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The Roadmap for a Prospective US-ASEAN FTA: Legal and Geopolitical Considerations

Pasha L. HSIEH^{*}

This article examines the legal framework governing economic relations between the United States and the Association of Southeast Asian Nations (ASEAN) and outlines a roadmap for a US-ASEAN Free Trade Agreement (FTA). Notwithstanding ASEAN's emerging centrality in Asian regionalism, America remains the only Pacific power that has not concluded any form of FTA with ASEAN. This article explains that limited progress in Washington's efforts stemmed from the domestic politics of the US Trade and Investment Framework Agreement (TIFA) approach and the Myanmar dilemma. It further analyses the challenges that the Trans-Pacific Partnership (TPP) Agreement negotiations have encountered and contends that the TPP cannot be a substitute for a US-ASEAN FTA. Finally, a 'Plan B' roadmap to reinvigorate US-ASEAN trade ties is proposed. This roadmap calls for an enhanced TIFA that incorporates the building block features of ASEAN's framework agreements, thereby laying a solid yet gradual foundation for an FTA. This research therefore provides a valuable study of a region-based FTA under the multilateral trading system.

1 INTRODUCTION

Asia's rise is demonstrated by its rapidly increasing share of global trade and is reinforced by the fact that for the first time, it over took the European Union (EU) as the largest US export destination.¹ Asia's economic and security significance has shaped American foreign policy with the new goal of re-engaging in the region. Despite political rhetoric, the United States lacks a comprehensive roadmap for its trade policy in Asia.

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¹ Aaron Siirila, 'U.S. Exports to Asia Surpass Those to Europe for First Time Ever', <<http://aseanmattersforamerica.org/u-s-exports-to-asia-surpass-those-to-eu/268>>, 17 May 2010.

The two locomotives for emerging Asian regionalism are China and the ten-country bloc, the Association of Southeast Asian Nations (ASEAN).² The 'Asia' policy of both the US executive branch and Congress is overshadowed by intensifying trade conflicts with China, including trade remedies, intellectual property protection, and Renminbi re-evaluation. US policymakers have perceived ASEAN as a functional rather than indispensable partner in the Asia Pacific.³ ASEAN's relevance is merely revealed in the backdrop of Washington's war on terror or its countermeasures against China's rise. Since 2002, ASEAN as a single entity has concluded free trade agreements (FTAs) with China, Japan, South Korea, India, Australia, and New Zealand.⁴ America remains the only major country in the region that has not signed any form of FTA with ASEAN. If the United States wishes to remain a Pacific power and salvage its economy devastated by the financial crisis and credit rating downgrade, it is essential that Washington adopts a pragmatic solution to cement its hub-and-spoke alliance system in Asia.

This article argues that the legal frameworks governing US-ASEAN trade ties should be reinvigorated. To this end, it examines the roadmap for concluding a region-based FTA from legal and geopolitical perspectives. Section 2 explores current bilateral economic relations and provides compelling reasons for a US-ASEAN FTA. The section also analyses economic and political obstacles that contribute to the failure of the US Trade and Investment Framework Agreement (TIFA) approach and US economic sanctions against Myanmar (Burma). Section 3 discusses ASEAN's emerging centrality in Asian regionalism due to its internal integration and external FTAs with regional economies. It then explains the potential impasse of the current US-backed Trans-Pacific Partnership (TPP) Agreement and contends that the TPP cannot serve as a substitute for a US-ASEAN FTA. Against this background, this article proposes a 'Plan B' roadmap based on an 'enhanced TIFA' that incorporates building block features of ASEAN's framework agreements. Section 4 concludes by summarizing legal and policy recommendations for trade negotiators from both ASEAN and the United States.

² The Association of Southeast Asian Nations (ASEAN) includes Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Myanmar (Burma), Cambodia, Laos, and Vietnam.

³ See, e.g., Alice Ba, 'Systemic Neglect? A Reconsideration of US-Southeast Asia Policy', *Contemp. S.E. Asia* 31, no. 3: 369, 370–371 ('... US involvement in Southeast Asia suffers from "neglect" (benign or otherwise), "episodic attention", ... and subject to "strategic drift."').

⁴ See generally 'ASEAN FTA Agreements', <www.aseansec.org/Fact%20Sheet/AEC/AEC-12.pdf>, 1 Jul. 2011.

2 AN EXAMINATION OF US-ASEAN TRADE RELATIONS

Notwithstanding ASEAN Member States' differences in size, population, and gross domestic product (GDP),⁵ the bloc has evolved as a regional economic power. With its GDP growing more than 170% over the past decade, ASEAN is now the third largest Asian economy, behind only China and Japan.⁶ ASEAN is also a major trade partner of the United States. Yet, from ASEAN's view, Washington's focus on Southeast Asia has been 'episodic rather than consistent' and subject to US-centric security considerations.⁷ The fact that US trade policy on ASEAN fails to yield substantial results will eventually erode America's geostrategic goals.

2.1 REASONS FOR CONCLUDING A REGION-BASED FTA

There are salient economic and geopolitical reasons for signing a prospective US-ASEAN FTA. First, US economic interests in Southeast Asia are significant. The United States and ASEAN are currently each other's major trading partner. Bilateral trade totalling USD 149.6 billion makes America ASEAN's fourth largest trading partner, after China, the EU, and Japan.⁸ ASEAN collectively is America's fourth largest export destination.⁹ Regarding individual ASEAN countries, US exports are primarily bound to Singapore, Malaysia, and Thailand.¹⁰ Moreover, US foreign direct investments (FDIs) in ASEAN, which amount to more than USD 153 billion, have been even greater than America's combined total investment in China, Japan, and Korea.¹¹ Such substantial trade relations make ASEAN an ideal FTA partner in emerging Asia. US policymakers should be cautioned that in 2008, China's imports from and exports to ASEAN exceeded those of America by 6%

⁵ See 'Table 1: Selected Basic ASEAN Indicators', <www.aseansec.org/stat/Table1.pdf>, 15 Feb. 2011.

⁶ 'ASEAN's Importance', <<http://aseanmattersforamerica.org/aseans-importance>>, 1 Jul. 2011.

⁷ Tommy Koh, 'The United States and Southeast Asia', in *America's Role in Asia, Asian and American Views: Recommendations for U.S. Policy from Both Sides of the Pacific* (2008), 35, 37.

⁸ 'Table 19: ASEAN Trade by Selected Partner Country/Region, 2009', <www.aseansec.org/stat/Table19.pdf>, 15 Jul. 2010.

⁹ 'Remarks by Ambassador David Carden at the U.S.-ASEAN Business Council ASEAN Dinner, Washington, DC', <<http://asean.usmission.gov/news06032011.html>>, 3 Jun. 2011; Thomas Lum et al., 'United States Relations with the Association of Southeast Asian Nations (ASEAN)', CRS Report for Congress' (16 Nov. 2009), 16.

¹⁰ Table A1.4: Merchandise Exports and Re-exports by Trading Partner, 2003–2009, Trade Policy Review Report by the Secretariat: United States Revision, WT/TPR/S/235/Rev/1 (20 Oct. 2010), 132.

¹¹ Remarks by Deputy Chief of Mission, Louis Mazel, Embassy of the United States, Workshop on US-ASEAN Relations, Institute of Southeast Asian Studies (ISEAS), 16 Jul. 2010 (on file with the author); for US foreign direct investment (FDI) in ASEAN, see Table 4: FDI Flows to ASEAN from the EU, Japan, the United States, and China: 2006–2008; Mark E. Manyin et al., 'U.S. Accession to the Association of Southeast Asian Nations' Treaty of Amity and Cooperation (TAC), CRS Report for Congress' (26 Oct. 2009), 6.

and 75%, respectively.¹² Due to the lack of effective US engagement, China has surpassed the United States in economic significance to ASEAN.

Second, a US-ASEAN FTA will increase each side's exports by furthering liberalization of trade barriers. This is particularly important, given the Doha Round impasse. From US businesses' perspective, major obstacles to expand trade in ASEAN do not concern tariff.¹³ Instead, critical difficulties result primarily in non-tariff barriers (NTBs), such as quantitative restrictions, import licensing, and trading rights.¹⁴ Service and investment barriers also prevent US enterprises from penetrating ASEAN's telecommunications, banking, securities, and other financial markets.¹⁵ As of now, the World Trade Organization (WTO) disputes that were initiated by the United States against ASEAN countries mostly arose from barriers to automobile, port, and poultry industries.¹⁶ The fact that the ten ASEAN countries, except for Singapore, are not parties to the WTO Agreement on Government Procurement (GPA) also impairs US business opportunities.¹⁷ Moreover, ASEAN's endemic problem concerning intellectual property right (IPR) protection is also evidenced by the 2011 Special 301 review process, which places Indonesia and Thailand on the Priority Watch List, and Malaysia, the Philippines, and Vietnam on the Watch List.¹⁸

From ASEAN's perspective, the most serious obstacle to the American market is US trade remedies, particularly anti-dumping actions, against ASEAN exports. Remarkably, four of the seven WTO complaints that ASEAN countries filed against the United States challenged its measures under the WTO Anti-Dumping Agreement.¹⁹ According to ASEAN complaints during the 2010 US Trade Policy Review, US agricultural subsidies under its Farm Bill also seriously undermine ASEAN's farm exports to the US market.²⁰ In addition, US regulations on trade

¹² Manyin et al., *supra* n. 11, at 5, n. 5.

¹³ See Dean A. DeRosa, 'US Free Trade Agreements with ASEAN', in *Free Trade Agreements: US Strategies and Priorities*, ed. Jeffrey J. Schott (2004), 117, 130 ('[In 2000,] ASEAN average tariff levels are . . . in the moderate range of 8 to 12 percent; the exceptions are [duty-free] Singapore, . . . and Thailand, whose average applied tariff stands just over 18 percent.'). See also Table 6.6: Trade and Protection in the United States and ASEAN Countries, Circa 2000. *Ibid.*, 131–35.

¹⁴ See 'Sections of Brunei Darussalam, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam, 2010 National Trade Estimate Report on Foreign Trade Barriers', <www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/NTE_COMPLETE_WITH_APPENDnonameack.pdf>.

¹⁵ See *ibid.*

¹⁶ These disputes (DS59, 74, 102, 195, and 403) are US complaints against Philippines and Indonesia. For details, see Annex II.

¹⁷ Singapore acceded to the WTO Agreement on Government Procurement (GPA) in 1997. 'Parties and Observers to the GPA', <www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>, 20 Jul. 2011.

¹⁸ 'Executive Summary, 2011 Special 301 Report', <www.ustr.gov/webfm_send/2844>.

¹⁹ These cases (DS324, 343, 383, and 401) are initiated by Thailand and Vietnam. For details, see Annex II.

²⁰ Jemy Gatdula, 'Trade Tripper: The Flaky Ally', *Business World*, 7 Oct. 2010, <www.bworldonline.com/main/content.php?id=19107>.

in services pose restrictions for both ASEAN professionals and low-skilled labour to enter the US market.²¹ These trade barriers in ASEAN and the United States demonstrate substantial room for improving bilateral trade and should be effectively addressed in a US-ASEAN FTA.

Third, a US-ASEAN FTA will facilitate ASEAN integration, which is mutually beneficial to both sides. FTA negotiations and implementation invariably prompt ASEAN countries to find a common stance and expedite harmonization of customs procedures and national standards. These integration efforts will increase ASEAN's competitiveness by attracting American and other sources of FDIs and, more importantly, accelerate ASEAN's goal to form the ASEAN Economic Community (AEC) as a single market by 2015.²² The AEC will allow US corporations to place their production chains in ASEAN based on each country's comparative advantage, thereby substantially reducing operation costs. ASEAN's unity will also facilitate Washington's FTA comprehensive strategy in Asia, providing foundation for negotiating the enlarged TPP and, in the long run, a Free Trade Area of the Asia-Pacific (FTAAP) that includes twenty-one Asia-Pacific Economic Cooperation (APEC) economies.²³

Finally, given Southeast Asia's increasingly regional significance, a US-ASEAN FTA will strengthen the US security alliance that is essential to the US role in Asia. In past decades, ASEAN has evolved as an indispensable geopolitical hub. It has not only hosted the ASEAN Regional Forum (ARF) since 1994 but also the East Asia Summit (EAS) since 2005.²⁴ Both the ARF and the EAS include key stakeholders in the region and cover topics that concern America's core interests ranging from North Korea missiles tests to anti-terrorism efforts. The United States is an original member of the ARF and signed the Treaty of Amity and Cooperation in Southeast Asia (TAC) to be a formal dialogue partner in the EAS in 2009.²⁵

Among ASEAN countries, the Philippines and Thailand are treaty allies and were further designated by the Bush Administration as 'major non-NATO allies', thus entitling them to US military aid under the US Foreign Assistance Act of

²¹ See DeRosa, *supra* n. 13, at 139 ('Most importantly, especially for low-income ASEAN countries, US immigration laws . . . prohibit general immigration of unskilled labor to the United States to meet the high demand for the services of low-wage labor.').

²² *ASEAN Economic Community Scorecard* (2010), 3.

²³ The US policy is to use the Trans-Pacific Partnership (TPP) Agreement as a building block for the Free Trade Area of the Asia-Pacific (FTAAP). Ian F. Fergusson & Bruce Vaughn, 'The Trans-Pacific Partnership Agreement, CRS Report for Congress' (10 Jan. 2011), 2.

²⁴ Lum et al., *supra* n. 9, at 5.

²⁵ See Manyin et al., *supra* n. 11, at 1 ('On July 22, 2009, in Phuket, Thailand, Secretary of State Hillary Rodham Clinton . . . signed the Instrument of Extension and the Instrument of Accession to ASEAN's Treaty of Amity and Cooperation (TAC).').

1961.²⁶ Singapore and the two large Muslim countries, Indonesia and Malaysia, are also US security partners. Specifically, ASEAN countries' territorial disputes with China concerning the Spratly Islands and US insistence on freedom of navigation in the South China Sea make US-ASEAN security cooperation mutually critical.²⁷ A US-ASEAN FTA will fortify such cooperation. Dominated by geostrategic considerations, current US FTAs in force cover only two countries of the nation's top ten trade partners.²⁸ US trade in goods with respective FTA partners – Israel, Jordan, Morocco, Bahrain, and Oman – constitutes a mere 0.1% of total US trade.²⁹ It is thus vital for Washington to engage in an effective strategy with ASEAN involving overarching trade and security stakes.

2.2. LEGAL FRAMEWORKS AND GEOPOLITICAL OBSTACLES

Despite significant benefits for both the United States and ASEAN to conclude a region-based FTA, such a development has progressed marginally. The legal frameworks that govern US-ASEAN trade ties are poorly structured and thus provide limited support for the private sector. The absence of meaningful legal frameworks is due to US perception of ASEAN. Following the September 11 attacks, the Bush Administration predominantly focused its foreign policy on the Middle East and viewed Southeast Asia through the lens of the war on terror. ASEAN leaders' view that Bush lacked strong commitment to the region eroded the effectiveness of US initiatives to deepen bilateral ties.³⁰

President Barack Obama, who came into office in 2009, seemingly adopted a different policy to re-engage Asia with a focus on ASEAN.³¹ As the country's 'first

²⁶ Thomas Lum, 'The Republic of the Philippines and U.S. Interests, CRS Report for Congress' (3 Jan. 2011), 11; Emma Chanlett-Avery, 'Thailand: Background and U.S. Relations, CRS Report for Congress' (2 Oct. 2006), 9 and n. 25.

²⁷ US Secretary of State Hillary Clinton claimed that '[t]he United States has a national interest in freedom of navigation, open access to Asia's maritime commons and respect for international law in the South China Sea'. Mark Landler, 'Offering to Aid Talks, U.S. Challenges China on Disputed Islands', *New York Times*, 23 Jul. 2010, <www.nytimes.com/2010/07/24/world/asia/24diplo.html>. For South China Sea issues and US-China relations, see Zha Daojiong, 'South China Sea Diplomacy: More Needs to be Done', *PacNet*, no. 35, 19 Jul. 2011, <<http://csis.org/files/publication/pac1135.pdf>>.

²⁸ US Free Trade Agreements (FTAs) that are currently in force cover seventeen countries, and Canada and Mexico rank as the first and third largest trade partners, respectively. 'Free Trade Agreements, USTR', <www.ustr.gov/trade-agreements/free-trade-agreements>, 1 Aug. 2011; US Census Bureau, 'Top Trading Partners – Total Trade, Exports, Imports: Year-to-Date December 2010', <www.census.gov/foreign-trade/statistics/highlights/top/top1012yr.html>, 1 Aug. 2011.

²⁹ Table AII.2: Overview of U.S. Free-Trade Agreements, March 2010, Trade Policy Review Report by the Secretariat: United States Revision, WT/TPR/S/235/Rev/1 (20 Oct. 2010), 139–141.

³⁰ These initiatives 'included becoming the first country to appoint an ambassador to ASEAN, providing assistance to the ASEAN Secretariat to upgrade its capabilities, and launching the US-ASEAN Trade and Investment Framework Agreement (TIFA)'. Lum et al., *supra* n. 9, at 2.

³¹ See Patrick deGateno, 'America's Renewed Engagement of Asia', <www.acus.org/new_atlanticist/americas-renewed-engagement-asia>, 12 Nov. 2010 ('Obama's renewed engagement of Asia is an

Pacific President', Obama was the first US president who met ASEAN heads of states, although the meeting was held on the sidelines of the 2009 APEC Summit in Singapore.³² At the invitation of Obama, the Second US-ASEAN Leaders Meeting also took place in New York in 2010.³³ Nonetheless, the political gestures and the consistent emphasis on deepening economic ties have thus far failed to enhance legal frameworks governing bilateral trade.³⁴ The need for Washington to articulate a more comprehensive trade strategy on ASEAN negotiations has caused concerns for the US Congress. For instance, Republican Senator Richard Lugar introduced Senate resolutions to direct the United States Representative Office (USTR) to engage ASEAN in serious FTA negotiations.³⁵ These resolutions not only signal that current frameworks cannot meet US interests in expanding bilateral ties with ASEAN but also recognize that the TPP is unable to substitute a US-ASEAN FTA. The impediments for the US executive branch to develop this FTA are examined below.³⁶

2.2[a] *The Bilateral TIFA Approach*

The US-favoured approach to develop FTAs with individual ASEAN states under a TIFA proved futile in the past decade. The ASEAN-US Initiative, developed in the 1980s, was a formal study initiated by US and ASEAN governments to enhance bilateral economic cooperation.³⁷ The US-proposed Enterprise of ASEAN Initiative (EAI) in 2002 was the first meaningful start to strengthen legal frameworks on US-ASEAN trade ties.³⁸ Compared to the Obama Administration's TPP efforts, the EAI can be categorized as an 'old roadmap' to

attempt to renovate America's regional role [and] it is perhaps the first time that an American president's renewed diplomacy enshrined improving cooperation with regional organizations [such as ASEAN] as a core priority').

³² 'Remarks by President Barack Obama at Suntory Hall, Tokyo, Japan', <www.whitehouse.gov/the-press-office/remarks-president-barack-obama-suntory-hall>, 14 Nov. 2009; Lum et al., *supra* n. 9, at 2.

³³ 'Joint Statement of the 2nd U.S.-ASEAN Leaders Meeting, New York, NY', <www.whitehouse.gov/the-press-office/2010/09/24/joint-statement-2nd-us-asean-leaders-meeting>, 24 Sep. 2010. Myanmar was only represented by its foreign minister at the meeting.

³⁴ See *ibid.* (indicating that both the United States and ASEAN should 'further economic cooperation' and intensify trade under the 'ASEAN-U.S. TIFA').

³⁵ See generally S. Res. 311 (111th Congress), 13 Oct. 2009; S. Res. 218 (112th Congress), 29 Jun. 2011.

³⁶ Senator Lugar explained that '[w]hile there may be merit to the Trans-Pacific Partnership ..., the reluctance of the Obama Administration to signal its commitment to developing a strategy for pursuing an FTA with ASEAN suggests to ASEAN leaders that they should first look to China, India and elsewhere . . .'. 'Lugar Urges US-ASEAN FTA Negotiations', *The Nation*, <www.nationmultimedia.com/2011/06/29/national/Lugar-urges-US-Asean-FTA-negotiations-30158978.html>, 2 Aug. 2011.

³⁷ Mari Pangestu, 'Southeast Asian Regional and International Economic Cooperation', in *International Relations in Southeast Asia: The Struggle for Autonomy*, ed. Donald E. Weatherbee (2005), 187, 212.

³⁸ 'Enterprise for ASEAN Initiative', <www.amchamvietnam.com/876>, 2 Aug. 2011.

intensify trade relations with ASEAN. The EAI's goal was to form a network of bilateral FTAs with ten ASEAN countries and to strengthen ASEAN economic integration.³⁹ Under the EAI, the two conditions for a prospective FTA are that an ASEAN state must be a WTO member and must sign a TIFA with the United States.⁴⁰ A TIFA, which serves as a precursor to a full-fledged FTA, provides a high-level consultative mechanism for the United States to strengthen economic reform in a potential FTA partner.

The EAI roadmap did not enable the United States to achieve the intended FTA goal as of 2011. The limited 'success' was the conclusion of the US-Singapore FTA (USSFTA) in 2003 and TIFAs with seven other ASEAN countries without evolving to FTAs.⁴¹ The relatively smooth negotiations of the USSFTA were due to Singapore's duty-free trade regime and the lack of an agricultural sector in the island state. These unique features made Singapore distinguishable from other ASEAN states in FTA negotiations.

US FTA negotiations with ASEAN countries were unsuccessful on various grounds. For example, Washington's insistence on a comprehensive, non-sectoral agreement modelled on the USSFTA inevitably made Thailand-US FTA negotiations complex.⁴² The US intention to include WTO-plus pharmaceutical patent protection caused particular concerns to the Thai public health sector.⁴³ In 2006, FTA talks became impossible due to Thailand's political crisis involving a military coup.⁴⁴ Malaysia-US FTA negotiations also halted in 2008.⁴⁵ The prime hurdle was Malaysia's government procurement policy under its New Economic Program that favours ethnic Malays (known as *Bumiputera*) in the bidding process and preferential treatment for companies owned by the group.⁴⁶ The expiration of

³⁹ See generally 'Enterprise for ASEAN Initiative', <www.ustr.gov/trade-agreements/other-initiatives/asean-initiative>, 2 Aug. 2011.

⁴⁰ See also 'Enterprise for ASEAN Initiative', *supra* n. 38 ('Under the EAI, the United States offered the prospect of bilateral free trade agreements with ASEAN countries that are committed to economic reforms and openness inherent in an FTA with the United States.').

⁴¹ 'President Signed US-Singapore Free Trade Agreement', <<http://singapore.usembassy.gov/050603a.html>>, 6 May 2003; the United States concluded TIFAs with Brunei, Cambodia, Indonesia, Malaysia, Philippines, Thailand, and Vietnam. Annex 1.

⁴² See Raymond J. Ahearn & Wayne M. Morrison, 'U.S.-Thailand Free Trade Agreements, CRS Report for Congress' (28 Jul. 2006), 6–11 (detailing issues in FTA negotiations).

⁴³ See generally Duangrat Laohapakul, 'United States – Thailand Free Trade Agreement Negotiations: Potential Effects on Pharmaceutical Patent Protection in Thailand, LL.M. Paper, Harvard Law School', <<http://leda.law.harvard.edu/leda/data/774/Laohapakul06.pdf>>, April 2006.

⁴⁴ See Ahearn & Morrison, *supra* n. 42 ('In March 2006, Thailand suspended the negotiations pending the outcome of the snap April general election (which was subsequently invalidated by a constitutional court)').

⁴⁵ Michael F. Martin, 'The Proposed U.S.-Malaysia Free Trade Agreement, CRS Report for Congress' (25 Jan. 2008), 29–30.

⁴⁶ *Ibid.*, 17 and 24.

the US president's fast-track authority or trade promotion authority (TPA) in 2007 may have also prompted Malaysia to discontinue FTA efforts.⁴⁷

The limited US FTA progress resulted from a US model FTA with WTO-plus obligations, which developing ASEAN countries found difficult to accept. In my view, acceptance of the US bilateral FTA approach would have undermined ASEAN's core benefits. There are foreseeable negative consequences absent a US-ASEAN FTA or a valid promise to conclude a similar region-based agreement. It is in Washington's best interest to pursue bilateral FTAs only with ASEAN countries that are important US export markets, that is, Singapore, Malaysia, and Thailand. The potential bandwagoning effect would galvanize subsequent FTA partners to make additional concessions pursuant to the benchmark set under the first 'high standard' FTA, such as the USSFTA. ASEAN would thus face fragmentation if more developed countries vie to conclude separate FTAs with the United States.⁴⁸ This disintegrated development would deprive ASEAN of its combined leverage in negotiations with Washington and, in the long term, weaken the bloc's common stance in APEC, the Cairns Groups, and the WTO.⁴⁹

Individual US FTAs with some ASEAN countries would also isolate unfavourable trade partners that are undemocratic and of limited trade interest to the United States. This alienation would diminish ASEAN's and America's collective political influence over countries, such as Cambodia, Laos, Myanmar, and Vietnam (known as CLMV countries). Economically, selective FTAs would widen the gap between more developed ASEAN countries and the less developed ones, thus counteracting ASEAN integration. Moreover, ASEAN's weakening coalition would decrease its status as a hub of regionalism, and China would, in turn, take its place. China's version of Asian regionalism, the East Asia Economic Community (EAEC), attempts to exclude the United States and thus diminishes

⁴⁷ Michael F. Martin, 'The Proposed U.S.-Malaysia Free Trade Agreement, CRS Report for Congress' (25 Jan. 2008), 31.

⁴⁸ See Anak Agung Banyu Perwita, 'ASEAN-US Relations: Challenges Ahead', <www.siaonline.org/files/Prof.%20Anak%20Agung%20Banyu%20Perwita.pdf>, 2 Aug. 2011 ('[T]he tendency of the US government to deal bilaterally with individual ASEAN Member States rather than with ASEAN collectively on [economic] issues do not help the US to win trust among ASEAN people'). Surin Pitsuwan, Secretary-General of ASEAN, stated that '[ASEAN] leaders need to convince Americans to look at it as a single unit'. Men Kimseng, 'ASEAN Leaders Seek US Trade Attention', *Voice of America*, 11 May 2010, <www.voanews.com/khmer-english/news/Asean-Leaders-Seek-US-Trade-Attention-93425919.html>.

⁴⁹ Mohd Haflah Piei, Director of the Malaysian Institute of Economic Research, commented that '[t]he co-existence of regional and bilateral FTAs may be viewed as a sign of ASEAN's disintegration and the situation may be exploited by its trading partners to their advantage in negotiating . . . FTAs'. Arun Bhattacharjee, 'Bilateral Deals Hinder ASEAN Trade Block', *Asia Times*, 30 May 2003, <www.atimes.com/atimes/Southeast_Asia/EE30Ae04.html>; see also Ludo Cuyvers, 'An EU-ASEAN Free Trade Agreement: Reflections on Issues, Priorities, Strategies', CAS Discussion Paper No. 53 (October 2007), 14 ('[T]he EU approach to restrict an FTA to ASEAN 7 . . . can easily divide the ASEAN countries in negotiations.').

its regional stake. For these reasons, the old roadmap under the US TIFA approach is at the cost of ASEAN's development and should not be the blueprint for prospective US-ASEAN trade ties.

2.2[b] *The Myanmar Dilemma*

The EAI's goal to form a network of bilateral FTAs with individual ASEAN states failed to progress satisfactorily. Washington also attempted to conclude an FTA with ASEAN as a single entity in 2006 when the US-ASEAN TIFA was signed under the US-ASEAN Enhanced Partnership framework.⁵⁰ The US-ASEAN TIFA could have paved a way towards developing a framework with ASEAN, but no progress was made. The conspicuous obstacle to this region-based FTA has been the political Myanmar dilemma.

Myanmar's accession to ASEAN in 1997 was controversial.⁵¹ Unlike the EU, ASEAN never made democracy a condition of membership. Given Myanmar's abundant resources and strategic location bordering China and India, it was of ASEAN's geopolitical interest to engage rather than isolate the regime.⁵² However, since 1997, the United States has imposed economic sanctions on Myanmar as a response to the suppression of the democratic opposition by the military junta, known as the State Peace and Development Council.⁵³ US sanctions against Myanmar made a US-ASEAN FTA essentially impossible because of the US Congress's robust resistance to include Myanmar in the FTA and ASEAN states' opposing insistence on negotiating the FTA only as a group.⁵⁴ Divergent US and ASEAN approaches towards Myanmar have been the key impediment to bilateral security and economic cooperation.⁵⁵

⁵⁰ Lum, *supra* n. 9, at 16. The ASEAN-US Initiative was a framework that the United States created with goals of providing security and economic assistance to ASEAN. *Ibid.*

⁵¹ Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (2006), 131–135.

⁵² *Ibid.*, 134.

⁵³ The United States imposes economic sanctions on Myanmar based on s. 570, Omnibus Consolidated Appropriations Act of 1997, Burmese Freedom and Democracy Act of 2003, Tom Lantos Block Burmese Jade Act of 2008, and Executive Orders 13047, 13310, 133448, and 13464. Michael F. Martin, 'Burma's 2010 Elections: Implications of the New Constitution and Election Laws, CRS Report for Congress' (29 Apr. 2010), 14 and n. 43.

⁵⁴ See Severino, *supra* n. 51, at 329 ('ASEAN Economic Ministers . . . insisted that the EAI be discussed with ASEAN as a whole and that a framework be worked out between ASEAN as a group and the United States.').

⁵⁵ See Larry A. Niksch, 'Burma-U.S. Relations, CRS Report for Congress' (2 Jun. 2008), 9 ('ASEAN leaders stressed to the Bush Administration that ASEAN assertiveness has limits and will not include economic sanctions against Burma.').

The US policy remained unchanged until the Obama Administration adopted a new 'pragmatic engagement' policy in 2009.⁵⁶ Ostensibly, Washington no longer seeks 'regime change' but encourages high-level talks with Myanmar's leadership while continuing US economic sanctions.⁵⁷ This policy change promoted senior officers' dialogue with the government of Myanmar before and after the heavily criticized 2010 election, which barred the participation of the National League for Democracy led by Aung San Suu Kyi.⁵⁸

Washington's 'old wine in a new bottle' approach has neither brought major changes to Myanmar's political reform nor reinvigorated US-ASEAN FTA negotiations. The US policy simply missed the point. Maintaining current sanctions against Myanmar will further erode America's already-dwindling regional influence and alienate the United States from ASEAN. The following evidence illustrates the inefficacy of the decade-long sanctions. Despite often-mislabelled 'international' economic sanctions on Myanmar, trade with the country is only blocked by the West, which includes the United States, the EU, and Canada.⁵⁹ In fact, Myanmar has never been severely affected by the sanctions because it engages most trade with ASEAN countries and China. The list of Myanmar's top ten trade partners reveals the blind spot in the US policy.⁶⁰ These countries include five ASEAN countries (Thailand, Singapore, Malaysia, Indonesia, and Vietnam), two US FTA partners (Singapore and Korea), and two TPP participants (Malaysia and Vietnam).⁶¹ Not to mention the fact that current sanctions do not apply to US-based Chevron and French-based Total, both of

⁵⁶ David I. Steinberg, 'Aung San Suu Kyi and U.S. Policy toward Burma/Myanmar', *J. Current S.E. Asian Aff.* 29, no. 3 (2010): 35, 42.

⁵⁷ *Ibid.*; Martin, 2010, *supra* n. 53, at 14.

⁵⁸ In 2009, 'U.S. Secretary of State for East Asia and Pacific Kurt Campbell and Deputy Assistant Secretary of State Scot Marciel traveled to Burma to meet with Burma's Prime Minister Thein Sein . . .'. Martin, 2010, *supra* n. 53, at 8. In 2011, Senator John McCain also visited Myanmar to 'assess the country's political situation after the civilian government took charge'. *Southeast Asia from the Corner of 18th & K Streets*, vol. II, no. 9 (Center for Strategic & International Studies, 8 Jun. 2011), 9.

⁵⁹ See generally Bert Morsbach, 'Counterproductive Sanctions on Burma Should Be Lifted', *MIZZIMA*, 26 May 2011, <www.mizzima.com/edop/commentary/5325-counterproductive-sanctions-on-burma-should-be-lifted.html>; Daniel Schearf, 'Burma Sanctions Debated after Change in Government', *Voice of America*, 18 Apr. 2011, <www.voanews.com/english/news/asia/-Burma-Sanctions-Debated-after-Change-in-Government-120057694.html>.

⁶⁰ Myanmar's top ten trade partners are Thailand, China, India, Singapore, Japan, South Korea, Malaysia, Indonesia, EU27, and Vietnam. 'Myanmar's Trade with Main Partners (2010)', DG-Trade of the European Commission', <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113423.pdf>, 8 Jun. 2011.

⁶¹ Singapore allegedly permitted Myanmar 'officials to hold assets in bank accounts in Singapore'. Emma Chanlett-Avery, 'Singapore: Background and U.S. Relations, CRS Report for Congress' (25 Feb. 2011), 3.

which are major oil companies that provide financial assistance to the military junta.⁶²

More importantly, ASEAN has concluded region-based FTAs with six countries and none of them exclude Myanmar from the FTA or impose trade sanctions.⁶³ These countries even include close US allies, such as Australia, Japan, and Korea. The fact that Myanmar invariably benefits from foreign trade and investment under these FTAs further undermines the effectiveness of economic sanctions. US sanctions also gave China additional leverage over Myanmar. In fact, China has become Myanmar's second largest trade partner and the third largest investor, with a focus primarily on oil and gas, electric power, and mining sectors.⁶⁴ The increasing Chinese presence in Myanmar will not only deteriorate American interests but also influence ASEAN's decision process. This development ironically contravenes the US strategic objective to counterbalance China's rise in Southeast Asia.⁶⁵ These loopholes should prompt the US government and Congress to articulate a more pragmatic policy on Myanmar, thereby removing this geopolitical obstacle to a US-ASEAN FTA.

3 A CONSTRUCTIVE FTA ROADMAP IN THE CONTEXT OF ASIAN REGIONALISM

Faced with the proliferation of Asian FTAs and challenges by regional powers, it is vital for the United States to implement a constructive FTA strategy to maintain its leadership in the Asia Pacific. Washington must recognize ASEAN's status as indispensable regional architecture in practice rather than simply in political

⁶² See Pauline Chiou, 'Analysis: Why Sanctions Aren't Working in Myanmar', <http://articles.cnn.com/2009-07-02/world/myanmar.sanctions_1_myanmar-government-jade-and-rubies-natural-gas?_s=PM:WORLD>, 5 Jul. 2009 (explaining that Chevron and TOTAL are able to operate in Myanmar 'because their contracts were signed with Myanmar's military government before international pressure was tightened'). US sanctions laws allow Chevron to 'consider voluntary divestment over time'. Larry A. Niksch & Martin A. Weiss, 'Burma: Economic Sanctions, CRS Report for Congress' (3 Aug. 2009), 7.

⁶³ For the list of ASEAN's FTA partners, see 'AFTA & FTAs', <www.aseansec.org/4920.htm>, 2 Aug. 2011. Simon Crean, Australian Minister of Trade, stated that 'Australia does not have trade sanctions against Myanmar, as we see our financial sanctions and travel restrictions targeted at the Burmese regime . . . as a more effective response to the situation in Myanmar'. 'Global Crisis versus Free Trade, AANZFTA: Building a Deeper Integration with ASEAN', *ASEAN Affairs*, <www.aseanaffairs.com/interview/aanzfta_global_crisis_versus_free_trade>, 2 Aug. 2011.

⁶⁴ 'Myanmar's Trade with Main Partners (2010)', *supra* n. 60; Niksch, *supra* n. 55, at 10. It is estimated that 60% of Myanmar's economy is controlled by China. *Ibid.*

⁶⁵ Leon T. Hadar, 'U.S. Sanctions against Burma: A Failure on All Fronts', *Trade Policy Analysis*, no. 1, 26 Mar. 1998, <www.cato.org/pubs/trade/tpa-001.html> ('Without engagement with ASEAN . . . there was a danger that [Myanmar] would form closer ties with China, a development that would pose a direct strategic threat to Vietnam and an indirect one to the United States.').

discourse.⁶⁶ A framework that reinvigorates US-ASEAN FTA negotiations should be a priority of the US trade agenda. From economic and political perspectives, the Obama Administration's TPP initiative may be a building block for a US-ASEAN FTA, but it cannot be a substitute for the latter. The United States should consider the 'ASEAN way' of FTAs based on a framework agreement approach. This 'Plan B' roadmap will serve as a building block to deepen trade liberalization and circumvent political opposition that the TPP negotiations currently encounter.

3.1 EMERGING CENTRALITY OF ASEAN

In the early 1990s, Washington's lukewarm approach to ASEAN did not significantly affect US political and trade interests in the region because ASEAN was not seen as Asia's focus. Since its inception in 1967, ASEAN remained a loose organization due to its 'non-interference' principle.⁶⁷ ASEAN's economic integration did not begin until 1992 when countries decided to form the ASEAN Free Trade Area (AFTA) through the Common Effective Preferential Tariff (CEPT) scheme.⁶⁸ The progress was limited for two reasons. First, to accommodate ASEAN states' divergent economic interests, the AFTA allowed substantial exclusions on trade in goods and had little impact on NTBs and service trade.⁶⁹ Second, most ASEAN countries pursued significant unilateral reduction in tariffs, and the extra margin of benefits conferred by the AFTA was rather restricted.⁷⁰ Based on intra-ASEAN traders' observation, the system was of little use because the AFTA's lower tariff levels that they used covered a mere 5% of overall trade.⁷¹ These factors made the scheme 'a paper exercise' of trade liberalization within ASEAN.⁷²

ASEAN's importance changed dramatically in the twenty-first century. The bloc's geopolitical location and economic integration accelerated its emerging

⁶⁶ See, e.g., 'Joint Statement of the 1st ASEAN-U.S. Leaders' Meeting, Singapore, 15 Nov. 2009', <http://app.mfa.gov.sg/pr/read_content.asp?View,14148> ('We agreed to work closely together in building this regional architecture . . . [and] reaffirmed the importance of ASEAN centrality in this process.').

⁶⁷ Severino, *supra* n. 51, at 87-88; see also ASEAN Declaration (Bangkok Declaration), preamble (ASEAN Member States should 'ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities . . .').

⁶⁸ Frank Frost, *ASEAN's Regional Cooperation and Multilateral Relations: Recent Developments and Australia's Interests*, Parliament of Australia Department of Parliamentary Services Research Paper, No. 12 (9 Oct. 2008), at 9.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Razeen Sally, 'The ASEAN Charter and the ASEAN Economic Community: A Watershed for Regional Economic Integration', in *ASEAN: Life after the Charter*, ed. S. Tiwari (2010), 113, 114.

centrality in Asian regionalism. Because of competition from the EU and North American Free Trade Agreement (NAFTA), ASEAN leaders were concerned that procrastinating intra-ASEAN integration would jeopardize ASEAN's competitiveness. Hence, during the 2003 ASEAN summit, ASEAN states adopted the Bali Concord II to usher ASEAN's development.⁷³ The leaders expected to establish an ASEAN Community based on three pillars, including political and security cooperation, sociocultural cooperation, and economic cooperation.⁷⁴ The ASEAN Economic Community (AEC) Blueprint, adopted in 2007, also provides an outline and schedule for the formation of the AEC by 2015.⁷⁵

As of January 2010, ASEAN-6 (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand) eliminated tariffs covering 99.65% of the CEPT's tariff lines.⁷⁶ Less developed CLMV countries also accomplished 0%–5% tariff rates under 98.96% of such tariff lines.⁷⁷ Moreover, expanded services commitments negotiated under the ASEAN Framework Agreement on Services resulted in the service sector receiving 50.6% of ASEAN's FDIs in 2009.⁷⁸ The new trade facilitation efforts also progressively diminish NTBs in areas covering customs and sanitary and phytosanitary (SPS) measures.⁷⁹ Due to these developments, ASEAN has achieved 73.6% of the AEC's target and reached the significant growth rate of 7.6% in 2010, after a weak 1.5% during the 2009 financial crisis.⁸⁰

ASEAN's external FTAs also complement intra-ASEAN integration. Since ASEAN first signed the framework agreement with China in 2002, ASEAN has concluded trade pacts with Japan, Korea, India, Australia, and New Zealand.⁸¹ January 2010 witnessed the completion of free trade areas with China and Korea, as well as the commencement of the implementation of the ASEAN-Australia-New Zealand FTA (AANZFTA) and the ASEAN-India Trade in Goods Agreement.⁸² These FTAs are significant because they cemented ASEAN's status in Asian regionalism. The hub-and-spoke system centred in

⁷³ Press Statement by the Chairperson of the 9th ASEAN Summit and the 7th ASEAN+3 Summit (Bali, Indonesia, 7 Oct. 2003).

⁷⁴ Article 1 of the Declaration of ASEAN Concord II (Bali Concord II).

⁷⁵ *ASEAN Economic Community Scorecard* (2010), 3.

⁷⁶ ASEAN Annual Report: 2009–2010, at 27.

⁷⁷ *Ibid.*

⁷⁸ 'Keynote Address by H.E.S. Pushpanathan, Deputy Secretary-General of ASEAN for ASEAN Economic Community, at the ASEAN Roundtable 2010X', <www.asean.org/24656.htm>, 9 Oct. 2008.

⁷⁹ *Ibid.*

⁸⁰ *ASEAN Economic Community Scorecard* (2010), 13; 'Table 2: Selected Key ASEAN Macroeconomic Indicators, 15 Feb. 2011', <www.aseansec.org/stat/Table2.pdf>; Esther Samboh, 'ASEAN Forecasts Lower GDP Growth', *Jakarta Post*, 11 Apr. 2011, <www.thejakartapost.com/news/2011/04/11/asean-forecasts-lower-gdp-growth.html-0>.

⁸¹ For information on ASEAN's FTAs, see <www.aseansec.org/4920.htm>, 20 Oct. 2010.

⁸² ASEAN Annual Report: 2009–2010, at 25.

ASEAN is acceptable to regional powers, such as the United States and Japan. Regionalism based on ASEAN carefully avoids a Sino-centric trade block, particularly given that China has signed FTAs with Hong Kong, Macau, ASEAN, Singapore, Pakistan, New Zealand, and Taiwan.⁸³ ASEAN-based FTAs also bring business and geopolitical advantages for ASEAN under its post-Cold War strategy of power balance.⁸⁴ The signal to Washington is straightforward. A trade policy on Asia cannot ignore ASEAN.

Increased trade under external FTAs also enhances ASEAN economic integration. As these FTAs do not exclude any ASEAN countries, Member States benefit from foreign trade and investment according to their comparative advantage. This will give extra incentive for ASEAN countries to further reduce intra-ASEAN trade barriers to lower production costs and attract FDIs. In addition, FTA negotiation and implementation strengthen ASEAN's capacity building to concentrate on unified interests in external economic relations as a single entity. Absent a written procedure, ASEAN's chief FTA negotiators, the Leaders of the Senior Economic Officials' Meeting, with the assistance of the ASEAN Economic Ministers, have developed an informal process to coordinate members' positions in negotiations.⁸⁵ In 2007, ASEAN countries signed the ASEAN Charter that confers a legal personality on the bloc.⁸⁶ It is expected that the Charter will strengthen ASEAN's FTA negotiation mechanism, as Article 41.7 of the Charter mandates that the ASEAN Coordinating Council prescribe procedures for international agreement negotiations.⁸⁷ Consequently, ASEAN's existing FTAs and escalated trade negotiations capacity will give the group additional leverage over a prospective US-ASEAN FTA. For these reasons, I

⁸³ For information on China's FTAs, see <<http://fta.mofcom.gov.cn/topic/ensingapore.shtml>>, 20 Oct. 2010; for an analysis on China's FTA considerations, see Pasha L. Hsieh, 'The China-Taiwan ECFA, Geopolitical Dimensions and WTO Law', *J. Int'l Eco. L.* 14, no. 1 (2011): 121, 131–133.

⁸⁴ For details on ASEAN's 'power balance' policy, see generally Sandy Gordon, 'South Asia after the Cold War: Winners and Losers', *Asian Survey* 35, no. 10 (1995): 879, 879–895.

⁸⁵ David Chin Soon Siong, 'ASEAN's Journey towards Free Trade', in *Economy Diplomacy: Essays and Reflections by Singapore's Negotiators*, ed. C.L. Lim & Margaret Liang (2010), 209, 241. For ASEAN's organization chart, see Lee Hsien Loong, 'The Future Market of ASEAN', in *Think ASEAN! Rethinking Marketing toward ASEAN Community (2015)*, ed. Philip Kotler et al. (2007), 42, 44, and 48.

⁸⁶ See Art. 3 of the Charter of the Association of Southeast Asian Nations ('ASEAN . . . is hereby conferred legal personality'); see also Jeffrey Chan Wah Teck, 'ASEAN Legal Personality under Its New Charter – Its Nature, Meaning and Implications: Status of the Work and Issues Involved', in *ASEAN: Life after the Charter*, ed. S. Tiwari (2010), 1, 8 ('Although ASEAN may not be a legal person prior to the Charter, its Secretariat . . . has operated in many jurisdictions, notably in Indonesia where it has its headquarters, as a legal person.').

⁸⁷ See Art. 41.7 of the Charter of the Association of Southeast Asian Nations ('The procedures for concluding such agreements shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils.'). The ASEAN Coordinating Council comprises of foreign ministers of ASEAN states.

suggest that Washington acknowledge ASEAN's emerging centrality in Asia by pursuing a constructive roadmap for a bilateral FTA.

3.2 CHALLENGES TO THE TPP AGREEMENT

Regardless of Washington's political rhetoric reiterating its focus on ASEAN, the new trade priority of the United States ignores ASEAN as a group. The USTR's current trade effort concentrates on negotiating an expanded TPP, which builds on an FTA that took effect between the Pacific-4 (P4) countries including Singapore, New Zealand, Chile, and Brunei in 2006.⁸⁸ In November 2009, the Obama Administration notified Congress of the government's intention to participate in negotiations with TPP countries.⁸⁹ These trade partners perceive the TPP as a 'high quality, twenty-first century agreement' that will provide a roadmap towards the FTAAP covering twenty-one APEC economies.⁹⁰ As of August 2011, negotiating parties include nine countries – the United States, the original P-4 countries, Australia, Peru, Vietnam, and Malaysia.⁹¹ There have been seven rounds of negotiations, including the most recent one in Vietnam in June 2011.⁹² Although the deadline for concluding the TPP remains uncertain, TPP partners aim to provide a framework by the US-hosted APEC Leaders' Meeting in Honolulu in November 2011.⁹³

For the United States, motives for promoting the TPP are twofold. The TPP provides a substitute pathway towards Asian regionalism other than the Beijing-preferred EAEC based on the 'ASEAN Plus Three' framework, which will likely exclude the United States.⁹⁴ The TPP therefore not only avoids America's marginalization from Asian FTA networks but also reinforces its leadership in the process. Moreover, the comprehensive contents of the TPP can be set as the benchmark for prospective partners. The United States essentially transplants the American approach to FTA negotiations into the TPP process, thereby elevating the TPP standards to maximize US trade interests.

⁸⁸ Fergusson & Vaughn, *supra* n. 23, at 1.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, 8; 'Sixth Round of Trans-Pacific Partnership Agreement (TPP) Negotiations', <www.dfat.gov.au/fia/tpp/110404-tpp-stakeholder-update-6.html>, 10 Aug. 2011.

⁹¹ See Fergusson & Vaughn, *supra* n. 23, at 1 ('Malaysia was accepted as the ninth negotiation partner in October 2010, and the nine conducted a fourth round of negotiations in December 2010 in New Zealand.').

⁹² 'Steady Progress at the Seventh Trans-Pacific Partnership (TPP) Round', <www.ustr.gov/about-us/press-office/press-releases/2011/june/steady-progress-seventh-trans-pacific-partnership-tpp>, 11 Aug. 2011.

⁹³ 'Trade Ministers Meet to Discuss TPP Progress', <www.trademinister.gov.au/releases/2011/ce_mr_110519.html>, 19 May 2011.

⁹⁴ The 'ASEAN Plus Three' framework includes ten ASEAN countries plus China, Korea, and Japan.

I do not challenge the TPP initiative as a positive development for trade liberalization in the Asia Pacific. Nevertheless, the TPP cannot replace a US-ASEAN FTA. The current TPP members include only four ASEAN states (Brunei, Malaysia, Singapore, and Vietnam). Three ASEAN countries (Cambodia, Laos, and Myanmar) are not APEC members and will unlikely be considered as potential TPP partners.⁹⁵ In various aspects, the TPP resembles the previously failed US TIFA approach, which is counterproductive to ASEAN's integration and US regional influence. The United States should prioritize a US-ASEAN FTA over the TPP and utilize the former as a foundation for the latter as the long-term goal. Washington's sole pursuit of the TPP not only misses the geopolitical focus but also increases the complexity of the negotiation. There are some nearly insurmountable challenges that the TPP negotiations will encounter and that will likely frustrate Obama's FTA roadmap.

First, the TPP's major dilemma is the unpredictability of new members. Despite the agreement's 'open accession clause' that permits entry into the agreement 'by any APEC Economy or other State',⁹⁶ its WTO-plus liberalization levels hinder potential membership. For instance, Japan's devastated farming industry following the 2011 mega-tsunami, earthquake, and nuclear disaster has remarkably weakened the government's ability to 'sacrifice' the agricultural protectionism in exchange for TPP membership.⁹⁷ The liberalization of the dairy market has also caused grave concerns to Canada and New Zealand. Notably, US trade with current TPP countries simply represents 6% of its overall trade with the world. Absent participation by major economies, the TPP is doomed as an insignificant trade exercise. Furthermore, even assuming TPP partners intend to use the agreement as the blueprint for the FTAAP, it is inconceivable that they are prepared to negotiate with all twenty-one APEC economies. APEC members range from Papua New Guinea, China to Russia, which has yet to join the WTO. The massive variance in economic levels, compounded by the lack of common commitments, will invariably complicate the TPP process. This membership dilemma makes the TPP much less attractive than a US-ASEAN FTA, which possesses clearly defined members with shared political interests.

Second, TPP negotiations face the problem of tackling overlapping FTAs among partners, which agreed to have the TPP coexist with these existing FTAs.⁹⁸

⁹⁵ Figure A-1: TPP States and Potential Additional Members, Fergusson & Vaughn, *supra* n. 23, at 18; Annex 1.

⁹⁶ Article 20.6.1 of the Trans-Pacific Strategic Economic Partnership Agreement (P4 Agreement).

⁹⁷ See Aurelia George Mulgan, 'TPP off Japan's Trade Agenda for the Time Being', *East Asia Forum*, 19 Apr. 2011, <www.eastasiaforum.org/2011/04/19/tpp-off-japans-trade-agenda-for-the-time-being/> (explaining Japan's position on the TPP).

⁹⁸ Russell L. Smith, 'Whither (and Whether) a Trans-Pacific Partnership (TPP)?', *KWR International*, <www.kwrintl.com/library/2010/tpp.html>, 24 Aug. 2011.

The multiple FTAs will worsen the 'spaghetti bowl' problem that often diminishes trade liberalization due to different sets of rules of origin (ROO). For example, a controversial ROO issue is whether the TPP should adopt the 'yarn-forward' rules under which preferential treatment for textile and apparel products is only granted if they originate from FTA partners and their cutting and assembling also occur in the region.⁹⁹ Such rules, which were already included in the NAFTA and following US FTAs, are preferred by the US textile industry but will invariably contravene Vietnam's export interests.¹⁰⁰

Third, the complicated web of FTAs poses additional challenges to goods market access schedules, in which TPP countries differ fundamentally in negotiating modality. As the schedules have different tariff reductions and deadlines, Australia, New Zealand, and Singapore proposed plurilateral negotiations over such schedules with the goal of making the talks more transparent and straightforward.¹⁰¹ However, the United States prefers a two-stage strategy. It will negotiate a common goods market schedule only after bilateral negotiations with its non-FTA partners (Brunei, Malaysia, New Zealand, and Vietnam) are completed.¹⁰² The US objective is to exert pressure over non-FTA partners to substantially liberalize domestic markets before they join multilateral negotiations. This strategy may maximize US trade interests in bilateral negotiations but risks delaying the TPP process. Although a hybrid compromise was allegedly reached, it remains doubtful whether this approach can yield substantial results.¹⁰³ In addition, the TPP market access schedule talks can be further handicapped because TPP partners have yet to agree on whether schedules under existing FTAs should be renegotiated.¹⁰⁴ Even US agricultural groups, which often form strong lobbying powers, are divided on this perspective, given that producers and processors have opposite interests.¹⁰⁵

⁹⁹ Leonie Barrie, 'Why US Textile Groups Fear Vietnam in TPP Pact', <www.just-style.com/analysis/why-us-textile-groups-fear-vietnam-in-tpp-pact_id111261.aspx>, 2 Jun. 2011.

¹⁰⁰ *Ibid.*; Jonathan Fee & B.J. Shannon, 'Overview of the Central America – Dominican Republic Free Trade Agreement', <www.cottonusasourcing.com/Business/contentEn.cfm?ItemNumber=1809>, 20 Aug. 2011.

¹⁰¹ Joe Nunweek, 'TPP Second Talks: Past Agreements and Regulatory Coherence', *TPP Digest*, 5 Jul. 2010, <http://tppdigest.org/index.php?option=com_tag&task=tag&tag=market-access>.

¹⁰² 'Official: U.S. TPP Goods Market Access Offer Will Not Exclude Any Sector', *Inside U.S. Trade*, 12 Jan. 2011.

¹⁰³ See Claude Barfield, 'The TPP: A Model for 21st Century Trade Agreements?', *East Asia Forum*, 25 Jun. 2011, <www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements/> ('In 2009, a hybrid approach was adopted under which countries will be allowed to make offers on a bilateral basis or to the TPP membership as a whole.').

¹⁰⁴ Smith, *supra* n. 98; see *ibid.* ('The US has strongly urged that existing FTA market access schedules be maintained, as bilateral agreements provide both defensive and offensive benefits to US trade.').

¹⁰⁵ See Smith, *supra* n. 98 ('[A]gricultural producers such as dairy, sugar and . . . meat and livestock want existing FTAs to be kept in place and see limited benefit from the TPP negotiations. Food importers, processors and exporters, on the other hand, favor revisiting the existing FTAs.').

Fourth, the TPP's controversial IPR provisions constitute a significant challenge to negotiation. The US position is to pursue standards beyond the WTO Agreement Trade-Related Aspects of Intellectual Property Rights (TRIPS) with the goal of elevating IPR criteria to those under US law.¹⁰⁶ US proposals include non-TRIPS obligations in the TPP. For instance, to impede 'the unauthorized storage and transmission of copyrighted materials', TPP countries should offer deterrent 'legal incentives for service providers to cooperate with copyright owners'.¹⁰⁷ Although comparable provisions exist in the US-Australia FTA and the USSFTA, developing country partners will find these obligations hard to accept.¹⁰⁸ In addition, the United States seeks to qualify TPP members' existing rights under the TRIPS. A prime example is Article 27 of the TRIPS, which authorizes WTO members to exclude two categories – 'plants and animals' and 'diagnostic, therapeutic and surgical methods for the treatment of human or animals' – from patentability.¹⁰⁹ However, the US draft provides that TPP members 'shall make patents available for inventions for' such categories with limited exceptions on '*ordre public* or morality' grounds.¹¹⁰ These TRIP-plus provisions will increase regulatory costs and make the compromise difficult, particularly because, as of 2011, five TPP countries remain on the US Special 301 List.¹¹¹

Lastly, other WTO-plus obligations that may similarly stall negotiations include government procurement issues. Notably, Brunei, Chile, and New Zealand have not even acceded to the WTO GPA.¹¹² TPP partners may find US insistence on the inclusion of environmental and labour rights clauses intrusive.¹¹³ Their concern is realistic because in 2010, Washington filed the first labour complaint under its FTAs, alleging that Guatemala's ineffective enforcement of labour laws violates Article 16 of the US-Dominican Republic-Central America FTA (CAFTA-DR).¹¹⁴ These WTO-plus elements, aggravated by the bipartisan attitude

¹⁰⁶ See Fergusson & Vaughn, *supra* n. 23, at 14 (explaining US negotiating objectives for FTAs' IPR protection).

¹⁰⁷ 'Trans-Pacific Partnership Intellectual Property Rights Charter Draft, 10 Feb. 2011', <<http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>>, Art. 16.3(a).

¹⁰⁸ Article 17.11.29(a) of the US-Australia Free Trade Agreement; Art. 16.9.2(a) of the US-Singapore Free Trade Agreement.

¹⁰⁹ Articles 3(a) and (b) of the Agreement Trade-Related Aspects of Intellectual Property Rights.

¹¹⁰ 'Trans-Pacific Partnership Intellectual Property Rights Charter Draft', *supra* n. 107, Arts 8.2 and 8.3.

¹¹¹ Chile is on the Priority List, and Brunei, Malaysia, Peru, and Vietnam are on the Watch List. Executive Summary, 2011 Special 301 Report, *supra* n. 18.

¹¹² Parties and Observers to the GPA, *supra* n. 17.

¹¹³ See Fergusson & Vaughn, *supra* n. 23, at 15 ('In August 2010, USTR officials announced that all TPP participants, despite differences in levels of development, would be required to meet the same labor and environmental conditions [as other US FTA partners].').

¹¹⁴ 'U.S. Trade Representative Ron Kirk Announces Next Step in Labor Rights Enforcement Case against Guatemala', <www.ustr.gov/about-us/press-office/press-releases/2011/august/us-trade-representative-ron-kirk-announces-next-ste>, August 2011.

towards the Trade Adjustment Assistance (TAA) Program, worsened the unpredictability of US Congressional approval of the TPP in the post-TPA era.¹¹⁵ The fate of long-awaited US FTAs with Columbia, Panama, and South Korea can undermine TPP participants' confidence in negotiating with the United States.¹¹⁶

3.3 POLICY RECOMMENDATIONS AND WTO ISSUES

The above-analysed issues show that TPP negotiations are tackling an expanded version of obstacles that a US-ASEAN FTA may encounter. The US approach is not only overly ambitious as to the TPP's geographic scope and liberalization standards but also lacks the collective support from ASEAN. The Obama Administration is choosing an FTA roadmap with a misplaced priority. The leadership that Washington seeks to demonstrate in fact hinders the impetus to finalize the TPP.

As the 'American way' of getting involved in Asian regionalism either by the bilateral TIFA approach or the TPP initiative proves infeasible, it is advisable to consider a constructive 'Plan B' roadmap based on the 'ASEAN way' of trade integration. Specifically, the interim objective should be a US-ASEAN framework agreement that provides a legal basis for FTA negotiations. In the long run, this FTA will solidify ASEAN's position with America in the TPP process. Lessons learned from experiences dealing with problems that result from development gaps such as IPR enforcement and government procurement can be applied to developing countries in TPP negotiations. Moreover, the TPP that builds on a US-ASEAN FTA can facilitate the aspiration of achieving the FTAAP. Both the United States and ASEAN will, consequently, benefit from becoming key pillars in the hub-and-spoke architecture.

3.3[a] *A US-ASEAN Framework Agreement as an Enhanced TIFA*

The ASEAN experience in negotiating external FTAs can serve as a model for a US-ASEAN FTA. ASEAN's approach originates from its internal integration towards the AEC. Except for the AANZFTA, four of ASEAN's five region-based FTAs began with a framework agreement that provides a timetable for finalizing enabling agreements. This approach not only applies to ASEAN's FTAs but also

¹¹⁵ See 'US FTAs Reach Congressional Committees, Only to Face Political Limbo over Worker Aid', *Bridges Weekly Trade New Digest* 15, no. 25 (6 Jul. 2011): 3 ('[T]he prospect of reauthorizing an extension of the Trade Adjustment Assistance (TAA) programme, which provides assistance to workers displaced by foreign competition, has various Republicans balking, anxious about the increased spending . . .').

¹¹⁶ For example, as of August 2011, the US Congress has not ratified the Korea-US FTA that was signed in 2007. EU, South Korea Free Trade Pact Enters into Force, *ibid.*, 7–8.

provides a model for the politically volatile China-Taiwan Economic Cooperation Framework Agreement (ECFA).¹¹⁷ As of January 2010, the ASEAN-China FTA (ACFTA) and the ASEAN-Korea FTA (AKFTA) were completed under the framework agreement approach.¹¹⁸ The ASEAN-China Framework Agreement, concluded in 2002, was the first FTA experiment with ASEAN's trade partners.¹¹⁹ This agreement was subsequently supplemented by four enabling agreements on trade in goods (2004), dispute settlement (2004), trade in services (2007), and investments (2009), respectively.¹²⁰ The ACFTA forms the largest free trade area in the world and met the goal of creating an FTA that its Framework Agreement envisioned.¹²¹

The United States may consider a prospective US-ASEAN framework agreement as an 'enhanced TIFA'.¹²² This TIFA is distinguishable from the original US-ASEAN TIFA in several ways. The TIFA has no legal status under WTO law. Yet, a framework agreement in the ASEAN context constitutes an 'interim agreement necessary for' or 'leading to' an FTA under Article XXIV of the General Agreement on Tariffs and Trade (GATT).¹²³ In terms of the procedural notification process, the 2006 WTO General Council Decision on the Transparency Mechanism for Regional Trade Agreements makes no distinction between an interim agreement and a full-fledged regional trade agreement (RTA).¹²⁴ Under the Transparency Mechanism, the United States and ASEAN will be required to notify the Council for Trade in Goods and the Council for Trade in

¹¹⁷ Siong, *supra* n. 85, at 229–243; Hsieh, *supra* n. 83, at 138–1341.

¹¹⁸ ASEAN Annual Report: 2009–2010, at 25.

¹¹⁹ Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China (China-ASEAN Framework Agreement) was concluded on 4 Nov. 2002.

¹²⁰ The texts of China-ASEAN Framework Agreement and enabling agreements are available at China FTA Network, <<http://fta.mofcom.gov.cn/topic/chinaasean.shtml>>, 20 Aug. 2011.

¹²¹ Article 2 of the China-ASEAN Framework Agreement.

¹²² See Richard P. Cronin, 'A New U.S.-ASEAN Trade Tack', <www.stimson.org/essays/a-new-us-asean-trade-tack/>, 9 Feb 2006 ('[A]n "Enhanced TIFA" could serve as an interim deal that incrementally facilitates more trade and investment, but doesn't try to resolve all the issues in one fell swoop.').

¹²³ See Art. XXIV.5 of the General Agreement on Tariffs and Trade (GATT) ('... an interim agreement necessary for the formation of ... free trade area ...'); Art. XXIV.7(a) GATT ('... an interim agreement leading to the formation of such a[n] ... area ...'); Understanding on the Interpretation of Art. XXIV of the General Agreement on Tariffs and Trade 1994 (Art. XXIV Understanding), paras 1 and 12 ('... interim agreement leading to the formation of a ... free trade area').

¹²⁴ For instance, the EC-Chile Interim Agreement was notified to the WTO as a full agreement despite its 'interim' nature indicated by a ten-year transitional period. Committee on Regional Trade Agreements (CRTA), Examination of the Interim Agreement between the EC and Chile – Note on the Meeting of 28 Jul. 2005, WT/REG/164/M/1, 6 Oct. 2005, para. 10. See also Lorand Bartels, "Interim Agreements" under Article XXIV GATT, *World Trade Rev.* 8, no. 2: 339, 342 ('[T]he Decision makes no distinction between interim and "full" regional trade agreement with an implementation period.').

Services prior to the application of a bilateral framework agreement.¹²⁵ Moreover, pursuant to Article XXIV.5(c) of the GATT, an interim agreement should contain ‘a *plan and schedule* for the formation of . . . a free trade area within a *reasonable length of time*’.¹²⁶

The ‘plan and schedule’ requirement includes the information on ‘when the agreement is to be implemented by stages’.¹²⁷ ASEAN’s framework agreements meet this requirement. While ASEAN’s framework agreements with Japan and Korea provide a plan and schedule for completing overall FTA negotiations, comparable agreements with China and India go further by mandating respective deadlines for trade in goods, services, and investments liberalization.¹²⁸ Regarding the ‘reasonable length of time’ requirement, the Understanding on the Interpretation of Article XXIV of the GATT also requires the formation of an FTA not to ‘exceed ten years only in exceptional cases’.¹²⁹ The fact that the ACFTA and the AKFTA commenced negotiations under framework agreements in 2002 and 2005, respectively, and were both finalized in 2010 shows their compliance with the requirement.¹³⁰ In essence, a key difference between a previous TIFA and an enhanced TIFA based on a framework agreement is that the former simply provides a consultative mechanism, but the latter legally obliges parties to engage in subsequent negotiations within a time frame. A US-ASEAN framework agreement will, therefore, send a strong message to ASEAN leaders, reinforcing a US FTA ‘promise’ that can effectively offset their concern about the US president’s lack of fast-track authority.

¹²⁵ Committee on Regional Trade Agreements, Notification Format for Regional Trade Agreements, WT/REG/16 (23 Nov. 2006).

¹²⁶ Emphasis added. Art. XXIV.5(c) GATT.

¹²⁷ Annex, Transparency Decision, para. 2(a)(ii); see also Transparency Decision, para. 1(b) (‘Members parties . . . shall convey to the WTO . . . information on the RTA, including . . . any foreseen timetable for its . . . provisional application . . .’); Transparency Decision, para. 7 (‘To assist Members in their consideration of a notified FTA: (a) the parties shall make available to the WTO Secretariat data as specified in the Annex . . . and (b) the WTO Secretariat . . . shall prepare a factual presentation of the RTA.’).

¹²⁸ Preamble and Art. 10 of the Framework for Comprehensive Economic Partnership between the Association of Southeast Asian Nations and Japan (ASEAN-Japan Framework Agreement), 8 Oct. 2003; Art. 5.2.3 of the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (ASEAN-Korea Framework Agreement), 13 Dec. 2005; Art. 3 of the China-ASEAN Framework Agreement; Art. 8 of the Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and the Association of Southeast Asian Nations (ASEAN-India Framework Agreement), 8 Oct. 2003.

¹²⁹ Understanding on the Interpretation of Art. XXIV of the General Agreement on Tariffs and Trade 1994 (Understanding), para. 3. The term ‘exceptional cases’ has yet to be defined in WTO jurisprudence.

¹³⁰ The China-ASEAN Framework Agreement and the ASEAN-Korea Framework Agreement were concluded on 4 Nov. 2002 and 13 Nov. 2005, respectively.

Furthermore, a framework agreement that liberalizes top priority sectors represents a middle ground between a TIFA and an FTA. It paves the way for a WTO-plus FTA without incurring imminent political opposition from industries or Congress due to controversial issues including market access, IPR, labour rights, or environmental standards.¹³¹ An ultimate FTA based on a framework agreement is also required to comply with WTO rules. A US-ASEAN FTA should meet the 'substantially all the trade' requirement under Article XXIV.8(b) of the GATT and the 'substantially sectoral coverage' requirement under Article V.1(a) of the General Agreement on Trade in Services (GATS).¹³² In fact, ASEAN's framework agreements stipulate these requirements as guiding principles for subsequently negotiated Trade in Goods Agreements and Trade in Services Agreements.¹³³ For instance, both the ACFTA and the AKFTA satisfy the requirements by eliminating tariffs for more than 90% of traded goods and liberalizing substantial services sectors without 'provid[ing] for the *a priori* exclusion of any mode of supply'.¹³⁴ Hence, ASEAN's FTA experiences and WTO rules reinforce the gradual approach towards an FTA and should guide US-ASEAN trade negotiations.

3.3[b] *Building Block Features under the Existing Legal Structure*

As examined above, an enhanced TIFA based on ASEAN's framework agreement model is both WTO-consistent and constructive in current trade politics. A US-ASEAN framework agreement should, therefore, learn from the building block features of ASEAN's previous framework agreements. First and foremost, a US-ASEAN framework agreement should provide a time frame for enabling agreements. ASEAN's FTAs with China, Korea, and India are based on the legal structure that includes a framework agreement and four subsequent agreements on

¹³¹ See Cronin, *supra* n. 122 ('... U.S.-Asean trade negotiators could bypass knotty market access disputes and hot button obstacles such as labor rights and working conditions that are required by Congress as a condition for signing an FTA.').

¹³² Article XXIV.8(b) GATT and Art. V.1(a) General Agreement on Trade in Services (GATS).

¹³³ Articles 2, 3, and 4 of the ASEAN-China Framework Agreement; Art. 6 of the ASEAN-Japan Framework Agreement; Arts 2.1 and 2.2 of the ASEAN-Korea Framework Agreement; Arts 3 and 4 of the ASEAN-India Framework Agreement.

¹³⁴ For trade in goods and services liberalization under the ASEAN-China FTA and the ASEAN-Korea FTA, see <www.fta.gov.sg/fta_akfta.asp?hl=3>, 20 Aug. 2011. The quantitative benchmark for the 'substantially all the trade' rule usually 'mean[s] liberalization of 90% of the trade in goods between the FTA parties'. European Commission-Trade, *CARIFORUM-EC EPA: Trade in Goods* (October 2008), 2. See footnote to Art. V.1(a) GATS ('The "substantial sectoral coverage" rule is to be "understood in terms of number of sectors, volume of trade affected and modes of supply"'); for details on this rule, see Won-Mog Choi, 'Regional Economic Integration in East Asia: Prospect and Jurisprudence', *J. Int'l Eco. L.* 6, no. 1 (2003): 49, 64-65.

goods, services, dispute settlement, and investment.¹³⁵ Another feasible model is the ASEAN-Japan Comprehensive Economic Partnership (AJCEP) Agreement negotiated under the timetable of the ASEAN-Japan Framework Agreement. Absent separate enabling agreements, chapters on similar contents are included in the single undertaking AJCEP Agreement.

Second, the ASEAN approach's flexibility is shown in different liberalization agendas based on categories of goods and economic development of ASEAN states. For example, ASEAN's framework agreements contain an 'early harvest program (EHP)', which immediately accords preferential treatment to FTA partners and serves as a preliminary step for an FTA.¹³⁶ The EHP scope of liberalization is adaptable. Although the EHPs under ASEAN's framework agreements are confined to goods, the EHP of the China-Taiwan ECFA, a similarly interim agreement, includes services liberalization.¹³⁷ Parties may, therefore, choose to cover EHP sectors that are both non-sensitive and mutually beneficial. Goods other than those covered in the EHP are placed on the 'normal track' and the 'sensitive track' subject to different timetables and levels of tariff reduction.¹³⁸ The fact that the sensitive track allows highly sensitive agricultural goods such as rice to be minimally affected or even excluded avoids initial impasse similar to what TPP negotiations encounter.¹³⁹ Less developed CLMV countries are also given a longer period of time and supplementary stages for liberalization.¹⁴⁰ This aspect makes an ASEAN FTA significantly distinguishable from the TPP because the latter imposes the same standards regardless of participants' levels of development.

Third, an agreement on dispute settlement that covers jurisdiction over state-to-state conflicts arising from a framework agreement and enabling agreements on goods, services, and investment is to be concluded between parties.¹⁴¹ The mechanism that governs investor-to-state disputes is included in an agreement on investment, which is usually negotiated at a later stage, thus allowing

¹³⁵ For instance, Art. 1.4 of the ASEAN-Korea Framework Agreement identifies the agreements that will 'form part of legal instruments establishing the ASEAN-Korea FTA upon their respective entry into force'.

¹³⁶ For example, Art. 6 of the ASEAN-China Framework Agreement; Art. 7 of the ASEAN-India Framework Agreement.

¹³⁷ See Hsieh, *supra* n. 83 ('As the EHP [of the ECFA] covers trade in goods and services, it is the world's first EHP that includes trade in services.').

¹³⁸ For example, Art. 3 of the ASEAN-China Framework Agreement; Art. 3 of the ASEAN-India Framework Agreement.

¹³⁹ For an analysis on modalities for the sensitive track, see Siong, *supra* n. 85, at 221-240.

¹⁴⁰ For example, Art. 3.4 of the ASEAN-China Framework Agreement; Art. 3.5 of the ASEAN-India Framework Agreement. In other words, ASEAN six countries (Brunei, Indonesia, Malaysia, Singapore, Thailand, and Philippines) are usually subject to the 'first round' of liberalization under ASEAN FTAs.

¹⁴¹ For discussion on three models of ASEAN FTA's dispute settlement mechanisms, see Hsieh, *supra* n. 83, at 152-53.

parties to accumulate consensus on the more controversial investor-to-state arbitration system. Finally, none of ASEAN's FTAs with six countries exclude Myanmar. US economic sanctions against Myanmar have posed a political obstacle to realization of the FTA goal under the 2006 US-ASEAN FTA. Previous discussions indicate that Washington has failed to achieve its FTA objective and will risk alienating itself from ASEAN and advancing Chinese influence. The new wave of Asian regionalism should compel the US government and Congress to assess why the American approach is not even followed by close US allies.¹⁴² After the nominally civilian government took office in 2010, the EU also adopted a soft approach to temporarily suspend sanctions.¹⁴³ A US-ASEAN framework agreement needs to confront the Myanmar dilemma constructively. Given overriding trade and geopolitical interests, Washington is advised to limit sanctions on Myanmar to an extent that does not pose a hurdle to a region-based US-ASEAN FTA. The interim goal can be the 'ASEAN minus X' formula under which an ASEAN agreement takes effect absent ratification by all Member States.¹⁴⁴ This formula, which has been utilized in the Southeast Asian Nuclear Weapon-Free Zone Treaty and the ASEAN Agreement on Transboundary Haze Pollution, can be extended to the trade arena.¹⁴⁵ The United States may propose an FTA with ASEAN without Myanmar, thus shifting the negotiation burden to ASEAN as a whole. The prospect for a US-ASEAN FTA will be a robust inducement for ASEAN countries to exert collective pressure on Myanmar.¹⁴⁶ As five ASEAN countries are Myanmar's largest trading partners, their stronger stance on the regime should play a more active role in changing it than US economic sanctions.¹⁴⁷

A US-ASEAN framework agreement modelled after the building block features above will provide a cornerstone for a prospective US-ASEAN FTA.

¹⁴² Australia, Japan, and Korea concluded FTAs with ASEAN without excluding Myanmar. See also 'Global Crisis versus Free Trade, AANZFTA: Building a Deeper Integration with ASEAN', *supra* n. 63 ('Australia does not have trade sanctions against Myanmar, as we see our financial sanctions and travel restrictions targeted at the Burmese regime and its supporters as a more effective response to the situation in Myanmar').

¹⁴³ Schearf, *supra* n. 59 ('The EU has issued a one-year suspension of its visa and asset freeze for civilian leaders and the foreign minister').

¹⁴⁴ *Know Your ASEAN*, 2nd edn (2010), 45. The 'ASEAN minus X' or 'Ten-X' approach, which constitutes an exception to the ASEAN consensus-based principle, has also been applied in liberalization in intra-ASEAN service trade. Vo Tri Thanh, 'ASEAN Economic Community: Perspective from ASEAN's Transitional Economies', in *Roadmap to an ASEAN Economic Community*, ed. Denis Hew (2005), 105, 108.

¹⁴⁵ The two instruments only require seven and six ratifications, respectively, to become effective. *Ibid.*

¹⁴⁶ For example, after Cyclone Nargis devastated Myanmar in 2008, ASEAN foreign ministers were able to persuade the regime 'to accept humanitarian assistance [and] to empower ASEAN to take the lead'. Koh, *supra* n. 7, at 43–44.

¹⁴⁷ The five countries are Thailand, Singapore, Malaysia, Indonesia, and Vietnam. 'Myanmar's Trade with Main Partners (2010)', *supra* n. 60.

Notably, a region-based FTA can be complemented rather than hindered by bilateral FTAs with individual ASEAN states. For instance, the fact that the USSFTA covers two Indonesian islands – Batam and Bintan Special Economic Zones – helps Indonesia gain additional foreign investments.¹⁴⁸ The USSFTA's chapter on ROO also includes a novel design, known as the Integrated Sourcing Initiative (ISI).¹⁴⁹ The ISI allows certain medical equipment and information technology products to count as Singapore goods under the FTA.¹⁵⁰ The lack of the requirement to prove the origin of an ISI product constitutes an inducement for ASEAN companies to link to Singapore to receive the USSFTA's preferential treatment. These features of the USSFTA create spill-over economic benefits for other ASEAN countries and should be incorporated into other bilateral FTAs.

Along with a region-based FTA, the United States may also expedite the liberalization process through bilateral FTAs with ASEAN countries that involve substantial trade interests. This approach has been taken by China and India, both of which concluded FTAs with ASEAN as whole, but expanded services liberalization under respective bilateral FTAs with Singapore and Malaysia.¹⁵¹ To maximize liberalization under a US-ASEAN FTA and FTAs with separate ASEAN states, the United States is also advised to assist ASEAN in capacity building. For instance, the ASEAN Single Window Program that the US Agency for International Development (USAID) supported since 2008 should be expanded under a US-ASEAN framework agreement.¹⁵² This one-stop shop mechanism allows ASEAN countries to exchange electronic import and export data so that importers can ship goods to any Member States after finalizing customs procedures at one regional port, thereby cutting time for customs clearance.¹⁵³ Comparable

¹⁴⁸ See Razeen Sally, *Southeast Asia in the WTO* (2004), 58–59 ('The [USSFTA] has innovative provisions for goods manufactured in Batam and Bintan, and trans-shipped through Singapore, to have duty-free access to the U.S. market.').

¹⁴⁹ The list of products that are covered under the Integrated Sourcing Initiative is included in Annex 3B of the US-Singapore FTA.

¹⁵⁰ Ithnain Rossman, 'The Goods Package', in *The United States-Singapore Free Trade Agreement: Highlights and Insights*, eds Tommy Koh & Chang Li Lin (2004), 61, 69.

¹⁵¹ The China-Singapore FTA's 2011 Amendment Protocol allows 'ASEAN-China FTA Package 2 Services Commitments to be extended to Singapore ahead of ASEAN'. 'China-Singapore Free Trade Agreement: Amendment Protocol', <www.fta.gov.sg/press_release/CSFTA_Amendment_Protocol_Factsheet007.pdf>, 22 Aug. 2011. In addition, the 2010 India-Malaysia Comprehensive Economic Cooperation Agreement includes liberalization in services, which the ASEAN-India FTA does not cover. 'International Trade: Trade Agreements', <http://commerce.nic.in/trade/international_ta_current_details.asp>, 22 Aug. 2011.

¹⁵² See 'ASEAN Single Window Program', <www.usaid.gov/rdma/documents/ASEAN_Single_Window_Briefer_200805_508.pdf>, 22 Aug. 2011 (explaining the key work areas of the five-year programme). ASEAN's Agreement to Establish and Implement the ASEAN Single Window was concluded in 2005 and its objectives are stated in Art. 3.

¹⁵³ Under the ASEAN Single Window Project, '[t]he average time for customs clearance is expected to be shortened to 30 minutes by 2012'. 'Towards ASEAN One-stop Customs Market', *Vietnam Business News*, 8 May 2010, <<http://vietnambusiness.asia/towards-asean-one-stop-customs-market/>>.

areas of economic cooperation can be extended to 'behind the border' issues such as IPR capabilities and competition policy covered under the ASEAN-Japan Framework Agreement.¹⁵⁴ In sum, these policy recommendations will allow a prospective US-ASEAN FTA to harmonize ASEAN states' ROO, thus obviating the 'spaghetti bowl' problem. The common yet differential liberalization scheme will also help strengthen ASEAN integration and in turn benefit US exporters and investors.

4 CONCLUSION

In the past decade, ASEAN has evolved as a regional hub in Asian regionalism due to the bloc's FTAs with major economies in the Asia Pacific. The United States remains the only Pacific power that has not initiated any form of formal FTA with ASEAN. This article argued that the legal framework governing US-ASEAN trade ties should be reinvigorated, and it examined a feasible roadmap to conclude a US-ASEAN FTA from legal and geopolitical perspectives. As this FTA involves substantive interests that will arise from trade liberalization and security alliance, it should be Washington's priority on the trade agenda. Nevertheless, the US TIFA approach and the Myanmar issue have obstructed such efforts.

The Doha Round impasse has prompted WTO members to pursue bilateral and multilateral FTAs. These FTAs in turn became nations' primary geostrategic goal in the twenty-first century. Against this background, a new US FTA roadmap is essential for acknowledging ASEAN's emerging centrality in regional architecture. The Obama Administration's TPP initiative is a positive development, but the TPP can, by no means, be a substitute for a US-ASEAN FTA. Consequently, this article proposed an alternative roadmap based on an enhanced TIFA that incorporates building block features of ASEAN's framework agreements with trading partners. The roadmap will lay a solid yet gradual foundation for a region-based FTA. Although the impact of a prospective US-ASEAN FTA remains to be seen, this FTA will assuredly fortify the hub-and-spoke alliance across the Pacific and provide an important gateway to Asian regionalism under the multilateral trading system.

¹⁵⁴ Article 5 of the ASEAN-Japan Framework Agreement.

Annex 1. Trade-Related Organizations/Agreements Involving the United States and ASEAN Countries

ASEAN Country	WTO Member	APEC Member	TIFA with the United States, Signed in	FTA with the United States, Signed in
ASEAN	N	N	2006	N
Brunei Darussalam	Y	Y	2002	TPP, 2005
Cambodia	Y	N	2006	N
Indonesia	Y	Y	1996	N
Lao PDR	Observer	N	N	N
Malaysia	Y	Y	2004	Started FTA negotiations in 2006 (suspended in 2009), TPP (negotiating)
Myanmar	Y	N	N	N
Philippines	Y	Y	1989	N
Singapore	Y	Y	N	USSFTA, 2003; TPP, 2005
Thailand	Y	Y	2002	Started FTA negotiations in 2003 (suspended in 2006)
Vietnam	Y	Y	2007	TPP (negotiating)

•N: No;Y:Yes.

•TIFA:Trade and Investment Framework Agreement.

•TPP: Trans-Pacific Partnership; original members include Brunei, Chile, New Zealand, and Singapore; Australia, Malaysia, Peru, the United States, and Vietnam are currently negotiating to join the group.

Annex 2. WTO Disputes between the United States and ASEAN Countries (as of 1 July 2011)

Complainant	Respondent	Dispute Name	DS Number	Request Year	Agreements
United States	Philippines	<i>Philippines – Taxes on Distilled Spirits</i>	403	2010	GATT
United States	Philippines	<i>Philippines – Measures Affecting Trade and Investment in the Motor Vehicle Sector</i>	195	2000	GATT, SCM, TRIMs
United States	Philippines	<i>Philippines – Measures Affecting Pork and Poultry</i>	102	1997	Agriculture, GATT, Licensing, TRIMs
United States	Philippines	<i>Philippines – Measures Affecting Pork and Poultry</i>	74	1997	Agriculture, GATT, Licensing, TRIMs

Complainant	Respondent	Dispute Name	DS Number	Request Year	Agreements
United States	Indonesia	<i>Indonesia – Certain Measures Affecting the Automobile Industry</i>	59	1996	GATT, SCM, TRIMs, TRIPS
Indonesia	United States	<i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i>	406	2010	GATT, SPS, TBT
Vietnam	United States	<i>United States – Anti-dumping Measures on Certain Shrimp from Vietnam</i>	404	2010	AD, GATT, Protocol of Accession, WTO
Thailand	United States	<i>United States – Anti-dumping Measures on Polyethylene Retail Carrier Bags from Thailand</i>	383	2008	AD, GATT
Thailand	United States	<i>United States – Measures Relating to Shrimp from Thailand</i>	343	2006	AD, GATT
Thailand	United States	<i>United States – Provisional Anti-dumping Measures on Shrimp from Thailand</i>	324	2004	AD, GATT
Philippines	United States	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i>	61	1996	GATT, TBT
Malaysia and Thailand (with India and Pakistan)	United States	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i>	58	1996	GATT

•Information based on the WTO website and <<http://www.worldtradelaw.net/>>.

Submission Guidelines

The following is a brief guide concerning the provision of articles which may be of assistance to authors.

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3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
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