China and the Trans-Pacific Partnership: Excluding One of the United States' Top Trading Partners from a Cross-Pacific Trade Preference Program?

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I. Introduction

U.S.-China trade disputes are a deeply rooted problem. A comprehensive political, legislative, and judicial effort has struggled to address and resolve the issues in full, and will probably continue to do so for some while. The question remains: what can be done at this point in time, or in the always shifting political climate of any given moment (especially before now and the Presidential election in November of 2012)? The Obama Administration seems to have a prospective plan of action:1 while some facets of U.S. strategy are dependent upon the level of Chinese cooperation attained,2 some, such as the proposed Trans-Pacific Partnership (TPP),3 attempt to address the problem by circumventing Chinese participation altogether.

The Trans-Pacific Partnership is currently being negotiated as a nine member (Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States) cooperative agreement designed to enhance trade, investment, job creation and retention, and economic growth and development in member states.4 The

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2 Id. at 2-3. Kirk further stated that: Given the importance of our growing trade relationship with China, the United States will use all available tools in 2012 to ensure that China engages in fair play on trade and that U.S. exporters have a fair shot to compete in China. In addition to enforcement efforts that aim to end discriminatory policies and unfair subsidies, we will also continue to press China – through the Strategic & Economic Dialogue, the Joint Commission on Commerce and Trade, and other ongoing engagement – to open investment opportunities, to complete negotiations to join the WTO Government Procurement Agreement by offering comprehensive coverage of its procurement, and to increase transparency and eliminate market access barriers and distortions in areas ranging from agricultural goods to services. Id. at 3.
4 TPP. Japan is also a prospective member, and Japanese officials met with U.S. officials recently to discuss Japanese involvement. See, e.g., Press Release, Office of the United States Trade Representative, U.S., Japan Hold High Level Consultation on the Trans-Pacific Partnership, USTR.GOV (February 2012), http://www.ustr.gov/about-us/press-office/press-releases/2012/february/us-japan-high-level-consultation-trans-pacific; David Williams, Japan to announce TPP intentions, conference told, NBR.CON.NZ,

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agreement intends to feature innovations such as harmonizing the regulatory systems of member states to make them more compatible and introducing measures to encourage small and medium sized companies to participate in international trade.\textsuperscript{5} As of early May, 2012, TPP negotiations have gone through eleven rounds, the first round occurring in March 2010, the most recent round concluding on March 9, 2012, and the next round scheduled to take place in Dallas, Texas on May 8-9.\textsuperscript{6} Many hypothesize that the partnership is largely designed as a countermeasure to China’s rapid economic growth and world influence.\textsuperscript{7}

It is narrow-minded, however, to adopt an “us versus them” mentality when viewing U.S.-China trade relations, and some advocate that China be included in the TPP.\textsuperscript{8}

As the major growth engine of the global economy, China’s exclusion from the TPP raises questions about the TPP’s likely success. The TPP’s purpose is to weld the region together and lock in growth of trans-Pacific

\textsuperscript{5} May 4, 2012, \url{http://www.nbr.co.nz/article/japan-announce-tpp-intentions-conference-told-gb-118037} (indicating that “Japan’s prime minister should confirm by the end of this month his country's intentions to join” the TPP). \textit{See also} Tim Robertson, \textit{Why is the TPP Such a Big Secret?}, HUFFINGTONPOST.COM, May 4, 2012, \url{http://www.huffingtonpost.com/tim-robertson/trans-pacific-partnership_b_1476261.html} (Robertson) (speculating that along with Japan, Canada and Mexico, and eventually China and Russia will be involved in the TPP).

\textsuperscript{6} \textit{Id.}

\textsuperscript{7} See, e.g., John Ross, \textit{Realities Behind the Trans-Pacific Partnership}, CHINA.ORG.CN, November 18, 2011, \url{http://www.china.org.cn/opinion/2011-11/18/content_23953374.htm} (Ross). \textit{Cf.} David P. Fidler, Sung Won Kim & Summit Ganguly, \textit{Eastphalia Rising?: Asian Influence and the Fate of Human Security}, 26 WORLD POL’Y J. 53, 53 (2009), \url{http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1114&context=facpub} (Fidler) (stating that “[t]he question is no longer if the rise of China, India, and Asia will affect world politics. The question is \textit{how} the migration of power and influence towards Asia will change global affairs and the nations and people affected by these dramatic shifts.” (emphasis in original))).

economic relationships. The central strategic challenge for the TPP, therefore, relates to China’s membership.\(^9\)

The reality remains that China is one of the U.S.’s most important trading partners,\(^10\) and that the two nations have the potential to engage in mutually beneficial relations for decades to come, as long as cooperation and compromises can be attained. Regarding the ongoing presence of trade disputes in this context, there appears to be a fine line between simple cultural misunderstandings,\(^11\) and deliberate but veiled manipulations of the international trading system by one nation or the other to its primary (if not exclusive) advantage.\(^12\) The White House hopes to conclude the TPP by the end of 2012; yet some criticize that while it “would sidestep the mercantilism of China and other Asian nations that is displacing U.S. manufacturing; it would do nothing to raise labor or social standards, and would make the outsourcing problem worse.”\(^13\) Similarly, the TPP is criticized because it “is being negotiated in secret, using the ‘fast track’ provision characteristic of trade agreements, so that there can be no advance scrutiny by Congress

\(^9\) Armstrong.

\(^10\) Kimberly Amadeo, *U.S. Trade Deficit with China*, ABOUT.COM, January 26, 2012, http://useconomy.about.com/od/tradepolicy/p/us-china-trade.htm (Amadeo). In 2011, U.S. exports to and imports from China were the highest in history; the U.S. exported $94 billion in goods, and imported $367 billion. Id. U.S. trade deficits with China in both 2010 and 2011 were also also higher than any year prior to 2010. *Id.* See also U.S. Census Bureau, Top Trading Partners: Total Trade, Exports, Imports, CENSUS.GOV (Year-to-Date, December 2011), http://www.census.gov/foreign-trade/statistics/highlights/top/top1112yr.html (Trade Census). In 2011, China sent the greatest value of goods into the U.S. but Canada and Mexico received more in exports from the U.S. (China received the third most U.S. exports). Canada was the overall leader in total U.S. trade in 2011 (at 16.2%), China was at 13.6 %, and Mexico was at 12.5%. *Id.*

\(^11\) See, e.g., Pan Junwu, *Chinese Philosophy and International Law*, 1 A.J. INT’L L. 233, 233 (2010), http://asiansil.web.fc2.com/A-2/junwu_pan.pdf (Pan) (equating the Chinese concepts of Li and Fa to Natural Law and Positive Law respectively, and stating that “no proper English equivalent covers all of the features of Li and Fa. Li and Fa are the two basic concepts the Chinese have created to understand the diversified social phenomena in their society. Their effects are hidden but very powerful.”); Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 27 (2010) (Ginsburg) (describing China’s role in the possible emergence of a new “Eastphalian” world order).

\(^12\) See, e.g., Helene Cooper, *Asking China to Act Like the U.S.*, N.Y. TIMES, Nov. 27, 2010, http://www.nytimes.com/2010/11/28/weekinreview/28cooper.html?pagewanted=all (Cooper) (stating that “[a] fundamental tenet of foreign policy says that nations will seldom voluntarily act against what they have determined, for whatever reason, to be their own national interest.”).

or the public. The final deal just gets an up or down quickie vote.”

Given the crucial importance of U.S. trade relations with China in the coming years, the potential reality of the TPP (whether it includes or excludes China) provides a major incentive to examine the underpinnings of Chinese trade philosophy as well as the relative success of current U.S. trade preference programs.

Accordingly, Part II of this Paper addresses Chinese concepts of international law and how they may be affecting U.S.-China trade. Part III broadly compares the origins and effects of NAFTA and the origins and potential effects of the TPP. Part IV considers a number of other complicating factors which may be impacting U.S.-China trade policy, and Part V concludes that whether or not the reality of a TPP which includes China is possible, in the spirit of negotiation and consultation, the Chinese should be invited to participate in open and transparent discussions on the subject.

II. Chinese Concepts of International Law

Consider, for instance, a brief explanation of potential reasons why China, as a nation, sometimes acts in ways which the typical American perspective might struggle to understand:

China is a country which has been bathing in its unique philosophy for several thousand years. Even in modern China, the traditional philosophy continues to influence Chinese attitude to the world and the rules governing the world. The unique way to understand the world is characteristic of Chinese envision[ing] of international law. As a new growing power, China, based on its philosophy, is making an effort to revise the existing international system for creation of a new international order. Although the Chinese culture is being influenced by the western one, it has not been superseded yet. Accordingly, the Chinese behaviour pattern is still deeply rooted in its culture and philosophy.  

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14 Kuttner. Cf. Benjamin Franklin, in BARTLETT'S FAMOUS QUOTATIONS, at 310 (16th ed. 1992) (“No nation was ever ruined by trade, even seemingly the most disadvantageous.”).
15 Pan, at 233.
It is not surprising that the U.S. and China have experienced, and will continue to experience, conflicts in international relations. Flexibility and a willingness to incorporate and merge complex and seemingly contradictory value systems may be the key to continued joint prosperity, and a working understanding of traditional Chinese concepts of law may be essential in facilitating mutually beneficial relations.\textsuperscript{16}

According to some Chinese scholars, as it emerges as a world leader, China is striving to achieve a comprehensive understanding of a system of international law in which it inhabits its own and proper place.\textsuperscript{17} Much of this understanding can be drawn from the concepts of “Li” and “Fa”: \textsuperscript{18}

Li establishes unequal relations between people. Based on Li, people should know who is the master and who the servant, who is the elder and who the younger, who is the guest and who the host and behave accordingly. Li suggests to people their unequal duties and rights when they stay together. Li tries to make people internalise the unequal formalised behaviour so that personal desires and cultivation can be properly socialized. . . . Consequently, China believes that there should be some kind of ‘international Li’ existing as the basis for international law.\textsuperscript{19}

The concept of Li, if unappreciated, stands to offend western notions of international law regarding the sovereign equality of states, which can be traced back to the Peace of Westphalia in 1648.\textsuperscript{20} Take, for instance, Article 2.1 of the United Nations Charter,

\begin{itemize}
\item \textsuperscript{16}See id., at 233-34.
\item \textsuperscript{17}Id. at 235. “It is obvious that China is endeavouring to establish ‘international Li’ based on the concepts of peace, development and cooperation. Economic development is the core of the system of concepts.” (emphasis added) Id. at 237.
\item \textsuperscript{18}Id. at 234. “Fa, which is often comparable to ‘legalism’ or ‘law’, is traditionally different from the western concept of law. In ancient China, ‘law’ referred exclusively to criminal law.” Id. Similarly, consider the Chinese proverb, “[l]aw is meant for a base person but not for a gentleman.” Id.
\item \textsuperscript{19}Id. at 234.
\end{itemize}
stating that the organization (of which China is a member), is “based on the principle of the sovereign equality of all its Members.”21

Similarly, it is of little surprise that “unequal formalised behavior”22 which suppresses Chinese interests is aggravating to China. For example, the Treaty of Nanjing between China and the United Kingdom (in which, among other things, the U.K. gained possession of Hong Kong), concluded in 1842 after China lost the Opium Wars:

marked the beginning of a series of ‘unequal treaties’ between China and Western powers and heralded China’s ‘century of humiliation’ at the hands of imperialism. In 1844, following the U.K. example, the United States forced China to sign the Treaty of Wangxia, which accorded the U.S. the same trade privileges that Britain obtained. This was the first treaty between China and the United States. These unequal treaties, which introduced the Chinese to the West’s concepts of international law and ‘free trade,’ degraded the country to a semi-colonial status.23

China’s later economic policy, in the middle of the twentieth century, “focused on the inwardly-oriented goal of achieving self-reliance. Thus, the country had little interest in establishing economic ties with foreign states.”24 Slightly later on, and since 1978:

China has embraced [former vice chairman] Deng Xiaoping’s reform agenda, which was intended to replace the country’s Soviet-style central planning with a market economy and end China’s isolation. This decision was not simply an economic one, but symbolized a political and ideological turning point.25

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22 See Pan, at 234.
24 Id. at 373-74.

made a conscious decision to abandon Deng Xiaoping’s prudential counsel not to alarm others as China built its economic and military power: ‘Hide your capabilities, bide your time,’ Deng had advised. This was China’s ‘peaceful rise.’ . . . More recently, those in the Chinese military, political, and intellectual establishment, whom Henry Kissinger has called ‘the triumphalists,’ succeeded in advancing a disturbing new strategy for China:
China’s upward economic trajectory since that point has been self evident.\textsuperscript{26}

It is easy to suppose that the tension between traditional Chinese notions of law and westernized concepts of international order is a major factor behind ongoing U.S.-China trade disputes.\textsuperscript{27} Accordingly, U.S. policy on the TPP, among a plethora of other policies related to U.S.-China trade, must take account of and incorporate possible solutions to this tension if long term cross-Pacific trade partnerships are to be successful.

For instance:

According to Confucianism, obedience to Li will improve the public order and social relationships. In the Chinese view, the priority for international society is to construct a so-called ‘international Li.’ Actually China has been searching for the ‘international Li’ ever since it began to understand international law. What is ‘international Li’? When China realizes that the ‘international Li’ is still in the process of formation and that she is living in a world without a father, it naturally regards the world as being in a state of Anarchy, and the ‘The international law’ that has not grown out of ‘international Li’ is no ‘real law.’ Consequently, it intends to denounce the international rules that are thought to be unfair and tries to reform international legal systems. According to traditional Chinese ideology, without Li, there is no way in which a society can be a harmonious one or one ruled by real law.\textsuperscript{28}

In the modern globalized economy, understandably, if this philosophy is not resisted, it might pose problems for all states other than China. Thankfully, there is a mechanism built into Chinese legal thought which can be utilized to facilitate cooperation and greater understanding:

\textsuperscript{26} See, e.g., Zuliu Hu & Mohsin S. Khan, \textit{Why Is China Growing So Fast?}, International Monetary Fund, IMF.ORG (June 1997), \url{http://www.imf.org/external/pubs/ft/issues8/index.htm}

\textsuperscript{27} See, e.g., Cooper (quoting the vice president of strategic intelligence at a geopolitical risk analysis company as saying: “[b]asically, the U.S. wants China to do what the U.S. wants it to do. . . . We want to make sure that the world stays as the United States would like to see the world. Which means making China subservient to us in some cases.”). It is not difficult to see how this dynamic is akin to the U.S.’s own preferred concept of international Li. See Pan, at 234.

\textsuperscript{28} Pan, at 235.
Although China established a judicial system very early in history, the prevalence of Li encouraged the disputants to resolve their differences by dialogue rather than by adjudication. . . . It was common to regard adjudication as a kind of shame and a loss of face. There are many vivid Chinese proverbs related to the general aversion to adjudication, such as ‘in death avoid hell, in life avoid the law courts,’ ‘to enter a court of law is to enter a tiger’s mouth,’ and ‘it is better to die of starvation than to be a thief; it is better to be vexed to death than to bring a lawsuit, etc.’

For the Chinese, “adherence to negotiations and consultations has its roots in its philosophy, where establishing a relationship between the parties is always a top priority in Li.” As such, negotiations and consultations should, if strictly adhered to, in time provide the international trade community with working solutions to the difficulties presented by China, rather than any one party having to resort to the lesser alternative of trade war, or the even lesser alternative of military action.

Given the discussion above, shutting China out of the TPP may not be the best strategy. Does a TPP without China stand to further alienate the Chinese from western concepts of international order and drive China deeper into its own unique philosophy? Does including China in the TPP risk disruption of the current world order, considering that “[g]enerally, law in Chinese traditional comprehension is an instrument for dominance and not for the protection of natural rights”? The answer to both of these

\[29\] Id. at 237-38.
\[30\] Id. at 238.
\[31\] See, e.g., Hsieh, at 372 (mentioning the futility of U.S.-China trade wars).
\[32\] See, e.g., David Barboza, Chinese News Agency Warns Against U.S. Moves, N.Y. TIMES, Jan. 6, 2012, http://www.nytimes.com/2012/01/07/world/asia/chinese-news-agency-xinhua-warns-us-against-militarism.html (quoting Chinese military officials as saying “[t]he U.S. role [in increasing U.S. military presence in Southeast Asia], if fulfilled with a positive attitude and free from a cold war-style zero-sum mentality, will not only be conducive to regional stability and prosperity, but be good for China, which needs a peaceful environment to continue its economic development.”).
\[33\] See, e.g., Kuttner (stating that “[t]he real problems that the U.S. needs to address in its trade with Asia are hard. A more assertive stance toward China would alienate the U.S. corporations that profit from its capital subsidies and oppressed labor.”).
\[34\] Pan, at 234. See Ginsburg; Fidler.
questions, contradictory as it might seem, is probably “yes.” Thus, the problem of China and the TPP is difficult and complex, and may not have an easy solution.

III. U.S. Experience with Trade Preference Programs

Given the current economic climate, U.S.-China trade is sure to be a big issue in the upcoming Presidential election, and Democrats and Republicans do have a similar stance on Chinese trade practices: namely, China must improve.\(^35\) However, does this bipartisan policy, when applied to TPP negotiations, follow a repeating trend? Some critics of the TPP claim that:

[\[\text{like NAFTA before it, which was cooked up under Bush I and completed by Clinton, the proposed Trans-Pacific Partnership was conceived by a Republican administration (Bush II) and is being carried forward by a Democratic one (Obama). . . . The TPP has a much lower profile, but . . . [p]olitical and diplomatic capital that should be expended on the far more serious China trade problem are going instead to enact a secret deal that would only make it harder to have a regulated form of capitalism with decent standards both for production and for trade.}\(^36\)

A comparison between the TPP and NAFTA seems appropriate. Notably, not everyone with an opinion on the subject thinks that NAFTA negotiations were in vain.\(^37\) While NAFTA gives “considerable advantages” to the U.S., at the time it was being negotiated, “the agreement’s expected impact on Asia [was] causing widespread anxiety there. Asian


\(^36\) Kuttner.

\(^37\) See, e.g., Office of the United States Trade Representative, NAFTA Good for Farmers, Good for America, USTR.GOV (June 2001), http://www.ustr.gov/about-us/press-office/fact-sheets/archives/2001/june/nafta-good-farmers-good-america (citing Canada and Mexico, respectively, as the U.S.’s second and third largest markets for agricultural exports); Jeremy Quittner, Why NAFTA is Good for Entrepreneurs, BUSINESSWEEK.COM, Aug. 22, 2008, http://www.businessweek.com/magazine/content/08_68/s0808020464487.htm (stating that while Free Trade Agreements (FTAs) are “far from perfect,” they do “create important opportunities for small companies.”)
countries fear[ed] that NAFTA [would] hurt their export-driven economies by drawing trade and investment away from Asia:"38

One Asian leader stated he feared NAFTA would draw a line down the middle of the Pacific and that the United States would withdraw from Asia behind this line. The Japanese [were] particularly vocal in expressing their concern that NAFTA [was] protectionist and [would] have a negative impact on Japan's trade with North America. For example, former Japanese Prime Minister Kiichi Miyazawa voiced trepidation that NAFTA could turn North America into a ‘fortress’ against goods from abroad."39

What is to distinguish Asian concern over the promulgation of NAFTA in the mid 1990s from potential Chinese attitudes towards current TPP negotiations? Will the TPP raise a “fortress” against goods from China? The exclusionary element of the TPP seems far greater than that of NAFTA. The U.S. is figuratively reaching its hand out over the Pacific, crossing the trade “line” created by NAFTA, and welcoming many countries into a trade preference program to the exclusion of its chief trading partner outside of North America.40 The gesture is blatant. Again, think back to the mid 1990s:

Asian concern over NAFTA [was] not unfounded. . . . [t]he openness of the United States market to manufactured exports from Asia [was] one of the most important factors in the speed of Asia's economic growth. However, free trade areas are by nature discriminatory because their success hinges on lower tariff and nontariff barriers benefitting only the partner countries.41

The TPP is at least partially geared towards slowing “the openness of the United States market to manufactured exports” from China, which has been “one of the most important factors in the speed” of China’s economic growth.42 Yet shutting the U.S. off from China, or from Asia generally, is not a new idea: “[t]wenty years ago, then-

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39 Id. at 390.
41 McCall, at 390-91.
42 See id.
Secretary of State James Baker famously cautioned that it would be a mistake for the United States to permit ‘a line to be drawn down the middle of the Pacific’ with the United States on one side, separated from Asian countries on the other. Baker’s warning may be truer now than ever before. The decline of American industry has placed American consumers into an intricate balance with Chinese economic capacity. Several economic integration models from East Asia and the Asia-Pacific, such as ASEAN (Association of Southeast Asian Nations) + 3, ASEAN + 6, and an East Asian FTA (Free Trade Agreement) comprising Japan, Korea, and China, have all excluded the United States. It is arguable that the U.S. needs this new cross Pacific model to further stake its claim in a large economic growth zone:

If the United States could succeed in negotiating the TPP—and additionally succeed in selling the TPP as the basis for broader expansion within APEC [Asia-Pacific Economic Cooperation] — it could represent a major step toward achieving President Obama’s goal of engaging with Asia, and would erase the line down the middle of the Pacific, which China, Japan, and perhaps others, might prefer to draw.

To take things a step further, one can claim that a TPP without China (and Japan) is a half way measure. Uninhibitedly furthering U.S. ties to East Asia has the potential to solidify U.S. economic bases as the twenty first century progresses:

Depending on how the expansion is structured, the TPP additionally has the potential to multilateralize some aspects of regionalism, which would help facilitate the creation of an FTAAP [Free Trade Area of the Asia-Pacific]. In other words, the famous ‘spaghetti bowl’ of overlapping and inconsistent FTAs proliferating the globe could be partially untangled if a

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45 Kolsky Lewis, at 38.
46 Id. at 38.
large group of countries could agree to a harmonized set of commitments to which other countries could accede.\textsuperscript{47}

To be more precise, the greater access the U.S. has to deep Asian markets, the greater its chances of continued economic prosperity:

From the United States' perspective, Asia's economic dynamism could fuel American growth. . . . [as] expanding Asian markets continue to absorb American products. Thus, economic prosperity in the United States will depend a great deal on the continued growth of United States exports. . . . Much of the capital needed in the next few decades to restore the sluggish American economy will be available only in capital-rich Asian countries.\textsuperscript{48}

As such, “[t]he biggest risk of the TPP is the political risk that it will divide the region strategically between its members and the rest, with China, for example, not being a member.”\textsuperscript{49} Yet if the TPP “proceeds on terms set by the United States,” it might be very difficult for China to join.\textsuperscript{50} Compare, for instance, a recent statement by U.S. Trade Representative Ron Kirk that the U.S. will “continue to press China . . . to increase transparency and eliminate market access barriers,”\textsuperscript{51} against U.S. involvement in somewhat clandestine trade preference negotiations which exclude China.\textsuperscript{52} China may

\textsuperscript{47} Id. at 39-40.
\textsuperscript{48} McCall, at 407-08. “Over an estimated 40% of U.S. gross domestic product from 1985-1992 is attributable to export growth. In 1990 alone, export expansion accounted for 84% of the growth of U.S. gross national product. Thus, a sustainable growth and job creation agenda requires an active trade enhancing component.” Id.

\textsuperscript{50} Id.
\textsuperscript{51} Kirk, at 3.
\textsuperscript{52} See TPP.
even prefer not to join the TPP, and to keep a line drawn down the center of the Pacific.\textsuperscript{53} The risk here for the U.S. is that, perhaps for political rather than economic reasons, it will be shut out, or shut itself out, of many potential benefits related to the expansion of Chinese markets.\textsuperscript{54}

\textbf{IV. Evaluating the Situation and Incorporating New Perspectives}

Part of the challenge for the U.S. in trading with China is that historical theories of trade have been outpaced by the rapid rate at which large countries, such as China, are developing.\textsuperscript{55} As stated by Michael Spence, a Nobel Laureate economist at New York University, "[i]t's not like we can look to the past and ask ourselves what happened last time this happened, because there wasn't a last time."\textsuperscript{56} In short, "China represents a paragon of international trade uncertainty to the West."\textsuperscript{57}

\textbf{A. Economic, Political, and Military Tensions in the Region}

Despite current uncertainties, some of the recent trends in U.S. policy are difficult to differentiate from past U.S. policy. Though it may now possess novel elements, controversy between the U.S. and China is nothing new. For instance:

\textsuperscript{53} See Kolsky Lewis, at 38.
\textsuperscript{54} See, e.g., U.S. Census Bureau, International Data Base Country Ratings, CENSUS.GOV, March 29, 2012, http://www.census.gov/population/international/data/idb/rank.php (indicating that China’s population is over 1.3 billion people, which is easily more than twice the population of all of the TPP member countries combined). Cf. GDP (current US $), DATA.WORLDBANK.ORG (2012), http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (GDP) (indicating that in 2009, the combined GDP of all TPP countries other than the U.S. was approximately $1.82 trillion; the GDP of the U.S. was $14 trillion; and the GDP of China was $4.99 trillion. Accordingly, the combined GDP of all TPP countries was approximately $10.8 trillion greater than the GDP of China in 2009. It is note-worthy, however, that China’s GDP rose by almost $1 trillion dollars from 2009 to 2010, while the U.S.’ GDP rose by approximately half that, or $500 billion from 2009 to 2010).
\textsuperscript{56} Id.
The issue of Taiwan is a permanent open sore: the U.S. is absolutely committed to protecting its independence and freedom. Taiwan broke away from mainland China in 1949 . . . and established [its] own government under an American security blanket. China has never wavered in its view that the island was ‘stolen’ by the capitalists, and is determined to get it back.  

Former President George W. Bush once stated that the United States would do “whatever it takes” to defend democratic Taiwan against aggression by Chinese Communists, and building tension in the region over U.S. claims to freedom of navigation through the Taiwan Strait and the South China Sea (which is thought to be key to “lawful unimpeded commerce and economic development”) is causing further difficulties. As such:

The spectre of armed conflict between the superpowers, unknown since the Korean War ended in 1953, looms once more. . . . The Chinese navy is growing fast, acquiring aircraft-carriers and sophisticated missile systems. Beijing makes no secret of its determination to rule the oil-rich South China Sea, heedless of the claims of others such as Vietnam and the Philippines.


As former Pacific commander Timothy Keating succinctly put it, ‘We don’t need China’s permission to go through the Taiwan Strait.’. . . The West has reawakened to the growing peril posed by a Chinese government that has grown wealthy and powerful under the benefits of an international system it appears still to resent despite forty years of generous Western engagement. President Obama has discovered what President Bush discovered earlier, then seemed to forget: China’s Communist government remains a threat to the values and interests of the West.).


60 Clinton Statement on the South China Sea, U.S. Department of State, USEMBASSY.GOV, July 22, 2011, http://iipdigital.usembassy.gov/st/english/texttrans/2011/07/20110723125330su0.9067433.html#axzz1scEtRN2m

61 Hastings. See Associated Foreign Press, South China Sea Tensions a Threat to Peace: Clinton, THEJAKARTAGLOBE.COM, July 23, 2011, http://www.thejakartaglobe.com/seasia/south-china-sea-tensions-a-threat-to-peace-clinton/454762 (stating that “[t]he [South China] sea is believed to be extremely rich in oil and gas deposits, as well as being where shipping lanes link East Asia with Europe and the Middle East.”).
It is essential to this analysis to compare the states claiming maritime jurisdiction in the ongoing South China Sea disputes\(^{62}\) to the prospective members of the TPP: Vietnam, Malaysia, and Brunei are included in both small groups. The Philippines (also a claimant to territory in the South China Sea)\(^{63}\) seems to be excluded from TPP negotiations mostly on grounds that it is not yet ready to comply with the “higher ambitions” of regulatory compliance amongst members\(^{64}\) (which might, among other things, also be an obstacle to potential Chinese participation). The overlap between the TPP and the South China Sea disputes is strongly suggestive of an American influenced policy of containment. Some claim that:

Chinese military chiefs gloat without embarrassment at the spectacle of weakened Western nations. As America announces its intention to cut back defence spending, the Chinese armed forces see historic opportunities beckon. Ever since Mao Tse-tung gained control of his country in 1949, China has been striving to escape from what it sees as American containment.\(^{65}\)

The growing Chinese military presence has generated American concern, which has manifested itself in the controversial establishment of a new U.S military base in northern Australia. It is reported that:

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\(^{63}\) See id.


\(^{65}\) Hastings. See WILLIAM CONRAD GIBBONS, THE U.S. GOVERNMENT AND THE VIETNAM WAR: EXECUTIVE AND LEGISLATIVE ROLES AND RELATIONSHIPS, PART IV: JULY 1965-JANUARY 1968, at 264 (Princeton U. Press 1986) (quoting a “general agreement” amongst members of the Senate Foreign Relations Committee during open hearings on U.S. policy towards China held in 1966 that “Chinese Communists posed a threat to the countries of Asia, especially Southeast Asia, and must be ‘contained’. . . and that it was vital for the U.S. to help maintain the ‘power balance’ of Asia, and that its efforts to prevent the Communists from taking control of South Vietnam was an essential aspect of that objective.”).
Washington is increasingly sensitive to the fact that its bases in the western Pacific have become vulnerable to Chinese missiles. This is one reason why [in November 2011] the U.S. made a historic agreement with Australia to station up to 2,500 U.S. Marines in the north of the country. Beijing denounced the deal, saying it was not ‘appropriate to intensify and expand military alliances and may not be in the interests of countries within this region’. Even within Australia, the agreement for the U.S. base has provoked controversy.\(^\text{66}\)

Many political and economic strategists are concerned about these tensions and warn of their potential repercussions:

It will be tempting for some in the US and the region (especially those who see China as a rising threat) to try to exploit this state of affairs but, like most temptations, this should be resisted. It is not in the world’s interest to isolate China or to increase any sense of resentment the Chinese may hold. Rather, it remains very much in the world’s interest that China be integrated into global arrangements to manage the economy, limit climate change and combat proliferation.\(^\text{67}\)

An atmosphere of misunderstanding, whether it is called cultural, political, or philosophical, is palpable, and many outside of China may be failing to see the root causes of Chinese motivations:

The irony is inescapable: political leaders in the US and Asia are busy debating how best to meet what they see as the threat from China; political leaders in China are debating how best to meet the many threats they perceive to China. Most of the threats the Chinese see to their country come from within. For three decades China has depended on robust growth, largely from ever-increasing exports, to maintain high levels of employment and raise living standards, thereby assuring social tranquility. This era may have run its course. Years of low economic growth in Europe and the US (and the prospect of more to come) have limited their ability to absorb Chinese goods. . . . Domestic pressures – the need to raise hundreds of millions more Chinese out of poverty, growing resentment

\(^{66}\) Hastings. See id. (quoting Hugh White of the Australian National University, who called the base “a potentially risky move.” White also argued that America should gracefully release its claims to hegemony in the Indo-Pacific, “relinquish primacy in the region and share power with China and others.”). Cf. id. (quoting Richard Haass, chairman of the U.S. Council on Foreign Relations, as saying “U.S. policy must create a climate in which a rising China is never tempted to use its growing power coercively within or outside the region.”).

\(^{67}\) Richard Haass, China’s Greatest Threat is Internal, FT.COM, Dec. 28, 2011, http://www.ft.com/cms/s/0/9598b09e-2c9b-11e1-8cca-00144feabdc0.html#ixzz1sFV0qIDR (registered users only) (Haass).
over income and wealth inequality, the need to keep growth rates high – are also pushing China to find something to complement, if not replace, export-led growth.68

Though policy and practice on both the Chinese and American sides is subject to criticism, the Chinese, at least, may have received the message that some of their practices need to change. After a recent U.S.-led effort to express concern about China’s behavior:

China began to realize that its actions were harming its broader foreign policy objectives. One core principle of China's current grand strategy is to maintain good ties with great powers, its immediate neighbors, and the developing world. Through its actions in the South China Sea, China had undermined this principle several ways: . . . [i]n sum, China’s behavior worsened its relations with both its immediate neighbors and the United States – and created a shared interest among them in China.69

B. The Impact of Economic, Political, and Military Tensions on Trade

The multitude of tensions and uncertainties between the U.S. and China have led to a wide variety of criticism on U.S.-China trade relations, within which it is difficult to parse out grounded from ungrounded fears, and real possibilities from mere speculation.

For instance, some claim that trade wars, which:

spiraled into a vicious circle during the Great Depression, would [only] lead to a deterioration of bilateral trade relations. . . . the increasing disputes between China and the U.S. should be seen as a positive development because it shows that the two sides are working to reduce trade frictions through a legalized framework.70

68 Haass. See id. (stating that “[t]here is no reason to insult China.”).
70 Hsieh, at 372.
While it is plausible that increasing disputes will also lead to increasing dispute resolution, others prefer to focus on the collaborative aspects of a potential TPP, stating that:

It cannot be denied that because of the US presence, the TPP has now been able to take [the] lead for a more comprehensive and broad-based engagement among select APEC members. It now envisages cooperation in areas encompassing trade in goods, rules of origin, traditional agriculture, services, investments and competition policy, among others.\(^{71}\)

Consciousness of the effects that the TPP would have on other FTAs or trade partnerships, such as the WTO, is also a common consideration: WTO “members enter into FTAs [Free Trade Agreements] for political, strategic, and other noneconomic reasons. Thus, the potential for obtaining better market access through the WTO process will not preclude members from entering into certain FTAs.”\(^{72}\) Political and strategic considerations are especially prominent, and not only for the U.S.: “[t]he small Asian nations both fear China's regional domination but need China's collaboration, and also need access to the U.S. market.”\(^{73}\)

Regardless, critics assert that:

By binding [the small Asian nations] more closely to America's economic orbit, U.S. officials have convinced themselves that this helps create a counterweight to China. But this is an illusion. In the absence of real counter-pressure and serious diplomacy, China's lethal combination of state-subsidy, cheap capital, and exploited labor will continue displacing American industry. A bilateral trade deal with Korea, or a multilateral one with several smaller Pacific nations, does nothing to solve the more pressing problems.\(^{74}\)

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\(^{71}\) Ahmed.


\(^{73}\) Kuttner.

\(^{74}\) Id.
Given the discussion above, and especially given the Chinese preference for negotiations and consultations, there seems to be a real need for the U.S. to loosen its hold upon some of the ideals that have helped it rise to the status of global superpower over the past century, and to evolve and adapt to new and ever present challenges. The same might be said of China.

V. Conclusion

A recent visit to the U.S. by Chinese Vice President Xi Jinping (which was specifically geared to increase economic cooperation) indicates general goodwill between the countries despite the “thorny disagreements” yet to be resolved. During the visit, President Barack Obama asserted that China must follow “the same rules of the road” as the rest of the world, while Vice President Joseph Biden warned that cooperation "can only be mutually beneficial if the game is fair." This style of dialogue is not new: identifying differences while also working to resolve them has been a benchmark of the U.S.-China relationship since Richard Nixon and Henry Kissinger began communication with China in 1970. While the visit may not have had an immediate impact on substantive U.S.-China relations, even more recent public announcements by the Chinese government do indicate that China is making positive strides towards changing its trade policy.

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75 Pan, at 238.
77 Id.
78 Id. (with considerations to Dali L. Yang, a University of Chicago professor specializing in Chinese politics).
79 See Joe McDonald, China vows change in trade, finance, at U.S. talks, CNBC.COM, May 4, 2012, http://www.cnbc.com/id/47291191 (stating that on May 4, 2012, China agreed: to let foreigners own bigger stakes in its securities firms and promised to limit export subsidies . . . [and] also said it was implementing an earlier commitment to expand access to its auto insurance market and would allow greater foreign investment in Chinese
It is difficult to compare the particulars of the TPP to existing trade preference programs, largely because the exact details of TPP negotiations have not been well publicized as of the writing of this paper, and what little press coverage there is seems a bit speculative.\textsuperscript{80} However, from a broad perspective, it is certainly possible to theorize on the potential benefits and detriments of the agreement, as well as China’s involvement or lack thereof. According to one scholar, “[t]he TPP has the potential both to harmonize and to fragment. It reflects both a convergence of economies seeking to form a broader alliance, and a divergence from the multilateral trading system. The TPP has the potential to create a new paradigm for trade agreements.”\textsuperscript{81}

What is the U.S.’ end game? TPP critics claim that:

the content of such a policy is an attempt to force China, and in the future India, to accept living standards less than one quarter that of the US.\textsuperscript{82}

\footnotesize{stocks and bonds. It promised to pursue reforms of its controversial exchange rate controls but gave no timeline.). See also Lu Hui, \textit{China-U.S. talks yield substantive results}, XINHUFANET.COM, May 7, 2012, \url{http://news.xinhuanet.com/english/business/2012-05/07/c_131572366.htm} (stating that on May 4, 2012, “China and U.S. wrapped up their fourth round of Strategic and Economic Dialogue . . . with 67 substantial outcomes yielded in the economic track, covering macro-economics, trade and investment as well as finance.”). Cf. \textit{China blames U.S. for trade imbalance}, IBNLIVE.IN.COM, May 4, 2012, \url{http://ibnlive.in.com/news/china-blames-us-for-trade-imbalance/254563-2.html} (indicating that Chinese Commerce Minister Chen Deming said there is a trade imbalance between the countries because the U.S. has placed “restrictions on more than 2,400 items exported to China . . .”). See Robertson. The lack of transparency with which the negotiations are taking place is the subject of much criticism. For instance, \textit{see id.} (claiming that: negotiations for what’s likely to be the largest Free Trade Agreement (FTA) in U.S. history will continue in near total secrecy, despite growing demands for an open process. The darkness surrounding the talks isn’t surprising, considering the American public’s increasing disapproval of FTAs and the laundry list of corporate handouts under discussion.) See also Michael Brune, \textit{What are they trying to hide?}, SFGATE.COM, May 4, 2012, \url{http://blog.sfgate.com/mbrune/2012/05/04/trade/} (discussing the potential negative impacts of the TPP on the environment, health care policy, and workers’ rights).

\textsuperscript{80} Kolsky Lewis, at 28. \textsuperscript{81} Ross (stating that: [c]learly neither China nor India will ever accept such a proposition – nor, in the interests of human justice, should they. . . . This economic fact determines the course of the next decades of [the] 21st century. It is the framework within which specific issues such as the TPP, and the creation of a Pacific market, must be placed. Its reality already determines economic trends in the region.).
Such an attempt will fail but is destabilizing for the world. The danger of conflicts, and wars, which would have a wider effect than on simply the US, China and India would be real if such a policy is pursued. Instead of such a course the objective interests of China, India and the overwhelming majority of the world's population are to ensure that the fundamental economic processes taking place unfold in a peaceful and 'tranquil' fashion.83

There is a significant possibility that the exclusion of China from TPP negotiations is both short sighted and hubristic. Some claim that the U.S. is “still struggling with a post-unilateralist hangover,” which leads Americans to believe “that we’re the sole remaining superpower and the objective of our foreign policy is to get people to go along with that. To fall into step with our worldview. But the reality is, that’s not what the future holds.”84 Unsurprisingly, conflicting visions of the future seem to be at the heart of TPP tensions:

The TPP attempts to reorient trade discussion in the Pacific away from the most dynamic market, China, to the less dynamic one of the US by setting terms which exclude China. It therefore formulates policy not in terms of the region's economic needs but of the narrower interests of the US administration. This, together with other political and military moves, is why Chinese and Western analysts had little difficulty in understanding the TPP as an anti-China policy and not one objectively in the interests of all countries. . . . China's approach, to seek 'win-win' solutions, is correct because economic development is not a zero sum game but a mutually beneficial one. China's economic growth not only raises its own population's living standards but those in other countries as it creates gigantic markets for their products. The rest of the world therefore has an interest in peaceful economic cooperation with China - and the same applies to India.85

83 Ross.

84 Cooper (quoting David Rothkopf, author of Running the World: The Inside Story of the National Security Council and the Architects of American Power (PublicAffairs 2005)).

85 Ross. See id. (stating that:

Naturally the interests of those living outside the US, China and India are not determined by these three economic giants. China and India will become larger economies than the US during the 21st century not because of hostility towards the United States, a desire to
As such, the challenge for current U.S. policymakers seems to be achieving a coherent vision of the future U.S., preferably one in which it does not find itself “in the impossible situation of trying to tell China to act against its own national interests.”

The current posture of U.S. trade policy and the U.S.’ position on the TPP is almost certainly salvageable. We have not yet crossed the threshold of no return. Some sources indicate that China is fairly candid about the situation:

China's government indicated that it will support measures expanding Pacific trade and economic cooperation, but it is naturally not bound to accept rules which it had no part in negotiating. Despite what most analysts know to be the anti-China intention of the TPP China's government made clear it will proceed objectively. The course China outlined offers economic development benefitting both its own people and other countries. The neo-cons propose increased tension, policies against the best interests of other economies, and the threat or reality of wars. It is evident which of these approaches is in the best interests of the rest of the world.

China should be offered a place in TPP negotiations. Excluding China entails a serious risk of backfire. Even if Chinese regulatory mechanisms are in a similar state to those of the Philippines (i.e. behind the current members of the TPP), and given the possibility that China would not want to join if offered, the gesture seems an important good faith consideration. Let us remember that “Li tries to make people internalise . . . unequal formalised behaviour so that personal desires and cultivation can be properly

replace the US as 'number 1', but simply to achieve their populations' highest possible living standards. Other countries have the same motivation, which is why they have common interests with China and India.).

86 Cooper (citing the opinion of David Rothkopf, see Cooper, supra note 84).
87 Ross.
89 See Philippines Not Yet TPP Ready.
socialized. . . . Consequently, China believes that there should be some kind of ‘international Li’ existing as the basis for international law.” 90 As the U.S. government proceeds (to the exclusion of China) to negotiate trade alliances with China’s lesser economic neighbors at the same time it continues to trade heavily with China, it risks putting itself, from a Chinese perspective, on the lesser side of an unequal formal relationship between the countries (rather than, as is probably intended, demonstrating its dominance over China). China’s unique understanding of this gesture may be the reason its government is so candid about TPP negotiations.

Old tensions between democracy and communism harkening back to the Korean and Vietnam Wars, even older and broad sweeping principles of the freedom of navigation over the high seas, 91 and contested territorial claims to the South China Sea, under which may be a "second Persian Gulf" worth of oil and gas resources 92 complicate U.S.-China relations and U.S.-China trade issues to no end. It may serve the interests of both nations at this stage to adhere to the principles of the late Deng Xiaoping, and “[set] aside disputes and [pursue] common development.” 93 Deng made the statement in reference to China’s maritime conflicts, and it is not a stretch to apply the strategy in negotiating a trade preference program that spans the breadth of the Pacific Ocean.

90 Pan, at 234.
92 Zou Le, Oil Bonanza in the South China Sea, GLOBALTIMES.CN, April 19, 2011, http://special.globaltimes.cn/2011-04/645909.html “It is estimated that the area contains over 50 billion tons of crude oil and more than 20 trillion cubic meter of natural gas.” Id.
93 Fravel.