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Yong-Shik Lee, *Trans-Pacific Partnership Agreement: A Commentary on Developing/Developed Country Divide and Social Considerations*  
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TRANS-PACIFIC PARTNERSHIP AGREEMENT: A  
COMMENTARY ON DEVELOPING/DEVELOPED COUNTRY  
DIVIDE AND SOCIAL CONSIDERATIONS

**YONG-SHIK LEE, PH.D (CANTAB.)\***

*The Trans-Pacific Partnership Agreement or “the TPP” is one of the largest Regional Trade Agreements (RTAs) signed by eleven countries in the Asia-Pacific region. It is unique in the composition of its membership; half of its membership is comprised of developing countries, and the other half, developed countries, which is unusual for large-scaled RTAs such as the TPP. This diverse composition creates an inevitable developed/developing country divide in the TPP with respect to the effect of its terms on the trade and development interests of the participating countries. Building on the author’s previous works, this article discusses the impact of several key TPP provisions along this developing/developed country divide, provides a commentary on the gains and trade-offs for developing countries, and proposes ways to achieve a balance between the interests of developing and developed-country members. The TPP also has social implications for its member states, which has caused the President of the United States, Donald Trump, elected by support of the working class who perceived the existing trade agreements as a threat to their economic positions, to withdraw the United States from the TPP. This article also examines these social issues.*

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## I. INTRODUCTION

After five years of negotiation, the Trans-Pacific Partnership Agreement or “TPP” was finally concluded on October 5, 2015 in Atlanta, United States.<sup>1</sup> It was originally signed by twelve trading countries in the Asia-Pacific region, including Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.<sup>2</sup> The United States (U.S.) withdrew from the TPP shortly after the new president, Donald Trump, came into power with the support of the working class who perceived the existing and pending trade agreements, such as the TPP, as a threat to their economic interests.<sup>3</sup> The continuation of the TPP has become unclear with the exit of the U.S.,<sup>4</sup> but, if it should be implemented with the remaining eleven member states,<sup>5</sup> it

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<sup>1</sup> Press Release, Trans-Pacific Partnership Ministers’ Statement, United Nations Trade Representative (USTR), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/trans-pacific-partnership-ministers>. (Last visited Jan. 31, 2017).

<sup>2</sup> *Id.*

<sup>3</sup> It was reported that a poll by the Pew Research Centre during the primaries found that 60% of Trump’s supporters believed trade had hurt their family’s finances. *What’s Going On*, THE ECONOMIST, Nov. 5, 2016, <http://www.economist.com/news/united-states/21709596-support-donald-trump-working-class-whites-not-what-it-seems-whats-going> (Last visited Jan. 31, 2017).

<sup>4</sup> The continuation of the TPP without the participation of the United States will call for an amendment of the TPP implementation provision that requires the ratification of 85 percent of the original signatories, which would not be possible without the participation of the United States. *See* Trans-Pacific Partnership, arts.30.2 and 30.5, Nov. 5, 2015 [hereinafter TPP], <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>. Discussions among the remaining members are continuing on this issue.

<sup>5</sup> Some TPP member states intend to proceed with the TPP without the United States. For example, as of January 2017, Australia was known to “push ahead for a Trans-Pacific Partnership trade deal.” *See* Paul Karp, *Australia open to China and Indonesia joining TPP after*

will remain as one of the largest trade agreements with significant implications on the trade and economy of the Asian-Pacific region, including six of the top thirty exporters and importers in the world and two of the NAFTA countries (Canada and Mexico).<sup>6</sup>

It is also unique in its membership composition; comprising an equal number of developing countries and developed countries.<sup>7</sup> Although trade agreements between developed and developing countries are found in bilateral trade agreements, often necessitated by the participating developing country's need to access the export market afforded by the participating developed country, such a composition is not commonplace among large-scaled RTAs, which tend to be concluded among countries sharing similar economic and trade interests in a

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*US pulls out*, THE GUARDIAN, Jan. 23, 2017, <https://www.theguardian.com/australia-news/2017/jan/24/australia-open-to-china-and-indonesia-joining-tpp-after-us-pulls-out>. (Last visited Feb. 5, 2017). In November 2017, the remaining 11 countries stated that they are committed to resurrecting the TPP without the United States. See Alexandra Stevenson & Motoko Rich, *Trans-Pacific Trade Partners Are Moving On, Without the U.S.*, N.Y. TIMES, Nov. 11, 2017, <https://www.nytimes.com/2017/11/11/business/trump-tpp-trade.html>.

<sup>6</sup> A study examined the impact that the TPP may have on the trade of the “excluded” (former British) Commonwealth developing countries. The study concluded that the overall impact of the TPP on the trade of the excluded Commonwealth developing countries is not expected to be serious, but TPP may nevertheless cause trade diversion with respect to particular products from the competing Commonwealth countries. On goods, Vietnam and to a lesser extent Peru, Mexico and Malaysia may present the greatest threat of trade diversion to Commonwealth developing countries in developed TPP markets. See Max Mendez Parra & Jim Rollo, *The Trans-Pacific Partnership and Excluded Commonwealth Developing Countries*, THE COMMONWEALTH 119, 1-8 4,6 (2014). See also, Yong-Shik Lee, *The Eagle Meets the Dragon – Two Superpowers, Two Mega RTAs, and So Many In Between: Reflections on TPP and RCEP*, 50(6) J. WORLD TRADE 475-496 (2016).

<sup>7</sup> There are no formal definitions for developing countries and developed countries. In the World Trade Organisation, developing country status is self-declared with no formal criteria. Developed countries are commonly understood as countries with advanced economies, often demonstrated by high per capita income, and large industrial capacities. Developed countries tend to be the members of the Organisation for Economic Co-operation and Development (although the membership of the two groups may not exactly coincide) and are also classified as the high-income countries designated by the World Bank. For the 2017 fiscal year, the World Bank defines low-income economies as those with a GNI (gross national income) per capita of USD \$1,005 or less, middle-income economies are those with a GNI per capita between USD 1,006 and USD 12,235, and high-income economies are those with a GNI per capita of USD 12,236 or more. Lower-middle-income and upper-middle-income economies are separated at a GNI per capita of USD 3,955. WORLD BANK COUNTRY AND LENDING GROUPS, <http://data.worldbank.org/about/country-and-lending-groups> (Last visited Aug. 5, 2017).

region.<sup>8</sup> The regulatory terms of trade which tend to favour developed countries versus developing countries may differ,<sup>9</sup> as discussed throughout this article. As a result, it is not straightforward to agree upon them in an RTA participated by a number of developed and developing countries.

The unique developed/developing country composition of the TPP may, in part, be explained in the context of U.S. trade initiatives. Since U.S. participation in the TPP negotiations in 2008, the TPP had been a key strategic step for the U.S. in its 'pivot' to the Pacific,<sup>10</sup> setting up a new trade platform to advance U.S. interests *vis-à-vis* not only developed countries in the region, but also developing ones. The U.S. could not promote its interests and priorities effectively in the Doha Round of the World Trade Organisation (WTO),<sup>11</sup> and turned to bilateral and regional approaches to promote its trade interests more effectively.<sup>12</sup> The conclusion of the TPP is a triumphant outcome of these U.S. efforts.<sup>13</sup> The TPP was also U.S.'s

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<sup>8</sup> For example, the EU includes twenty-eight European countries with advanced industrial economies, MERCOSUR is comprised of developing countries in Latin America (five full members and six associate members) and The ASEAN (Association of Southeast Asian Nations) Economic Community also includes ten countries in Southeast Asia, all of which, except Singapore, are developing countries.

<sup>9</sup> See, YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM (Cambridge University Press, 2d ed.) (2016) [hereinafter LEE, RECLAIMING DEVELOPMENT].

<sup>10</sup> President Obama, declaring a "pivot" to the Pacific, stated, "If we don't write the rules for free trade around the world, guess what, China will. And they'll write those rules in a way that gives Chinese workers and Chinese businesses the upper hand." Paul Koring, *China will have to play by TPP rules to join world's biggest free-trade league*, THE GLOBE AND MAIL (July 29, 2015), <http://www.theglobeandmail.com/news/world/china-will-have-to-play-by-tpp-rules-to-join-worlds-biggest-free-trade-league/article25769349> (Last visited Feb. 5, 2017).

<sup>11</sup> The negotiations have been continuing for over 14 years due to opposing positions on fundamental issues, such as agriculture, among key players. For further discussion of the impasse of the Doha Round, See LEE, RECLAIMING DEVELOPMENT, *supra* note 9 Chapter 9.

<sup>12</sup> Before the conclusion of the TPP, the United States had signed RTAs with Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, South Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore. USTR, *Free Trade Agreements*, TRADE AGREEMENTS, <https://ustr.gov/trade-agreements/free-trade-agreements> (Last visited Feb. 5, 2017). The United States is currently negotiating the Transatlantic Trade and Investment Partnership (TTIP) Agreement with the EU.

<sup>13</sup> For further discussion see Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34(1) B.C INT'L & COMP. L. REV. 27-52 (2011); Claude V. Chang & Karl Kluegel, *Protectionism and Containment in the Twenty-First Century: Trans-Pacific Partnership (TPP)*, 3(10) INT'L J. MGMT. & SUSTAINABILITY 633-647 (2014); Ian F. Fergusson, Mark A. McMinimy & Brock R. Williams, *The Trans-Pacific Partnership (TPP)*

response to a parallel development in Asia under the participation and leadership of China, namely negotiations for the Regional Comprehensive Economic Partnership (RCEP), in which sixteen countries in the region<sup>14</sup> currently participate.<sup>15</sup> Considering that the U.S. avidly pursued the TPP negotiations, seeing it as a platform to advance its key trade and economic interests, it is ironic that the U.S. became the first state to withdraw from it, now claiming that the TPP undermines the economic interests of its citizens.<sup>16</sup> The author will explore the grounds for this policy shift in Section III.

Returning to the issue of diverse membership in the TPP, the participation of several developing and developed countries creates a potential conflict of interest in its regulatory makeup. For example, the development needs of the participating developing countries may necessitate the preservation of policy space to adopt effective trade-related development measures, which may not be consistent with the regulatory requirements of the TPP. Building on my previous works,<sup>17</sup> this article examines the developed/developing country divide in the TPP, with analysis of the effect of its terms on the trade and development interests of the participating countries. It also provides a commentary on the gains and trade-offs for developing countries. The second section introduces the origin of the TPP, discusses the developing/developed country divide in the TPP, and the benchmark against which the gains and losses of developing countries can be assessed. Sections III (on conventional provisions) and IV (on newer provisions) examine the impact of the current TPP provisions on the trade and development interests along the line of the developed/developing country divide, and discusses the gains and trade-offs for developing countries.<sup>18</sup> As discussed earlier, the TPP also raised substantial debate in the U.S., leading to its withdrawal. The relevant social issues leading to the withdrawal are also discussed. Section V offers conclusions, proposing ways to protect the development interests of developing countries while

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*Negotiations and Issues for Congress*, 23 CURRENT POL. & ECON. S. SE & CENT. ASIA 369-443 (2014).

<sup>14</sup> The sixteen countries include China, India, South Korea, Japan, Australia, New Zealand, Cambodia, Indonesia, Laos, Myanmar, The Philippines, Thailand, Brunei, Singapore, Vietnam, and Malaysia. Interestingly, seven countries – Australia, Japan, New Zealand, Brunei, Singapore, Vietnam, and Malaysia – participate in both TPP and RCEP.

<sup>15</sup> *Supra* note 10.

<sup>16</sup> *Supra* note 3.

<sup>17</sup> Yong-Shik Lee, *Future of Trans-Pacific Partnership Agreement: Just a Dead Trade Initiative or a Meaningful Model for the North-South Economic and Trade Integration?*, 51(5) J. WORLD TRADE 907-932 (2017); Yong-Shik Lee, *The Eagle Meets the Dragon – Two Superpowers, Two Mega RTAs, and So Many In Between: Reflections on TPP and RCEP*, 50(3) J. WORLD TRADE 479-500 (2016).

<sup>18</sup> However, a difference in negotiation positions is not always along this line and is present among developed countries as well as developing countries.

promoting economic and trade integrations intended by RTAs such as the TPP.

## II. THE TPP: ORIGIN AND THE DIVIDE

### A. *The Origin of the TPP.*

The origin of the TPP dates back to the negotiations for a smaller regional agreement titled, “Trans-Pacific Strategic Economic Partnership”. The agreement initiated by New Zealand, Chile, and Singapore (the Pacific Three or “P-3”), was launched on the sidelines of the summit of the Asia-Pacific Economic Cooperation (APEC) forum in 2002.<sup>19</sup> The initial negotiation group was expanded to “P-4”, after Brunei joined the negotiations in 2005. The P-4 concluded negotiations later that year, except for an agreement on the financial services and investment chapters, which was deferred. The initial agreement came into force in 2006<sup>20</sup> as a small regional agreement that only included those four countries, without the involvement of other major trading countries in the region.

The nature of this small agreement began to change when the U.S. announced in 2008 that it would join the deferred P-4 negotiations on financial services and investment,<sup>21</sup> followed by another announcement in September 2008, of its decision to participate in comprehensive negotiations for an expanded trans-Pacific agreement.<sup>22</sup> Since then it became a major trade initiative by the U.S. to advance its trade interests in the Asia-Pacific region. The U.S. initiatives also countered another trade initiative led by China and a group of other Asian countries, namely RCEP.<sup>23</sup> By 2011, the group expanded to include nine countries.<sup>24</sup> The NAFTA partners of

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<sup>19</sup> T Rajamoorthy, *The Origins and Evolution of the Trans-Pacific Partnership (TPP)*, Center for Research on Globalization (2013), <http://www.globalresearch.ca/the-origins-and-evolution-of-the-trans-pacific-partnership-tpp/5357495>(Last visited Feb. 5, 2017). For the background of TPP, see also Deborah Elms, *From the P4 Agreement to the Trans-Pacific Partnership: Explaining Expansion Interests in the Asia-Pacific Region*, in *TRADE-LED GROWTH: A SOUND STRATEGY FOR ASIA*, Simon J Evenett *et al.* ed. (UN Economic and Social Commission for Asia and the Pacific, and Asia-Pacific Research and Training Network on Trade, 2011); Ian F Fergusson, William H Cooper, Remy Jurenas & Brock R Williams, *The Trans-Pacific Partnership negotiations and issues for Congress*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (June 17, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Supra* note 14.

<sup>24</sup> These nine countries included Brunei, Singapore, Vietnam, Malaysia, New Zealand, Australia, Chile, Peru, and the United States

the U.S., Canada and Mexico joined the TPP negotiations by 2012.<sup>25</sup> Finally, Japan joined the negotiations in 2013, becoming the twelfth member.<sup>26</sup> As a result of this expansion, the TPP developed into the largest RTA in existence in terms of the aggregate GDP of the participating countries, covering 810 million people as of July 2015.<sup>27</sup> The prospect of creating the largest RTA, however, stumbled with the election of Donald Trump as the President of the United States in November, 2016. He vowed to overturn the Obama administration's effort to implement the TPP and formally withdrew the United States from the TPP as he took office in January of 2018, citing that the TPP would undermine the U.S. economy.<sup>28</sup>

As discussed, the unique nature of the TPP is its membership comprised of diverse economies in different stages of economic development. Economic development or, simply, development, is generally understood as the process of a structural transformation of an economy, from one based largely on the production of primary products, i.e., a product consumed in its primary unprocessed state, generating low levels of income, to another based on modern industries that provides higher levels of income.<sup>29</sup> Among the remaining TPP members,<sup>30</sup> Canada, Japan, Australia, Singapore, and New Zealand are considered to be 'developed countries,'<sup>31</sup> while Mexico, Peru, Malaysia, and Vietnam are mid-to-low income countries with developing economies ('developing countries').<sup>32</sup> Brunei and Chile have relatively high per capita income<sup>33</sup> but may be considered developing countries given the developing status of their economies and industries. The presence of several developing countries in the TPP means that the terms of the TPP may have dissimilar impacts on the trade and development interests of the participating countries, particularly those on the latter two groups of TPP members.

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<sup>25</sup> Claude Barfield, *A Big Deal: Canada And Mexico Join The Trans-Pacific Partnership*, EAST ASIA FORUM (July 10, 2012), <http://www.eastasiaforum.org/2012/07/10/a-big-deal-canada-and-mexico-join-the-trans-pacific-partnership/>

<sup>26</sup> Faith Aquino, *Japan becomes 12th nation to join TPP free trade talks*, JAPAN DAILY PRESS (July 14, 2013), <http://japandailynews.com/japan-becomes-12th-nation-to-join-tpp-free-trade-talks-2432843/> (Last visited Feb. 5, 2017).

<sup>27</sup> International Monetary Fund (IMF), *World Economic Outlook* (2015).

<sup>28</sup> Adam Chandler, *Trump Take Office, Kills TPP*, THE ATLANTIC (Jan. 23, 2017), <https://www.theatlantic.com/business/archive/2017/01/trump-tpp-dead/514154/> (Last visited Feb. 5, 2017).

<sup>29</sup> LEE, RECLAIMING DEVELOPMENT, *supra* note 9, at 15.

<sup>30</sup> To distinguish the terms, WTO member countries are denoted as "Members" (with "M" capitalised).

<sup>31</sup> *Supra* note 7.

<sup>32</sup> *Id.*

<sup>33</sup> According to the World Bank statistics, the GNI per capita of Brunei and Chile were \$37,320 (2012) and \$14,920 (2014), respectively, meeting the World Bank standard of high income countries. *See supra* note 7.

B. *The Developing/Developed Country Divide in the TPP & the Analytical Benchmark.*

The perceived developed/developing country divide is caused by the significant gap in the industrial competitiveness between developed and developing countries. This does not mean that developing countries always stand to lose in competition with developed countries. There are industries in which developing countries are more competitive, such as labour intensive industries including textiles,<sup>34</sup> and developing countries may gain in those industries when trade barriers are removed in accordance with the TPP. It is considered a gain for developing countries, which could be sufficient enough for a large developed country, such as the U.S., to decide to withdraw in order to protect its own industries, as discussed in the next section. The long-term trade-off for developing countries is that the gains with market access could be offset by the loss of development potential when the terms of the TPP remove their ability to adopt trade-related measures to facilitate domestic industries facing competition from superior industries in developed countries. Although the efficacy of the infant industry promotion policy has been debated, successful developing countries in the past such as South Korea and Taiwan in the 1960s-1980s, and more recently China, adopted a range of trade-related measures, such as tariff measures and subsidies, to facilitate their own industries and rapidly develop their economies, while engaging in export promotion at the same time.<sup>35</sup>

This type of strategic trade policy will not be feasible under the terms of the TPP, unless the latter affords policy space for developing countries, which have already been substantially reduced by the requirements of GATT/WTO disciplines. Dani Rodrik observed that GATT/WTO disciplines, particularly subsidy rules, had made “a significant dent in the abilities of developing countries to employ intelligently-designed industrial policies.”<sup>36</sup> Despite the possible loss of development potential, an RTA such as the TPP may still be favoured by social and economic elites in developing countries who have vested interests in securing

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<sup>34</sup> IMF, *Global Trade Liberalisation and the Developing Countries* (November 2001), <https://www.imf.org/external/np/exr/ib/2001/110801.htm>.

<sup>35</sup> LEE, RECLAIMING DEVELOPMENT, *supra* note 9, Chapter 1.4. The United States also maintained high tariffs during its own development periods in the 19th and early 20th centuries. See also WORLD BANK, *Trade Liberalisation: Why So Much Controversy?*, [http://www1.worldbank.org/prem/lessons1990s/chaps/05-Ch05\\_kl.pdf](http://www1.worldbank.org/prem/lessons1990s/chaps/05-Ch05_kl.pdf) (Last visited Nov 29, 2017).

<sup>36</sup> Dani Rodrik, *Industrial Policy for the Twenty-First Century* 34-35 (Kennedy School of Government, Harvard University, Faculty Research Working Papers Series, , RWP04-047, 2004) <https://www.sss.ias.edu/files/pdfs/Rodrik/Research/industrial-policy-twenty-first-century.pdf>.

market access for their own export businesses,<sup>37</sup> regardless of the short-term income distribution issues within their country (concerning a potentially unequal income effect of the RTA on different classes of populations in the country).<sup>38</sup> Securing export market access will be all the more important and will be essential to bring in much needed foreign exchange, particularly for those developing countries in which export oriented industries produce only a few commodities and rely heavily on particular export markets such as the U.S.

After all, successful economic development through the adoption of a strategic trade policy, which combines import substitutions and export promotion, occurred only in a small number of countries, mostly in East Asia, as the trade policy space alone can not be sufficient to achieve economic development. Several non-trade factors such as political and social stabilities, effective technocratic bureaucracies and organised government support, strong political leadership, educated workforce, strict work ethics, and higher ratio of savings have been cited as key factors for the successful economic development of South Korea and the other Newly Industrialised Countries (“NICs”).<sup>39</sup> Without carefully coordinated industrial policies at the national level, coupled with these key factors, attempts to restrain trade may only fall into a mercantilist trap which would be economically inefficient, favouring a small number of domestic producers at the cost of consumers, without facilitating economic development of a nation as a whole. In this case, RTAs such as the TPP could be considered a better alternative for developing countries, as the latter would be required to remove economic inefficiencies associated with trade protection.<sup>40</sup> Thus for the advocated policy space to produce a positive development outcome, the country should be ready to engage the strategic trade policy effectively.

The developing/developed country divide in the TPP is also formed with respect to the regulatory requirements in areas other than traditional trade in goods. These areas include trade in services, rules of origin, customs, TBT and SBS measures, intellectual property rights, trade remedies, and investments. Most RTAs in recent decades, particularly those promoted by the U.S. and the EU, include these areas.

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<sup>37</sup> LEE, RECLAIMING DEVELOPMENT, *supra* note 9, Chapter 12.

<sup>38</sup> *Id.* RTAs lowering trade barriers will in the short term favour exporting industries, rather than domestic industries which will have to compete with foreign imports. For example, if the country exports manufactured products, RTAs will favour those in manufacturing industries vis-à-vis subsistence farmers.

<sup>39</sup> Kwang-suk Kim and Joon-kyung Park, *Sources of Economic Growth in Korea: 1963-1981* (Korea Development Institute, 1985), 6, in LEE, RECLAIMING DEVELOPMENT, *supra* note 9, at 18. The NICs include South Korea, Taiwan, Singapore, and Hong Kong. Hong Kong became a self-governing territory of China in 1997.

<sup>40</sup> Dominick Salvatore, *International Economics* (11th ed., John Wiley and Sons, Inc., Hoboken, NJ), 221–228, 257–260 (2013).

Commitments under these provisions may create potential benefits for developing countries as well as developed countries, as further discussed in the following section, but some of them also require the establishment of extensive regulatory apparatus, which may enhance the business and economic opportunities for developed countries but could also impose a substantial regulatory burden on the part of developing countries. The regulatory cost and the loss of policy space could offset the gains from export market access for developing countries, and hence, need to be addressed.

The gains and losses for developing countries are assessed throughout this article. The analytical benchmark for assessment is 1) whether the terms of the TPP provide sufficient export opportunities for developing countries to increase their exports in the product/service areas where they are competitive; 2) whether the regulatory obligations imposed on developing countries under the terms of the TPP are consistent with their development interests or they are burdensome and undermine the developing country members' development potential; and 3) whether the terms of the TPP allow developing countries necessary policy space, in the form of special and differential (S&D) treatment, to promote their development interests. The latter includes the full or partial exemption of trade liberalisation requirements or other obligations under the terms of the TPP on a temporary basis. A north-south RTA beneficial to developing countries would be one that not only promotes trade liberalisation but also accords developing countries the policy space in which to promote their development interests, where necessary. The following two sections discuss several key provisions of the TPP which address "conventional" provisions that are also found in the other RTAs, and "new provisions" only found in the TPP. These two sections also assess their trade and economic impact, and examine the gains and potential trade-offs along the developed/developing country divide.<sup>41</sup>

### III. REGULATORY ASSESSMENT: CONVENTIONAL PROVISIONS<sup>42</sup>

As discussed, the TPP includes several conventional provisions also found in most other RTAs in recent decades, including trade liberalisation terms in goods and services, rules of origin, customs, TBT and SBS measures, intellectual property rights, and investment terms. This section examines the key terms of these provisions with a discussion of the development ramifications.

#### A. Trade in Goods

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<sup>41</sup> *Supra* note 18.

<sup>42</sup> This section is developed from my previous work, *supra* note 17, at 907-932, *see* Sections II and IV.

The primary objective of the TPP is the elimination of tariff and non-tariff barriers on goods. All the TPP participants, except Australia and Mexico, have agreed to eliminate *all* tariffs on industrial goods<sup>43</sup> and to eliminate or reduce tariffs and other restrictive measures on agricultural goods.<sup>44</sup> The TPP members have agreed to remove most tariffs immediately and those on some sensitive products over a period of time up to 30 years.<sup>45</sup> Members have also agreed not to impose performance requirements, such as local production requirements, as a condition to obtain tariff exemption.<sup>46</sup> The TPP members do not prohibit import and export licenses, but they are subject to transparency measures, such as notification requirements.<sup>47</sup> The TPP prohibits the adoption of export subsidy on any agricultural good exported to another member,<sup>48</sup> which is a major step in the direction of the liberalisation of agricultural trade and could assist the agriculture industries of developing countries.

The liberalisation commitment for trade in goods accords both developing and developed country members the key benefit that they have negotiated for their export industries: market access for their export industries. Developing countries are expected to gain benefits for their exports of textile and clothing products as well as some commodities<sup>49</sup>. Significantly high tariff rates have been imposed on textile and clothing products exported from developing countries, even though trade in this area has been fully integrated into the international trading system since the expiration of the Agreement on Textile and Clothing in 2005.<sup>50</sup> Thus, the elimination of tariffs will be a substantial boost for textile and clothing exports by developing countries.<sup>51</sup> In contrast, developed countries are expected to increase their exports in the product areas that require technology and capital, such as machinery, automobiles, chemical, and telecommunication products.

Trade liberalisation would also have trade-offs. For developed countries, the market liberalisation commitment may lead to a massive increase in the import of labour-

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<sup>43</sup> TPP, Annex 2-D, Tariff Commitments.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, art. 2.5.

<sup>47</sup> *Id.*, arts. 2.13 and 2.14.

<sup>48</sup> *Id.*, art. 2.23, para. 2.

<sup>49</sup> The examples of commodities include grains, coffee, sugar, minerals, oil, and gas.

<sup>50</sup> WTO, Agreement on Textiles and Clothing, [https://www.wto.org/english/docs\\_e/legal\\_e/16-tex\\_e.htm](https://www.wto.org/english/docs_e/legal_e/16-tex_e.htm) (Last visited November 29, 2017).

<sup>51</sup> For instance, a study indicated that Vietnam, a textile exporting country, would be expected to increase its GDP by 10.52 percent after joining TPP, which consists of twelve countries. See Vo Tri Thanh, *Vietnam's Perspectives on Regional Economic Integration*, 32(1) J. SE ASIAN ECON. 117 (2015), Table 4 [hereinafter, Thanh].

intensive products such as textiles, which would undermine the position of their own domestic industries. To deal with this issue, the TPP adopts a textile-specific special safeguard that allows its members to restrain imports of textile products temporarily to prevent serious damage to the domestic industry in the event of a sudden surge in imports.<sup>52</sup> The safeguard might serve to protect the domestic textile industries of developed-country members, but it may reduce the benefit for developing countries under the TPP. A long-term ramification for developing countries is that market liberalisation commitments would not allow them to adopt trade-related measures to promote domestic industries for an economic development purpose, which GATT/WTO disciplines authorise under certain conditions. For instance, GATT Article XVIII,<sup>53</sup> the use of which has although diminished under the WTO, authorises developing country Members to increase tariffs, beyond the level at which they are bound under GATT Article II,<sup>54</sup> to facilitate the development of an infant industry for the purpose of economic development. The necessity to gain export market access may have prevailed in the acceptance of tariff removal by developing countries, but it creates a potential development ramification for these countries.<sup>55</sup>

Consideration may also be given to the adoption of another possible S&D treatment, namely 'Development-Facilitation Tariff' or 'DFT',<sup>56</sup> which, unlike Article XVIII, sets the maximum tariff rates and is a more controlled measure. The DFT scheme enables developing countries to set the maximum additional tariff rate above the tariff binding under Article II to assist the development of their infant industries.<sup>57</sup> It assigns a different maximum DFT rate to an individual developing country on a sliding scale, to be determined in accordance with its level of economic development measured by relevant economic indicators such as per-capita gross national income (GNI) figures.<sup>58</sup> For instance, suppose that the maximum DFT rate is set at 100% over the tariff binding and the economic threshold for an eligible developing country to benefit from a DFT is 12,000 USD per capita GNI. Then, any country that has a higher per-capita income than 12,000 USD will not be eligible for a DFT. Country A with per capita GNI of 3,000 USD,

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<sup>52</sup> TPP, arts. 4.2 and 4.3.

<sup>53</sup> General Agreement on Tariffs and Trade 1994, art. XVIII., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. [hereinafter GATT].

<sup>54</sup> This is subject to the requirements of negotiation and compensation. GATT, art. XVIII, para. 7.

<sup>55</sup> The gains estimated in *supra* note 51 do not take this long-term effect into account.

<sup>56</sup> Yong-Shik Lee, *Facilitating Development in the World Trading System: A Proposal for Development Facilitation Tariff (DFT) and Development Facilitation Subsidy (DFS)* 38(2) J. WORLD TRADE 935-954 (2004). See also Yong-Shik Lee, *WTO Disciplines and Economic Development: Reform Proposal*, 1(2) J. INT'L & COMP. L. 300-301 (2014).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

which is 25% of the threshold income, will be allowed to apply a DFT of 75% ( $100\% \times (100\% - 25\%) = 75\%$ ). On the other hand, Country B with per capita GNI of 9,000 USD, which is 75% of the threshold income, will be allowed to apply a DFT of 25% ( $100\% \times (100\% - 75\%) = 25\%$ ). While the imposition of negotiation and compensation requirements on developing countries is not proposed in the DFT, a series of procedural requirements— such as a report setting forth rationale for the proposed increase in tariffs, a public hearing, notice, and gradual liberalisation and elimination of the DFT after a set period of time— should reduce the possibility of abuse.<sup>59</sup>

As discussed earlier, the U.S. withdrew from the TPP on January 23, 2017 by an executive order.<sup>60</sup> The election of the political outsider and controversial businessman, Donald Trump, as the President of the United States marked the ending of an era and the beginning of a new, but uncertain one, which entails a radical shift in the perception of the interest of the United States in trade relations. The new regime perceives the gains of developing countries under the TPP – export of inexpensive manufactured products into the U.S. – as unacceptable and undermining of its economic interest, rather than an exchange to be made for other economic benefits to be generated from the TPP. It also perceives Obama's earlier vision to maintain and expand the leadership of the U.S. in global trade relations as irrelevant.

The decline of the U.S. manufacturing industries in many regions of the country, signified by the term 'the Rust Belt' and the resulting loss of employment, income, and population caused substantial social discontent in the U.S. This led to the dramatic political upset and unexpected victory of the political outsider, Donald Trump, in the 2016 presidential election. He had pointed to free trade agreements, such as the TPP and the NAFTA, as a cause for American businesses having to relocate their productive facilities to foreign countries for cheaper production costs such as lower wages. This, he stated, resulted in the loss of employment in the U.S., while these businesses benefitted from exporting their foreign-produced products back to the U.S. with no tariff charges as stipulated by the trade agreements.<sup>61</sup>

It is not clear whether Trump's policy to withdraw from the TPP and adjust the NAFTA will preserve and increase American jobs and serve the economic interests of the segments of populations that supported him. The U.S. no longer has a competitive advantage in wages, and higher tariffs, which the Trump

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<sup>59</sup> The Agreement on Safeguards also includes those procedural requirements. Agreement on Safeguards, arts. 3, 7, and 12, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1869 U.N.T.S. 154 [hereinafter SA].

<sup>60</sup> *Supra* note 28.

<sup>61</sup> Lee, *supra* note 42.

administration has indicated to impose<sup>62</sup> are likely to drive up the prices of imports and living costs in the country. This will then adversely affect the economic interests of Americans, including those of the working class that Trump wants to protect. The prospect of higher tariffs at borders may persuade some manufacturers to build factories within the United States,<sup>63</sup> but it is not certain whether it will generate a higher level of employment on a long-term basis where wages are much higher than those prevailing overseas and automation in production technology is readily available.<sup>64</sup>

All in all, it is more likely that Trump's policy will not generate a higher level of employment for a long term. Instead, it may drive up the prices of imports and living costs, and potentially undermine the exports of the United States,<sup>65</sup> due to the retaliatory measures, for example, higher tariffs, that could also be adopted by other countries in response to any protective trade measure put in place by the U.S. to protect its domestic industries. As a result, social discontent will increase, and Trump may lose some of his support base. Despite the prospective failure of this new policy, it serves as an example to show how free trade agreements could spur negative perceptions for their potentially adverse economic impact on segments of population (i.e. those who may lose jobs for business relocation abroad or competitive imports) and bring political consequences, even in presumably competitive developed countries such as the U.S., not to mention developing ones.

### B. Trade in Services

The liberalisation of trade in services is another key objective of the TPP, which has been achieved by mandating core principles, including national treatment<sup>66</sup> and

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<sup>62</sup> John King and Jeremy Diamond, *Trump Team Floats a 10% Tariff on Imports*, CNN NEWS, (Dec. 22, 2016), <http://www.cnn.com/2016/12/21/politics/donald-trump-tariffs/> (Last visited Feb. 5, 2017). See also Shawn Donnan, *Donald Trump Moves Towards Imposing Tariffs on Steel Imports*, FINANCIAL TIMES (Apr. 20, 2017), <https://www.ft.com/content/d8413fe8-25e6-11e7-8691-d5f7e0cd0a16?mhq5j=e7>.

<sup>63</sup> *Trump Calls for more US Auto Jobs, Factories Ahead of CEO Meeting*, CNBC NEWS, (Jan. 24, 2017), <http://www.cnn.com/2017/01/24/trump-calls-for-more-us-auto-jobs-factories-ahead-of-ceo-meeting.html> (Last visited Feb. 5, 2017).

<sup>64</sup> Lee, *supra* note 42.

<sup>65</sup> *Dealing with Donald- Donald Trump's Trade Bluster*, THE ECONOMIST (Dec. 10, 2016), <https://www.economist.com/news/briefing/21711498-whatever-he-thinks-dealmaking-wont-help-mr-trumps-trade-negotiations-donald-trumps-trade>.

<sup>66</sup> In the context of trade in services, national treatment refers to treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers. TPP, art. 10.3.

most-favoured-nation (“MFN”) treatment.<sup>67</sup> The TPP also stipulates a market access requirement that prohibits quantitative restrictions on the supply of services.<sup>68</sup> In addition, TPP members may not require specific types of legal entities or joint ventures through which a service supplier may supply a service.<sup>69</sup> It also prohibits the requirement of local establishment; that is, TPP members may not require a service supplier of another member to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.<sup>70</sup> The members must grant full market access to service suppliers from another member, except where they have taken an exception in the form of non-conforming measures in one of the country-specific annexes attached to the Agreement (‘a negative list approach’).<sup>71</sup>

The liberalisation commitments for trade in services will facilitate market access for foreign service providers, and this liberalisation policy is consistent with the approaches adopted by recent RTAs promoted by the U.S and the EU. For developing countries, the potential benefit would come from gaining access to advanced foreign services, such as banking and financing, for the use of both consumers and producers. Through this type of liberalisation, producers from developing countries in need of capital may obtain access to foreign capital at a rate that might be lower than those offered by domestic banks. The availability of efficient and more advanced foreign services may lead to the enhancement of productivity in the developing country. The developing country may also expect, as a result of the trade liberalisation, competition between foreign and domestic service providers, which may lead to the improvement of the competitiveness of domestic services. The TPP facilitates service exports for developed countries, by granting full market access<sup>72</sup> in the areas of service in which they tend to have competitive advantages, such as banking and finance, telecommunication, engineering, software, education, legal and information technology, and other professional services that require substantial amounts of capital, technology, managerial expertise and networks.

The potential trade-off for developing countries is that they may lack the capacity for appropriate oversight and regulation in the service areas cited above. The

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<sup>67</sup> In the context of trade in services, MFN refers to treatment no less favourable than that it accords, in like circumstances, to services and service suppliers of any other member or a non-member. TPP, art. 10.4.

<sup>68</sup> There should be no limit on the number of suppliers or number of transactions. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> TPP, art. 10.6.

<sup>71</sup> The two forms of the Annexes include 1) current measures on which a member accepts an obligation not to make its measures more restrictive in the future and 2) sectors and policies on which a country retains full discretion in the future. TPP, art. 10.7.

<sup>72</sup> It is subject to the exclusions negotiated and stipulated in the Annexes. *Id.*

imbalance in the market access would also be an issue, as the TPP does not grant market access for service areas where developing countries are likely to have an advantage, such as labour service. For example, the terms of the TPP exclude access to employment from its coverage,<sup>73</sup> so its members are free to control their borders to restrict labour movement. Although border control is legitimate and necessary for immigration and security purposes, access to cross-border labour markets is in the interest of developing countries which can supply inexpensive labour. Thus, this type of unqualified, blanket exclusion of labour market does not support the trade interest of developing countries.<sup>74</sup> Border controls are also excluded from the ambit of most other RTAs and the WTO legal disciplines on services. This imbalance can lead to a loss in domestic employment with service sectors in developing countries facing more competitive service providers from developed countries, and raising a range of social issues associated with the job displacement. The border control, unfettered by the TPP or WTO rules, could also lead to the illegal entry of labourers into the labour markets of developed countries, which will then cause social issues in developed, as well as developing countries, associated with the illegal migration.

There are additional potential trade-offs for developing countries. The prohibition against the requirement of joint ventures or specific forms of entity in the context of service trade prevents the host developing country members from participating effectively in the services provided by developed member suppliers and benefiting from the latter. For example, the joint venture requirement has frequently been used by successful developing countries, such as China, as a means to acquire superior technologies, production techniques, and managerial expertise from developed country suppliers,<sup>75</sup> and the prohibition stipulated in the TPP could block this learning opportunity for developing country members. The prohibition against the requirement of local establishment may also have an effect of precluding employment opportunities for developing country residents. In addition, the absence of local establishments could present difficulties for the importing countries, particularly developing countries with limited capacity to engage in cross-border legal affairs, in dealing with non-resident service suppliers overseas, where a service provided by the latter causes a legal issue in the importing country.

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<sup>73</sup> TPP “does not impose any obligation on a Party with respect to a national of another Party who seeks access to its employment market or who is employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment.” TPP, art. 10.2, para. 4.

<sup>74</sup> See also LEE, RECLAIMING DEVELOPMENT, *supra* note 9, Chapter 5.4.

<sup>75</sup> Ping Deng, *Why do Chinese Firms tend to Acquire Strategic Assets in International Expansion?* 74–84 J. World Bus. 44 (2009) [http://www.rcmewhu.com/upload/file/20150527/20150527094931\\_1700.pdf](http://www.rcmewhu.com/upload/file/20150527/20150527094931_1700.pdf)

The liberalisation of service trade, in conjunction with investment liberalisation, also has an effect of diffusing the cultural traits associated with the provision of a particular service. For example, “Hallyu,” which refers to popular Korean cultural content, for example, Korean pop music, Korean drama, movies, Korean fashion and cosmetics, has moved to other countries through service trade and has become popular in many countries, including China. For example, Korean TV soaps have gained great popularity among young Chinese,<sup>76</sup> as American and British pop culture had become popular in other parts of the world in decades earlier, and concerts featuring Korean pop musicians attracted a large number of audiences throughout China.

Hallyu has permeated into all segments of the Chinese population. For instance, not only the young population but senior politicians, such as Wang Qishan, have described themselves as frequent viewers of Korean TV dramas. Even China's conservative military newspaper has advocated a popular Korean TV drama, ‘Descendants of the Sun’ as an ideal advertisement for military conscription, one that should be referenced and followed.<sup>77</sup> Despite this popularity, the Chinese government has restricted the spread of Hallyu content since the fall of 2016 when a political dispute between China and Korea erupted over the latter’s deployment of a U.S. missile defense system (Terminal High Altitude Area Defense or “THADD”).<sup>78</sup> Since then China has banned Korea-related content on TV programs and commercial performances by Korean music stars.<sup>79</sup> In addition to the THADD issue, it has been observed that the rising concerns about dominant Korean influence over China’s pop culture and young population may have also led the Chinese government to use this opportunity to restrict Hallyu contents and related service trade.<sup>80</sup>

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<sup>76</sup> Yong-Shik Lee, *Should China be Granted Market Economy Status?: In View of Recent Development* 3(2) CHINA & WTO REV. 319 (2017). Popular Korean TV dramas, such as “Descendants of the Sun” and “My Love from the Star,” have attracted billions of views on Chinese online streaming sites, with a single popular Korean soap generating nearly USD 500 million in economic activity.

<sup>77</sup> *Id.* Tessa Wong, *Descendants of the Sun: the Korean Military Romance Sweeping Asia*, BBC NEWS (Mar. 27, 2016), <http://www.bbc.com/news/world-asia-35888537>.

<sup>78</sup> Seema Mody, *China Lashes out as South Korea puts an American Anti-Missile System in Place*, CNBC NEWS (Apr. 28, 2017), <https://www.cnbc.com/2017/03/17/thaad-anti-missile-system-makes-china-lash-out-at-south-korea.html>.

<sup>79</sup> *Id.*

<sup>80</sup> R. Cruz, *China Officially Restricts All Korean Entertainment; Korean Pop Stars Snubbed at MAMA?*, YIBADA (Nov. 20, 2016), <http://en.yibada.com/articles/176161/20161130/china-officially-restricts-korean-music-entertainment-pop-stars-snubbed-mama.htm#ixzz4cjGEvzs7> (Last visited, July 1, 2017).

This episode demonstrates the significant cultural impact that service trade may have on the importing countries and its social and political consequences. As service trade tends to flow dominantly in one direction: from developed countries to developing ones, the cultural effect and its social consequences are also likely to be more evident in the importing developing countries, rather than exporting developed ones. This unidirectional cultural flow and influence may prompt developing countries, which may want to protect their own cultural identity and shield it from overpowering foreign influence, to restrain related service trade, as China has done *vis-à-vis* service imports from Korea related to Hallyu. The TPP terms mandating service trade liberalisation, which prohibit such restraints, could work as an agent to facilitate the spread of cultural and social influences associated with service trade, even though it may not be a stated objective of such terms.

### C. Rules of Origin, Customs, TBT and SBS measures

Rule of origin, customs, TBT and SBS measures are also covered by most RTAs in recent decades. The rules of origin are essential terms for an RTA as they determine whether an imported product is of an origin to benefit from preferential RTA terms. It is particularly important where a production process is separated in various segments to be completed in different countries. The TPP sets product-specific rules of origin attached as an annex to the Agreement.<sup>81</sup> The TPP rules of origin allow inputs from one TPP member to be treated in the same manner as materials from any other TPP member (allow ‘accumulation’), if they are used to produce a product in any TPP member State.<sup>82</sup> This accumulation rule is expected to facilitate trade among TPP members, including developing countries, by creating global value chains (“GVCs”) among them.<sup>83</sup>

The TPP also provides for customs cooperation,<sup>84</sup> advance rulings,<sup>85</sup> and responses to requests for advice or information.<sup>86</sup> It sets forth rules to enhance transparency, including the publication of customs laws and regulations.<sup>87</sup> It also requires release of goods without unnecessary delay, on bond where it is necessary, or ‘payment under protest’ where customs has not yet made a decision on the amount of duties or fees applicable.<sup>88</sup> These requirements are designed to expedite processing at

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<sup>81</sup> TPP, Annex 3-D, Product Specific Rules.

<sup>82</sup> *Id.*, art. 3.10.

<sup>83</sup> Lee, *supra* note 42.

<sup>84</sup> TPP, art. 5.2.

<sup>85</sup> Advance rulings refer to rulings from customs prior to the importation of a good in question. TPP., art. 5.3.

<sup>86</sup> *Id.*, art. 5.4.

<sup>87</sup> *Id.*, art. 5.11.

<sup>88</sup> *Id.*, art. 5.10. TPP also provides for expedited customs procedures for express shipments. *Id.*, art. 5.7.

customs, which will be beneficial to exporters and importers from both developing and developed countries. However, this may also impose considerable regulatory and financial burdens on developing country members lacking sufficient resources, including manpower, to implement the expedited process. The TPP does not link the implementation of these requirements to the acquisition of capacity by developing country members, as stipulated by the WTO Agreement on Trade Facilitation.<sup>89</sup> Even though the TPP encourages a member receiving an assistance request to provide assistance,<sup>90</sup> it is not a mandatory obligation.

The TPP also regulates technical barriers to trade (TBT).<sup>91</sup> Its members are required to grant MFN treatment to conformity assessment bodies located in the territory of another member with respect to procedures, criteria, and other conditions that TPP members may apply to their own domestic conformity assessment bodies.<sup>92</sup> The TPP also facilitates the acceptance of the results of conformity assessment procedures from conformity assessment bodies in the other member States.<sup>93</sup> The TPP includes annexes related to regulation of specific sectors to promote common regulatory approaches, and<sup>94</sup> also regulates sanitary and phytosanitary (SPS) measures for the protection of human, animal or plant life or health.<sup>95</sup> It approves emergency measures, the scientific bases of which must be reviewed within six months.<sup>96</sup> The rules on TBT and SPS measures attempt to prevent abuse of the measures that would unduly restrain trade for the purpose of protecting domestic industries. Thus, this regulatory function will be beneficial to the trade of both developing and developed countries. The TPP also establishes a mechanism for consultations between governments to resolve SPS issues.<sup>97</sup> It would be beneficial for developing countries if stringent TBT and SPS requirements imposed by developed countries, which are impediments to exports

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<sup>89</sup> LEE, RECLAIMING DEVELOPMENT, *supra* note 9, Chapter 9. See also World Bank, *WTO Trade Facilitation Agreement: A Development Opportunity*, <http://blogs.worldbank.org/trade/wto-trade-facilitation-agreement-development-opportunity> (Last visited Nov. 29, 2017).

<sup>90</sup> TPP, art. 5.2, para. 8.

<sup>91</sup> TBTs refer to technical regulations and standards applied to products, including a wide range of regulations and standards facilitating environmental protection, public safety, national security, and consumer information. See LEE, RECLAIMING DEVELOPMENT, *supra* note 9, Chapter 7.3.1.

<sup>92</sup> TPP, art. 8.6.

<sup>93</sup> *Id.*, art. 8.9.

<sup>94</sup> *Id.*, Annexes. These sectors include cosmetics, medical devices, pharmaceuticals, information and communications technology products, wine and distilled spirits, proprietary formulas for prepackaged foods and food additives, and organic agricultural products.

<sup>95</sup> *Id.*, art. 7.2.

<sup>96</sup> *Id.*, art. 7.14.

<sup>97</sup> *Id.*, art. 7.17.

from developing countries lacking the necessary technical and financial resources to meet them, could be adjusted, or if developing countries receive assistance through consultations.<sup>98</sup>

#### D. Intellectual Property Rights

The TPP also includes extensive provisions for the protection of intellectual property rights, including patents, trademarks, copyrights, industrial designs, geographical indications, trade secrets and other forms of intellectual property.<sup>99</sup> The TPP requires members to grant national treatment with respect to IPR protection<sup>100</sup> and the effective enforcement of IPRs,<sup>101</sup> including mandatory criminal procedures and penalties.<sup>102</sup> It provides for regulatory standards for patents based on those established by the WTO Agreement on Trade-Related Intellectual Property Rights (“TRIPS Agreement”<sup>103</sup>) and international best practices.<sup>104</sup> It also goes beyond the TRIPS Agreement, as it protects copyrights for the life of the author and an additional 70 years, which is longer than the TRIPS standard.<sup>105</sup> As to trademarks, the TPP mandates the minimum protection period of 10 years for initial registration and for each renewal.<sup>106</sup> It also stipulates commitments relating to the protection of undisclosed tests and other data submitted to obtain marketing approval of a new pharmaceutical or agricultural chemicals product.<sup>107</sup>

The TRIPS Agreement and RTAs have stipulated the protection of IPRs as key

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<sup>98</sup> For example, the exports of livestock products from East Africa to Europe were restricted due to the EU’s stringent SPS requirements that could not be met by producers in these countries. Melaku Desta, *EU Sanitary Standards and Sub-Saharan African Agricultural Exports: A Case Study of the Livestock Sector in East Africa* 1(1) L. & DEV. REV. 96-122 (2008).

<sup>99</sup> *Id.*, chapter 18.

<sup>100</sup> TPP, art. 18.8.

<sup>101</sup> *Id.*, Section I, arts. 18.71-18.80.

<sup>102</sup> *Id.*, art. 18.77.

<sup>103</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>104</sup> TPP, arts. 18.37-18.46.

<sup>105</sup> *Id.*, art. 18.63.

<sup>106</sup> *Id.*, art. 18.26. TPP also limits, under certain conditions, the liability of Internet Service Providers for copyright infringements that they do not control, initiate, or direct but take place through systems or networks controlled or operated by them or on their behalf. *Id.*, art. 18.82.

<sup>107</sup> *Id.*, arts. 18.47 and 18.50. During TPP negotiations, the United States initially demanded 12 years for the protection of undisclosed tests and other data on new pharmaceutical products, but the members agreed on five years for protection (eight years for the product that is or contains a biologic). *Id.*, arts. 18.50 and 18.47.

terms, and the inclusion of IPR protection has dual effects.<sup>108</sup> The first effect is the protection of innovation and the enhancement of productive creativity in society. The second effect is the creation of a cost for adopting advanced technology,<sup>109</sup> which has ramifications for development. Developed countries tend to have an interest in protecting their own IPRs and advocate their inclusion in trade disciplines, such as the WTO rules and RTAs. For developing countries, this protection could be translated into an added cost in acquiring and developing new production techniques and advanced technologies.<sup>110</sup> Overcoming cultural unfamiliarity with the concept of IPRs in many developing countries in the implementation of IPR protection could also entail a substantial social cost. Given the strong position on IPR issues by some developed countries, particularly the U.S., it would have been difficult for developing countries not to accede to the demands for reinforced IPR protection in the TPP and elsewhere.

The fact that developing countries have already adopted extensive IPR protection terms under the TRIPS Agreement may render the adoption of IPR terms in the TPP a smaller trade-off than what otherwise could have been. However, for developing countries lacking financial and technical resources associated with the implementation of complex IPR provisions, its capacity for implementation would be an issue.<sup>111</sup> Many developing countries, particularly least-developed ones, have experienced considerable difficulty in implementing the terms of TRIPS Agreement.<sup>112</sup> The TPP provides reinforced protection beyond what is offered by the TRIPS Agreement. Considering the added implementation difficulty for developing countries, it would make sense to link the implementations of the IPR terms to the acquisition of capacity to be measured by a series of criteria, such as technical and financial resources, availability of legal infrastructure, and the level of economic and industrial development.

### *E. Investments*

Investments, which were initially governed by international investment treaties such as bilateral investment treaties, were outside the realm of RTAs for decades, but recent RTAs tend to include investment terms. In line with this trend, the TPP

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<sup>108</sup> Lee, *Reclaiming Development*, chapter 5.3.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> WTO, TRIPS and Public Health, IP/C/W/296 (advance copy received June 19, 2001), [https://www.wto.org/english/tratop\\_e/trips\\_e/paper\\_develop\\_w296\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/paper_develop_w296_e.htm)

<sup>112</sup> According to a study, implementing the TRIPS obligations would require “the least developed countries to invest in buildings, equipment, training, and so forth that would cost each of them \$150 million — for many of the least-developed countries this represents a full year’s development budget.” J. Michael Finger, *The WTO’s Special Burden on Less Developed Countries* 19(3) *CATO JOURNAL* 435 (2000).

includes an investment chapter that stipulates the key elements of investment protection, such as national treatment,<sup>113</sup> MFN treatment,<sup>114</sup> and “the minimum standard of treatment,” including fair and equitable treatment and full protection and security.<sup>115</sup> The TPP adopts a ‘negative-list’ basis for the regulation of investment; all investments are permitted unless specifically stipulated as exceptions.<sup>116</sup> The TPP allows expropriation, provided that it is for a public purpose, non-discriminatory, and compliant with due process of law.<sup>117</sup> Due compensation is required for expropriation.<sup>118</sup> The TPP also requires the members to permit all (financial) transfers relating to a covered investment freely and without delay, subject to certain exceptions.<sup>119</sup> The TPP prohibits performance requirements, such as local content requirements<sup>120</sup> and stipulates a procedure for investor-state dispute settlement (“ISDS”) through which a member may submit a claim arising from the investment chapter to arbitration outside the host member’s court system.<sup>121</sup>

Both developed and developing countries have an interest in receiving foreign investment. For developed countries, foreign investment may contribute to the local economy by creating employment and increasing local production, while in developing countries, foreign investments are instrumental in facilitating economic development, as it brings key resources needed for development such as financial capital, technology, manpower, managerial expertise, and international distribution networks.<sup>122</sup> Thus, the TPP investment provisions, which mandate non-discrimination and protection, may contribute to increasing foreign investment for both developed and developing countries. For example, Australian capital may find Vietnam’s commitments under the investment provisions helpful to increasing their investment in Vietnam, which will, in turn, enable Vietnam to secure the cited resources for their own economic development from Australia.

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<sup>113</sup> TPP, art. 9.4.

<sup>114</sup> *Id.*, art. 9.5.

<sup>115</sup> *Id.*, art. 9.6.

<sup>116</sup> Under this approach, members do not restrict foreign investments except where they have taken an exception in the form of a non-conforming measure. The non-conforming measures, listed in country-specific annexes, include existing measures on which 1) a member agrees on an obligation to refrain from making them more restrictive in the future and to allow future liberalisation and 2) a member retains full discretion. *Id.*, art. 9.11.

<sup>117</sup> *Id.*, art. 9.7.

<sup>118</sup> Compensation must be prompt, adequate (i.e., fair market value) and effective (i.e., realisable and freely transferable). *Ibid.*

<sup>119</sup> *Id.*, art. 9.8.

<sup>120</sup> *Id.*, art. 9.9.

<sup>121</sup> *Id.*, art. 9.18.

<sup>122</sup> Lee, *Reclaiming Development*, chapter 5.2.

On the other hand, developing countries may also have an interest in maximising the contribution of investment to economic development by setting terms of investment, such as performance requirements, in order to promote domestic production and employment. The latter policy has been adopted by countries with successfully developed economies such as South Korea and China, and also by developing countries, such as Nigeria.<sup>123</sup> This tendency to adopt investment measures is not limited to current developing countries. A historical study reveals that today's developed countries also imposed regulations on foreign investment during their developments, when they were net recipients of foreign investment, to ensure that foreign investment contributed to their long-term development objectives.<sup>124</sup> Thus, to the extent that TPP provisions prohibit these investment-related measures, the TPP provisions could be seen as adverse to the development interests of developing countries.<sup>125</sup> To ameliorate the adverse effect of this prohibition, the TPP allows members to offer certain advantages to investors on compliance with the requirement to locate production, supply services, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory.<sup>126</sup>

The ISDS provision also requires discussion, since considerable opposition has been formed against the adoption of the ISDS in developed countries, such as the U.S. and Australia, as well as in developing countries, due to the fear that the extra-judisdictional arbitration process allowed by the TPP ISDS provision will undermine sovereign judicial authorities.<sup>127</sup> From the perspectives of foreign investors, however, the existence of the ISDS could increase confidence in the fairness of the dispute resolution. The potential bias of domestic courts in favour of their own nationals, regardless of whether they are located in developed or developing countries, could not be completely precluded, and the ISDS process

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<sup>123</sup> *Id.* See also, Chilenye Nwapi, *Defining the 'Local' in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries*, 8(1) L. & DEV. REV. 187–216 (2015).

<sup>124</sup> Ha-Joon Chang and Duncan Green, *The Northern WTO Agenda on Investment: Do As We Say, Not As We Did* (South Centre/CAFOD, June 2003), at 33. These regulations included a simple ban on the entry of foreign investment into particular sectors, as well as the conditional entries (e.g., requirements for joint ventures and ceilings on foreign ownership) still applied by today's developing countries. Bans on entry enabled local producers to establish themselves without competition with potentially more efficient foreign investment, and conditional entries made it possible for the host country to extract greater benefit from permitted investment. *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> TPP, art. 9.10.

<sup>127</sup> See Elizabeth Warren, *The Trans-Pacific Partnership clause everyone should oppose*, WASHINGTON POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html).

outside the domestic court system may function more neutrally. Despite the perceived neutrality of the ISDS in dispute resolution, the relatively weaker ability of developing countries to deal with the experienced, international investors with considerable resources in the ISDS process would be a concern for developing countries.

#### IV. NEW PROVISIONS - BRIDGING THE GAP?<sup>128</sup>

The TPP includes new provisions not found in most other RTAs, such as those on competition, State-owned Enterprises (“SOEs”), capacity building, development, digital trade (electronic commerce), and small and medium-sized businesses. The provisions on capacity building and development have been introduced, for the first time among RTAs, in an effort to promote the development interests of developing countries, and these provisions need to be examined as to whether they bridge the gap between developing and developed countries through development assistance and cooperation. The provisions on competition, labour, and environment are not strictly new in the sense that these provisions were included in a few other RTAs such as the U.S.-Korea FTA, but they are not found in most others. Thus, their inclusion in this category of provisions is justified.

##### A. Competition and SOEs

The TPP regulates competition issues and SOEs, which are not addressed by GATT/WTO disciplines or, in the case of SOEs, by any other RTA. On competition, the TPP requires the application of national competition laws to “*all commercial activities in its territory*”.<sup>129</sup> The TPP requires its members to “*adopt or maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare*.”<sup>130</sup> It also requires the members to maintain authorities responsible for the enforcement of its national competition laws and to ensure that the enforcement policy of those authorities do not discriminate on the basis of nationality.<sup>131</sup>

The TPP competition provisions may benefit exporters and investors from both developed and developing countries who face powerful local enterprises engaging in anti-competitive practices such as price fixing, which would be adverse to the business interests of foreign enterprises. While developing country enterprises, as well as developed-country businesses, could benefit from the competition provisions, there is a potential trade-off for developing countries. In the early

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<sup>128</sup> This section is developed from Lee, *supra* note 42, sections II and IV.

<sup>129</sup> TPP, art. 16.2.

<sup>130</sup> *Id.*, art 16.1.

<sup>131</sup> *Id.*, art. 16.3.

stages of economic development,<sup>132</sup> it is necessary to allow or even support efficient entrepreneurs to expand production capacity for economic development, and the tight application of competition law might impede such expansion and may not be conducive to the growth of efficient producers.<sup>133</sup> The government support focused on major enterprises proved to be effective for economic development in successful developed countries, such as South Korea, in the early stages of their economic development.<sup>134</sup> The calculus might change in later development stages where there is a policy need to adopt national competition law to ensure fair competition among powerful domestic enterprises. The requirements under the TPP competition provisions can then be used to overcome domestic resistance by the vested interests.

The TPP is the first RTA that attempts to regulate SOEs, although a large number of country-specific exceptions may limit the scope of their regulation.<sup>135</sup> The regulatory focus is to ensure that SOEs' transactions are made on the basis of commercial considerations, except to fulfill terms of its public service mandate.<sup>136</sup> SOEs or designated monopolies must not discriminate against the enterprises, goods, and services of other members or even non-members.<sup>137</sup> TPP members are also required to recognise the jurisdiction of their own courts over civil claims against an SOE, by a foreign country based on a commercial activity carried on in its territory.<sup>138</sup> The TPP prohibits members from causing adverse effects to the interests of another member through the use of the non-commercial assistance that it provides to an SOE.<sup>139</sup>

The regulatory attempt to create a 'level-playing field' between SOEs and private enterprises may benefit foreign enterprises, in both developed and developing

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<sup>132</sup> The early stages of economic development refer generally to the initial state of economic development with the characteristics of over-dependency on primary industries (non-manufacturing industries), low-level of industrialisation, and low per-capita income, as compared to the later stages of economic development referring to the more advanced state of economy with sustained economic growth, industrialisation, and higher (mid-level) per capita income.

<sup>133</sup> Yong-Shik Lee, *Call for a New Analytical Model for Law and Development*, 8(1) L. & DEV. REV. 44-45 (2015).

<sup>134</sup> Major enterprises in South Korea, such as Samsung and Hyundai, received support from the Korean Government in various forms, such as subsidies, in the early stages of economic development. These supported enterprises worked as an engine for South Korea's rapid economic development.

<sup>135</sup> TPP, Annex 17-D, E, F.

<sup>136</sup> *Id.*, art. 17.4.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*, art. 17.5.

<sup>139</sup> *Id.*, art. 17.6.

countries, facing competition by SOEs. However, this potential benefit needs to be assessed against the important role that SOEs have historically played in the early stages of economic development, when the private sector is underdeveloped, as shown during the economic development processes of South Korea and China.<sup>140</sup> In this respect, some non-commercial government support for SOEs, such as subsidies, is essential for economic development.<sup>141</sup> However, some SOEs have outlived their productive roles for economic development and have become economically inefficient agents.<sup>142</sup> With their vested social, political, and economics interests, reform has proven difficult.<sup>143</sup> For those countries which intend to reform SOEs, the TPP commitments under the SOE provisions may be a politically expedient device to overcome domestic resistance to reform. The social roles that SOEs play, such as provision of employment for a large number of population, may justify preferential treatment and state protection of SOEs, but this may come in conflict with the terms of the TPP unless the roles are directly relevant to the stated public state mandate.<sup>144</sup>

### B. Capacity Building and Development

Reflecting on the presence of several developing country members and their development interests, the TPP, for the first time, includes provisions to assist with the capacity-building of developing countries in the implementation of TPP obligations. For this purpose, the TPP has established the Committee on Cooperation and Capacity Building which seeks to identify and review areas for potential cooperative and capacity-building efforts.<sup>145</sup> These provisions are noteworthy as they demonstrate the willingness on the part of developed country members to assist their developing country counterparts. The Committee also seeks to undertake activities to provide assistance for developing countries. The limit to the provision, however, is that assistance is voluntary in nature, and not obligatory. Moreover, offers of cooperation and assistance could be conditioned

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<sup>140</sup> For example, POSCO, a major steel company established initially as an SOE in South Korea, made key contributions to the economic development of South Korea by producing steel products essential for the development of other industries, such as automobiles. SOEs are also an integral part of the fast growing Chinese economy.

<sup>141</sup> On the other hand, the expanded SOEs during the economic development process also raises issues with inefficient bureaucracy and corruption, and the TPP provisions could be used to reform SOEs.

<sup>142</sup> See Leila Fernandez-Stembridge and Juan Antonio Fernandez, *China's State Owned Enterprise Reforms: An Industrial and CEO Approach* (Routledge, 2012); See also Justin Yifu Lin, Zhou Li, Fang Cai, *State-Owned Enterprise Reform in China* (The Chinese University Press, 2002).

<sup>143</sup> *Id.*

<sup>144</sup> *Supra* note 136.

<sup>145</sup> TPP, art. 21.4.

upon a mutually agreed basis and the availability of resources.<sup>146</sup> TPP member states do not have a recourse to the dispute settlement process under the TPP on any issue arising from the application of this provision.<sup>147</sup>

The TPP also includes a separate chapter on development and establishes a Committee on Development to promote cooperative work in several areas, such as economic growth, education, science and technology, research and innovation.<sup>148</sup> The TPP is the first RTA that has a regulatory set-up to deal with development issues and is, thus, noteworthy. However, the provision has a similar limit as discussed above; the cooperation and assistance stipulated in this chapter is also voluntary rather than mandatory. Accordingly, no member has recourse to dispute settlement under the TPP for any matter arising under either of these chapters. Thus, the shortcoming of these provisions is that they are only declaratory, such as those in GATT Articles XXXVI to XXXVIII, as they do not create a binding obligation.<sup>149</sup> Although it would be politically difficult for developed country members to make such assistance obligatory and to subject a breach of any assistance commitment to a proceeding under the dispute settlement process for a potential remedy, consideration could instead be given to granting suspension from certain TPP obligations for developing countries that do not receive essential assistance for the implementation of obligations, after a commitment to provide such assistance has been made. The TPP provisions on capacity building and development can indeed be made more effective by linking the undertaking of TPP obligations by developing countries to the acquisition of necessary capacity, as has been attempted by the WTO Agreement on Trade Facilitation.

### *C. Digital Trading, Small and Medium-Sized Businesses, Labour, and Environment*

The TPP also includes provisions on digital trading, small and medium-sized businesses, labour, and environment. On digital trading, the TPP imposes two important restrictions: TPP members are prohibited from imposing customs duties on electronic transactions<sup>150</sup> and from requiring using or locating computing facilities in their own territories.<sup>151</sup> These provisions facilitate cross-border transactions in electronic commerce but will also have tax revenue implications - although it has been proved to be technically difficult.<sup>152</sup> The latter provision may

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<sup>146</sup> *Id.*, art. 21.5

<sup>147</sup> *Id.*, art. 21.6.

<sup>148</sup> *Id.*, arts. 23.3-23.7.

<sup>149</sup> *Id.*, arts. 21.6 and 23.9.

<sup>150</sup> *Id.*, art. 14.3.

<sup>151</sup> *Id.*, art. 14.13.

<sup>152</sup> See OECD, *Taxation and Electronic Commerce Implementing the Ottawa Taxation Framework Conditions*,

also limit the ability of TPP members to control electronic commerce where providers are located outside their own territories. The TPP also provides for consumer protection to counter potential fraudulent and deceptive electronic commerce activities.<sup>153</sup> These provisions appear advantageous to the technologically-advanced electronic commerce providers located in developed countries, rather than those located in developing countries. However, developing country providers may also benefit to the extent that the provisions facilitate the use and development of information technology for electronic commerce. Under the capacity-building and development provisions, assistance could be provided to increase developing countries' participation in cross-border electronic commerce.

The TPP also includes new provisions for small and medium-sized enterprises (SMEs). Due to the cost of trade, information, and technical issues, large-scale enterprises with sufficient trading capacity, rather than SMEs without such capacity, tend to benefit from RTAs. Recognising this difficulty for SMEs, the TPP requires information sharing for SMEs, including maintaining the website containing information about the TPP<sup>154</sup> and setting up a Committee on SMEs to seek ways to assist them to take advantage of the commercial opportunities under the TPP.<sup>155</sup> SMEs in developing countries, as well as those in developed countries, could benefit from this policy, particularly if it is linked to capacity building and development promotion.

Lastly, the TPP includes provisions on labour and environmental protection. TPP labour provisions ensure compliance with the labour rights stated in the International Labour Organisation (ILO) Declaration,<sup>156</sup> including freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.<sup>157</sup> The TPP further clarifies that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each member's labour laws.<sup>158</sup> On environment, the TPP has extensive provisions on commitments in a range of environmental issues, including enforcement of national environmental laws, protection of the ozone layer, implementation of multilateral environmental agreements, elimination of environmentally destructive

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<https://www.oecd.org/tax/consumption/Taxation%20and%20eCommerce%202001.pdf>  
(Last visited Nov. 29, 2017).

<sup>153</sup> TPP, art. 14.7.

<sup>154</sup> *Id.*, art. 24.1.

<sup>155</sup> *Id.*, art. 24.2.

<sup>156</sup> International Labour Organisation (ILO), *ILO Declaration on Fundamental Principles and Rights at Work* (June 1988).

<sup>157</sup> TPP, art. 19.3.

<sup>158</sup> *Id.*, art. 19.4.

subsidies, such as certain fishery subsidies, and elimination of tariffs and other barriers to trade in environmentally-beneficial products and technologies.<sup>159</sup> The TPP establishes a Committee on Environment to oversee the implementation of the environmental provisions.<sup>160</sup>

A potential developing/developed country divide in this area is that the level of protection that developing countries may afford in labour and environment may not meet the expectations of developed countries. It is because many developing countries rely on labour-intensive industries for economic development, where it is in the interest of these industries to suppress wages, and other labour rights which may translate into added costs and the hampering of economic development in the early stages of the economy. Developing countries with limited economic and technical resources, additionally, may not be able to control effectively the adverse environmental impact of industrial development, such as pollution. However, labour suppression and continued environmental damage is not sustainable in the long term, and successful economic development has enabled developing countries to improve labour and environmental protection with increased resources as has been seen in the cases of South Korea, Taiwan, and more recently, China.<sup>161</sup> The utility of the TPP terms is that they can provide regulatory assistance/cover for developing country members in overcoming internal political resistance by those who will incur costs and in adopting protection measures when they are economically and socially ready to promote labour rights and the environment at a higher level. Again, the effectiveness of these provisions will improve when their implementation is linked to capacity building and development promotion under the TPP terms.

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<sup>159</sup> *Id.*, arts. 20.3 – 20.18.

<sup>160</sup> *Id.*, art. 20.19.

<sup>161</sup> Efforts have also been made to restore the environment that had been damaged as a result of industrial drive during the periods of economic development. A publicised example is the successful restoration of “Cheonggyecheon” (Cheonggye River Stream) in the city of Seoul, South Korea. The river stream, a 8.4 km-creek flowing west to east through downtown Seoul, was covered with concrete for over a 20 year period since the late 1950s for serious pollution created by the migration of people to the surrounding area after the Korean War. In 1976, a 5.6 km-long, 16 meter-wide elevated highway was completed over the concrete-covered stream, and the area became an example of successful economic development of Korea. In 2003, the Seoul Metropolitan Government initiated a USD 900 million-environmental project to restore the stream, resulting in the successful recovery of the stream itself, natural environment around the stream, and natural habitats in the area. For further details of the restoration project, see Peter G. Rowe (ed.), *A City and Its Stream: An Appraisal of Cheonggyecheon Restoration Project and Its Environs in Seoul, South Korea* (Harvard University Graduate School of Design, 2010). The Chinese Government, with the resources that they now have as a result of successful economic development, is also making efforts to improve the environment, such as air quality, in major cities such as Beijing and Shanghai. *Cited in Lee, supra* note 133, at 41, fn. 214.

## V. CONCLUSIONS

The TPP attempts to setup a new regulatory framework for international trade in the Asia-Pacific region. Although its continuation is not certain at the time of this writing due to the exit of its architect, the United States, it is still worth studying for its unprecedented diversity in membership, comprised of several developing and developed countries. This mixed membership inevitably creates a developing/developed country divide as the terms of the TPP have dissimilar effects on trade and economy along this divide. For developing countries, the most significant benefit of the TPP – “*the grand bargain for developing countries*”, in the words of Alan Winters – would be preferential access to the markets of developed countries. The perceived grand bargain<sup>162</sup> has motivated the participating developing countries to accept the potential trade-offs, such as their own liberalisation commitments for trade in goods and services, commitments in other areas, including IPRs, competition, investments, and customs, and the regulatory costs and the resultant loss of policy space associated with these commitments. Social and economic elites in developing countries and developed ones have advocated these commitments as necessary to pursue a deeper economic and trade integration which, in their argument, would be beneficial to their own countries.<sup>163</sup>

However, this argument has not been shared by all, raising concerns in developed countries as well as developing ones. A Canadian observer has stated that “*What the TPP does is that it locks in that competitive advantage [for other countries] which makes it much, much harder for Canada to become an innovation nation.*” (*emphasis added*), meaning that the TPP deal would lock-up an advantage to other TPP members in the areas in which they have a competitive advantage, making innovation more difficult for Canada in these areas.<sup>164</sup> The Trump administration also stated that the TPP would undermine the U.S. economy and thus, withdrew the United States from it.<sup>165</sup> There is no assurance that the absence of RTAs would conversely lead to innovation and development, either, but as indicated above, the TPP terms reduce

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<sup>162</sup> *Supra* note 51.

<sup>163</sup> For example, a study by a developing country scholar evaluated TPP, comparing to RCEP, that “the former entails a more rigorous and comprehensive template than the latter. The range of issues under negotiation of TPP is rather wide with an unmatched depth of liberalisation.” Thanh, *supra* note 51, at 115.

<sup>164</sup> The statement is made by Jim Balsille, the former co-CEO of Research In Motion and co-founder of the Institute for New Economic Thinking. *TPP would make it Harder for Canada to Innovate, Jim Balsillie Warns*, THE HOUSE, (Feb. 6, 2016), <http://www.cbc.ca/radio/thehouse/christy-clark-on-economic-growth-pipelines-and-climate-change-1.3432461/tpp-would-make-it-harder-for-canada-to-innovate-jim-balsillie-warns-1.3432464>.

<sup>165</sup> *Supra* note 28.

the ability of members to adopt trade-related industrial policies for development and innovation and it has long-term ramifications, particularly for developing countries.

As noted, the policy space has already been reduced by adopting the obligations in GATT/WTO disciplines, but this does not justify removing it further through terms of RTAs such as the TPP, nor does it mean that RTAs can never preserve the policy space for development. It would be possible to secure policy space for developing countries while maintaining the terms of RTAs. RTAs may also include terms that authorise developing country members to adopt trade-related measures for a development purpose, such as tariffs higher than those authorised under the RTAs. For example, RTAs could allow developing countries to adopt an Article XVIII measure<sup>166</sup> under the conditions set out in GATT, just as RTA terms allow member states to adopt trade remedy measures as permitted under GATT/WTO disciplines.<sup>167</sup> Additional measures, such as DFT could be authorised for developing country members for the purpose of facilitating development.<sup>168</sup> RTAs may also afford developing country members the policy space by linking the implementation of RTA obligations to the acquisition of necessary capacity.

It may appear contradictory to attempt to secure policy space, such as one that allows increased tariffs, on the one hand, and to reduce trade barriers, including tariffs, on the other, pursuant to the objective of the RTA. But the proposed regulatory exemptions are selective and exceptional in nature, in that they can be invoked only when a developing country member makes a legitimate case for economic development, for example, demonstrating that the exceptional measures are necessary to facilitate economic development. Thus, these select exemptions would not undermine the trade and investment liberalisation promoted by RTAs. Additionally, the capacity linkage proposed in the preceding section has already been adopted by the WTO Agreement on Trade Facilitation, and its adoption for the potentially costly RTA commitments would be equally justifiable, provided that the elements of required capacity to implement RTA obligations are clarified in agreement with both developing and developed country members.

Despite the existence of the provisions concerning capacity building and development<sup>169</sup> and the benefits that trade liberalisation commitments may create for developing countries as well as developed ones, the current TPP rules display a development deficit. The regulatory imbalance would not serve the long-term interests of the TPP membership as a whole because an RTA that does not meet

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<sup>166</sup> See discussion *supra* Section III.A.

<sup>167</sup> TPP, chapter 6.

<sup>168</sup> See discussion *supra* section III.A.

<sup>169</sup> See discussion *supra* section IV.B.

the interests of its majority membership would not be sustainable in the long run. It remains to be seen whether the benefits of market access afforded by the TPP would outweigh the regulatory cost imposed on developing countries. Reflecting on this uncertainty, more flexible implementation of TPP commitments, and full utilisation of the capacity-building and development promotion provisions could help reduce the gap and restore the balance of interests between developing and developed country members. Consideration should also be given to allowing developing country members to adopt Article XVIII and DFT-type measures as suggested above.

The proliferation of RTAs has made it necessary for many developing countries to join RTAs and accept, for the fear of losing market access, the terms that they may not have in multilateral trade negotiations. As a result, some of the RTA terms, as shown in the case of the TPP, further restrict the policy space for developing countries, which may have an adverse effect on their development interests.<sup>170</sup> After all, it will be in the long-term interests of developed countries to support the economic development of developing countries by agreeing to preserve the necessary policy space, *albeit* on a selective basis, which will enable developing countries to increase the contribution of trade liberalisation to their economic development. The successful economic development of developing countries will provide developed countries with much larger export markets than they have today, as demonstrated by the outcome of successful economic development in East Asia.<sup>171</sup> In this sense, the perceived developing/developed country divide in the TPP is not an insurmountable obstacle to achieving economic goals for both developing and developed countries.

Lastly, it is an ironic turn of history that the U.S. withdrew from the TPP following the change of the administration, after having pushed so hard for its successful conclusion. This radical policy shift represents a change of perspective on the beneficial effects of RTAs; the U.S. negotiated and succeeded in incorporating much of its regulatory preferences in the TPP, which it could not do in the multilateral Doha negotiations at the WTO. The U.S. influence is evident in multiple areas covered under the TPP, including service trade, intellectual property,

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<sup>170</sup> A possible measure to prevent this adverse effect would be to modify GATT Article XXIV, which approves the creation of RTAs, to prohibit the encroachment of policy space granted under GATT/WTO disciplines and the abridgment of the rights of developing countries to adopt trade-related development measures, such as those under GATT Article XVIII. The precedent of this approach is the prohibition of gray-area measures in the Agreement on Safeguards. See Yong-Shik Lee, *Safeguard Measures in World Trade: The Legal Analysis* (Edward Elgar, 2014), chapters 2.3 and 9.1.

<sup>171</sup> The countries that have achieved successful economic development, such as South Korea and China, provide some of the largest export markets for developed countries today.

investments, competition, and regulation of SOEs, among others. Yet, the new administration, elected by the support of the working class in the United States, did not consider this triumphant negotiation outcome sufficient enough to outweigh its potential loss in manufacturing jobs. For the reasons that have already been discussed,<sup>172</sup> the announced trade policies of the Trump administration seem to have only limited prospect for success, but the unexpected overturn of the U.S. over the TPP remains as a testament of social discontent and resistance by those who believe that they are losing after the economic integration promoted by RTAs.<sup>173</sup>

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<sup>172</sup> See discussion *supra* section III.A.

<sup>173</sup> *Supra* note 3.