment as a "ceiling" in the Dialogue.[31]

Japan, together with Australia and New Zealand, expressed its intention to promote the TPP-11 at the TPP-11 Chief Negotiators' meeting in early May, and the 11 countries agreed.[32] At the TPP-11 Ministerial Meeting, held in Ha Noi, Vietnam on May 21, trade ministers of the TPP-11 countries "agreed on the value of realizing the TPP's benefits and to that end, *they agreed to launch a process to assess options to bring the comprehensive, high quality Agreement into force expeditiously*, including how to facilitate membership for the original signatories" (emphases added).[33] They tasked their senior trade officials to engage to take forward the preparation of this assessment, to be completed before they met at the APEC Economic Leaders Meeting on November 10-11, 2017 in Da Nang,

---

[28] *See* JOINT STATEMENT BY TPP PARTNERS (Mar. 15, 2017), http://www.cas.go.jp/jp/tpp/naiyou/pdf/chile/170315_tpp_chile_statement_en.pdf.
[29] JOINT STATEMENT (Feb. 10, 2017), http://www.mofa.go.jp/mofaj/files/000227768.pdf.
[30] *See Japan Steered Itself in the Direction of Promoting the TPP Without the U.S.*, *supra* note 7.
[31] *See id*.
[32] *See Chief Negotiators Confirmed Their Unified Goal of Promoting TPP-11*, NIKKEI NEWSPAPER, May 5, 2017 (in Japanese).
[33] TRANS-PACIFIC PARTNERSHIP (TPP) AGREEMENT: MINISTERIAL STATEMENT, *supra* note 8.

臺灣大學學術期刊資料庫

Vietnam. The Ministerial Statement thus officially announced the common goal of pursuing the TPP-11, and set the deadline of assessing options to realize this goal at the APEC Summit of November. The 11 countries held a chief negotiators' meeting in Hakone, Japan from July 12 to 14. After the meeting, Japanese chief negotiator Kazuyoshi Umemoto told reporters that attendees "achieved mutual understanding on a path forward" toward implementing the Agreement. The 11 countries "will carry on working without lowering the TPP's high standards," he said.[34] It was reported that the 11 countries agreed to make minimal changes to the Agreement in promoting the TPP-11. However, they could not enter into the discussion on the details of the options for promoting the TPP-11. It was announced that the next meeting of chief negotiators would be held in Australia in late August or early September.[35]

IV. OPTIONS FOR THE TPP-11

TPP-11 parties are, therefore, exploring options for bringing the TPP-11 into force expeditiously with minimal changes to the Agreement. What, then, could such options be? Australia, Japan and New Zealand have been reportedly advocating for the TPP-11 to advance the current version of the agreement, keeping its substance intact except for a few minor changes to facilitate its entry into force.[36] For instance, Article 30.5 on entry into force must be modified, because the agreement will not enter into force with 11 parties without the U.S. under the current Article 30.5.[37] Article 30.4 on accession must also be modified if the TPP-11 parties are "to facilitate membership for the original signatories", as envisioned by the TPP-11 trade ministers in May, 2017, because they intended to provide for an expeditious accession procedure for the U.S. when it "returns" to the TPP. Besides the text of the agreement, there are annexes[38] and documents[39] that embody the result of bilateral negotiations conducted in

---

[34] *See* Tomohiro Ebuchi et al., *The TPP-11 Agree to Move Forward with Minimal Tweaks*, NIKKEI ASIAN REV. (July 20, 2017, 10:00 AM), https://asia.nikkei.com/magazine/20170720/Politics-Economy/The-TPP-11-agree-to-move-forward-with-minimal-tweaks.

[35] *See id*.

[36] *See TPP-11 Negotiators Examine Options for Advancing Deal Without US*, 21(26) BRIDGES (July 20, 2017), https://www.ictsd.org/bridges-news/bridges/news/TPP-11-negotiators-examine-options-for-advancing-deal-without-us.

[37] *See supra* note 5.

[38] The U.S. and Brunei agreed on a bilateral labor consistency plan, where Brunei undertakes to conduct legal reforms to implement its obligations under the TPP Chapter 19 on labor. This agreement is annexed to Chapter 19, together with similar agreements between the U.S. and Malaysia and Vietnam.

[39] The website of the USTR uploaded 58 such documents (exchange of letters, etc.) reflecting bilateral negotiations between the U.S. and the other parties. *See* TPP FINAL TABLE OF CONTENTS, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last

臺灣人權學術期刊授權使用

parallel with the TPP negotiations between the U.S. and other parties. As the U.S. withdrew from the TPP, these annexes and documents became void, or at least "frozen" until the U.S. returns to the TPP, and they will not be included in the TPP-11.

Malaysia and Vietnam, however, have reportedly suggested that certain rules may need to be revised, because the U.S. withdrawal has changed the balance of benefits and burdens for their TPP membership. Australia, Japan and New Zealand are skeptical about the revision of the content of the agreement, as it would destroy the delicate balance of benefits and burdens contained in the text and the annexes of the agreement. It would also make it more difficult for the U.S. to "return" to the TPP.[40] In addition, it must be noted that Malaysia and Vietnam might still benefit substantially even from the TPP-11. According to an estimate, the TPP-11 would increase the real GDP of Malaysia and Vietnam by 20.65% and 10.39%, respectively, while TPP-12 would increase the real GDP of Malaysia and Vietnam by 23.48% and 17.69%, respectively.[41]

Even if Malaysia and Vietnam were to agree not to revise the content of the agreement, there might be options for promoting the TPP-11 with minimal changes. A first option might be to conclude a protocol of provisional application of the TPP, while keeping the text and annexes of the TPP intact. As is well known, the General Agreement on Tariffs and Trade (hereinafter "GATT") entered into force by a Protocol of Provisional Application, so as to implement the result of tariff negotiations that were conducted in parallel with the negotiation of the Charter of the International Trade Organization (hereinafter "the ITO Charter") expeditiously. The GATT was provisionally applied for two reasons. First, as they were drawn from the negotiating text of the ITO Charter, there was a need to avoid conflicts between the GATT provisions and the final text of the ITO Charter. Secondly, so as to implement the GATT expeditiously, some of the conflicts between the GATT provisions and the existing domestic laws of the contracting parties had to be settled by grandfathering the latter. This was done through the Grandfather Clause of the Protocol.[42]

If the TPP-11 is concluded through a protocol of provisional application of the TPP, the text and the annexes to the TPP will remain intact. The protocol should include provisions on the coverage of the

visited Aug. 11, 2017).

[40] *See TPP-11 Negotiators Examine Options for Advancing Deal Without US*, *supra* note 36.

[41] *See* Kenichi Kawasaki, *Emergent Uncertainty in Regional Integration: Economic Impacts of Alternative RTA Scenarios* 8 tbl. 3 (Nat'l Graduate Inst. for Pol'y Stud., Discussion Paper No. 16-27, 2017) (in Japanese).

[42] See Art. I.1.(b) of the Protocol of Provisional Application, which reads that the governments of the contracting parties agree to apply the GATT provisionally ("Part II of that Agreement to the fullest extent not inconsistent with existing legislation"). Protocol of Provisional Application of the General Agreement on Tariffs and Trade art. 1.1(b), Oct. 30, 1947, 55 U.N.T.S. 308.

臺灣大學期刊資料庫

TPP-11 with respect to the text and the annexes to the TPP, and provisions on the conditions for entry into force of the TPP-11. It should also include provisions on the conditions for accession to the TPP-11, so that the TPP-11 countries may start negotiations with those countries on the waiting list for their accession. If there are some provisions in the text of the TPP or some commitments in the annexes to the TPP that a party finds it difficult to accept, it might grandfather them under a grandfather clause. However, in contrast to the wide range of grandfathering allowed to the GATT contracting parties, the possibility of grandfathering should be kept at a minimum, for the following three reasons. First, opening a wide window for grandfathering would practically require renegotiation of the whole agreement among the 11 parties. Secondly, Japan and New Zealand have already passed legislation to implement their TPP obligations. Thirdly, drastic law reforms should be avoided among the TPP-11 parties when the U.S. returns and the original TPP is revived according to Article 30.5. Even if the U.S. does not return to the TPP at least for the time being, the TPP-11 parties will be able to implement the TPP-11 with minimal grandfathering, and commence negotiations for TPP-11 enlargement, offering newcomers membership with similar minimal grandfathering options. For all these reasons, provisional application would be the best option for the TPP-11.[43]

Another option might be to modify the TPP on a few points that I mentioned above, including Article 30.5 on entry into force and Article 30.4 on accession. One difficulty of this option would be that Japan and New Zealand would have to conduct their domestic ratification procedures again for the TPP-11, as the original TPP that they ratified and the TPP-11 would be different international treaties. Another difficulty would be that 11 countries would have to agree on which provisions/commitments to be modified or waived for which country. Once you open a Pandora's box of treaty modification, you may not expect expeditious settlement of the negotiations for modification.

V. CONCLUDING REMARKS

It is a pity that the U.S. withdrew from the TPP, that was intended to become "a new kind of trade agreement for the 21st century". However, if the remaining parties to the TPP agree to conclude the TPP-11, with minimal modifications to the original TPP agreement, the TPP-11 will be the new kind of trade agreement for the 21st century. The TPP-11 will impact on the negotiations of other mega-FTAs such as the East Asian

[43] *See* Jeffrey J. Schott, *TPP Could Go Forward Without the United States*, PETERSON INST. FOR INT'L ECON. (Nov. 15, 2016, 12:15 PM), https://piie.com/blogs/trade-investment-policy-watch/tpp-could-go-forward-without-united-states.

臺灣人文與藝術期刊資料庫

Regional Comprehensive Economic Partnership (RCEP) and the Japan/China/Korea FTA. The TPP-11 will also impact on the renegotiations of the North American Free Trade Agreement (NAFTA),[44] as Mexico and Canada may use the TPP-11 as a "shield" against a U.S. demand to raise the level of market access or rules beyond those contained in the TPP-11. Japan may expect a similar "shield" effect of the TPP-11 when it negotiates bilateral trade deals within the context of the Japan-U.S. Economic Dialogue.

For all these reasons, the TPP-11 should be a priority goal for the remaining parties to the TPP after U.S. withdrawal. This article has explored options for promoting the TPP-11, and has concluded that provisional application would be a preferable option, in light of its flexibility and expeditiousness. Japan should seek to persuade other parties to take this option by the deadline in November. The upcoming several months will be of critical importance to Japan's economic diplomacy.

[44] The USTR notified to the U.S. Congress its intention to renegotiate the NAFTA on May 17. *See USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE (May 17, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces.

臺灣人權學術期刊資料庫

REFERENCES

Books

CIMINO-ISAACS, CATHLEEN & JEFFREY J. SCHOTT (eds.) (2016), TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT.

ESCAITH, HUBERT & SATOSHI INOMATA (eds.) (2011), TRADE PATTERNS AND GLOBAL VALUE CHAINS IN EAST ASIA: FROM TRADE IN GOODS TO TRADE IN TASKS.

Articles

Lewis, Meredith Kolsky (2009), *Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities*, 4(2) ASIAN JOURNAL WTO & INTERNATIONAL HEALTH LAW & POLICY 401.

Nakagawa, Junji (2015), *The WTO at a Critical Juncture*, *in* INTERNATIONAL ECONOMIC LAW: THE ASIA-PACIFIC PERSPECTIVES 22 (Won-mog Choi ed.).

Newspapers

Chief Negotiators Confirmed Their Unified Goal of Promoting TPP-11, NIKKEI NEWSPAPER, May 5, 2017 (in Japanese).

Japan Steered Itself in the Direction of Promoting the TPP Without the U.S.: 11 Countries Are Going to Hold a Ministerial Meeting in May, NIKKEI NEWSPAPER, April 15, 2017 (in Japanese).

Mixed Opinions Expressed Towards "TPP Minus One", NIKKEI NEWSPAPER, March 17, 2017, at 8 (in Japanese).

Internet Sources

Chilean Official Hopes Upcoming Summit Will Provide Avenue for TPP-Like Deal, Chinese Involvement, WORLD TRADE ONLINE (February 3, 2017), https://insidetrade.com/daily-news/chilean-official-hopes-upcoming-summit-will-provide-avenue-tpp-deal-chinese-involvement.

Ebuchi, Tomohiro et al., *The TPP-11 Agree to Move Forward with Minimal Tweaks*, NIKKEI ASIAN REVIEW (July 20, 2017, 10:00 AM), https://asia.nikkei.com/magazine/20170720/Politics-Economy/The-TPP-11-agree-to-move-forward-with-minimal-tweaks.

JOINT STATEMENT (February 10, 2017), http://www.mofa.go.jp/mofaj/files/000227768.pdf.

JOINT STATEMENT BY TPP PARTNERS (March 15, 2017), http://www.cas.go.jp/jp/tpp/naiyou/pdf/chile/170315_tpp_chile_statement_en.pdf.

McClay, Todd, *McClay Says TPP Ratification Keeps Options Open*, BEEHIVE.GOVT.NZ (May 11, 2017), https://www.beehive.govt.nz/release

臺灣大學圖書館出版資料庫

/mcclay-says-tpp-ratification-keeps-options-open.

Office of the Press Secretary, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, THE WHITE HOUSE (January 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific.

Schott, Jeffrey J., *TPP Could Go Forward Without the United States*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (November 15, 2016, 12:15 PM), https://piie.com/blogs/trade-investment-policy-watch/tpp-could-go-forward-without-united-states.

Stars and Stripes Forever Pac, *Donald J. Trump's Vision*: *Donald J. Trump's 7 Point Plan to Rebuild the American Economy by Fighting for Free Trade*, FACEBOOK (October 1, 2016), https://www.facebook.com/notes/the-2016-committee/donald-j-trumpsvision/1251246731604221/.

The United States Officially Withdraws from the Trans-Pacific Partnership, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (January 30, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.

Tiezzi, Shannon, *China's Vice Foreign Minister Says Beijing Is Interested in Joining TPP as Its Own Economic Reforms Take Shape*, THE DIPLOMAT (October 10, 2014), http://thediplomat.com/2014/10/will-china-join-the-trans-pacific-partnership/.

TPP FINAL TABLE OF CONTENTS, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

TPP Signatories Consider Next Steps Following US Withdrawal, 21(4) BRIDGES (2017), https://www.ictsd.org/bridges-news/bridges/news/tpp-signatories-consider-next-steps-following-us-withdrawal.

TPP-11 Negotiators Examine Options for Advancing Deal Without US, 21(26) BRIDGES (July 20, 2017), https://www.ictsd.org/bridges-news/bridges/news/TPP-11-negotiators-examine-options-for-advancing-deal-without-us.

TRANS-PACIFIC PARTNERSHIP (TPP) AGREEMENT: MINISTERIAL STATEMENT (May 21, 2017), http://www.cas.go.jp/jp/tpp/naiyou/pdf/hanoi/170521_tpp_hanoi_statement_en.pdf.

TRANS-PACIFIC STRATEGIC ECONOMIC PARTNERSHIP (P4), N.Z. FOREIGN AFFAIRS & TRADES, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/p4/.

Trans-Pacific Strategic Economic Partnership Agreement (P4) Chile-Brunei Darussalam-New Zealand-Singapore: Background and Negotiations, ORGANIZATION OF AMERICAN STATES, http://www.sice.oas.org/TPD/CHL_Asia/CHL_Asia_e.ASP.

Viral, Going, *President-Elect Trump Outlining Plans for First 100 Days*, YOUTUBE (November 21, 2016), https://www.youtube.com/watch?v=u

臺灣大學法律學院期刊資料庫

2Z_4z1EWAY.

Other Sources

Kawasaki, Kenichi (2017), *Emergent Uncertainty in Regional Integration: Economic Impacts of Alternative RTA Scenarios* (National Graduate Institution for Policy Studies, Discussion Paper No. 16-27) (in Japanese).

Letters of Ambassador Ronald Kirk to the Speaker of the House Nancy Pelosi and Senate President Pro Tempore Robert Byrd, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (December 14, 2009), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/december/trans-pacific-partnership-announcement.

Notification of Completion of Domestic Procedures for the Trans-Pacific Partnership (TPP) Agreement, MINISTRY OF FOREIGN AFFAIRS JAPAN (January 20, 2017), http://www.mofa.go.jp/press/release/press4e_001443.html.

Prime Minister Abe's Speech at the Plenary Session of the House of Councilors, RECORD OF THE PLENARY SESSION, HOUSE OF COUNCILORS (January 24, 2017) (in Japanese).

Protocol of Provisional Application of the General Agreement on Tariffs and Trade, October 30, 1947, 55 U.N.T.S. 308.

Trans-Pacific Partnership (TPP) Trade Ministers' Report to the Leaders, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (November 11, 2011), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re.

United States to Join Sectoral Negotiations with Four Asia-Pacific Countries Will Explore Participation in Broader Strategic Partnership Agreement, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (February 3, 2008), https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2008/february/united-states-join-sectoral-negotiations.

USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (May 17, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces.

臺灣大學學術期刊資料庫