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Juan Nascimbene, *The Impact of the TPP on International Trade Negotiations*
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# THE PHANTOM OF THE TPP: THE IMPACT OF THE TPP ON INTERNATIONAL TRADE NEGOTIATIONS

**JUAN NASCIMBENE***

*The U.S. President Donald J. Trump decided to withdraw from the Trans-Pacific Partnership (TPP) on January 23, 2017, thus ending the collective TPP-12 enterprise that had begun more than eight years ago. However, this did not put an end to the impact that the TPP would have on ongoing and future trade negotiations. The TPP is already being used as a template in other trade and investment agreements. This note will show the same by analysing the realms of investment law and patent standards post-TPP. This phenomenon gives developing countries a direction into how some future negotiations of the developed world will be framed. In turn, this hindsight should allow them to either support or collectively oppose certain standards.*

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## I. INTRODUCTION

Only a couple of years ago, the international order of free trade and investment was the ruling paradigm. After the failure of the World Trade Organization's Doha Rounds to produce multilateral trade liberalisation results,[1] most developed States started pursuing large-scale preferential trade agreements, such as the Trans-Pacific-Partnership ("TPP"),[2] the Transatlantic Trade and Investment Partnership ("TTIP"),[3] and the Comprehensive Economic Trade Agreement ("CETA"),[4] with the purpose of protecting their investment and trade interests abroad.

These new regional treaties were supposed to become the beacons of liberalisation and free trade with the hope of expanding geopolitical goals. Particularly in the case of the TPP, the regional agreement *par excellence*, the U.S. had the clear objective of limiting the ever-increasing influence of China in the Pacific.[5]

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[1] The "Doha Rounds" are a series of trade negotiation rounds under the auspices of the World Trade Organization (WTO) that started in 2001 in Doha, Qatar. These talks were aimed at liberalising trade, promoting poor countries' development and ending agricultural subsidies. However, they were suspended indefinitely. *See* Richard Baldwin, 29(6) *Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies*, WORLD ECON. 677 (2006); S. Cho, *The Demise of Development in the Doha Round Negotiations*, 45(3) TEX. INT'L L. J. 573 (2010).

[2] The States parties to the TPP were the United States, Mexico, Peru, Chile, Japan, Vietnam, Brunei, Canada, Malaysia, Singapore, Australia and New Zealand.

[3] The parties to the TTIP were the European Union and the United States.

[4] The parties to CETA are the European Union and Canada.

[5] B.S. Chimni, Trans-Pacific Partnership Agreement, Donald Trump and After: A Subaltern Perspective, DRAFT, 30 (2016).

However, given the series of events that have taken place in just the past few years — Donald Trump's presidential victory, Brexit and nationalist and protectionist movements all over Europe — the previous consensus built around free trade is being challenged. Moreover, discontentment with globalisation[6] has started to flourish in the developed world,[7] and those who have been left behind by this process have found the perfect scapegoat in the free movements of goods and people.[8] In this context, some leaders have taken advantage of this feeling and are pushing anti-free trade and anti-migration agendas. Indeed, whilst technological advances are inevitable, one can always vote against preferential trade agreements or immigration policy. Donald J. Trump, for example, has exploited this anti-trade rhetoric during his campaign and once in office, he expeditiously withdrew from the TPP on January 23, 2017.[9]

Notwithstanding this formal withdrawal from the partnership, this comment will argue that the TPP has had, and will continue to have, a profound impact in the arena of international trade negotiations. Not only does the TPP consolidate many international economic law standards, but it also creates new ones, which were inexistent at least on the international level. This new body of international law, although not binding, given that the TPP has not been ratified, will influence future treaties, which will be binding and could then be pointed out as state practice or even be used to interpret future agreements that the TPP members will sign.

In this sense, the TPP could act as a mega-trade-model agreement, similar to Model Investment Agreements, which many States publish.[10] Although these have no

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[6] *See* Joseph Stiglitz, Globalization and its Discontents (2003).

[7] *What the World Thinks About Globalization*, THE ECONOMIST (Nov. 18, 2016), https://www.economist.com/blogs/graphicdetail/2016/11/daily-chart-12 (as observed in this poll, most people in different developed countries feel that globalisation has benefited the wealthiest rather than the ordinary citizens).

[8] Douglas Irwin, *The Truth About Trade*, FOREIGN AFF. (July/Aug. 2016), https://www.foreignaffairs.com/articles/2016-06-13/truth-about-trade, [hereinafter Irwin] (explaining that most people tend to blame trade for the loss of jobs and growth. However, he points to the fact that according to the CBER (Center for Business and Economic Research) out of the 5.6 million jobs that were lost in the manufacturing industry between 2000 and 2010, only 13% were related to a change in trade patterns. The rest is due to technological changes that turned a lot of those jobs obsolete by increasing productivity).

[9] Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 25, 2017).

[10] *See, e.g.*, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, OFF. OF THE U. S. TRADE REP. (2012), http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf;

binding nature, they are the "starting point for BIT negotiations",[11] thus reducing drafting and negotiation costs.[12] Further, Model Investment Agreements express the State's position regarding investment policy and negotiation.[13] And in some cases, arbitration tribunals analyse Model Investment Agreements to interpret other treaties that the State has signed after the Model Investment Agreement.[14] Thus, the TPP, though non-binding, is an important and impactful milestone in international investment and trade law.

Furthermore, there was another important ongoing negotiation that the text of the TPP has already affected: the TPP-11. On November 9, 2017, all the trade ministers of the TPP partners except the U.S. announced that they wanted to "resurrect" the TPP, transforming it into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") or the TPP-11.[15] This incipient process involved

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Treaty Between the Federal Republic of Germany and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investments, FED. MINISTRY FOR ECON. & TECH. (2008), http://www.italaw.com/sites/default/files/archive/ita1025.pdf; Model Agreement between Canada and [Country] for the Promotion and Protection of Investments, FOREIGN AFF. & INT'L TRADE CAN. (2004), http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf; Draft Agreement Between the Government of the Republic of France and the Government of Republic of [Country] on the Reciprocal Promotion and Protection of Investments, MINISTRY OF ECON. AFF. (2006), http://italaw.com/documents/ModelTreatyFrance2006.pdf; Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Columbia and [Country], MINISTRY OF TRADE, INDUS. & TOURISM (2007), http://italaw.com/documents/inv_model_bit_colombia.pdf; Agreement Between the Government of Republic of India and the Government of Republic of [Country] for the Promotion and Protection of Investments DEP'T OF ECON. AFF. (2003), http://www.italaw.com/sites/default/files/archive/ita1026.pdf.

[11] Chester Brown, *Introduction: The Development and Importance of the Model Bilateral Investment Treaty, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 2 (Chester Brown ed., 2013) [hereinafter Brown].

[12] Stephan Schill, The Multilateralization of International Investment Law 91 (2009) [hereinafter Schill].

[13] Brown, *supra note* 11, at 2.

[14] SCHILL, *supra note* 12, at 312-314.

[15] *Trans-Pacific Ministerial Statement* (Nov. 11, 2017), http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/statement-declaration.aspx?lang=eng&_ga=2.249592260.335457002.1510577658-1886342693.1509367194 [hereinafter Trans-Pacific Partnership Ministerial Statement]; *See also* Alexandra Stevenson & Motoko Reich, *Trans-Pacific Trade Partners Are Moving On, Without the US*, NEW YORK TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/business/trump-tpp-trade.html.

adopting the TPP text with some modifications as established in Annex 2 of the Trans-Pacific Partnership Ministerial Statement.[16] Nevertheless, the final text of the CPTPP has not been released yet and there is some speculation on whether other sorts of TPP provisions may be heavily modified, particularly in the realm of intellectual property rights.[17] In this way, the text of the TPP had a profound impact in the CPTPP's negotiations, which was signed in Chile in March 2018.[18] By referring to "impact", one should think of this term in its broadest sense: some of this influence will not only be transformed in adopting the same or similar TPP wording in future trade negotiations but it will also be translated in reacting to the text of the TPP by opposing it or departing from its standards.

This note has been separated into five Sections. While Section I above provided a brief introduction to the note, Section II will describe the enterprise of the TPP and what it ultimately aimed to obtain. Then, the consequences of the TPP on the developed and developing world's international economic law negotiations will be discussed in Section III. Finally, Sections IV and V will present two case studies on investment and intellectual property rights and analyse how they relate to the hypotheses presented here. The importance of relying on these two areas of the TPP involves the potential impact that these regulations could have on the developing world and their ever-evolving regulatory texts.

## II. A BRIEF INTRODUCTION TO THE TPP

### *A. The TPP Enterprise*

The TPP was written as a free trade and trade-related disciplines treaty between 12 States: the United States, Japan, New Zealand, Australia, Brunei, Vietnam, Malaysia, Mexico, Chile, Canada, Peru and Singapore. When it was first negotiated in 2011, it represented a new trend in international trade law, which Professor Richard Baldwin of the International Economics Department at the University of Geneva has

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[16] Trans-Pacific Ministerial Statement, Annex II, List of Suspended Provisions, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/annex2-annexe2.aspx?lang=eng&_ga=2.249592260.335457002.1510577658-1886342693.1509367194.

[17] *Pacific Nations Clinch Comprehensive Trade Accord*, BRIDGES (Jan. 25, 2018), https://www.ictsd.org/bridges-news/bridges/news/pacific-nations-clinch-comprehensive-trade-accord.

[18] Id.

described as "regionalism of the 21st century".[19] As he observes, this is more about setting regulations rather than tariffs.[20] In fact, out of 30 chapters, the TPP has only one chapter devoted to trade of goods.[21] In effect, this treaty aimed at harmonising regulation in various disciplines and at the same time setting labour and environmental standards.[22] In this manner, it was hoped that non-signatory States would be pressured to join the TPP, in the pursuit of acceding members' markets.[23] This would have particularly increased the cost of trading for developing countries presenting them with a *fait accompli*:[24] either endorsing the TPP standards or losing access to a potential $27.64 trillion market.

The treaty itself regulated trade in goods, trade in services, agriculture, intellectual property rights, rules of origin, competition, labour, environmental standards, state-owned enterprises, regulatory coherence, supply chain competitiveness and investment, among others.

From the U.S. perspective, the TPP process pursued a double effect. First, in terms of economic consequences, according to Petri and Plummer from the Peterson Institute for International Economics, the TPP would increase economic output by 0.3 to 0.5% by 2030.[25]

Second, the TPP had a standard-setting objective. Indeed, originally it was the U.S. that, in President Bush's words, wanted to pursue "strong, high-standards trade agreements" with the purpose of "establishing rules for the global economy that help [U.S.] businesses grow".[26] In fact, this position seemed to be a bipartisan one since President Obama endorsed it fervently during both of his terms. When presenting

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[19] Richard Baldwin, 21st Century Regionalism: Filling the Gap Between 21st Century Trade and 20th Century Trade Rules (WTO Econ. Research & Stat. Div., Staff Working Paper ERSD-2011-08).

[20] Id.

[21] *Trans-Pacific Partnership Treaty*, OFF. OF THE U.S. TRADE REP.https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text [hereinafter TPP].

[22] José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?*, 47(4) VIC. UNIV. WELL. L. REV. 503 (2016) [hereinafter Alvarez].

[23] R. Baldwin, *Multilateralizing Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade*, (Nat'l Bureau of Econ. Research, Cambridge M.A, Working Paper No. 12545,. 2006), http://www.nber.org/papers/w12545.

[24] Eyal Benevenisti, Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law, 23(1) CONSTELLATIONS 58 (2016).

[25] Peter A. Petri & Michael G. Plummer, *The Economic Effects of the Trans-Pacific Partnership: New Estimates* (Peterson Inst. for Int'l Econ., Working Paper Series WP 16-2, 2016).

[26] The National Security Strategy of the United States of America 46 (2006), http://www.comw.org/qdr/fulltext/nss2006.pdf.

the partnership, he said: "the TPP means that America will write the rules of the road in the 21st century. When it comes to Asia, one of the world's fastest growing regions, the rulebook is up for grabs. And if we don't pass this agreement – if America doesn't write those rules - then countries like China will".[27]

As expressed by President Obama, the TPP also had geopolitical objectives, particularly those of curtailing China's growing hegemony in Asia.

Nevertheless, during the presidential campaign of 2016, both candidates campaigned against the TPP and Free Trade Agreements more generally as a result of a growing popular discontent with globalisation. In fact, even the Democratic Party opposed the TPP on the ground that it would violate the U.S.'s rule of law since it gives foreign investors the right to challenge government policies.[28]

Regardless of all the inherent problems with the Free Trade Agreements, they were unfairly characterised by many as the perfect scapegoat for all the negative consequences resulting from globalisation. In Harvard Kennedy School of International Development's Professor Rodrik's words: "globalization accentuates class divisions between those who have the skills and resources to take advantage of global markets and those who don't".[29]

Trump campaigned on the anti-trade platform and using his privilege as an "outsider", he was able to go against the previous Republican President's strong endorsement of the TPP by withdrawing the USA's signature from the same.[30]

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[27] Barack Obama, *Here's the Deal: The Trans-Pacific Partnership*, OBAMA WHITE HOUSE (Nov. 6, 2015), https://obamawhitehouse.archives.gov/blog/2015/11/06/heres-deal-trans-pacific-partnership.

[28] Letter from Alliance for Justice, to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi, and Ambassador Froman, ALLIANCE FOR JUST. (Mar. 11, 2015), http://www.afj.org/press-room/press-releases/more-than-100-legal-scholars-call-on-congress-administration-to-protect-democracy-and-sovereignty-in-u-s-trade-deals.

[29] Dani Rodrik, *The Abdication of the Left*, PROJECT SYNDICATE (Jul. 11, 2016), https://www.project-syndicate.org/commentary/anti-globalization-backlash-from-right-by-dani-rodrik-2016-07.

[30] President George W. Bush had initially supported the enterprise of the TPP in its embryonic stage when it was going to be formed by Brunei, Chile, Singapore and New Zealand. *See* Joshua P. Meltzer, *The Significance of the Trans-Pacific Partnership for the United States*, BROOKINGS (May 16, 2012), https://www.brookings.edu/testimonies/the-significance-of-the-trans-pacific-partnership-for-the-united-states.

Now, getting specifically into the content of the TPP, there were several characterisations of the agreement as "new",[31] "high standard"[32] or "21st century".[33] This account may be misleading since there was a preponderance of the U.S. writing the TPP. Over 45% of the wording of the TPP coincides with the U.S.'s previous Free Trade Agreements.[34] This was followed by a 30% coincidence with the text of previous preferential trade agreements signed by Australia, Canada and Peru.[35] The TPP text was "disproportionately taken from earlier US trade agreements and was an important new example of how powerful states use international institutions strategically to advance their interests".[36]

Consequently, there is a strong claim that the TPP was nothing more than a condensation of previous trade agreements that had been celebrated by the U.S. and other TPP members. However, this is not necessarily a contra-argument to the thesis presented here. The TPP has consolidated a series of previous trends or State practice with regard to international trade and investment regime in a single instrument and has added new ones. In doing so, it has secured unprecedented income and geographical diversity. Indeed, there are Member States from South America, North America, East Asia, Southeast Asia and Oceania. The GDP disparity is striking too: the range goes from Brunei's $11.4 billion to the U.S.'s $25 trillion.[37]

*B. The consequences of the United States' withdrawal from the TPP*

The U.S. withdrew from the TPP on January 23, 2017 by means of an executive order of the President.[38] This withdrawal had several consequences.

First of all, the immediate consequence related to the dismantling of the TPP enterprise as originally conceived. The treaty established that in order to enter into

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[31] Laura Dawson & Kent Hughes, *The Trans-Pacific Partnership: What's New, What's Not, What's Next*, WILSON CTR. (2015), https://www.wilsoncenter.org/article/the-trans-pacific-partnership-whats-new-whats-not-whats-next.

[32] Jeffrey J Schott, Barbara Kotschwar & Julia Muir, Understanding the Trans-Pacific Partnership (2013), https://piie.com/publications/chapters_preview/6727/04iie6727.pdf.

[33] Tsuyoshi Kawase, *The Trans-Pacific Partnership as a Set of International Economic Rules*, THE E15 INITIATIVE (May 2016), http://e15initiative.org/blogs/trans-pacific-partnership-as-a-set-of-international-economic-rules.

[34] Todd Allee & Andrew Lugg, *Who Wrote the Rules for the Trans-Pacific Partnership?,* RES. & POL. 1, 3 (2016).

[35] *Id.*

[36] *Id.*

[37] World Development Indicators, The World Bank, https://datacatalog.worldbank.org/dataset/gdp-ranking

[38] *See* Chimni, *supra* note 5.

force, either the 12 signatory States or at least six of the original signatories needed to ratify it.[39]

Second, in withdrawing from the partnership, the goal of reducing China's influence in Asia was forfeited and it showed the declining power of the U.S. and its ally Japan in setting the agenda throughout the Asian continent.[40] The failure of the TPP could bolster China's leading role in the Regional Comprehensive Economic Partnership, a free-trade agreement pushed by the ASEAN States alongside Japan, India and China. In fact, one may say that it has further promoted other Chinese initiatives such as the One Belt One Road and the Asian Infrastructure Investment Bank.[41]

But, the TPP's process has attained one of its main objectives of setting the rules and standards in many international economic law disciplines. This comment will explore this line of thought and will try to prove that the TPP will affect the text of international trade negotiations of both bilateral and multilateral regional trade agreements.

## III. THE AFTERMATH OF THE TPP – "DEAD LETTER" THAT STILL CONTROLS THE LIVING

### *A. The Effects of the TPP on the U.S. and Japan's Trade Negotiations*

It may be reasonably argued that although the TPP will never formally enter into force, developed Member States are likely to use it as a template for future negotiations, specifically in the case of non-trade-of-goods related standards.[42] The TPP will likely come back as a template in future U.S. trade negotiations for two reasons.

First, Trump's opposition to the TPP was mainly related to trade in goods, not to its other disciplines.[43] Thus, the U.S. may adopt some of these provisions in future agreements. Trump's trade policy differs from the traditional Republican Party's liberal discourse of expanding free trade on a regional level (NAFTA, TPP) and

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[39] TPP, *supra* note 21, art. 30.5.
[40] Mireya Solis, The Trans-Pacific Partnership: The Politics of Openness and Leadership in the Asia-Pacific (Brookings Inst., Asia Working Paper Group 6, 2016).
[41] Matteo Dian, The Strategic Value of the Trans-Pacific Partnership and the Consequences of Abandoning it for the US Role in Asia, 54(5) INT'L POL. 583, 593 (2017).
[42] Rodrigo Polanco Lazo & Sebastián Gómez Fiedler, *A Requiem for the Trans-Pacific Partnership: Something New, Something Old and Something Borrowed?*, 18(2) MELB. J. INT'L L. 298, 300 (2017) [hereinafter Rodrigo Polanco Lazo & Sebastián Gómez Fiedler].
[43] Chimni, *supra* note 5.

multilaterally (World Trade Organization).[44] But it coincides with recent public opinion's position in America predominantly against free trade agreements.[45]

Trump's agenda has focused on reducing the trade deficit with other States.[46] On the other hand, he has eagerly supported other non-trade related disciplines included in the TPP such as intellectual property rights.[47] Thus, there is a strong presumption that the IP Chapter will be used as a template by the US in its future IP trade negotiations.[48]

One of Trump's major campaign proposals was related to "unfair deals" that the US had entered in terms of trade agreements over the past decades.[49] Thus, he proposed to re-negotiate the North American Free Trade Agreement (NAFTA) and to exit the TPP once in office.[50] Indeed, once elected, he quickly proceeded to fulfil these proposals by withdrawing from the TPP on January 23, 2017 and by starting the NAFTA renegotiation process in July 2017. The United States Trade Representative ("U.S.T.R.") released a document containing a series of renegotiation objectives for NAFTA,[51] which was quite similar to the text of the TPP.[52] Thus, it should not come as a surprise when reading in the news[53] and in U.S.T.R's statements that the U.S.

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[44] Beata Slomińska & Marek, Wasiński, *The Prospects for U.S. Trade Policy under the Trump Administration*, 26(1) POL. Q. INT'L. AFF. 86 (2017).

[45] Id.

[46] *Id.* at 93.

[47] Off. of the U.S. Trade Rep., 2017 USTR Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program,https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-trade-policy-agenda-and-2016, [hereinafter USTR Trade Policy Report 2017].

[48] Mike Palmedo, Do Pharmaceutical Firms Invest More Heavily in Countries with Data Exclusivity?, 21 CURRENTS INT'L TRADE L. J. 38, 39 (2013).; Ruth Lopert & Deborah Gleeson, The High Price of "Free" Trade: U.S. Trade Agreements and Access to Medicines, 41(1) J. L. MED. ETHICS 199, 206-7 (2013).

[49] Donald Trump's campaign website (Nov. 2, 2016), <www.donaldjtrump.com>.

[50] Id.

[51] Press Release, Off. of the U.S. Trade Rep., Exec. Off. of the President, Summary of Objectives for the NAFTA Renegotiation, (July 17, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf.

[52] Simon Lester, *The Trump Administration's NAFTA Negotiation Objectives*, INT'L. ECON. L.& POL'Y BLOG (July 17, 2017), http://worldtradelaw.typepad.com/ielpblog/2017/07/the-trump-administrations-nafta-negotiating-objectives.html.

[53] Ana Swanson, *How the Trump Administration is Doing Renegotiating Nafta*, THE NEW YORK TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/business/how-the-trump-administration-is-doing-renegotiating-nafta.html; David Dayen, *Trump's Renegotiation of NAFTA is Starting to Look a Lot Like the TPP*, THE NATION (July 18, 2017),

has proposed TPP's wording in the renegotiation of NAFTA.[54] Moreover, it may also be taken as a template in future Trump Administration's free trade agreements' negotiations. It must be borne in mind that in his Trade Policy for 2017, the Administration did not state that it would not negotiate Free Trade Agreements, but rather that it would pursue bilateral agreements.[55]

Second, the current anti-trade rhetoric could eventually fade out. Even in the trade arena, the anti-trade rhetoric has its limits. One of the main ideas behind the discontent with trade and trade agreements relates to the losing of jobs as a result of a higher rate of imports and a lower rate of exports.[56] However, the losing of jobs is not strictly correlated to trade deficits.[57] The U.S. current account deficit was reduced from 5.8% of GDP in 2006 to 2.7% in 2009[58] and yet the unemployment rate rose from 4.5 to 10% in those same years.[59] Therefore, the use of trade policy as scapegoating has its own limits. When the political class finally comes to terms with some possible benefits that derive from a more inclusive trade, trade agreements will be back on the forefront of the U.S.'s foreign policy and the TPP could make its comeback either as a new treaty or as part of bilateral treaties that the U.S. will pursue. For example, even though Barack Obama campaigned in 2008 against the NAFTA, he did not only not withdraw from that treaty but was also one of the main proponents of the TPP.[60]

Another signatory State whose trade negotiations should be closely followed is Japan. Unlike the U.S., Japan was never a detractor of the TPP. The main goal of the TPP for Japan was that of integrating the market-oriented Indo-Pacific States as a

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https://www.thenation.com/article/trumps-renegotiation-of-nafta-is-starting-to-look-a-lot-like-the-tpp/; Ana Campoy, *Trump Wants to Make Nafta More Like the TPP, the Trade Deal He Killed on His Third Day in Office*, QUARTZ (July 19, 2017), https://qz.com/1032258/trump-wants-to-to-renegotiate-nafta-to-make-it-similar-to-the-tpp-which-he-killed/.

[54] Press Release, Closing Statement of USTR Robert Lighthizer at the Fourth Round of NAFTA Negotiations (Oct. 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/closing-statement-ustr-robert.

[55] USTR Trade Policy Report 2017, *supra* note 47.

[56] Irwin, *supra* note 8, at 86.

[57] Id.

[58] Id.

[59] Bureau of Labor Stat., U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, https://data.bls.gov/timeseries/LNS14000000.

[60] *See* Michael Grunwald, *The Trade Deal We Just Threw Overboard*, POLITICO MAGAZINE (Mar./Apr. 2017), https://www.politico.com/magazine/story/2017/03/trump-tpp-free-trade-deal-obama-renegotiate-nafta-214874.

counterweight to the Chinese leadership in terms of trade flows.[61] This objective is so important for Japan that it is even now pushing for a TPP without the USA.[62] There are still many economic benefits for Japan in opening up its economy and forcing itself to compete with both developed and developing Asian States.[63]

Most importantly, Japan is one of the leading States in the ongoing CPTPP negotiations. As established in the Ministerial Statement of November 17, 2017, the CPTPP will "incorporate provisions of the TPP, with the exception of a limited set of provisions, which will be suspended".[64]

Japan is also looking forward to joining the TPP and the Regional Comprehensive Partnership Agreement ("RCEP")[65] with the hope of forcing the other RCEP countries, including China, to adopt similar standards as those of the TPP.[66] In fact, an ASEAN official has already referred to the increased investment and intellectual property standards that would be negotiated in the RCEP as being similar to those contained in the TPP.[67]

*B. The developing world's menu of options derived from the TPP*

Many commentators have argued that in case the TPP had entered into force, it would have had a negative economic impact in the developing non-signatory States.[68] However, this direct impact would now be prevented given that the TPP, in its original conception, will not enter into force.

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[61] Michael Auslin, *Getting It Right: Japan and Trans-Pacific Partnership*, 19(1) ASIA PAC. REV. 21, 22 (2012) [hereinafter Michael Auslin].

[62] Kyodo, *TPP States Push to Activate Pact Without U.S. As Soon As Next Week,* THE JAPAN TIMES (Nov. 2, 2017), https://www.japantimes.co.jp/news/2017/11/02/business/tpp-states-push-activate-pact-without-u-s-soon-next-week/#.WgiQw4Zryu6.

[63] Michael Auslin, *supra* note 61, at 27.

[64] Trans-Pacific Partnership Ministerial Statement, *supra* note 15, ¶ 3.

[65] The RCEP is a comprehensive preferential trade agreement between the ten ASEAN States, Japan, India and China, New Zealand and Australia. Out of the potential 15 partners, there are seven CPTPP members: Japan, New Zealand, Australia, Singapore, Malaysia, Brunei and Vietnam. Accordingly, it is reasonable that they would want to push for a common pool of standards.

[66] Michael Auslin, *supra* note 61, at 27.

[67] Mainichi Shimbun, *ASEAN Regional FTA to Slash 95% of Tariffs to Compete with TPP*, CITIZENSTRADE (Feb. 27, 2012), http://lists.citizenstrade.org/pipermail/ctcfield-citizenstrade.org/2012-February/001910.html.

[68] Harsha Vardhana Singh, *Trans-Pacific Partnership Agreement: Its Impact on India and Other Developing Nations*, INTER'L INST. FOR SUSTAINABLE DEV. (Aug. 12, 2014),

A once tangible threat is now an opportunity. The lack of ratification of the TPP gives developing countries the benefit of hindsight. The text of the treaty reveals the preferences of the developed world – what economists call "revealed preferences".[69] This allows the developing countries to first pick-and-choose favourable clauses that they know that the developed countries are willing to accept (as reflected in the TPP). Second, they are now aware of standards that the US, Japan and other developed TPP-Member States are pursuing on a regional level that may negatively affect them. In turn, it could allow them to coordinate efforts to oppose them.

This argument is applicable both to developing States that will continue to be part of the TPP-11 enterprise, namely: Brunei, Mexico, Vietnam, Malaysia and to developing States that are not and will not be part of the CPTPP.

With regard to TPP-signatory Member States, they have already adopted this pathway in view of the CPTPP negotiation. Indeed, the Ministerial Statement signed by the remaining 11 TPP members contained an annex in which they established certain provisions that would be revised.[70] Of particular relevance were those provisions associated with patents and intellectual property rights that will be closely evaluated in subsection IV.B. As established below, there were some patents provisions that would have been detrimental for the developing TPP States such as Vietnam, Brunei or Peru and that have been included as topics to be revised for the CPTPP.

Other developing States such as India should also be wary of the potential impact of the TPP on their future trade negotiations. India is currently negotiating to sign the RCEP. This treaty, whose exact provisions are still unknown, could very likely reflect a great part of the TPP or CPTPP standards. As shown in the figure below, seven of the RCEP members are also parties to the TPP. And further, as pointed out in the previous subsection, Japan is pursuing similar investment and intellectual property rights standards as those contained in the TPP for the RCEP.[71]

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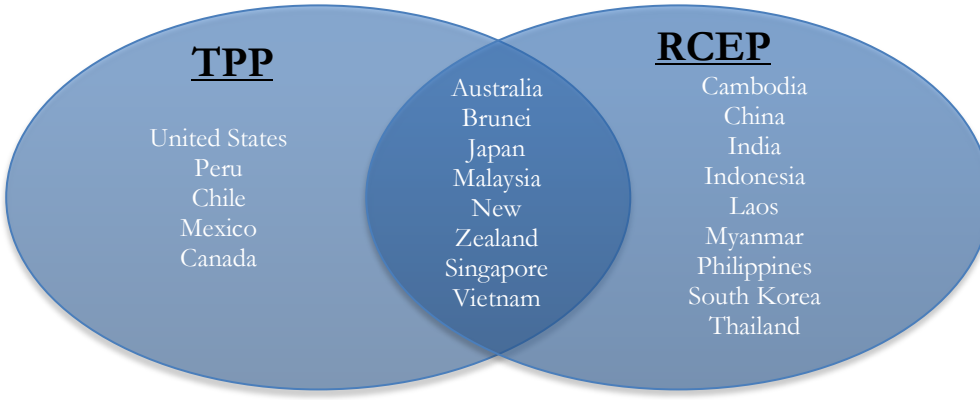
https://www.iisd.org/sites/default/files/publications/trans-pacific-partnership-agreement-impact-on-india-other-developing-nations.pdf..

[69] A revealed preference in economics refers to obtaining a consumer's information based on its purchasing decisions. Here it would translate to the Signatories States' preferences based on the final TPP text. For an interesting analysis of States' revealed preferences with regards to the NAFTA and environmental principles *see* Laura Fernandez, *Revealed Preferences of an International Trade and Environment Institution*, 80 LAND ECON. 224 (2004).

[70] Trans-Pacific Partnership Ministerial Statement, *supra* note 15, Annex II.

[71] Michael Auslin, *supra* note 61, at 27.




As seen in the figure above, with the exception of South Korea, all of the RCEP States are developing States whose domestic policies would be limited by the adoption of TPP-like provisions in the RCEP. Thus, they should start singling out provisions from the TPP menu to readily oppose, even on a coordinated manner.

Other developing States, which are not parties to the RCEP, the TPP or the CPTPP, could also be affected by the TPP. A paradigmatic example is that of Uruguay which signed a Preferential Trade Agreement on October 4, 2016 with Chile – a TPP member State - eight months after the TPP was signed. This agreement has identical provisions to that of the TPP such as certain provisions in the intellectual property rights chapter and in the investment chapter.[72] This phenomenon will be referred to as the "diffusion effect". The TPP's text may diffuse into future trade agreements that the member States of the TPP will pursue. This will have a collateral effect on the developing third party States who negotiate with TPP member States in the future.

## IV. CASE STUDY 1 – THE TPP'S STANDARDS IN INTERNATIONAL INVESTMENT PROTECTION

The TPP has 30 chapters and it would be worth going over each and every type of regulation and its possible impact on the future of trade negotiations. Given the limited space, it would not be possible to do it here. Consequently, a subset of

[72] Tratado de Libre Comercio entre Uruguay y Chile [Free Trade Agreement Between Uruguay and Chile], Uru. Chile, Oct. 4, 2016, http://www.mrree.gub.uy/frontend/page?1,inicio,TLC-URUGUAY-CHILE,O,es,0,.

regulations in the investment and intellectual property rights have been selected and evaluated in light of the ongoing international practice.

International investment protection is an area of international law with rapid changes and development. According to the United Nations Conference on Trade and Development ("UNCTAD"), by the end of 2016, there were a total of 3324 international investment agreements in force, with 37 signed during 2016.[73] As there are so many ongoing negotiations and many are soon to be starting, investment protection negotiations is a fertile area where the TPP can have an impact on an immediate basis.

Over the past few years, we have witnessed a regionalisation of international investment agreements.[74] BITs have cross-fertilised regional agreements and vice-versa.[75] Particularly, regarding the TPP, some have wondered whether the treaty represented the new golden standard for investment agreements.[76] As Professor Alvarez of New York University states: "If one expected the TPP negotiations to produce a "state of the art" investment treaty, that goal was achieved. The TPP is the latest thing in a traditional investment protection treaty."[77] He then suggests that it reflects the trend of granting States more policy space in a backlash to previous extremely pro-investor treaties such as the NAFTA.[78]

Overall, the TPP investment chapter is a more balanced instrument than previous treaties since most countries within the TPP – with the exception of New Zealand perhaps – have both inward and outward foreign direct investment ("FDI") to protect.[79] Thus, some developing countries that are inward receivers of FDI should be wary of the consolidation of certain provisions of the TPP.

The objective of the investment chapter of the TPP, in the words of its negotiators was that of "striking an interesting balance between the protection of foreign investments and the sovereign right of states to regulate their interests in pursuit of

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[73] United Nations Conference on Trade and Development, *World Investment Report 2017, Key Messages and Overview*, 22, UNCTAD/WIR/2017 (Overview), *available at* http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.
[74] Alvarez, *supra* note 22, at 504-506.
[75] Id.
[76] Id.
[77] *Id.* at 519.
[78] *Id.* at 519-520.
[79] *Id.* at 531.

legitimate public policy objectives."[80] However, if we compare it with other precedent Bilateral Investment Treaties ("BITs"),[81] the TPP is mainly a reflection of the U.S. trends in investment agreements.[82] The TPP reflects recent U.S. investment practice. In fact, 82% of its text is taken from the US-Colombia Free Trade Agreement investment chapter.[83] In a critical way, some authors have considered that many of the innovations contained in the TPP are merely "tweaks around the margin" while not fully addressing the main concerns raised by the critics of the investment regime.[84] But there are plenty of examples that go beyond traditional U.S. practice.[85]

In Chapter 9 of the TPP,[86] investment is protected from the pre-establishment phase; protections of treatment (national and most-favoured nation, full protection and security) are present; direct and indirect expropriation is defined; and there is investor-state dispute settlement with certain ameliorations (such as challenge to arbitrators).

The true innovation that the TPP has brought forward relies on specific clauses that have set the tone for other treaties. Thus, in this area of regulation, it is clear that the watermark that the TPP leaves, relates to the differences between previous preferential trade agreements or BITs rather than its similarities.

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[80] *Acuerdo Transpacífico TPP Inversiones [Transpacific Partnership TPP Investments]*, GEN. DIRECTORATE OF INT'L. ECON. REL. http://www.direcon.gob.cl/tpp/capitulo_inversiones (last visited July 14, 2018)..

[81] BITs are bilateral investment treaties that regulate the promotion and protection of investments between two States. For a good description of the history of BITs and of the investment regime *see* Kenneth J. Vandevelde, 12(1) *A Brief History of International Investment Agreements*, U.C. DAVIS J. INT.L. L. & POL. 157 (2005). The main difference between BITs and the TPP lies on the character of the agreement. The BIT regulates foreign direct investment between two States. The TPP is a multilateral trade and investment agreement. It regulates varied disciplines, among which investment is included, and 12 States have signed it.

[82] Rodrigo Polanco Lazo & Sebastián Gómez Fiedler, *supra* note 41, at 2.

[83] Wolfgang Alschner & Dmitriy Shougarevskiy, *The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe* (Graduate Institute of International and Development Studies Working Paper Series, Nov. 23, 2015), http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI%202015- 8%20Alschner_Skougarevskiy_TPP.pdf.

[84] Lise Johnson & Lisa Sachs, *The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System,* COLUM. CTR. ON SUSTAINABLE INV. (Nov. 2015), http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf.

[85] Alvarez, *supra* note 22.

[86] TPP, *supra* note 21, ch. 9.

Of all the differences, we will particularly analyse the Fair and Equitable Treatment ("FET") clause and the Prohibition of Performance Requirements ("PPR") clause. Both these clauses have been modified in way that may impact the landscape of international investment regulation for treaties to come.

The reason behind focussing on FET and PPR lies in the potential impact that the crafting of these provisions may have on developing States in the future. Indeed, these two clauses serve a different function in the available menu from which the developing world can choose. The FET clause contained in the TPP seems to address a series of problems that have affected the developing States in the past. Thus, adopting a similar provision could benefit them in future investment negotiations.[87] However, the PPR clause would be detrimental for most developing States' interests given that it limits the kind of industrial policies that they can adopt in order to develop.[88]

There is also a claim that the developed world's original intent to sign investment treaties was directed towards their interest in advancing international customary law that would be applicable to all States.[89] In fact this was the view defended by the U.S. State Department in its strong will to push for the adoption of model U.S. treaties with no major modifications.[90] Europe also justified its investment program on the basis that it was advancing international customary law.[91] For instance, the U.K. stated that this was one of its main reasons for signing BITs.[92] However, there is disagreement between scholars given that the practice is very inconsistent and treaty content varies significantly.[93] This note does not make the case that the TPP is trying to codify international customary law, but that the TPP does advance State practice in a significant way: the TPP is the regional trade agreement with the highest degree

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[87] For an analysis of the differences in the FET clause in the TPP see Alvarez, *supra* note 22, at 531-538.

[88] Alexandre Genest, *Performance Requirements Prohibitions in International Investment Law*, SPIL INT.L. L. J., 1,9 (2014) [hereinafter Alexandre Genest].

[89] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, The Political Economy of the Investment Treaty Regime 199 (2017) [hereinafter Bonnitcha et. al.].

[90] Kenneth J. Vandevelde*,* 21(2) *The Bilateral Investment Program of the United States*, CORNELL INT.L. L. J. 201 (1988).

[91] BONNITCHA ET. AL., *supra* note 89, at 199.

[92] Eileen Denza & Brooks Shelagh, *Investment Protection Treaties: the British Experience*, 36(4) INT.L. & COMP. L. Q. 908 (1987).

[93] See Andrew Guzman, *Why LDCs Sign Treaties that Hurt them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT.L. L. 639, 684-686 (1998).

of geographical and income representation.[94] Thus, in the framework of the investment regime, it does advance State practice in East Asia, Southeast Asia, South-America, North America and Oceania even if it is a mere recollection of existing practice with regard to investment.[95]

*A. Fair and Equitable Treatment in the TPP*

This subsection will deal with the impact of the TPP in the development of the FET clause in the international investment regime. It will ultimately show that the TPP has addressed most of the criticisms related to the FET and incorporated text to deal with them. Further, it will purport to show how the way in which the clause is construed in the TPP is affecting ongoing and concluded investment negotiations.

1. The FET Clause and its Problems

The FET is a widely agreed upon clause in investment agreements: 95% of agreements contain this provision.[96] Moreover, almost all investors allege a breach of FET in their claims against States and in most cases where the State has lost, the tribunal has found a FET violation.[97] It could be traced back to the first kind of treaties that States signed to reciprocally protect their investments: Friendship and Navigation Treaties. Usually those treaties established that States would treat the other parties' investment in their territory in a fair and equitable way.

The first generation of BITs contained similar clauses as those found in their predecessors. For example, the 1991 US-Argentina Treaty establishes that "investment shall at all times be accorded fair and equitable treatment".[98] There was no definition of "equitable" or of "fair" and thus, as explained further in this subsection, this clause led to conflicting interpretations.

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[94] The TPP had a combined overall GDP of 27 trillion dollars and it involved States from South-East Asia, East Asia, Oceania, South America and North America. There is no other trade agreement with that amount of combined GDP (the next in line would be the CETA with a combined GDP of 22 trillion dollars) and the regional diversity of other trade agreements is also limited (CETA merely involves Canada and the EU, RECEP only Asian states, etc.).

[95] Alvarez, *supra* note 22.

[96] Bonnitcha et. al., *supra* note 89, at 90.

[97] *See* Rudolf Dolzer & Christoph Screuer, Principles of International Investment Law 119–49 (2008).

[98] Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, U.S-Arg., art. II.2.a, Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993) .

The FET is absolute in the sense that unlike other clauses such as most-favoured nation or national treatment, its assessment is not construed relative to a different treatment of an investor.[99] Over the progressive development of the investment regime, this provision has evolved in a responsive way to its underlying problems.[100]

First, the first-generation BITs included a FET clause that was too vague.[101] A series of interpretative questions arose from the way in which the clause was phrased. What is fair? What is equitable? What sources should the tribunal look into when analysing whether a certain State's act is fair and equitable? These uncertainties gave arbitrators a lot of discretion to interpret the clause as they saw fit, producing a series of diverging and often contradictory interpretations.[102] Among the several accounts, some arbitrators have considered that the FET clause was breached when the subjective expectations of investors had not materialised.[103] For example, in *Saluka v. Czech Republic*, the tribunal said that the breach of the FET clause should be analysed primarily taking into account investors' legitimate expectations.[104] The problem is that "legitimate expectations of investors" is a profoundly diffuse concept. The tribunal in *Tecmed v. Mexico* interpreted that FET requires the State to provide "to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investors to make the investment".[105] But other tribunals have warned that taking into account the subjective expectations of the investor at the moment of investing would "impose upon the States' obligations which would be inappropriate and unrealistic".[106] They have also required doing a thorough assessment of the investor's expectations on the one hand versus the State's legitimate policy objective on the other.[107]

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[99] Benedict Kingsbury & Stephan Schill, Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law 9 (N. Y. U. Pub. L. & Legal Theory Research Paper Series Working Paper No. 146, 2009) [hereinafter Kingsbury & Schill].

[100] Id.

[101] Bonnitcha et. al., *supra* note 89, at 110.

[102] Kingsbury & Schill, *supra* note 99.

[103] *See*, Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶¶ 427-454 (Mar. 17, 2015) [hereinafter Bilcon v. Canada]. *See also*, Mesa Power Group LLC (USA) v. Government of Canada, PCA Case No. 2012-17, Second Submission of the United States, ¶¶ 14-19 (June 12, 2015).

[104] Saluka Investments BV v. The Czech Republic, PCA Case No. 2001-04, Partial Award, ¶ 302 (Mar. 17, 2006) [hereinafter Saluka v. Czech Republic].

[105] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003), 10 ICSID Rep. 130, (2004) [hereinafter Tecmed].

[106] Saluka v. Czech Republic, *supra* note 104, ¶ 304.

[107] *Id.* ¶ 306.

Others arbitrators have found that the FET is violated when the State has breached other international obligations or its own laws.[108] For example, in *CMS v. Argentina*, the arbitrators considered "that a stable and business environment is an essential element of the fair and equitable treatment".[109] Other tribunals have also considered that the lack of assurance of a predictable framework constituted a breach of the clause,[110] going as far as claiming that very vague laws affecting investors' rights by themselves breach the fair and equitable treatment.[111]

A third line has established that a breach of the FET occurs whenever the investor has been denied a due process.[112]

2. The TPP's Way of Addressing the FET's Challenges

Given the abstractness and vagueness of the FET, the result of an investor-State arbitration pretty much depended on the tribunal's position on that clause. Article 9.6 of the TPP ("minimum standard of treatment") has addressed some of the concerns raised by conflicting interpretations of the FET by different tribunals. It does so in a variety of ways.

First, the title refers to the standard as "minimum standard of treatment" instead of merely "fair and equitable clause" to prevent the vagueness of the words "fair and equitable" and the historical connotations associated with them. The "minimum standard of treatment" clause of the TPP encompasses both the traditional "fair and equitable treatment" clause and the term "full protection and security".

Second, it limits "fair and equitable treatment" to that contained under international customary law, thus foreclosing the possibility of arbitrators to discretionarily interpret when the FET has been breached.[113] The arbitrator would be bound to

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[108] Kingsbury & Schill, *supra* note 99.

[109] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005), https://www.italaw.com/cases/288. *See also*, Occidental Exploration and Production Company (OEPC) v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award ¶ 183 (July 1, 2004), https://www.italaw.com/cases/documents/762 [hereinafter OEPC v. Ecuador].

[110] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000), https://www.italaw.com/cases/671; Tecmed, *supra* note 105, ¶ 154.

[111] OEPC v. Ecuador, *supra* note 109, ¶ 184.

[112] S.D. Myers, Inc. v. Gov't of Canada, UNCITRAL, Partial Award, ¶134 (Nov. 13 2000), https://www.italaw.com/cases/969.

[113] *See* TPP, *supra* note 21, arts. 9.6.1. & 9.6.2.

interpret the practice of States in this regard and would be foreclosed from lightly determining when the treatment has been breached.

Third, Article 9.6.2.a of the treaty includes a "for greater certainty" provision by which a denial of justice or of due process can constitute a breach of the FET.[114] Accordingly, it settles the question of whether a due process breach is included under FET.

Fourth, Article 9.6.3 establishes that a violation of another clause of the TPP does not by itself constitute a violation of the FET.[115] This would limit arbitrator's interpretation to exclude results such as those as *CMS v. Argentina*.

Fifth, it purposely excludes the violation of the "subjective expectations" of investors as an *ipso facto* violation of the FET.[116] As I have previously mentioned, the arbitrator's reliance on the investors' expectations has led to a wide variety of contradictory interpretations.

Finally, it specifically states that failing to renew or to maintain a grant or a subsidy does not violate FET,[117] leaving this decision to the discretion of the host State.

3. The Impact of the TPP's Framing of the FET

Although the TPP does not fully address all the possible criticisms with regard to the FET,[118] it does advance the law to narrow down the possibility of interpretative abuses of the clause. These limitations are positive to prevent abuses and indeed it is a clause that developing countries could include in future trade agreements to neutralise the FET related problems. In fact, some recent treaties that have been signed contained minimum-standard of treatment clauses modelled after the TPP. There have been 65 BITs or PTAs with Investment Chapters signed since the TPP was signed on February 2016.[119] Roughly one half of all these treaties try to address possible interpretative FET problems related to those with which the TPP deals. Out of these roughly 20 treaties there are 12 that incorporate in lesser or greater detail TPP-like text. There are five of them that contain an almost exact wording

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[114] *Id.* art. 9.6.2.a.
[115] *Id.* art. 9.6.3.
[116] *Id.* art. 9.6.4.
[117] *Id.* art. 9.6.5.
[118] In a recent NAFTA case, Bilcon v. Canada, *supra* note 103), the tribunal found that an environmental policy taken by the Canadian government based on "community core values" constituted a breach of FET. These kind of policies would not be covered by the present construction of the minimum standard of treatment clause of the TPP.
[119] Most recent International Investment Agreements, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu.

(with slight changes that do not alter the meaning of what is established in Article 9.6). The other seven apply some of Article 9.6's recipes and those will be evaluated next. This is clearly an influence of the TPP.

There are five treaties that have the same or exactly the same framing of the wording of "minimum standard of treatment" as the TPP. Those treaties are: the BITs between Singapore and Nigeria, Nigeria and Morocco, Chile and China, the investment chapter of the PACER plus agreement and the Hong Kong-Mainland China investment agreement. In what follows, we will first analyse those agreements.

Article 3 (Minimum Standard of Treatment) of the Singapore-Nigeria BIT also contains the first three paragraphs of the TPP (almost word-for-word with certain slight exceptions of wording that do not change the overall meaning).[120] It has added a fourth paragraph that relates to the different levels of development of the parties. And this final drafting choice may have resulted from negotiations between the parties. Singapore, being a TPP party, would have likely purported to adopt the full prescriptions of Article 9.6 of the TPP.

Article 7 of the Nigeria-Morocco BIT has exactly the same first three paragraphs as the TPP (word-by-word) and then it specifies what the parties to the treaty consider to be customary international law in paragraph 4.[121] The title is also the same. The interesting fact of this article in this treaty is that neither Morocco nor Nigeria were parties to the TPP. But, Nigeria had signed a BIT with a TPP partner (Singapore) only one month before as described in the paragraph above. This could have very well impacted the text that Nigeria wanted to include in its treaty with Morocco, showing that the TPP's impact goes beyond TPP's partners. It extends to other States with which TPP's members interact. This, in turn, creates a snowball that amplifies the initial impact of the TPP standard-setting system, which was one of the U.S.'s initial purposes in advancing this agreement.

Another TPP-party which has exported TPP's standards to other treaties that it has signed is Chile. Article 6 of the China-Chile BIT ("minimum standard of treatment") contains the first four paragraphs of Article 9.6 of the TPP.[122] There are some slight

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[120] Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore, Nigeria-Sing., art. 3, Nov. 4, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5410.

[121] Reciprocal Investment Promotion and Protection Agreement between The Government of the kingdom of Morocco and the Federal Republic of Nigeria. Morocco-Nigeria, art. 7, Dec. 3, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409.

[122] Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile, H.K.-Chile, Nov. 18, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5413.

word changes but the limitation of FET to customary international law, the detachment of the breach of another provision of the treaty with the *ipso facto* violation of the FET standard and the exclusion of investor's expectations are intact. There is no due-process requirement that is present in Article 9.6 of the TPP or paragraph 5 of Article 6 of the BIT altogether. Probably, this was also the result of negotiations between States. But Chile is another TPP partner who is pursuing TPP standards, thus exporting its content. This was also true in the recently signed Chile-Argentina Preferential Trade Agreement Chapter.

Article 9 of Chapter 9 of the Pacific Agreement on Closer Economic Relations (PACER) Plus contains the identical text of the first three paragraphs of Article 9.6 of the TPP.[123] The PACER is a comprehensive agreement between the Forum Islands New Zealand and Australia[124]. The two latter States were parties to the TPP and they are now exporting some of its provisions to other agreements that they sign.

Interestingly, the only investment treaty that has been signed containing all the prescriptions of the TPP (almost on a textual basis) was that between Hong Kong and Mainland China.[125] The notable fact is that the TPP, the agreement that initially sought to contain China,[126] is having an impact even on the trade agreements that China is pursuing. This shows that States are converging to the technology adopted by the TPP. Thus, Article 4 of the Agreement (Minimum Standard of Treatment) includes all the provisions that are purported in Article 9.6 of the TPP.

One could make the case that some of these were signed before the US retreated from the TPP and thus its impact was sterilised. However, the Hong Kong and Mainland China and the PACER Plus agreements were signed six months after Trump decided to withdraw from the TPP. And Chile and Argentina's investment agreement was signed 12 months after the US's withdrawal.

Other treaties that were signed posteriorly to the TPP such as the China-ASEAN Investment Agreement, Japan-Israel BIT, Argentina-Qatar, Japan-Kenya, Hong Kong & China-Canada, the CETA and Japan-Iran contain certain provisions to

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[123] Pacific Agreement on Closer Economic Relations (PACER) Plus, ch. 9, June 14, 2017), http://dfat.gov.au/trade/agreements/pacer/Pages/documents.aspx.

[124] Its member States include Cook Islands, Fiji, French Polynesia, Kiribati, Marshall Island, Micronesia, Nauru, New Caledonia, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

[125] Mainland and Hong Kong Closer Economic Partnership Arrangement, June 18, 2017), https://www.tid.gov.hk/english/cepa/legaltext/cepa14.html [hereinafter CEPA].

[126] *Id.* § II.A.

constrain the FET that is included in the TPP but do not have the same structure as the latter. For example, CETA enumerates the kind of measures that constitute a breach of FET, which include discrimination and lack of due process.[127] It also mentions that a breach of another provision of the investment chapter does not trigger an immediate violation of the FET.[128]

Thus, in these cases, it is difficult to ascertain whether the TPP influenced the inclusion of those barriers to the FET. But, it has advanced the traditional interpretation of the clause and is influencing the phrasing of posterior treaties.

It is extremely difficult to establish causality in the realm of international relations or international law. One could not allege that because the TPP adopted such and such provision, other States followed. But what this section suggests is that the TPP sought to tackle certain ongoing interpretative problems with the FET, and in doing so it collated a lot of the ongoing international practice on the FET. But, at the same time, there are plenty of States – not necessarily part of the TPP – which are relying on the text of Article 9.6. This is not mere coincidence and shows at least a strong correlation between TPP and ulterior investment agreements.

Finally, regarding the ongoing CPTPP negotiations, Annex II of the Ministerial Statement, which establishes which provisions of the TPP will be suspended in the final CPTPP text does not mention Article 9.6. Therefore, the same article will be included in the CPTPP final text.

After a thorough review of recent practice, it can be observed that the TPP's framing of the FET clause has been captured by other investment agreements. The comprehensive structure that the TPP adopts may be used as a block, such as in the case of the CPTPP or in the investment agreement between China and Hong Kong, in parts such as the PACER Plus Agreement, or with a similar spirit but a deviant and more comprehensive approach as found in the CETA.

It must be borne in mind that many of the standards that the TPP adopted to deal with the ongoing challenges of the FET clause were not completely newly phrased. But the TPP compiled them all together and in a particular way. This compilation has triggered similar or responsive FETs phrasings and will likely continue to do so in the agreements to come.

*B. The Crafting of the Prohibition of Performance Requirements in the TPP*

1. PPRs in the International Investment Regime

[127] CETA (2016) art. 8.10.2.
[128] *Id.* art. 8.10.6.

Another clause that has been construed in an innovative way in the framework of the TPP has been the prohibition of performance requirements ("PPR") clause. This provision, which is only present in 5% of all international investment agreements,[129] aims to limit the conditions that host States can impose on investors. Prohibition requirements are usually "stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country".[130] For example, these measures include imposing local content requirements or export requirements when or after investing in the home State.

Both developed and developing nations have used prohibition requirements in the past.[131] Their main objective was that of "strengthening the industrial base and national added value, developing national expertise in a given sector, creating upstream and downstream economic links in a given economic sector, ensuring technology transfer, achieving better environmental or social outcomes, reducing unemployment, avoiding restrictive trade practices, preserving a significant part of national enterprises in key sectors, or guaranteeing security in the industrial sector, etc.".[132] Sometimes, developed States have been able to develop a robust national industry by relying on these instruments and are now forbidding developing States from doing so by including these kinds of provisions in investment agreements or other types of agreements.[133] The developed world has declined its use of PPRs since they can attain the same industrial objectives through other means.[134]

Roughly speaking, there are two types of Performance Restrictions ("PRs"): mandatory performance requirements, which refer to conditions for the investment itself;[135] and non-mandatory performance requirement, which relate to benefits that investors could have access to if they comply with certain measures.[136] Usually the advantages relate to tax exemptions or even subsidies.[137]

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[129] Bonnitcha et. al*., supra* note 89, at 93.
[130] United Nations Conference on Trade and Development, *World Investment Report 2003*, *UNCTAD*/WIR/*2003*.
[131] Dani Rodrik, Straight Talk on Trade 11 (2017) [hereinafter Dani Rodrik].
[132] Suzy H. Nikièma, *Performance Requirements in Investment Treaties*, INT'L. INST. FOR SUSTAINABLE DEV. (Dec. 2014), http://www.iisd.org/library/best-practices-series-performance-requirements-investment-treaties [hereinafter Nikièma].
[133] DANI RODRIK, *supra* note 131.
[134] Nikièma, *supra* note 132, at 1.
[135] *Id.* at 2.
[136] Id.
[137] Id.

To give an indicative list of possible performance requirements that one could come across, the most commonly used PRs are those related to:

- Ensuring a level of local content for products and services provided by the investor.
- Reaching a determinate threshold of local hired jobs.
- Complying with a certain level of research and development in the host country.
- Transferring technology from the investor's State to the host State.
- Developing environmentally friendly and socially aware campaigns and actions.
- Getting into a joint venture with national partners to make the investment.
- Forming a corporation with minimum domestic shares in the company's capital.
- Exporting a determinate level of nationally produced goods.[138]

The PPRs clause, which is found in the TPP, was initially conceived under the auspices of the WTO Trade Related Investment Measures Agreement ("TRIMS").[139] This treaty binds all WTO-member States (164 States since July 2016)[140] as it is an Amendment to the Marrakesh Protocol.

According to the TRIMS, States cannot require investors: to comply with a certain local content; to adopt external measures concerning the balance of trade that limits the amount of imported goods or distorts the volume or value of exported products; and to limit the amount of imports or reach a certain amount of exports.[141] The TRIMS further allows developing countries to temporarily adopt performance requirements.[142]

Over the past few years, the PPRs provision has been included in BITs and in the Investment Chapters of Preferential Trade Agreements. The main objective of doing so was to give arbitrators jurisdiction over these kinds of measures in the context of Investor-State arbitration.[143] At the same time, including the PPR clause in

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[138] Alexandre Genest, *supra* note 88.

[139] Agreement on Trade-Related Investment Measures, art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS].

[140] *Understanding the WTO: The Organization, Members and Observers*, WORLD TRADE ORGANIZATION https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 1, 2018).

[141] TRIMS, *supra* note 139, Annex.

[142] *Id.* arts. 4 & 5.3.

[143] Nikièma, *supra note* 132*,* at 5.

investment treaties nullifies the TRIMS exception that allows developing countries to temporarily adopt some of those measures.[144]

PPRs' inclusion into investment agreements is quite recent. When the first generation of investment treaties started to be negotiated, it was contended that BITs left "host states free to pursue a variety of economic nationalistic policies"[145] including "performance requirements".[146] This encouraged some developed States to include the PPRs clause in their bilateral or multilateral investment agreements. But originally it was modestly included (there were very few treaties that mentioned PPR at all and those that did at maximum referred to the TRIMS prohibitions). This trend intensified itself in the first decade of the 21st century and finally reached its peak in the TPP with almost no policy space left for the State to adopt measures to promote its local industry.

2. PPRs in the TPP

The TPP heavily restricts the host State's policy space to adopt almost any policy to help develop its domestic industry. The same policies that developed countries such as the U.S. or Japan took in the past to help their industries thrive are now being curtailed for the rest of the developing States parties to the TPP.[147]

The PPR clause included in the TPP is an exact copy of the one contained in the US 2012 Model Bilateral Investment Treaty ("2012 Model BIT"). But it is the first time that this text was included into a signed agreement because the US did not sign any investment protection agreement prior to the TPP. The text of the 2012 Model BIT was almost entirely taken from Article 10.9 of the US-Colombia 2006 FTA. However, the TPP has one important addition related to the prohibition to force the investor to buy domestic technology or to adopt a given rate of royalty or to enter into a concession contract for a given timeframe.[148]

It is even more surprising in the context of a regional treaty to have such an overarching clause given that States such as Vietnam, Singapore and Malaysia, three parties to the TPP, have heavily relied on performance requirements to promote the growth of their respective industries.[149] There is a caveat to the PPRs clause. States have the possibility to list non-conforming measures with the PPRs that they already

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144 *Id.*
145 Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92(4) AM. J. INT.L L. 621, 633-34 (1998).
146 *Id.* at 632.
147 DANI RODRIK, *supra* note 131.
148 TPP, *supra* note 21, art. 9.10.1.h.
149 DANI RODRIK, *supra* note 131.

have in force in accordance with what is established in Article 9.11 of the TPP. They can also reserve certain sectors in which they could adopt performance requirements in the future as long as they notify all of their counterparts before adopting them. Although this seems like a safe-heaven, it is a way of curtailing the States' policy space of adopting industrial developmental policies.

However, as shown in the table below, the amount of prohibitions far exceeds any of its previous treaties. As such, the TPP can be conceived as a refinement of the PPRs' clause:

| Type of PPRs | 1994 TRIMS | 1992 NAFTA | 2012 United States Model BIT | TPP |
|---|---|---|---|---|
| Export Requirements | Yes | Yes | Yes | Yes |
| Import Requirements | Yes | Yes | Yes | Yes |
| Local / Domestic Content | Yes | Yes | Yes | Yes |
| Purchase of local goods | No | Yes | Yes | Yes |
| Transfer of technology | No | Yes | Yes | Yes |
| Mandatory Supplier of goods | No | Yes | Yes | Yes |
| Provide goods or services | No | No | Yes | Yes |
| Prevent the purchase of technology | No | No | Yes | Yes |
| Nationality of Board of Directors | No | No | Yes | Yes |
| Adoption of a given rate or royalty under a licence contract | No | No | No | Yes |
| Adopt a given duration of the term of a licence contract | No | No | No | Yes |

3. The Impact of the TPP's PPRs in the International Investment Regime

If we look at the treaties that have been signed since the TPP, there are five treaties that have PPRs. Out of those five, there are two (the Hong Kong-Canada BIT and the CETA) that contain almost the same wording as the TPP except for the licensing requirements prohibition (Article 9.10.1.h). One of those five (the Japan-Israel BIT) has the exact same wording as the TPP. These results are portrayed in the following table:

| Type of PPRs | Japan – Iran BIT | Japan-Kenya BIT | Hong Kong – Canada BIT | CETA | Japan-Israel |
|---|---|---|---|---|---|
| Export Requirements | Yes | Yes | Yes | Yes | Yes |
| Import Requirements | Yes | Yes | Yes | Yes | Yes |
| Local / Domestic Content | No | No | Yes | Yes | Yes |
| Purchase of local goods | No | No | Yes | Yes | Yes |
| Transfer of technology | No | No | Yes | Yes | Yes |
| Mandatory Supplier of goods | No | No | Yes | Yes | Yes |
| Provide goods or services | No | No | Yes | Yes | Yes |
| Prevent the purchase of technology | No | No | Yes | Yes | Yes |
| Nationality of Board of Directors | No | No | Yes | Yes | Yes |
| Adoption of a given rate or royalty under a licence contract | No | No | No | No | Yes |
| Adopt a given duration of the term of a licence contract | No | No | No | No | Yes |

As I have established in the previous subsection, there have been 44 investment agreements that have been signed since the signature of the TPP. Having five out of those 44 containing PPRs may seem as a small number, however, if we compare it with the total percentage of investment agreements that contain PPRs (5%),[150] the percentage is more than doubled since the TPP was adopted (five treaties out of 44 amounts to 13%).

Further, in taking into account Japan's practice with regard to PPRs post and pre signature of the TPP, we can see a clear influence of the latter on the Asian State's inclusion of TPP like wording for PPR. Before the signing of the TPP, Japan had investment agreements that contained PPRs with Iran (2016), Ukraine (2015), Iraq (2012), Mongolia (2001), and Russia (1998), but none of them were as exhaustive as the TPP. After the signing of the TPP, Japan has signed a BIT with Israel that includes a textual PPR provision akin to that of the TPP.[151] But, most importantly, Japan is in the process of negotiating a preferential trade agreement with the European Union, which includes an almost identical TTP-like PPR clause. This shows that Japan is exporting the PPR article from the TPP to other investment agreements.

Regarding ongoing negotiations, there are two processes that are worth mentioning. First, given that PPRs is not mentioned in Annex II of the November 17, 2017 Ministerial Statement, the CPTPP will have the same PPRs as the TPP, consolidating itself as one of the more demanding investment agreements with regard to PPRs.

Second, Japan has been negotiating a trade agreement with the European Union for the past nine years and since the U.S. withdrew from the TPP, the negotiation process has accelerated. In the investment chapter, which was published by the European Union, Article x7 on PPRs is an identical copy of the PPRs clause contained in the TPP.[152] This shows that Japan is exporting parts of the text of the TPP to its other trade and investment negotiations.

In all, we can see that after the TPP adopted very stringent rules regarding PPR, other States have started to copy them. There are two trends that we have seen in our analysis. The first one relates to some TTP member States such as Japan that have exported the PPR rules from the TPP to other investment agreements that they have posteriorly signed. The second trend lies in some other developed or

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[150] BONNITCHA ET. AL., *supra* note 89, at 92.

[151] Agreement Between Japan and the State of Israel for the Liberalization, Promotion and Protection of Investment, Japan-Isr., art. 6, Feb. 1, 2017, https://www.mofa.go.jp/mofaj/files/000236609.pdf.

[152] Draft text "Investment" (excl. ISDS) 18th round – Tokyo 12 2016.

developing States that, with the objective of strongly protecting their investors from performance requirements in host States, have decided to include these kind of provisions into their agreements. For example, this has been the case in China.

## V. CASE STUDY 2 – THE TPP'S STANDARDS IN INTELLECTUAL PROPERTY RIGHTS: PATENT PROTECTION

In the realm of intellectual property rights, we have particularly relied on one of the most disputed IP rights: patents. The reason for delving into the patent regulations of the TPP lies in its potentially severe consequences on the developing world's capacity to produce drugs. Hence, one standard that the developing non-signatory States to the TPP should be wary of and zealously opposing could be found in patent regulations. The impact in here will be gradual given that IP rules are negotiated in the framework of regional trade agreements rather than bilaterally as in investment protection agreements. However, the huge detrimental effects that some of the standards pursued by the TPP could have on the developing world are a good reason to evaluate patent innovations in the TPP.

This section will deal with the impact of TPP patent regulations on future trade negotiations and how this could affect the developing world. It must be borne in mind that these patent regulations could still be present in a TPP-11 treaty and that they may eventually affect the developing world by means of the most-favoured nation clause as applied to intellectual property rights agreements.

Thus, unlike the FET clause, developing States should be defensively watching out for these clauses. Indeed, Doctors without Borders has claimed that "the TPP will still go down in history as the worst trade agreement for access to medicines in developing countries, which will be forced to change their laws to incorporate abusive intellectual property protections for pharmaceutical companies".[153]

### *A. Intellectual Property, Patents and the TPP*

For many years there was no comprehensive multilateral regulation of intellectual property rights until the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") in 1994. This agreement regulates nine types of intellectual property rights: copyrights, patents, trademarks, geographical indications, industrial designs, patents, layout designs and undisclosed information.

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[153] *Medécins Sans Frontiéres* (MSF) Statement by MSF on the conclusion of TPP negotiations in Atlanta, Press Release, Oct. 4, 2015, available at http://www.doctorswithoutborders.org/article/statement-msf-conclusion-tpp-negotiations-atlanta.

Particularly, in terms of patents, which is the main focus of this subsection, the TRIPS requires that all WTO-member States should allow the patentability of any invention (product or process) limited by the regular tests of novelty, inventiveness and industrial applicability.[154] There are three exceptions to patentability. First, no one can patent inventions that go against public order or morality.[155] Second, diagnostic, therapeutic and surgical methods for human or animal treatment may be excluded from patentability.[156] Third, members can also reject the patentability of plant and animals.[157] And for the first time in an international agreement, the term of the patent was established at 20 years.[158]

The TRIPS was the U.S., Japan and Europe's way of "multilateralizing" the intellectual property rights agenda of the developed world.[159] During the arduous negotiation of the TRIPS, there were a lot of compromises drawn in terms of patent regulation, particularly those that dealt with health-related concerns. These were previously introduced by the US and the EU in the negotiating rounds of the TRIPS and were removed from the treaty given the strong opposition of the developing world.[160] But other new benchmarks in terms of patents remained. For instance, the TRIPS established a mandatory 20-year long patent period across all fields including pharmaceutical products. This entailed a postponement of the production of generic products in developing States,[161] hence curtailing the possibility of delivering affordable-price medicines in the developing world.[162] Notwithstanding, all developing States that were party to the WTO had to adapt their patent regulations to this new regime. But this was as much as the developing world was willing to go.

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[154] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].
[155] *Id.* art. 27.2.
[156] *Id.* art. 27.3(a).
[157] *Id.* art. 27.3(b).
[158] *Id.* art. 33.
[159] Mohammed K. El-Said, TRIPS-Plus, Public Health and Performance-Based Rewards Schemes Options and Supplements for Policy Formation in Developing and Least Developed Countries, 31(3) AM. U. INT'L L. REV. 373, 410-11 (2016).
[160] Max Rubinson, Exploring the Trans-Pacific Partnership's Complexities Through the Lens of its Intellectual Property Rights Chapter, 31(3) EMORY INT'L L. REV. 468 (2017).
[161] Richard D Smith, Carlos Correa & Cecilia Oh, *Trade, TRIPS, and Pharmaceuticals*, 373 THE LANCET 684 (2009).
[162] Brenda Waning B, Warred Kaplan, Alexis King et al., *Global Strategies to Reduce the Price of Antiretroviral Medicines: Evidence from Transactional Databases*, 87(7) BULL. WORLD HEALTH ORG. 520 (2009).

Knowing that there was no possibility of pursuing more stringent patent-regulations in the multilateral sphere, the United States and the European Union, where most of the pharmaceuticals are located, continued to expand patent related regulations in their bilateral or regional trade agreements.[163] The latest and most-comprising agreement signed by the U.S. was the TPP, which adopts TRIPS-plus standards – that is to say standards that go beyond the TRIPS - as a result of the strong lobbying of pharmaceutical companies.[164] The special concern for the patent-related standards set forth in the TPP related to the interests at stake: human lives and the leading billion-dollar industry of pharmaceuticals. [165]

The whole debate behind raising the standards of the TRIPS to the benefit of pharmaceutical companies is staged in the traditional debate between those who contend that stringent standards favour pharmaceutical development[166] and those that state that this would increase the price of medicines by blocking the access to generics.[167] Despite this disagreement, the TPP regulation on patents is much stricter than in the TRIPS.

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[163] R. Lopert R & D. Gleeson, *The High Price of 'Free' Trade: U.S. Trade Agreements and Access to Medicines*, 41(1) J. L. MED. & ETHICS 199 (2013).

[164] U. N. Secretary-General, High-Level Panel on Access to Medicines, Final Report: Promoting Innovation and Access to Health Technologies (Sept. 14, 2016),http://www.unsgaccessmeds.org/final-report/; Brook K Baker, *Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere*, 13(3) PLoS Med. (2016), http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001970; Jing Luo & Aaron S Kesselheim, *Protecting Pharmaceutical Patents and Test Data: How the Trans-Pacific Partnership Agreement Could Affect Access to Medicines in the US and Abroad*, 18(7) AMA J. ETHICS 727 (2016) [hereinafter Luo & Kesselheim]; Amy Kapczynski, *The Trans-Pacific Partnership - Is it Bad for Your Health?*, 373 NEW ENG. J. MED. 201 (2015).

[165] TONY HARRIS, NIC GRUEN & DIANNE NICOL PHARMACEUTICAL PATENTS REVIEW REPORT (Commonwealth of Australia, 2013), https://www.ipaustralia.gov.au/sites/g/files/net856/f/2013-05-27_ppr_final_report.pdf.

[166] *See, e.g.*, *Trade Enhancing Access to Medicines* OFF. OF THE U.S. TRADE REP. (2011), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/september/trade-enhancing-access-medicines; *see also* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 186-94 (2000) .

[167] Burcu Kilic et al., What is Patentable Under the Trans-Pacific Partnership? An Analysis of the Free Trade Agreement's Patentability Provisions from a Public Health Perspective, 40 YALE J. INT'L L. 1 (2015); Ruth Lopert & Deborah Gleeson, The High Price of "Free" Trade: U.S. Trade Agreements and Access to Medicines, 41(1) J. L. MED. & ETHICS 199, 206-07 (2013); Brook K. Baker, US Trade-Enhancing Access to Medicines (Access Window) in its Proposed TPP IP Text is a Sham, INFOJUSTICE.ORG (Oct. 25, 2011), http://infojustice.org/resource-library/us-trade-enhancing-access-to-medicines-access-window-in-its-proposed-tpp-ip-text-is-a-sham.

Most of the patent-related provisions are present in past PTAs that the U.S. has signed over the years.[168]

When analysing IP regulation in a multilateral comprehensive agreement such as the TPP, we should not forget that intellectual property rights' regulation is different to either investment or trade in goods given the most-favoured nation clause included in the TRIPS Agreement. Thus all WTO members could have had claim to the benefits of the agreement.[169] But further, given that intellectual property is intangible and de-localised, the regulations taken by one or a bunch of States could have a direct impact on the rest of the international community. "Adoption of new law in a mega-regional like the TPP, which maps imperfectly onto trade patterns in information products, the structures of creative communities, and cultural relationships, can magnify the impact."[170]

*B. The Regulation of Patents in the TPP and its Possible Effects on the Access to Medicines in the Developing World*

The TPP was originally conceived to advance the U.S.'s intellectual property agenda, particularly that of the American pharmaceutical industry, but it has become more moderate in scope.[171] However, it still has many patent-related regulations that go way beyond the TRIPS. This in turn increases the monopolistic rights and thus the cost of producing generics in developing countries.[172] There are certain prescriptions within the IP chapter that try to protect public health and the flexibilities that could be needed to obtain public health objectives. For instance, Article 18.3 of the TPP establishes that a signatory country "may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition…provided that such measures are consistent with the provisions of this

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[168] Lee Branstetter, *TPP and the Conflict over Drugs: Incentives for Innovation Versus Access to Medicines, in* 2 PETERSON INST. FOR INT'L ECON. ASSESSING THE TRANS-PACIFIC PARTNERSHIP: INNOVATIONS IN TRADE RULES 11 (2016).

[169] General Agreement on Tariffs and Trade, art. I, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194; TRIPS, *supra* note 154, art. 4; Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law-Conflict or Complementarity?*, 78 LAW & CONTEMP. PROBS. 137 (2015).

[170] Rochelle Cooper Dreyfuss, Harmonization: Top Down, Bottom Up – and Now Sideways? The Impact of the IP Provisions of Megaregional Agreements on Third Party States (Inst. for Int'l L. & Just., Working Paper No.2, 2017) [hereinafter Dreyfuss].

[171] Id.

[172] Emily Michiko Morris, *Much Ado About the TPP's effect on Pharmaceuticals*, 20 SMU. SCI. & TECH. L. REV. 135, 136 (2017) (hereinafter Emily Michiko Morris).

Chapter."[173] Article 18.6 reaffirms the parties' commitment to the "Declaration on TRIPS and Public Health…the obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health, and, in particular, to promote access to medicines for all".[174] Although these provisions are good interpretative standards, they do not catheterise the heightened standards that result from the TRIPS-plus patent provisions incorporated.

There are quite a few provisions that increase the strictness of patent regulations.

First, the TPP lowers the threshold on patentability requirements, making it easier for the practice of *evergreening* – this refers to the process of changing a small substance of a pharmaceutical product and re-patenting it again as a new or different product. Article 18.37 paragraph 1 specifically allows the patenting of existing pharmaceuticals for "new uses, new methods of using…or new processes".[175] Criticisms to this kind of patenting point to the fact that this standard de facto prolongs the patent life by six or seven years.[176] This kind of regulation goes directly against some developing States' policies regarding patenting of pharmaceutical products. For example, India has a high "inventive step" threshold to have medications patented. And it particularly excludes from patentability the "mere discovery of a new form of a known substance" and the "new use for a known substance".[177] This prohibits practices such as *evergreening*, which entail changing a small part of a substance in a pharmaceutical product and re-patenting it.

Accordingly, many pharmaceuticals are not patentable under this provision of the Indian Patent Act. In a recent case, Novartis has unsuccessfully sued India for not allowing the patenting of a treatment for leukemia called Gleevec given that the Indian Patent Act forbids the *evergreening* process.[178] Other countries such as

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[173] TPP *supra* note 21, art. 18.3.
[174] *Id.* art. 18.6.
[175] *Id.* art. 18.37.
[176] Luo & Kesselheim, supra note 164.
[177] The Patents Act, 1970, No. 39, Acts of Parliament, 1970 (India), § 3(d).
[178] *See e.g.*, Novartis AG v. Union of India, A.I.R. 2013 SC 1311 (India).

Argentina[179] or Chile[180] have emulated this Indian approach with more or less the same strictness in patentability requirements.

Moreover, this method entailed by Article 18.37 of the TPP, which is also referred to as: "secondary patenting", may have a major effect on the increase of the length of the patent menacing the production of generics.[181] In most of the States where secondary patenting is permissible, such as the U.S. or Australia, one product's patent length could be increased up to 12 years.[182] If the TPP-11 project were to continue and an agreement with secondary patent use were to be reached, developing States such as Vietnam would need to grant secondary patents in the field of HIV medicines with only slight modifications with a grave effect on the amount of people that they could treat.[183]

Second, the TPP increases the patent term beyond 20 years if the companies can allege that there were administrative delays.[184] These types of delays are related to the time the State's authorities take in granting a determinate patent license. Under this provision, if authorities take an unusually long time, the petitioner who requested the patent, could ask for an extension of their patent right in proportion to the delay. All developed States that are signatories to the TPP have this extension provision in place but all of the developing nations except Chile (i.e. Brunei, Malaysia, Mexico, Peru and Vietnam) would have to change their domestic legislation to accommodate this regulation.[185] Again, this provision would delay the introduction of generic drugs to the market.

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[179] Resolución Conjunta [Joint Resolution] Nº 118/20012, 546/2012 & 107/2012, May 2, 2012, Ministry of Industry, Ministry of Health and National Institute of Intellectual Property (INPI) (Arg.).

[180] WIPO Committee on Development and Intellectual Property, *Study on Pharmaceutical Patents in Chile*, CDIP/15/INF/2 (Jan. 8, 2015).

[181] Deborah H. Gleeson, Ruth Lopert & Hazel Moir, *Costs to Australian Taxpayers of Pharmaceutical Monopolies and Proposals to Extend them in the Trans-Pacific Partnership Agreement*., 202(6) MED. J. AUSTL. 306 (2015).

[182] Tahir Amin & Aron S. Kesselheim, *Secondary Patenting of Branded Pharmaceuticals: A Case Study of How Patents on Two HIV Drugs Could Be Extended for Decades*, 31(10) HEALTH AFF. 2286 (2012).

[183] Moir HVJ, Tenni B, Gleeson D, et al., *The Trans Pacific Partnership Agreement and access to HIV treatment in Vietnam*, 13(4) GLOBAL PUB. HEALTH 400 (2016).

[184] TPP, *supra* note 21, arts. 18.46 & 18.48.

[185] Deborah Gleeson, Joel Lexchin, Ruth Lopert & Burcu Kilic, The Trans Pacific Partnership Agreement, Intellectual Property and Medicines: Differential Outcomes for Developed and Developing Countries, 18(1) GLOBAL SOC. POLICY 1,9 (2017) [hereinafter Gleeson, Lexchin et al.].

Third, the TPP intellectual property rights chapter contains test data protection for at least 8 years. Test data refers to clinical trials that are required to obtain approval for the commercialisation of a certain drug. In most developing States, the data can be obtained from the Drug-authorisation administration as soon as a new drug is patented. The TRIPS mandates that this data should not be used in an unfair commercial way.[186] However, the TPP establishes a minimum time frame for States to prevent third parties from having access to this data. The impact of this provision on public and private costs for biologics is steep[187] since it would also increase the costs for the production of generics given that companies that produce generics would need to pay for their own clinical trials. There is data that suggests that the introduction of data exclusivity in Jordan in 2001 postponed the availability of generic drugs for 79% of all new drugs that were commercialised between 2002 and 2006.[188] Further, the adoption of data exclusivity in Jordan increased the general expenditure in medicine between 1999 and 2004 by 17%.[189] In the TPP member States, this would imply a change in domestic legislation of 4 States: Brunei, Mexico, Peru and Vietnam.[190]

Fourth, the TPP proposed the ratification of the Patent Cooperation Treaty (PCT). This treaty allows applicants to apply for patent protection in multiple States simultaneously. This would essentially lower the costs for pharmaceutical companies to patent their products and it would curtail the developing world's possibility of having more policy space in determining what substances could be granted patent protection.

Fifth, Chapter 18 also includes patent linkage. Article 18.53 of the TPP establishes that marketing approval of a new drug that has used safety and efficacy data presented by the patent holder of another drug is subjected to the latter's consent.[191] For example, if drug A is already being commercialised and has obtained a patent presenting certain safety and efficacy data, and if drug B uses the same safety and efficacy data as drug A, it can only be commercialised if drug A's patent holder does not object. "Patent linkage thus imposes the burden of knowing the patent status of

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[186] TRIPS, *supra* note 154, art. 39.1.

[187] Ronald Labonté, Ashley Schram & Arne Ruckert, *The Trans-Pacific: Is it Everything We Feared for Health?*, 5(8) INT. J. HEALTH POL'Y MGMT. , 487, 490 (2016).

[188] All Costs, No Benefits: How TRIPS-Plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines OXFAM INT'L (Mar. 2007), www.oxfam.org/sites/www.oxfam.org/files/all%20costs,%20no%20benefits.pdf.

[189] Ryan B. Abbott, Rania Bader et al.., The Price of Medicines in Jordan: The Cost of Trade Based Intellectual Property, 9(2) J. GENERIC MED. 75 (2012).

[190] Gleeson, Lexchin et al., *supra* note 185, at 11.

[191] TPP, *supra* note 21, art. 18.51.

all approved drugs and then policing potential infringement of those patents on the regulatory agency that monitors pharmaceutical marketing regardless of whether they have any expertise in patent law".[192] In turn, this prescription forces regulatory IP agencies to presumptively favour the patent holder's view on whether a certain drug is covered by a patent, curtailing generics' production.[193] In this regard, the patent-linkage further advances *evergreening*.[194] Brunei, Vietnam and Malaysia would have to introduce new domestic legislation with the purpose of complying with this regulation.

One is forced to wonder why developing TPP States agreed to these provisions if they were harmful for them. There are a couple of hypotheses here. First, developing States have weaker bargaining power and influence in the overall international standard-setting process for intellectual property in the international level.[195] This is even more diminished in the framework of bilateral or regional negotiations such as the TPP.[196] Second, the TPP was a wide-ranging treaty dealing with a series of different trade related issues. The developing States may have ceded in intellectual property given that they could have gained benefits somewhere else.[197]

*C. The effect of the TPP's standards on the developing world*

Most of the pharmaceutical-related issues adopted in the TPP are not new standards. Indeed, most of these provisions have been previously stated in previous FTAs signed by the U.S. such as the U.S.-Chile FTA.[198] The novelty brought about by the TPP relates to its stringency and to its regionalisation. Regarding stringency, the years of protection for data go from 5 in the U.S.-Chile Treaty to 8 in the TPP. Regarding regionalisation, while the U.S. could have sporadically negotiated IP agreements with certain small partners, regionalising it into a market of 28 trillion dollars would have impacted heavily on the other trade-partners' possibility to go around the IP rules. Indeed, if it were adopted, the intellectual property rights to the TPP would have no

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[192] Emily Michiko Morris, *supra* note 172, 155.

[193] Frederick M. Abbott, The Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements, QUAKER UNITED NATIONS OFFICE Sept. 2003, at 8.

[194] Eugenia Costanza Laurenza, The Scope of 'Patent Linkage' in the US-South Korea Free Trade Agreement and the Potential Effects on International Trade Agreements, 6(3) EUR J. RISK REG. 439,442 (2015).

[195] Peter Drahos, Developing Countries and International Intellectual Property Standard-Setting, 5(5) J. WORLD INTELL. PROP. 765 (2002).

[196] John Ravenhill, *Global Value Chains and Development*, 21(1) REV. INT.L POL. ECON. 264 (2014).

[197] Gleeson Lexchin et al., *supra* note 185.

[198] Rodrigo Polanco Lazo & Sebastián Gómez Fiedler, *supra* note 41, at 310.

longer been the exclusive rights of the U.S. with its few partners, but the Trans-Pacific Partnership intellectual property rights; an over-arching set of rules that encompass five different regions and both developing and developed States.

Another trend that is worth highlighting is the reshaping of the intellectual property chapter of the CPTPP. Indeed, as established in Annex II of the Ministerial Statement of November 2017, the CPTPP States have revised the intellectual property chapter of the TPP and decided to "suspend" the provisions related to data protection, patent term adjustment for administrative delays, patentability of biologics and patentable subject matter (Articles 18.37.2 and 18.37.4 of the TPP).[199] These are all provisions that, as described above, were detrimental to the developing signatory members. It is uncertain what "suspending" these provisions actually means and a full evaluation will only be feasible when the CPTPP final text is released. One hypothesis to explain this revision could rely on the fact that, although burdensome for the developing States, the developing partners to the TPP had agreed to these patent provisions in exchange for having access to the U.S. market. However, once the U.S. exited the TPP, they pushed hard to exclude them from the new version of the treaty.

Further, despite the discontinuation of the TPP-12 project, other developing countries such as India who are heavily reliant on the generic industry could be hampered by the adoption of TPP IP rules in other trade agreements.[200] In this sense, there are some strategies that developing countries can take to prevent the consolidation of these kinds of standards. For example, if the curtailment of generic products were a real threat to the developing world, they could unite to incentivise the development of their generic drug industry.[201] The Doha Declaration on Public Health has been read along these lines.[202] Indeed, this declaration was the developing States' response to the TRIPS and it assures that this treaty "should be interpreted and implemented in a manner supportive of WTO Member's rights to protect public health and, in particular to promote access to medicines for all."[203]

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[199] Trans-Pacific Partnership Ministerial Statement, *supra* note 15, Annex 2.
[200] Dreyfuss *supra* note 170, at 28.
[201] *Id.*
[202] World Trade Organization General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. ¶ 6 , WT/L/540 and Corr. 1 (Sept 1, 2003).
[203] *Id.* ¶ 4.

## VI. CONCLUSION

The TPP was a massive enterprise with economic, geopolitical and strategic strings attached. This article wanted to shed light on the fact that this enterprise is far from dead even though the original TPP-12 will never become a reality.

Developed States will continue to use the TPP as a template and this will have spill over effects on international economic law negotiations, as model investment treaties have over investment negotiations. In light of this, the developing world should be attentive but also receptive. Sometimes they will have the winning hand, for example, in knowing that a large part of the developed world is willing to limit the FET, but other times they will have to prevent major losses, such as in opposing certain detrimental standards that may fetter their generic medicine production.

In fact, despite his initial strong opposition to the Treaty, even President Trump has suggested that he may be willing to re-join the TPP in case it is "substantially better" than the one President Obama signed.[204] In case this ever happens, the chances that the original TPP-12 text is used as a baseline is surely high and that is why we affirm that the ghost of the TPP will haunt the arenas of trade negotiations for many years to come.

Thus, President Trump has not been able to fully deactivate President Bush's and President Obama's desire to set the rules of international trade law by withdrawing from the TPP.

[204] Trump to reconsider joining TPP trade pact, BBC News (13 Apr. 2018), at https://www.bbc.com/news/business-43747211.