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## Trans-Pacific Partnership Trump(ed): Was TPP that Bad an Acronym in New U.S. Trade Terminology?

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*The year 2017 saw an end to U.S. negotiations with eleven other Pacific-Rim countries on the Trans-Pacific Partnership (TPP). The twelve-year journey, beginning from the “Pacific 4” agreement in 2005 to consolidating twelve countries representing roughly 40% of the global economic output until 2016, was nothing less than an odyssey albeit with an unexpected ending. Along came a jolt on reducing the “Spaghetti Bowl” effect at the regional level and on beginning a new and ambitious chapter in the global trade governance and rulemaking. The remaining (erstwhile) eleven partner countries have moved on toward the TPP-11 or Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), yet the fate of the other significant preferential trade agreement, namely the North American Free Trade Agreement (NAFTA) lingered for a long while before being renegotiated, as is apparent now, along the lines of various TPP-features. Was the unceremonious withdrawal on the first day at the office a policy-guided decision or an effort to satiate populism and protectionism? Could a commission to revisit the TPP’s contentious provisions have helped and salvaged the labor of exhaustive negotiations lasting twelve years? The long-term implications of the decision to withdraw from the TPP shall be studied in the times to come; however, the perfunctory action did draw scrutiny, recurrently with an adverse reaction. As for now, the TPP perhaps may also be characterized as an acronym in American trade terminology for “Trump’s Political Preeminence.”*

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“We can’t go on together with suspicious minds  
And we can’t build our dreams on suspicious minds . . . .”  
—Elvis Presley (*Suspicious Minds*, 1969)

## I. INTRODUCTION

President Trump formally signed off on the United States’ goodbye to the once-ambitious Trans-Pacific Partnership (TPP) as he directed the withdrawal from its negotiating process on January 23, 2017, his first full

weekday in office.<sup>1</sup> This step brought an end to the United States' association with the "mega-regional" trade agreement, which had sought a deep integration partnership among twelve countries of the Asia-Pacific region to attain extensive liberalization in goods and services while entailing comprehensive coverage of trade in services, investment, government procurement, nontariff measures, and various regulatory expanses.<sup>2</sup>

Representing approximately 40% of the world's economic output and a collective population of roughly 800 million, the twelve erstwhile TPP partner countries aspired to deepen economic and political ties, slash trade barriers, and foster trade to boost growth.<sup>3</sup> The transformation from the "Pacific 4" agreement signed in 2005 (original State parties being Brunei, Chile, New Zealand, and Singapore) to the emergence of the "mega-regional" TPP agreement was characterized arguably as the most significant trade policy issue in the Pacific Rim region.<sup>4</sup> Although the United States under the erstwhile Obama administration officially made the announcement way back in November 2009 to join the TPP talks with

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1. Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 2017 DAILY COMP. PRES. DOC. 64 (Jan. 23, 2017); Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

2. See Tomas Hirst, *What Are Mega-Regional Trade Agreements?*, WORLD ECON. F. (July 9, 2014), <https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/> (originally a "Pacific 4" free trade agreement among four countries: Brunei, Chile, New Zealand, and Singapore, TPP subsequently encompassed eight additional countries: Australia, Chile, the United States, Japan, Malaysia, Mexico, Vietnam, and Peru); see *About TTIP*, EUR. COMMISSION (Apr. 1, 2015), <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/> (alongside TPP, many other mega-regional trade agreements (MRTA), such as the Transatlantic Trade and Investment Partnership (T-TIP) and the Regional Comprehensive Economic Partnership (RCEP), have been doing the rounds); Phillip Inman, *TTIP: The Key to Freer Trade, or Corporate Greed?*, GUARDIAN (Jan. 2, 2016), <https://www.theguardian.com/business/2016/jan/02/ttip-terms-growth-markets-worker-protection>; Emiko Jozuka, *TPP vs RCEP? Trade Deals Explained*, CNN (Feb. 4, 2017), <http://www.cnn.com/2017/01/24/asia/tpp-rcep-nafta-explained>; *Regional Comprehensive Economic Partnership*, ASIAN DEV. BANK, <https://aric.adb.org/fta/regional-comprehensive-economic-partnership> (last visited Oct. 20, 2018); *The TTIP of the Spear*, ECONOMIST (Oct. 17, 2015), <http://www.economist.com/news/europe/21674772-selling-europes-trade-agreement-america-strategic-has-problems-ttip-spear>; Andrew Walker, *TTIP: Why the EU-US Trade Deal Matters*, BBC (May 13, 2015), <http://www.bbc.com/news/business-32691589>.

3. *TPP: What Is It and Why Does It Matter?*, BBC (Jan. 23, 2017), <http://www.bbc.com/news/business-32498715>.

4. Jeffrey D. Wilson, *Mega-Regional Trade Deals in the Asia-Pacific: Choosing Between the TPP and RCEP*, 45 J. COMTEMP. ASIA 345 *passim* (2015) (stating that the P4 Agreement was also known as "the Trans-Pacific Strategic Economic Partnership Agreement"). See generally Meredith Kolsky Lewis, *Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 351 *passim* (2009).

a view toward establishing a free trade agreement (FTA) with “like-minded” trading partners,<sup>5</sup> the political and public rhetoric engirdled it with mixed emotions, and the recent culmination of the long and bitterly fought presidential campaign has led to the scale-up thereof.<sup>6</sup>

Whereas the long-term implications of withdrawing from the TPP will be studied in the times to come, the withdrawal, however, invokes a scrutiny of the end of a yet-to-begin chapter of the United States’ international trade framework. This work attempts to chart the intricacies of the TPP by exploring its stated objectives, the ensuing promises and perils, and the way ahead.

Part I commences with the Introduction and the Article’s scheme. Part II briefly outlines the regional trade milieu. This Part lays out the prominence of the preferential trade agreements at a regional level as well as under the multilateral trade framework. It further expounds a transition to the mega-regional trade agreements, being the latest entry in preferential trading. Part III examines the TPP’s intrinsic aspects. This Part evaluates the TPP’s aims and objectives, its different hallmarks, and the facets marking the agreement’s economic impact and other geo-strategic implications. This Part draws to an end by assessing the TPP from the standpoint of the global trade regime and illustrating its neoliberal critique made by a number of commentators.

Part IV discusses the developments of the post-TPP withdrawal phase. This Part charts the task to sustain the TPP’s negotiations and to bring about its successful culmination into Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) without the United States. It also explores the precipitous change in the track vis-à-vis the international trade policy that also put the fate of the other international trade instrument, the North American Free Trade Agreement

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5. Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER J. INT’L ECON. L. 2, 6 (2014) (discussing Obama’s intent to join TPP discussions to establish the free trade agreement with “like-minded” trading partners).

6. See *2016 Presidential Candidates on the Trans-Pacific Partnership Trade Deal*, BALLOTPEdia, [https://ballotpedia.org/2016\\_presidential\\_candidates\\_on\\_the\\_Trans-Pacific\\_Partnership\\_trade\\_deal](https://ballotpedia.org/2016_presidential_candidates_on_the_Trans-Pacific_Partnership_trade_deal) (last visited Feb. 4, 2017) (TPP has been akin to an array of words and phrases, such as “gold standard” in trade agreement and potential “job killer”). See generally John Brinkley, *Trump Hands China a Gift in Dumping Trans-Pacific Partnership*, FORBES (Jan. 24, 2017), <http://www.forbes.com/sites/johnbrinkley/2017/01/24/trump-dumps-trans-pacific-partnership-sad/#68f862255660>; Fergus Hunter, *The Slow, Painful Death of the 12-Country Trans-Pacific Partnership*, SYDNEY MORNING HERALD (Jan. 24, 2017), <http://www.smh.com.au/federal-politics/political-news/the-slow-painful-death-of-the-12country-transpacific-partnership-20170123-gtxfbk.html>; Amitendu Palit, *Can the Trans Pacific Partnership Survive After Trump?*, HUFFINGTON POST (Jan. 26, 2017), [http://www.huffingtonpost.com/the-conversation-global/can-the-trans-pacific-par\\_b\\_14422352.html](http://www.huffingtonpost.com/the-conversation-global/can-the-trans-pacific-par_b_14422352.html).

(NAFTA), in jeopardy—at least for a while. The last Part concludes the Article by observing the increasing role of the preferential trading in advancing the global trade governance. Despite an unending storm of controversies surrounding the TPP even before the last U.S. presidential election transpired, this work notes that the agreement promised an array of benefits. This work discerns the play of the TPP and trade, in general, as the contentious debating issues in the 2016 U.S. presidential election. Lastly, this work highlights the importance of the NAFTA for the United States as much as for Canada and Mexico. While the NAFTA’s renegotiation was inevitable, it was expected that it would not meet the same fate as that of the TPP.

## II. REGIONAL TRADE CONUNDRUMS

Preferential trade agreements (PTAs) have emerged as an important means to further regional and collective progress and strengthen the intra-regional association.<sup>7</sup> PTAs serve as an important link in the three-tier process for “competitive liberalization” or “parallel liberalization”<sup>8</sup> towards the end of global free trade, whereby trade liberalization at regional levels runs simultaneously with multilateral and bilateral levels.<sup>9</sup> Regional integration through PTAs yields an array of benefits in terms of bringing down the trade barriers, a decrease of trade costs, and the

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7. See generally Divesh Kaul, *Eliminating Trade Barriers Through Preferential Trade Agreements: Perspectives from South Asia (SAARC)*, 25 TUL. J. INT’L & COMP. L. 355 *passim* (2017). Article XXIV of the General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services (GATS) provide the mandate for PTAs within the global trade regime. These provisions validate the co-existence of PTAs within the WTO framework, whether in the form of an FTA or a Customs Union. Operation of such FTAs ultimately expedites the goal of the WTO, i.e., dismantling both tariff and nontariff trade-distorting barriers.

8. See generally *General Agreement on Tariffs and Trade (GATT) 1994*, WORLD TRADE ORG. (2018), [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_e.htm](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm). GATT Article XXIV is the central provision for regulating RTAs. Article XXIV effectuates as a provision to ensure that States do not enter into any regional trade agreement which prejudices the core objective of trade liberalization of the universal trade regime. The simple construction of the provision reveals the drafters’ intention of balancing the obligations of contracting nation states, sustaining most favored nation (MFN) treatment and acknowledging the aspirations of regional (or non-global) economic integration. In other words, through this provision it seems that the global trade regime envisions a harmonization between global and regional trade efforts and yet promotes trade liberalization.

9. RAJ BHALA, *INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK* 825 (4th ed. 2015) (three-tier “competitive liberalization” simultaneously at multilateral, regional, and bilateral levels).

improvement of infrastructures such as logistics and transport.<sup>10</sup> The rule-making in the universal trading system has expanded from global to bilateral, regional, and sectoral agreements covering not only trade in goods and services but also agriculture, intellectual property, regulatory barriers, cross-border investments, and many other complex modern trade and non-trade aspects.<sup>11</sup>

Mega-regional trade agreements (MRTAs) go a step further than a traditional smaller FTA in terms of the scope.<sup>12</sup> Being sufficiently large and ambitious to influence trade rules beyond their areas of application, MRTAs are preferential trade agreements that have a systemic and global impact.<sup>13</sup> Furthermore, MRTAs such as the TPP may enable a higher benchmark for future reforms for global trade regimes by allowing in the percolation of regulatory and other sectoral reforms from the TPP.<sup>14</sup>

Owing to a multiplicity of bilateral trade agreements all around the world, Professor Jagdish Bhagwati in his critique on the PTAs coined the term “Spaghetti Bowl” to denote the convoluted crisscrossing of multiple PTAs around the world.<sup>15</sup> The preferential trade regime is inevitable in today’s time, and the possibility of more MRTAs is unavoidable. They may even help streamline the Spaghetti Bowl effect at the regional level. However, the PTAs do not serve as a substitute for the World Trade Organization (WTO).<sup>16</sup> Trade experts caution a balanced approach.<sup>17</sup> Former Director General of the WTO, Pascal Lamy, while predicting the

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10. Pascal Lamy, *The Future of the World Trade System: Asian Perspectives*, in ASIAN DEV. BANK INST. & CTR. FOR ECON. POLICY RESEARCH, *THE FUTURE OF THE WORLD TRADING SYSTEM: ASIAN PERSPECTIVES* 15, 16-17 (Richard Baldwin et al. eds., 2013), <https://think-asia.org/bitstream/handle/11540/4724/2013.06.14.future.world.trading.system.pdf?sequence=1>.

11. WORLD BANK, *GLOBAL ECONOMIC PROSPECTS: SPILLOVERS AMID WEAK GROWTH* 220 (Jan. 2016) [hereinafter *GLOBAL ECONOMIC PROSPECTS 2016*], <http://pubdocs.worldbank.org/en/697191452035053704/Global-Economic-Prospects-January-2016-Spillovers-amid-weak-growth.pdf>; see also Kaul, *supra* note 7, *passim*; *Game of Zones: Regional Trade Deals Aren't as Good as Global Ones but They Are Still Beneficial*, *ECONOMIST* (Mar. 21, 2015), <http://www.economist.com/news/finance-and-economics/21646772-regional-trade-deals-arent-good-global-ones-they-are-still> (joining the FTAs may entail other benefits such as domestic policy reforms, increased multilateral bargaining power, strategic linkages, more political stake in multilateral negotiations, and geo-political considerations).

12. *Id.*

13. *GLOBAL ECONOMIC PROSPECTS 2016*, *supra* note 11, at 221.

14. *Id.*

15. See JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* 61-70 (2008) [hereinafter *BHAGWATI, TERMITES IN THE TRADING SYSTEM*].

16. See generally Patrick Low, *Preferentialism in Trade Relations: Challenges for the World Trade Organization* 1 (Asian Dev. Bank Inst., Working Paper no. 478, 2014), <https://www.adb.org/sites/default/files/publication/156333/adbi-wp478.pdf>.

17. *Id.* at 16.

sustenance of parallel global and regional trade mechanisms in the future, asserted that the best way ahead was to strive for coherence between the two.<sup>18</sup> Professor Bhagwati has suggested a careful approach of open regionalism by not compartmentalizing a regional trade agreement.<sup>19</sup>

### III. TRANS-PACIFIC PARTNERSHIP—WHY AND WHY NOT?

#### A. *TPP—Aims and Objectives*

Composed of thirty chapters and an array of annexes and side letters, the TPP aimed to be the largest FTA to be negotiated in human history.<sup>20</sup> The United States Trade Representative (USTR) portal defined the TPP as “a comprehensive agreement that will open markets, set high-standard trade rules, and address 21st-century issues in the global economy.”<sup>21</sup> Specifically, the former Obama Administration pursued the TPP as a tool to not only promote jobs and increase economic growth in both the United States and other TPP member countries but to also unlock opportunities for American manufacturers, workers, service providers, farmers, and ranchers.<sup>22</sup>

Incidentally, the TPP’s scope was not only limited to trade creation and supporting American jobs.<sup>23</sup> Exceeding 6000 pages, the TPP

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18. Lamy, *supra* note 10, at 17.

19. Televised Interview with Professor Jagdish Bhagwati by Bloomberg News, *Columbia’s Bhagwati: Why the TPP Probably Won’t Succeed*, BLOOMBERG (Aug. 25, 2016), <https://www.bloomberg.com/news/videos/2016-08-25/columbia-s-bhagwati-why-the-tpp-probably-won-t-succeed> [hereinafter Bhagwati’s Interview].

20. See *Consolidated TPP Text*, GOV’T CAN. (Dec. 20, 2016), <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tpf/text-texte/toc-tdm.aspx?lang=eng>. See generally Alvaro Guzman Bastida, *History’s Largest Trade Agreements Are Being Negotiated in Secret*, AL JAZEERA (Sept. 29, 2014), <http://america.aljazeera.com/articles/2014/9/29/history-largest-tradeagreements.html>.

21. *The Trans-Pacific Partnership: Detailed Summary of U.S. Objectives*, U.S. TRADE REPRESENTATIVE PORTAL (Sept. 2015), <https://ustr.gov/sites/default/files/TPP-Detailed-Summary-of-US-Objectives.pdf>; see Peter A. Petri & Michael G. Plummer, *The Economic Effects of the Trans-Pacific Partnership: New Estimates 2* (Peterson Inst. for Int’l Econ. 2, Working Paper 16-2, 2016), <https://pie.com/publications/working-papers/economic-effects-trans-pacific-partnership-new-estimates>. The scholars at Peterson endorse that the “agreement itself is deep and comprehensive, targeting economic integration with provisions that range from goods, services, and investment to critical new issues such as the digital economy, intellectual property rights, regulatory coherence, labor, and the environment.” The study affirmed that TPP appeared to have met its key objectives: first, to establish new, market-oriented rules in a host of rapidly changing areas of international commerce and; second, to reduce trade and investment barriers among (erstwhile) TPP countries to yield considerable gains for the United States and its (erstwhile) eleven partners.

22. *The Trans-Pacific Partnership: Detailed Summary of U.S. Objectives*, *supra* note 21, at 1-2.

23. *Id.*

agreement detailed provisions comprehensively related to new and meaningful market access for goods and services; strong and enforceable labor standards and environmental commitments; groundbreaking rules to ensure fair competition between state-owned enterprises and private companies; commitments that will improve transparency and make it easier for small and medium-sized businesses to export; a robust intellectual property rights framework to promote innovation while supporting access to innovative and generic medicines; and obligations that will promote an open Internet and a thriving digital economy.<sup>24</sup>

USTR's detailed summary listed TPP's objectives and benefits through a variety of mechanisms. These are trade in goods;<sup>25</sup> textiles;<sup>26</sup> services;<sup>27</sup> investment;<sup>28</sup> labor;<sup>29</sup> environment;<sup>30</sup> E-commerce and telecommunications;<sup>31</sup> state-owned enterprises;<sup>32</sup> competition policy;<sup>33</sup> small and medium-sized enterprises;<sup>34</sup> intellectual property rights;<sup>35</sup> technical barriers to trade;<sup>36</sup> sanitary and phytosanitary measures;<sup>37</sup> transparency and anti-corruption;<sup>38</sup> customs, trade facilitation, and rules of

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24. *Id.*; see Consolidated TPP Text, *supra* note 20.

25. *The Trans-Pacific Partnership: Detailed Summary of U.S. Objectives*, *supra* note 21 (helping American producers sell more Made in America products abroad).

26. *Id.* at 10 (enhancing the competitiveness of Made in America textiles in the Asia-Pacific region).

27. *Id.* at 11-12 (increasing opportunities for American service providers in the Asia-Pacific region).

28. *Id.* at 13-14 (promoting job-creating investment and strengthening the rule of law across the Asia-Pacific).

29. *Id.* at 16-17 (protecting basic labor rights in the Asia-Pacific region and leveling the playing field for American workers).

30. *Id.* at 18-19 (protecting oceans, forests, and wildlife by putting in place strong commitments to preserve the marine environment, promote conservation, and combat wildlife trafficking).

31. *Id.* at 20-21 (promoting a free and open Internet, breaking down barriers, and strengthening protections for consumers).

32. *Id.* at 22 (leveling the playing field for American workers through fair competition).

33. *Id.* at 23 (benefitting American consumers through fair competition).

34. *Id.* at 24-25 (advancing the interests of America's largest employers: small and medium-sized businesses).

35. *Id.* at 26-28 (supporting American jobs by promoting America's innovation advantage).

36. *Id.* at 29-30 (breaking down barriers to Made in America products and promoting government transparency).

37. *Id.* at 31-32 (eliminating unscientific discrimination against Made in America goods and ensuring that food safety standards are strong).

38. *Id.* at 33-34 (promoting good governance through transparency, accessibility, and accountability).

origin (ROO);<sup>39</sup> government procurement;<sup>40</sup> development and trade capacity-building;<sup>41</sup> dispute-settlement;<sup>42</sup> and U.S.-Japan bilateral negotiations on motor vehicle trade.<sup>43</sup>

For instance, in the case of “trade in goods,” TPP marked the following highlights: First, support American jobs.<sup>44</sup> Second, eliminate tariffs on trade between each TPP country and the United States on the broadest possible basis, taking into account the need to obtain competitive opportunities for U.S. exports while addressing their import sensitivities.<sup>45</sup> This includes eliminating tariffs on U.S. manufactured goods as well as on most agricultural products.<sup>46</sup> Third, achieve new and commercially meaningful market access through significant tariff reductions and preferential tariff rate quotas for the remaining products.<sup>47</sup> Fourth, address nontariff barriers to U.S. exports, including discriminatory barriers on agricultural and other products, restrictive administration of tariff-rate quotas, unjustified trade restrictions, or other measures that unfairly limit access to markets for U.S. goods.<sup>48</sup> Fifth, obtain full reciprocal access to the TPP country markets and more open conditions of trade for U.S. textile and apparel products.<sup>49</sup> Sixth, establish disciplines on state-owned enterprises to enhance transparency and eliminate market distortions.<sup>50</sup> Seventh, reaffirm and build on WTO commitments on technical barriers to trade.<sup>51</sup> Eighth, reaffirm and build on WTO commitments on sanitary and phytosanitary measures.<sup>52</sup> Ninth, ensure that no commitments would require changes to U.S. anti-dumping and countervailing duty laws and practices or diminish the United States’ ability to effectively enforce those laws.<sup>53</sup>

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39. *Id.* at 35-36 (cutting red tape to increase exports of Made in America products and to ensure that American goods become part of global supply chains).

40. *Id.* at 37-38 (promoting fair and transparent government procurement while maintaining key preference programs).

41. *Id.* at 39-40 (promoting sustainable development and broad-based economic growth).

42. *Id.* at 41 (creating fair and effective means to resolve disputes).

43. *Id.* at 42-43 (promoting the interests of the American auto industry and American auto workers).

44. *Id.* at 8-9.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

Similarly, the services provision focuses *inter alia* on reducing tariff and nontariff barriers, safeguarding the nondiscrimination principle, improving transparency and predictability, committing to the transfer of funds freely and without delay, and committing to further liberalizing foreign financial services and insurance markets.<sup>54</sup> With respect to investment, provisions such as transparency, protection against discrimination, basic protections against the uncompensated expropriation of property, and placing strong safeguards to raise the standards around investor-state dispute settlement are distinctive of fostering a favorable investor-friendly regional regime.<sup>55</sup>

### B. *The Hallmarks*

Many international trade scholars find consensus on a variety of characteristic hallmarks promised by the TPP. These are as follows:

#### 1. Market Access

Professor of international trade law Raj Bhala noted that the TPP affords comprehensive market access and “sets the rules for duty-free access to goods markets, with complete tariff elimination a core objective, and lifts barriers to trade in services, government procurement, and FDI” (foreign direct investment).<sup>56</sup> With the inclusion of services and investment based on a Negative List, the TPP prospectively covers all trade sectors (including financial services) unless specifically exempted.<sup>57</sup> Notably for the United States, the TPP was primarily a mechanism to secure greater market access, and the USTR never tried to promote it from other perspectives, e.g., social justice.<sup>58</sup> Acknowledging that the United States stood at the 130th position (among 138 destinations around the world for exports) in terms of trade barriers, Professor Bhala observed that the TPP would have helped level the competitive playing field for American exporters, who were facing higher trade barriers overseas than almost all of the trade barriers their competitors faced when shipping to the United States.<sup>59</sup>

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54. *Id.* at 11-12.

55. *See id.* at 13-14.

56. RAJ BHALA, TPP OBJECTIVELY: LAW, ECONOMICS, AND NATIONAL SECURITY OF HISTORY'S LARGEST, LONGEST FREE TRADE AGREEMENT 84 (2016) [hereinafter BHALA, TPP OBJECTIVELY].

57. *Id.*

58. *Id.*

59. *Id.* at 85.

## 2. Cross-Cutting and Novel Regional Mechanism

As a mega agreement, the TPP's scope cannot be equated with smaller bilateral agreements. The TPP has a single tariff schedule common ROOs with provisions that are designed to facilitate trade among the twelve Pacific Rim countries and encourage accumulation to promote production and supply chains across the region.<sup>60</sup> TPP deals with cross-cutting subjects including regulatory requirements concerning nontariff barriers and transparency; business facilitation to enhance competitiveness; small or medium-sized enterprises; and customs, trade facilitation, and capacity building.<sup>61</sup> The TPP encompasses emerging trade subjects with regard to e-commerce and the digital economy, environmentally friendly growth, and public health.<sup>62</sup> From open Internet access and intellectual property infringement to government procurement, the TPP deals comprehensively with such new issues concerning international trade.<sup>63</sup>

## 3. A Living and Dynamic Agreement

Unlike many regional trade agreements that were negotiated decades ago, the TPP embraces contemporary phenomenon in trade, FDI, and technology, is forthcoming in its scope and is likely to have a longer shelf-life and relevance.<sup>64</sup> Erzell and Levy remarked that the TPP was meant to serve as a model agreement, which the new members could join on terms to be agreed upon by the parties, any Asia-Pacific Economic Cooperation

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60. *Id.* at 86.

61. *Id.*; see Petri & Plummer, *supra* note 21, at 1-5; see also Joshua P. Meltzer, *The Trans-Pacific Partnership Is a Win for All Parties*, BROOKINGS (Dec. 9, 2015), <https://www.brookings.edu/blog/future-development/2015/12/09/the-trans-pacific-partnership-is-a-win-for-all-parties> [hereinafter Meltzer, *TPP Is a Win for All Parties*].

62. BHALA, *TPP OBJECTIVELY*, *supra* note 56, at 87; see Joshua P. Meltzer's Testimony, *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>; see also Meltzer, *TPP Is a Win for All Parties*, *supra* note 61. TPP strengthens and expands the scope of environmental protection. It embraces all the environmental matters with reference to the seven multilateral environmental agreements (MEAs), which Congress-approved Trade Promotion Authority alluded to. TPP, for instance, upholds the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for trade in wildlife flora and fauna and includes additional commitments to address trade in illegal logs. TPP also addresses subsidy matters leading to overfishing, a result that has been pursued unsuccessfully at the WTO for the last fifteen years. TPP's environment chapter subjects to the agreement's state-to-state dispute settlement.

63. BHALA, *TPP OBJECTIVELY*, *supra* note 56, at 87.

64. *Id.*; see Meltzer, *TPP Is a Win for All Parties*, *supra* note 61.

(APEC)<sup>65</sup> member state, or other State.<sup>66</sup> More so, with its explicit intent to welcome new members as a distinguishing feature, the TPP was anticipating new countries joining, at least before the outcome of the 2016 U.S. presidential elections.<sup>67</sup> In addition to membership expansion, the TPP's dynamism is also reflected by its design to allow for the broadening of coverage and to be open for revision on an ongoing and regular basis.<sup>68</sup>

### C. TPP—Path to Elimination of Trade Barriers

With tariff liberalization on trade in goods being the most significant aspect of the regional endeavor, the TPP envisaged progressive tariff reduction in two ways.<sup>69</sup> First, the uniform across-the-board “B schedules” necessitated an even and gradual lowering of tariff rates on an annual basis on account of the operational most-favored nation (MFN) rate.<sup>70</sup> Second, every member country could organize its schedule for gradually eliminating the tariffs for its sensitive products.<sup>71</sup> The tariffs nearly bear down zero while approaching the sixteenth year.<sup>72</sup> Beyond that time period, only the United States' cars and trucks designated for Japan carry above zero MFN rates and also exhaust by the thirtieth year.<sup>73</sup>

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65. See generally *About APEC*, ASIA-PAC. ECON. COOPERATION, <https://www.apec.org/About-Us/About-APEC> (last visited Sept. 1, 2017).

66. Claude Ercell Barfield & Philip I. Levy, *Tales of the South Pacific: President Obama and the Transpacific Partnership*, in INTERNATIONAL ECONOMIC OUTLOOK 3 (Am. Enter. Inst. for Pub. Pol'y Research No. 2, 2009), <http://www.aei.org/wp-content/uploads/2011/10/09-IEO-Dec-g.pdf>.

67. BHALA, TPP OBJECTIVELY, *supra* note 56, at 87; Barfield & Levy, *supra* note 66, at 2.

68. GLOBAL ECONOMIC PROSPECTS 2016, *supra* note 11, at 219; Deborah Elms, *The Trans-Pacific Partnership Negotiations: Some Outstanding Issues for the Final Stretch*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 371, 386-87 (2013).

69. Sarah Oliver, *How Quickly Are Tariffs Eliminated in the TPP?*, PETERSON INST. FOR INT'L ECON. (Dec. 2, 2015), <https://piie.com/research/piie-charts/how-quickly-are-tariffs-eliminated-tpp>.

70. *Id.*

71. *Id.*

72. *Id.*; Caroline Freund et al., *Tariff Liberalization*, in PETERSON INST. FOR INT'L ECON., ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES, 31-40 (Feb. 2016), <https://piie.com/system/files/documents/piieb16-1.pdf>.

73. Oliver, *supra* note 69; see Caroline Freund & Sarah Oliver, *US Auto Tariffs Under TPP*, PETERSON INST. FOR INT'L ECON. (Nov. 16, 2015), <https://piie.com/research/piie-charts/us-auto-tariffs-under-tpp>. As regards the auto sector, United States' priority centered on Japan, due to the latter's dominance over auto exports. Freund and Oliver noted the restraining of Japanese cars from reaching the U.S. market as an historical feature of U.S. policy. Although this disparity between tariff scheme indicates dearth of eagerness on part of the United States to liberalize its automobile market, the Japanese car manufacturers may not feel much impact from these tariff conundrums as a majority of them relocated production to United States to eschew previous restrictions on their exports. Freund et al., *supra* note 72, at 31-40.

The formal effectuation of the TPP would have seen the elimination of almost three-quarters of non-zero tariffs and an eventual liberalization of 99% of goods trade.<sup>74</sup>

The TPP promised rather noteworthy liberalization in some partner countries that are traditionally characterized as protectionist, such as Vietnam, where the average applied tariff foresaw a downturn from 10.6% to 6.1% speedily, followed by a drop to 0.4% ten years later.<sup>75</sup> The differentiated liberalization schedules, another distinctive aspect of the TPP, acknowledged trade subtleties of the partner countries owing to their variable economic dimensions and disparate developmental phases.<sup>76</sup> The TPP served as a chance to stir up trade liberalization and better the prevailing trade agreement regime. The TPP tariff regime inferred divergent gains for different partners.<sup>77</sup> For instance, some partners already boasted lower tariff levels and therefore anticipated relatively modest dividends.<sup>78</sup> In contrast, the countries with emerging markets expected plentiful gains, thanks to a significant liberalization on their part.<sup>79</sup>

The tradable business services sector accounts for a sizeable 25% of U.S. employment.<sup>80</sup> In terms of liberalization of trade in services, the TPP sought to further enhance the gains for the United States.<sup>81</sup> Endowed with a colossal comparative advantage in the services trade, for the United States the earnings received from the U.S.-outward FDI in service industries amounted to \$318 billion in 2014, which is a great number in contrast to the U.S. income payments of \$54 billion on the U.S.-inward

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74. Freund et al., *supra* note 72, at 31.

75. *Id.*

76. *See id.* at 31-39. Open economies such as Australia, Chile, New Zealand, and Singapore already have lower tariffs. Indeed, Singapore's MFN tariffs are benchmarked nearly all zero. None of these countries levies an *ad valorem* tariff exceeding 10%. As regards the advanced economies in the United States, Japan, and Canada, although roughly 60% of their tariffs are less than 5%, all these advanced countries assert high tariffs on sensitive products, and will likely continue to do so for some time. However, the United States and Canada, already being part of a prevailing FTA, enjoy bilateral tariffs lower than the MFN rates. As a result, their liberalization with each other is higher in contrast to their liberalization in respect to Japan. However, in the third category of partner countries with emerging markets—Brunei, Malaysia, Mexico, Peru, and Vietnam—they have a propensity to have higher MFN tariffs within the TPP alliance. For example, 15% of Vietnam's tariff lines are 20% or higher—a very high benchmark for tariffs, and in the case of Malaysia, about 20% of the tariff lines are very high.

77. *Id.* at 39.

78. *Id.*

79. *Id.*

80. Gary Clyde Hufbauer, *Liberalization of Services Trade*, in PETERSON INST. FOR INT'L ECON., *supra* note 72, at 81.

81. *Id.* at 81.

FDI in the same year.<sup>82</sup> In the services sector, the United States would have benefitted the most from an increase in service exports by \$149 billion, the maximum in services sectors among the erstwhile TPP partner countries.<sup>83</sup> Moreover, the TPP aimed at expanding trade by \$225 billion for the entire TPP bloc, after being fully effectuated within approximately fifteen years.<sup>84</sup>

Notwithstanding the General Agreement on Trade in Services (GATS) membership of all the TPP member countries, very little reduction of barriers took place following the Uruguay Round.<sup>85</sup> Furthermore, the Doha Round also failed to take off with any achievements in this discipline.<sup>86</sup> The TPP asserted fair and equal treatment to foreign firms, restrained any new restrictions on market access, and permitted automatic proffering of new unilateral liberalization to all the TPP partners, subject to country and subject-specific exceptions.<sup>87</sup> Although the United States pledged to a small number of new commitments in the TPP's four essential chapters of "cross-border trade," "temporary movements of persons," "finance," and "telecommunications," or other disciplines influencing services trade such as investment, e-commerce, and state-owned enterprises, the TPP provided a platform to have many more commitments from other member states, harmonize the TPP-wide services sector norms, and improve foreign services market access for U.S. firms.<sup>88</sup> All of these mechanisms would have resulted in not only United States' and other partner states' favor but also in the emergence of regional best practices in service trade at the regional level and, perchance, at the global level.

ROOs are an important mechanism needed for attributing a product to its country of origin and for executing trade policy measures encompassing "trade preferences," "quotas," "anti-dumping measures," and "countervailing duties."<sup>89</sup> Today's globalized world envisages a

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82. See *id.* at 82-84 (explaining the preeminence of U.S. service firms in three factors: "the efficiencies of large firms engaged in service industries," "the huge US pool of highly educated personnel," and "the widespread use of information technology").

83. *Id.* at 81.

84. *Id.*

85. *Id.* at 82.

86. *Id.*

87. *Id.* at 85.

88. *Id.* at 89.

89. See *Rules of Origin*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_e.htm) (last visited Sept. 1, 2017); *Technical Information on Rules of Origin*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm) (last visited Sept. 1, 2017); *What Are Rules of Origin?*, WORLD CUSTOMS ORG., <http://www.wcoomd.org/en/topics/origin/instrument-and-tools/comparative-study-on-preferential-rules-of-origin/specific-topics/general-topics/roo-agr-atiga.aspx> (last visited Sept. 1, 2017). Rules of origin (ROO) are used (1) "to

predictable and harmonized international regime, more so for dealing with international trade matters. With no specific General Agreement on Tariffs and Trade (GATT) rules regulating the ascertaining of the country of origin in international trade, the onus thus lies on each contracting party “to determine its own origin rules, and . . . even maintain several different rules of origin depending on the purpose of the particular regulation.”<sup>90</sup> The preferential trade agreements generally constitute the rules of origin to check “trade deflection,” which refers to the commodities from non-member states transshipped through a free-trade partner to gain a preferential market access.<sup>91</sup> In other words, the ROOs play a role of “gate-keepers” in reciprocal trade regime while performing the task of

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implement measures and instruments of commercial policy such as anti-dumping duties and safeguard measures”; (2) “to determine whether imported products shall receive most-favored-nation [MFN] treatment or preferential treatment”; (3) “for the purpose of trade statistics”; (4) “for the application of labelling and marking requirements”; and (5) “for government procurement.” The ROOs may be classified into two categories: (1) Non-preferential ROOs are “those which apply in the absence of any trade preference—that is, when trade is conducted on a most-favored nation basis.” Certain measures such as quotas, anti-dumping or “made in” labels necessitate an ascertaining of the origin, and thus, the requirement of non-preferential rules. (2) Preferential ROOs are “those which apply in reciprocal trade preferences [i.e., regional trade agreements or customs unions] or in non-reciprocal trade preferences [i.e., preferences in favor of developing countries or LDCs].” *Rules of Origin, supra*, at 1; see Bernard Hoekman & Stefano Inama, *Rules of Origin as Non-Tariff Measures: Towards Greater Regulatory Convergence* 1-2 (European Univ. Inst., Working Paper RSCAS 2017/47, 2017), [http://cadmus.eui.eu/bitstream/handle/1814/48024/RSCAS\\_2017\\_45.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/48024/RSCAS_2017_45.pdf?sequence=1); see also Kaul, *supra* note 7, *passim* (exploring the discourse on the ROO in a South Asian context).

90. *Technical Information on Rules of Origin, supra* note 89.

91. Paul Brenton, *Preferential Rules of Origin*, WORLD BANK 161, 161 (2011), <https://siteresources.worldbank.org/INTRANETTRADE/Resources/C8.pdf>. The ROO have significant effects on trade flows among countries. They are often more complex than simple and thus pose as constraints on trade in commodities among countries. Brenton proposed some best practices for the design of the ROO such as “simple, precise, easy to understand, transparent, predictable, and stable rules of origin,” “rules with least trade-distorting impact and which don’t come in the guise of non-tariff barriers,” and “rules should be consistent across products and across agreements.” Eventually, instituting less antagonistic rules by affording adjustability in sourcing inputs from third countries without undermining the criteria of trade deflection may go a long way in stimulating trade, and in the process, help check trade protectionism. *Id.*; Moshe Hirsch, *International Trade Law, Political Economy and Rules of Origin*, 36 J. WORLD TRADE 171, 184-89 (2002) (stating a reform in the form of liberalizing the ROOs must focus on increasing transparency and progressive lowering of trade restrictive measures); see Olivier Cadot & Jaime de Melo, *Why OECD Countries Should Reform Rules of Origin*, 23 WORLD BANK RES. OBSERVER 77, 77-78 *passim* (2008) (definition and measurement (regime-wide rules and product-specific ROO), and the significance of simple, transparent, and WTO-compatible ROO); see also *Trade Deflection*, THEGLOBALECONOMY.COM, <http://www.theglobaleconomy.com/glossary/article/138/> (last visited Nov. 3, 2017) (“The movement of goods or components of goods from outside a trading arrangement to a country within such an arrangement in order for the seller to benefit from trading preferences.”).

differentiating products on the basis of their location of production.<sup>92</sup> In the process, they often end up as protectionist tools with an aim to pose trade barriers against the non-beneficiary states.<sup>93</sup> Additionally, they help draw investment towards the beneficiary state markets.<sup>94</sup> In regards to the TPP's ROO regime in the context of textiles, eligibility for tariff reductions was only for the apparel produced from fabric and other contributions made by the TPP partners, with a handful of exceptions.<sup>95</sup>

One of the TPP contracting parties, Vietnam, which is one of the largest exporters of apparel (textiles and apparel commodities constitute almost a third of the country's total exports to the United States),<sup>96</sup> would have gained from the TPP's tariff reduction again.<sup>97</sup> However, in order to benefit from such trade liberalization, Vietnam was required to adhere to the ROO regime and source most of its inputs from the other erstwhile TPP countries.<sup>98</sup> Vietnam is reliant on the non-TPP countries for most of its inputs for textile and apparel production.<sup>99</sup> In terms of the apparel exports, it would not necessarily have any advantage from the TPP unless any other textile producing country, such as Korea, was to be a TPP member and supply the inputs at a comparable cost.<sup>100</sup> Therefore, the TPP's outcome for Vietnam's textile and apparel export commodities symbolize "managed trade" instead of free or preferential trade.<sup>101</sup> Similarly, the TPP's ROO requirements in the sector of finished automobiles aimed at incentivizing the beneficiary countries with an enhanced share of production within the preferential trade zone instead of sourcing inputs from outside.<sup>102</sup>

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92. Hirsch, *supra* note 91, at 176-78. The additional tests being a "domestic content test" (the requirement of a bottom-scale localized value increase and highest value increase from a non-beneficiary sourced input), a "technical test" (determining the operational process based on the source origin/location), and a "change in tariff classification" (compliance under the Harmonized Commodity Description and Coding System or Harmonized System).

93. *Id.* at 178.

94. *Id.*

95. Kimberly Ann Elliott, *Rules of Origin in Textiles and Apparel*, in PETERSON INST. FOR INT'L ECON, *supra* note 72, at 66.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 73.

102. Sarah Oliver, *Auto Sector Liberalization*, in PETERSON INST. FOR INT'L ECON., *supra* note 72, at 60, 62-63 [hereinafter Oliver, *Auto Sector Liberalization*]. Oliver in her work reveals that the TPP's ROO requirement for auto parts vary from "35 to 45 percent of parts originating within the TPP, with an additional list of parts that can be considered as 'wholly originating' given

While the preferential trade agreements have been considered liberalizing, the primary cause of them not being so is that the ROO themselves are the “hidden protection” as they bring about tariffs on foreign-sourced materials and impact the like locally sourced material as well.<sup>103</sup> The ROO raises the price of the intermediate input sourced from the preferential trading area and, as a result, offers a shield to it from an FTA-welfare perspective.<sup>104</sup> Product specific ROOs have elsewhere helped increase trade among the preferential trade agreement partner countries.<sup>105</sup> For example, the implementation of stringent ROOs in the auto parts sector under NAFTA led to the increase of auto parts trade between Mexico and the United States.<sup>106</sup> Likewise, the U.S.-Mexico textile trade saw a remarkable elaboration after the “yarn forward” rule introduced a 100% value-added ROO under NAFTA.<sup>107</sup> The TPP provides a framework of trade liberalization in the auto sector as much as it does in other sectors, such as the subtraction of cost of freight and insurance.<sup>108</sup> However, the agreement serves to shelter the countries with large automobile and automobile parts production, specifically the United States, Mexico, and Canada with the help of the “regional content requirements” and “long tariff expiration periods.”<sup>109</sup>

Although the ROO’s resultant trade impediments and other intricacies may vary in different preferential trade agreements, a framework to streamline the diverging ROO regimes of various or overlapping preferential trade agreements may present as a more favorable option.<sup>110</sup> It is argued that harmonizing the regime at the multilateral level

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certain conditions,” whereas NAFTA seeks a ROO requirement of 62.5% of origin from the preferential trade area.

103. Kala Krishna, *Understanding Rules of Origin 1* (Nat’l Bureau of Econ. Research, Working Paper 11150, 2005), <http://www.nber.org/papers/w11150>.

104. *Id.*

105. GLOBAL ECONOMIC PROSPECTS 2016, *supra* note 11.

106. Rupa Duttagupta & Arvind Panagariya, *Free Trade Areas and Rules of Origin: Economics and Politics* 5, 25-26 (IMF, Working Paper WP/03/229, 2003), <https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Free-Trade-Areas-and-Rules-of-Origin-Economics-and-Politics-16994>.

107. *Id.*

108. Hoekman & Inama, *supra* note 89, at 5.

109. Oliver, *Auto Sector Liberalization*, *supra* note 102, at 65.

110. John Brinkley, *Trump Hands China a Gift in Dumping Trans-Pacific Partnership*, FORBES (Jan. 24, 2017), <http://www.forbes.com/sites/johnbrinkley/2017/01/24/trump-dumps-trans-pacific-partnership-sad/#68f862255660>; Antoni Estevadeordal et al., *Multilateralising Preferential Rules of Origin Around the World, passim* (Inter-Am. Dev. Bank, Working Paper No. 137, 2009), [https://publications.iadb.org/bitstream/handle/11319/2521/IDB-WP-137.%20%20Multilateralising%20Preferential%20Rules%20of%20Origin%20around%20the%20World.pdf?squence](https://publications.iadb.org/bitstream/handle/11319/2521/IDB-WP-137.%20%20Multilateralising%20Preferential%20Rules%20of%20Origin%20around%20the%20World.pdf?squence%20of%20Origin%20around%20the%20World.pdf?squence) (indeed, “agricultural products” and “textiles” and “apparel” are particularly some of the

alleviates some distortionary “noodle bowl” or “spaghetti bowl” effects, thanks to the abundant free trade agreements.<sup>111</sup> Being a mega-regional agreement, the TPP had the scope of harmonizing the overlapping ROO regimes in the Trans-Pacific region where the stumbling block of divergence had historically been a concern.<sup>112</sup> The consensus among the beneficiary countries (toward the product-specific U.S. approach) to iron out the divergence between the United States and East Asian ROO measures pointed toward a multilateral convergence in the form of a uniform ROO approach.<sup>113</sup> This was, undeniably, a signal of progressing the agenda of multilateralization.<sup>114</sup>

*D. Implications of the TPP—Adverse Economic Impact? Job Killer?*

The TPP has drawn the attention of various financial institutions and economic scholars and their foresight of the TPP indicated ambivalent implications. The World Bank’s 2016 Global Economic Prospects Report predicted that by 2030, the TPP would, overall, raise member country gross domestic product (GDP) by 0.4%-10% and by 1.1% on a GDP-weighted average basis.<sup>115</sup> Although the benefits would mostly stem from nontariff-based and services-benefitting measures, the economic benefits may not eventuate as rapidly as desired.<sup>116</sup> The report noted that tariff reduction would lead to only 15% of the GDP increase, whereas decrease

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commodities targeted by strong ROO barriers); Simon Lacey, *Multilateral Disciplines on Rules of Origin: How Far Are We from Squaring the Circle?*, 7 GLOBAL TRADE & CUSTOMS J. 473, 473-92 (2012).

111. Estevadeordal et al., *supra* note 110, *passim*; Lacey, *supra* note 110, *passim*; see Masahiro Kawai & Ganeshan Wignaraja, *Policy Challenges Posed by Asian FTAs*, in ASIAN DEV. BANK INST. & CTR. FOR ECON. POLICY RESEARCH, *supra* note 10, at 83, 87-88. The multitude of ROO regimes in Asia cause a “noodle bowl” complex at the regional level. This crisscross may cause the increase of transaction costs for small and medium enterprises operation in the region.

112. Alex Capri, *The TPP Moves Forward Without Trump’s America*, FORBES (May 22, 2017), <https://www.forbes.com/sites/alexcapri/2017/05/22/the-tpp-moves-forward-without-trumps-america/#63ddb7a84fed>.

113. Ann Capling & John Ravenhill, *Multilateralising Regionalism: What Role for the Trans-Pacific Partnership Agreement?*, 24 PAC. REV. 553, 564-65 (2011). There are two different ROO approaches: the widespread custom in East Asia of using a determined percentage of the worth of the locally sourced commodity; whereas a product-specific practice prevails in the case of the United States.

114. ROBERT SCOLLAY & RAY TREWIN, REG’L ECON. POLICY SUPPORT FACILITY, REPSF PROJECT NO. 05/003, AUSTRALIA AND NEW ZEALAND BILATERAL CEPS/FTAs WITH THE ASEAN COUNTRIES AND THEIR IMPLICATION ON THE AANZFTA (2006), [http://www.thaifta.com/trade/aanzfta/2006-06REPSF\\_05003\\_Report.pdf](http://www.thaifta.com/trade/aanzfta/2006-06REPSF_05003_Report.pdf).

115. GLOBAL ECONOMIC PROSPECTS 2016, *supra* note 11, at 226.

116. *Id.* at 226-27.

in nontariff measures would account for 53% in goods and 31% in services of total increase in GDP, respectively.<sup>117</sup>

With respect to the TPP's impact on erstwhile individual member countries, the largest gains in GDP were not expected in bigger economies, such as the United States, but rather in smaller ones: Vietnam (10%) and Malaysia (8%).<sup>118</sup> Regarding the impact on non-member countries, trade diversion effects were likely to be limited, since almost half of trade deemed to effectuate among the TPP countries.<sup>119</sup>

The World Bank's 2016 Global Economic Prospects Report indicated that the TPP was unlikely to affect overall employment in the long run.<sup>120</sup> However, it could "accelerate structural shifts between industries based on comparative advantage and scale economies."<sup>121</sup> In other words, the TPP may have favorably induced, as a sectoral shift, traded services and advanced manufacturing towards advanced economies.<sup>122</sup> Some resource-rich countries may further attract investments and primary products.<sup>123</sup> Also, the developing countries may side with manufacturing industries, composed of both a particularly unskilled labor-intensive make up, and some primary production.<sup>124</sup> Even so, the rise in the wages of the unskilled workers may manifest more in developing economies, such as Vietnam (more than 14% by 2030), whereas the United States was likely to see a rather small increase in unskilled (0.4%) and skilled (0.6%) wages.<sup>125</sup>

The Peterson Institute for International Economics commissioned an in-depth study on the economic effects of the TPP. Per the estimates reported there, "TPP will increase annual real incomes in the United States by \$131 billion, or 0.5 percent of GDP, and annual exports by \$357 billion, or 9.1 percent of exports, over baseline projections by 2030, when the agreement is nearly fully implemented."<sup>126</sup> In terms of income, exports, and foreign investment, the TPP promised \$131 billion as annual gains for the United States and \$492 for the world by 2030.<sup>127</sup>

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117. *Id.* at 227.

118. *Id.* at 227.

119. *Id.*

120. *Id.* at 228.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Petri & Plummer, *supra* note 21, at 2.

127. *Id.* at 10; *see also* Theodore H. Moran & Lindsay Oldenski, *TPP Will Promote Investment as Well as Trade*, PETERSON INST. FOR INT'L ECON. (Mar. 10, 2015, 11:15 AM), <https://>

Concerning the TPP's effect on jobs, the study envisaged that the TPP was not likely to affect overall employment in the United States.<sup>128</sup> However, the maneuvering and movement between jobs (also referred to as "churning") involved adjustment costs.<sup>129</sup> Despite the fact that most (lost) jobs would be substituted by alternative employment, some workers, working in specific locations or with skill shortages, could face serious transition costs such as lasting wage cuts and unemployment.<sup>130</sup> The study noted:

As US resources shifted from general manufacturing toward traded services and advanced manufacturing, the returns of skilled labor rise. While the TPP

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piie.com/blogs/trade-investment-policy-watch/tpp-will-promote-investment-well-trade. Moran and Oldenski noted that TPP went beyond being merely a trade agreement. The Agreement's provisions aimed at influencing foreign direct investment (FDI) whether in direct ways or indirect ways. It sought to promote higher FDI in USA by (erstwhile) partners country firms. Specifically, TPP promised to influence FDI in two ways. First, TPP attempted to cover measures to minimize investment barriers by way of ameliorating intellectual property protection, eliminating investment barriers in services, and strengthening transparency, consistency and, therefore, its overall governance. Second, investment being concomitant to trade, a trade increasing invariably favors increase in FDI. Nonetheless, the investments lead to various long-term economic rewards such as new jobs, more capital, expansion of research and development spending and enhancing productivity. For instance, in 2012 alone more than 1.4 million U.S. workers benefitted employment from firms based in or originating from other TPP countries; 1.4 million is a substantial figure, being 26% of the entire U.S. workforce engaged by foreign enterprise subsidiaries in 2012. As regards capital expenditure, in 2012 subsidiaries of firms originating from other TPP countries spent more than \$70 billion on new ventures in the United States, which stood as 36% of whole capital expenditures by U.S. subsidiaries of foreign enterprises in the same year. Of all the erstwhile TPP partner countries, Japan has been a major source of FDI received by the United States. In 2013, the United States saw fresh investments from Japan worth around \$45 billion being infused into its economy.

128. Petri & Plummer, *supra* note 21, at 3.

129. *Id.* ("For perspective, 55.5 million American workers changed jobs in this way in 2014—so the transition effect of the TPP would represent only less than 0.1 percent increase in labor market churn in a typical year." (footnote omitted)).

130. *See id.* at 3, 11-14 (considering the sectoral drift). In the United States, manufacturing, as a whole, has declined gradually. This decline has coincided with the demand being shifted toward services and reduced demand for labor due to advancing technology, and competitive manufacturing models abroad, particularly in China. The study cited U.S. manufacturing in 2014 was a modestly sized, capital intensive sector accounting for 12% of GDP and 9% of employment, down from 13% and 11%, respectively, a decade earlier. The decline in manufacturing jobs in the United States, at least relative to the rest of the economy, is expected to continue regardless of trade policy. On the export side, the United States has comparative advantage in primary goods, advanced manufacturing, and services. On the import side, foreign producers have comparative advantages in labor-intensive manufacturers and in some services. Considering the dynamism related to some subsectors and firms, baseline projections show manufacturing value added growing by almost 2% annually between 2015 and 2030. The net gains become evident by weighing gains and losses in different sectors. But, under normal labor market conditions, most workers displaced by the TPP were likely to find new jobs. And there are strategies that may be employed to support displaced workers who face greater challenges due to age or location in an economically depressed area.

increases the returns of all three factors (skilled labor, unskilled labor, and capital) due to increases in productivity, it causes wages overall to rise more than returns on capital (0.53 percent vs. 0.39 percent), and the wages of skilled workers, who make up 60 percent of the labor force, to rise more than those of unskilled workers (0.63 percent vs. 0.37 percent).<sup>131</sup>

Employing a global “computable general equilibrium” model to analyze the TPP’s effects, the study suggested an addition of roughly 796,000 jobs in U.S. exporting activities by 2030.<sup>132</sup> All in all, the study endorsed the TPP as an agreement that would substantially benefit its members and raise real incomes in the United States and other member countries, however, policies to mitigate (job) adjustment costs were ethically compelling and were likely to be affordable.<sup>133</sup>

Professor Bhala regarded the TPP as a “partial economic success.”<sup>134</sup> He analyzed individually the four items: goods, services, intellectual property, and people with which the TPP’s economic impact could be estimated. For goods, Professor Bhala noted:

With respect to goods, *TPP* goes far in leveling the competitive playing field for producer-exporters and importers across the region, including in government procurement, and by imposing disciplines on SOEs [state owned enterprises]. Thanks to *TPP*, roughly 18,000 duties on product lines in the tariff schedules of the 12 countries are eliminated. That matters especially for American producer-exporters. The average tariff rate the United States imposes on imports is just 1.4%. But, the average tariff imposed by other countries on American goods is about double that figure, with many tariffs spiking at high double-digit and even triple-digit levels.<sup>135</sup>

As regards services, Professor Bhala observed:

The field on which *TPP* helps level competition is one on which service suppliers play. Impressively, *TPP* uses a pro-free trade “Negative List” methodology for liberalizing market access, and granting National Treatment, in respect of services and government procurement. That is, sectors are presumed open, unless specifically exempted. The reverse presumption, a Positive List method, is used in the *GATS*: Only specifically scheduled sectors are open and assured non-discriminatory treatment vis-à-vis domestic competitors. *TPP* thus is inherently more trade liberalizing in its approach to services trade than is *GATS*.<sup>136</sup>

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131. *Id.* at 13-14.

132. *See id.* at 6-8.

133. *Id.* at 17.

134. BHALA, *TPP OBJECTIVELY*, *supra* note 56, at 3-6.

135. *Id.* at 4 (footnotes omitted).

136. *Id.*

As for the intellectual property, Professor Bhala added:

*TPP* modernizes rules on IP [intellectual property] protection and ICT [information and communications technology] vis-à-vis those in the WTO *TRIPs Agreement* and FTAs such as *NAFTA*. *TPP* thus can be said to improve the flow of IP by providing a more secure playing field for that flow against piracy, and encouraging the development of new IP by granting protection periods that allow at least a reasonable reward for the hard work and ingenuity, and costs incurred by, inventors.<sup>137</sup>

Professor Bhala summarized that on goods, services, and intellectual property protection, the *TPP* scored impressively but is far from being perfect. In the context of people and their work conditions, Professor Bhala held:

Here, too, *TPP* has notable provisions. It boasts labor and environmental commitments, and ones on women and development, not found in previous American trade deals. In other words, *TPP* broadens and deepens the subject matter jurisdiction of trade. The fact the United States and its 11 *TPP* partners were able to do so following the death of the Doha Round was impressive. They achieved at a regional level what proved to be a debacle at the multilateral level.<sup>138</sup>

At the same time, Professor Bhala categorized the *TPP* as a “partial economic failure” due to its various drawbacks and multiple “missed opportunities.”<sup>139</sup> First, the *TPP* manages trade and favors plutocracy.<sup>140</sup> In general, the *TPP* implements the models of classical free trade theory and comparative advantage.<sup>141</sup> However, in some key agricultural and industrial product markets, many service sectors, and sub-sectors on matters pertaining to government procurement and state-owned enterprises, as well as on specific intellectual property matters, the *TPP* regulations seem to “serve economically and politically well-connected and vociferous constituencies.”<sup>142</sup> Consequently, Professor Bhala described the *TPP* as an acronym for “Trade Policy for Plutocracy.”<sup>143</sup> Second, the *TPP* does not afford “binding, enforceable rules against currency manipulation . . . [n]or does it allow [erstwhile member] [p]arties to impose capital controls in a satisfactory manner in extreme

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137. *Id.*

138. *Id.* at 4-5 (footnote omitted).

139. *Id.* at 5-6.

140. *Id.* at 5.

141. *Id.*

142. *Id.*

143. *Id.*

circumstances.”<sup>144</sup> Third, the TPP’s provisions on human rights are inadequate and feeble considering its status as a twenty-first century mega trade agreement.<sup>145</sup> Given that some (erstwhile) TPP member parties have had a controversial human rights track record, this becomes a critical issue.<sup>146</sup> Besides, one cannot keep treating labor and environmental concerns irresolutely. All in all, Professor Bhala inferred that neither the TPP’s commercial benefits should be exaggerated, nor should its costs be underemphasized.<sup>147</sup> In other words, one must refrain from the “mercantilist overselling” of the TPP.<sup>148</sup>

While the cited projections emphasizing the TPP’s prospective economic benefits with increasing economic growth assume full employment and constant income distribution in all member countries (excluding some major risks of trade liberalization), some alternative projections with lower assumptions demonstrate that the benefits to economic growth are even smaller than those projected with full-employment models and are negative for Japan and the United States.<sup>149</sup> Using the same study, the scholars concluded that the increasing inequality and job losses in all the participating economies had a projected loss of 770,000 jobs, with the largest losses occurring in the United States.<sup>150</sup> Not to mention, such realities prompt the pertinent risk of global instability and a race to the bottom.<sup>151</sup>

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144. *Id.*

145. *Id.* at 6.

146. *Id.*

147. *Id.* at 23.

148. *Id.*

149. Jeronim Capaldo et al., *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement* 1 (Glob. Dev. Env’t Inst., Working Paper No. 16-01, 2016), <http://www.ase.tufts.edu/gdae/Pubs/wp/16-01Capaldo-IzurietatTPP.pdf> (providing alternative projections of the TPP’s economic effects and exploring their macroeconomic consequences using the United Nations “Global Policy Model”). Scholars noted that such projections based on realistic assumptions about economic adjustment and income distribution led to infer a contraction of gross domestic product in the United States and Japan, and negligible income gains in other countries. Further, when analyzed with a model that recognized the risks of trade liberalization, TPP appeared to only marginally change competitiveness among the member countries. The scholars noted, therefore, most gains would be obtained at the expense of non-TPP countries. They deduced that the quest for ever more elusive trade gains could consequently accelerate the global race to the bottom and increasing downward pressure on labor incomes.

150. *Id.* at 1.

151. *Id.*

*E. Geo-Strategic and Other Considerations*

## 1. Pivot to Asia

Scholars at Brookings noted that the erstwhile Obama administration felt strongly toward the policy of “rebalance” in Asia with respect to two objectives: first, to embed the United States more deeply in the world’s most dynamic economic region, and second, to prevent a regional vacuum to be filled predominantly by China.<sup>152</sup> Moreover, the rebalance encompassed three pillars: political, security, and economic.<sup>153</sup> Whereas there have been tangible achievements on the political and security grounds, the progress on the economic component has been rather limited.<sup>154</sup> Therefore, even on the economic grounds the TPP was vital for the United States as a rebalance policy in the region.<sup>155</sup>

Additionally, the U.S. Trade Representative under the Obama administration was facing a predicament of China seizing the opportunity to boost its exports and set labor and environmental standards in the region through the Regional Comprehensive Economic Partnership (RCEP).<sup>156</sup>

Many Asian leaders, such as the former prime minister of Singapore Lee Kuan Yew, urged the United States to have a greater engagement in Asia to counteract China (being a regional hegemon to the detriment of the United States, and for the interest of other Asian countries) by being again at the helm of APEC or other trans-Pacific institutions.<sup>157</sup>

In regards to the United States’ allies in the Asia-Pacific, such as Japan, Singapore, and Australia, Professor Sandip Mishra noted: “If the TPP does not [materialize], the ties with the US would not hold much

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152. David Dollar & Jeffrey A. Bader, *Why the TPP Is the Linchpin of the Asia Rebalance*, BROOKINGS (July 28, 2015), <https://www.brookings.edu/blog/order-from-chaos/2015/07/28/why-the-tpp-is-the-linchpin-of-the-asia-rebalance>.

153. *Id.*

154. *Id.* “Political and security accomplishments”—over the past years, the former Obama administration strengthened alliances with Japan, South Korea, Australia, and the Philippines; normalized relations with Myanmar; joined the East Asia Summit; the presidential meetings with the leaders of the Association of Southeast Asian Nations [ASEAN]; the opening of embassy accredited to ASEAN in Jakarta; relaxation of the arms embargo on Vietnam; expansion of counterterrorist cooperation with Indonesia; a strategic and Economic Dialogue and frequent presidential summits with China; and heightened attention to the South China Sea. “Economic achievements”—The Korea-U.S. FTA stands out, but in isolation. Due to Chinese reluctance to further open up its economy, the U.S.-China negotiation on a bilateral investment treaty is on a very slow track.

155. *Id.*

156. Sandip Kumar Mishra, *Future of TPP and US’ Pivot to Asia—Analysis*, EURASIA REV. (Oct. 5, 2016), <http://www.eurasiareview.com/05102016-future-of-tpp-and-us-pivot-to-asia-analysis/>.

157. Barfield & Levy, *supra* note 66, at 2.

value for them, except for empty words and past performance, at least in the economic domain.”<sup>158</sup>

## 2. FTA with Japan

In the 1980s and 1990s, one-on-one trade negotiations between Japan and the United States were marked distinctively as “bruising talks” that threatened to damage the broader relationship between the two large economies.<sup>159</sup> A bilateral agreement between the two countries being a dismal idea, a regional partnership was projected as a favorable venture to facilitate trade negotiations and reciprocal reductions in trade barriers.<sup>160</sup> Thus, the TPP *inter alia* was viewed as a “backdoor way of creating a bilateral free trade agreement between the United States and Japan, which might have been politically difficult otherwise, and of bringing Japan more deeply into a network of the FTAs with other east Asian countries.”<sup>161</sup>

Japan’s most stringent food safety laws have often been accused of being protectionism in disguise.<sup>162</sup> Being the fourth largest food importer in the world, Japan imports 60% of its food annually.<sup>163</sup> Yet, Japan puts import tariffs approximately on 9000 items, 834 of which are farm products, and a few of which it regards as sensitive.<sup>164</sup> Similarly, the United States charges 25% tariffs on small trucks imported from Japan, while the products of its neighbor, South Korea, do not face such tariffs.<sup>165</sup>

After the TPP negotiations began, the United States and Japan agreed to phase out American tariffs on Japanese vehicles, except for long periods—thirty years for trucks, twenty-five for autos, and up to fifteen years for some auto parts.<sup>166</sup> Likewise, Japan overall agreed to abolish tariffs immediately upon the TPP entering into force on 81% of all farm goods.<sup>167</sup> As a result, an operational TPP with America in it would have

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158. Mishra, *supra* note 156.

159. Mitsuru Obe, *Japan Ratifies Trans-Pacific Partnership, Which Trump Has Promised to Leave*, WALL ST. J. (Dec. 9, 2016), <https://www.wsj.com/articles/japan-ratifies-trans-pacific-partnership-which-trump-has-promised-to-leave-1481273551>.

160. *Id.*

161. Guy De Jonquières, *What Will the TPP Mean for China?*, FOREIGN POL’Y (Oct. 7, 2015), <http://foreignpolicy.com/2015/10/07/china-tpp-trans-pacific-partnership-obama-us-trade-xi/#>.

162. Mina Pollmann, *What the TPP Means for Japan*, DIPLOMAT (Oct. 8, 2015), <http://the-diplomat.com/2015/10/what-the-tpp-means-for-japan>.

163. BHALA, TPP OBJECTIVELY, *supra* note 56, at 217.

164. *Id.*

165. Obe, *supra* note 159.

166. Jackie Calmes, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html>.

167. BHALA, TPP OBJECTIVELY, *supra* note 56, at 226.

given effect to over 50% of American farm products entering Japan duty free.<sup>168</sup> The tariff cuts were going to be substantial in the long run, with a projection of elimination of 97% of tariffs for Japan over sixteen years, and elimination of 99% of tariffs for the United States after thirty years.<sup>169</sup>

A study at the Peterson Institute for International Economics evinced that despite being a conglomerate of twelve countries (as of 2016), the TPP was largely a free trade agreement between the United States and Japan, and these two countries together accounted for approximately 60% of its economic benefits.<sup>170</sup> The study predicted Japan as clearly the largest national beneficiary of the TPP with, by 2025, an increase of its exports and imports by \$140 billion annually and its national income by more than \$100 billion.<sup>171</sup> Although the gains for smaller economies of Vietnam and Malaysia are larger in percentage terms, these figures for Japan are two and half times those of the United States and far ahead the benefit for any other member country.<sup>172</sup> With so many direct and indirect gains, Japan had a lot at stake with respect to the TPP.<sup>173</sup>

### 3. China—The Elephant in the Room

From the original P4 Agreement, the TPP expanded its membership over time, but China remained away from this endeavor.<sup>174</sup> Regarding China not being included in the deal, even the Obama administration was explicit that this was no accident.<sup>175</sup> At least until about three years ago, many in China too viewed the TPP as a thinly disguised plan to contain China's growing might and to "make sure that Washington rules supreme in the region."<sup>176</sup> However, scholars have conjectured about China signing up to "U.S.-prescribed rules on labor or environmental standards, with no guarantee of obtaining reciprocal trade benefits from the U.S. that Washington would undoubtedly find politically difficult to deliver."<sup>177</sup>

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168. *Id.*

169. Freund & Oliver, *supra* note 73.

170. C. Fred Bergsten, Commentary, *The Trans-Pacific Partnership and Japan*, PETERSON INST. FOR INT'L ECON. (Nov. 16, 2015), <https://piie.com/commentary/op-eds/trans-pacific-partnership-and-japan> (noting Japan and the United States already have FTAs with most of the other participants but not with each other).

171. *Id.*; Petri & Plummer, *supra* note 21, at 10-11.

172. Bergsten, *supra* note 170.

173. *Id.*

174. Elms, *supra* note 68, at 385-86.

175. Carrie Gracie, *US Leaving TPP: A Great News Day for China*, BBC (Nov. 22, 2016), <http://www.bbc.com/news/world-asia-china-38060980>.

176. *Id.*

177. De Jonquière, *supra* note 161.

Instead of making a precise stand on joining the TPP, China had many reasons to show a relaxed attitude to join it.<sup>178</sup>

Thanks to the impressive economic growth of China, its rising clout in Asia is inevitable. Not a part of the TPP, China has been negotiating economic partnerships through RCEP, One Belt One Road (OBOR) initiative, and Asia Infrastructure Investment Bank (AIIB).<sup>179</sup>

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178. *Id.*

179. Andrei Akulov, *TPP on the Rocks: End of US Pivot to Asia Pacific?*, STRATEGIC CULTURE (Aug. 26, 2016), <http://www.strategic-culture.org/news/2016/08/26/tpp-rocks-end-us-pivot-asia-pacific.html>; Int'l Movement for a Just World, *The Trans Pacific Partnership Agreement (TPP) Is Part of Obama's "Pivot to Asia,"* CTR. FOR RES. ON GLOBALIZATION (Dec. 8, 2015), <http://www.globalresearch.ca/the-trans-pacific-partnership-agreement-tpp-is-part-of-obamas-pivot-to-asia/5494409>; Mishra, *supra* note 156; see Min Ye, *China and Competing Cooperation in Asia Pacific: TPP, RCEP, and the New Silk Road*, 11 ASIAN SEC. 206, 209-22 (2015). For contrast among the OBOR, AIIB, and the TPP, while deconstructing past regionalism in Asia and charting future paths she observed that:

Multilateral institutions in Asia were initiated and promoted by countries other than China, whose choices had been limited to whether and how much to participate in these frameworks . . . . Asian regionalism has focused on economic cooperation but invariably implied political and strategic importance. Power alignment, the "China threat," and the rise of China had been among the underlying drivers of regional initiatives in Asia . . . . [W]ith newfound wealth and power, as well as more experience in regional and global institutions, Chinese policy elites have new ideas and are more confident in proposing them. The new Silk Road originated from China and exemplifies key strategic thinking among Chinese elites.

By various accounts, the new Silk Road is becoming "the foundation of China's regional diplomacy."

There is more to the new Silk Road than the strategic thinking in China. It harbors strong domestic components and important internal development priorities. Local governments, who are not strategists, have shown great interest in developing connections with the Silk Road in their localities. The new Silk Road, starting from coastal cities, traversing central China, and connecting to neighboring countries, is expected to drum up development fever in the less developed regions in China. Such outcomes are in line with China's domestic priority to narrow income gaps between regions. From the Chinese leadership point of view, the new Silk Road thus serves both strategic and development goals or, figuratively speaking, "using one stone to kill two birds."

. . . . Contents of the three frameworks differ. TPP is known for its "high standards," including not only trade and investment but also labor and environment clauses. Like other Asian-track regionalism, RCEP has few standards other than general consensus on trade and investment promotion. The new Silk Road has "no" standards. During its initial stage, China and its neighboring countries signed infrastructure and other projects, which expect to involve other multiple actors in implementation. Institutionalization, or the abidingness [sic] of the agreement, is high in TPP, low in RCEP, and not discussed in the new Silk Road. Key sectors covered in TPP are services and intellectual property rights. Those in RCEP are broadly defined. In the new Silk Road, key sectors are infrastructure and manufacturing, which touch upon investment flows, currency, and energy trade.

At the 2016 Asia-Pacific Economic Cooperation Summit held in Peru, Chinese President Xi Jinping reiterated to fellow regional leaders China's strong interest in "strong partnerships, win-win solutions, and strategic initiatives."<sup>180</sup> With the Chinese focus on huge investments and partnerships in the region, the United States, having withdrawn from the TPP, risks being left out in the region.

#### 4. TPP—Rather a Geo-Strategic Partnership

There is a consensus among scholars that more than trade, TPP was America's geo-strategic partnership with its allies in Asia-Pacific.<sup>181</sup> Professor Jagdish Bhagwati opined:

Many Asian countries joined TPP to "keep the US in the region" in the face of Chinese heavy-handedness. They embraced the US in the same way that East Europeans rushed to join NATO and the European Union in the face of the threat, real or imagined, posed by post-Soviet Russia.

America's design for Asian trade is inspired by the goal of containing China, and the TPP template effectively excludes it, owing to the non-trade-related conditions imposed by the US lobbies. The only way that a Chinese merger with the TPP could gain credibility would be to make all non-trade-related provisions optional. Of course, the US lobbies would have none of it.<sup>182</sup>

Professor Raj Bhala, on the one hand, preempted the TPP as a "partial economic success," with farsighted and innovative trade obligations.<sup>183</sup> On the other hand, he deemed the TPP a "partial economic failure" as it promoted short-term plutocratic-interests through managed trade in goods and services markets but failed to appropriately address other issues such

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Due to their different promoters, norms embodied in TPP are the US ones, such as free trade, liberal markets, and reduction of the governments' roles. In RCEP, the "ASEAN way" prevails, such as consensus-based decision making and respecting the ASEAN centrality. The new Silk Road embodies China's diplomatic ideas such as mutual respect and mutual interests.

. . . .

The Silk Road targets at under-developed areas and unmet developmental needs. It can be a boon for people in these lagging areas in Asia. Lastly, all TPP, RCEP and the new Silk Road have strong economic components and offer plenty of opportunities for them to work together.

180. Gracie, *supra* note 175.

181. BHALA, TPP OBJECTIVELY, *supra* note 56, at 226.

182. Jagdish Bhagwati, Commentary, *America's Threat to Trans-Pacific Trade*, PROJECT SYNDICATE (Dec. 30, 2017), <https://www.project-syndicate.org/commentary/america-s-threat-to-trans-pacific-trade> [hereinafter Bhagwati, PROJECT SYNDICATE].

183. BHALA, TPP OBJECTIVELY, *supra* note 56, at 3.

as currency manipulation, labor rights, and environmental concerns.<sup>184</sup> He regarded the TPP as fundamentally a geo-strategic partnership to bolster America's pivot out of the Middle East into the strategically more important Asia-Pacific region.<sup>185</sup> Therefore, grading on both the economic and national security criteria rather than just the economic ground "reflects better the motivations and promises of the deal."<sup>186</sup> Professor Bhala shared Professor Bhagwati's belief about the United States (and its Asian allies) employing the TPP as a means to contain China and to write future trading rules which, *inter alia*, China would have to abide too.<sup>187</sup> Consequently, in his overall candid assessment of the TPP, Professor Raj Bhala awarded it a "B" Grade, reflecting an average mean of "C" on economics and an "A" on national security.<sup>188</sup>

#### *F. Trade Diversion from Global Trade Regime and the Neo-Liberal Critique*

##### 1. Diversion from the Global Trade Regime

David Ricardo's "comparative advantage" principle symbolizes an essential aspect of international trade regimes. One argument distinguishes growth of regional trade regimes as unsustainable since they are diverting from the comparative advantage and therefore prejudicing competitiveness of global trade.<sup>189</sup> It is argued that due to this, the FTAs subvert the efficient allocation of resources and therefore impair "world welfare."<sup>190</sup>

Professor Bhagwati considers the PTAs "two-faced": they result in free trade among members but raise protection for non-members.<sup>191</sup> As a result, they are fundamentally different from free trade, since being preferential trade arrangements they are discriminatory and calling them free trade agreement leads people to misunderstand them as a species of free trade.<sup>192</sup>

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184. *Id.*

185. *Id.*

186. *Id.* at 23.

187. *Id.* at 3.

188. *Id.*

189. See BHAGWATI, TERMITES IN THE TRADING SYSTEM, *supra* note 15, at 16-17.

190. *Id.* at 49-50.

191. *Id.* at 17.

192. *Id.*; see also Jagdish Bhagwati, *Dawn of a New System*, FIN. & DEV. 8 (Dec. 2013), <https://www.imf.org/external/pubs/ft/fandd/2013/12/pdf/bhagwati.pdf> [hereinafter Bhagwati, *Dawn of a New System*]; Jagdish Bhagwati et al., *The World Trade System: Trends and Challenges*, DEEPAK & NEERA RAJ CTR. ON INDIAN ECON. POLICIES (May 3, 2014), <http://indianeconomy.com>.

## 2. Currency Manipulation Antagonisms and Global Trade Governance

The regional and mega-regional trade agreements are the latest elements expanding the global trade governance.<sup>193</sup> The global trade regime has gone beyond traditional exchange-of-goods transactions to encompass multilocation proliferation of global sourcing and cross-border investment with a growing role of technology.<sup>194</sup> Lester's proposed elements of the third (and the latest) era of global governance *inter alia* comprise the reduction of non-discriminatory trade barriers; harmonization of national laws or mutual recognition; good governance; efficient, effective, and reasonable law making; free movement of capital; and multilateralism or anti-unilateralism.<sup>195</sup> Such measures aid in cultivating economic efficiency by combating protectionism and discrimination.<sup>196</sup> Scholars have noted that in certain areas of law, such as financial regulation, the use of "soft" laws as well as "hard" treaty law is frequent and even encouraged.<sup>197</sup>

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columbia.edu/sites/default/files/paper1-the\_world\_trading\_system.pdf [hereinafter Bhagwati et al., *The World Trade System*]; Jagdish Bhagwati, *Why the TPP Is Undermining the Doha Round*, E. ASIA F. (Jan. 14, 2013), <http://www.eastasiaforum.org/2013/01/14/why-the-tpp-is-undermining-the-doha-round> [hereinafter Bhagwati, *Why the TPP Is Undermining*] (noting the stalemate at WTO Doha Round has also been a cause to drift further away from multilateral global framework to the regional ones to negotiate *inter alia* nontariff measures).

193. Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 211-40 (2011). Simon Lester charted the rise of the global trade regime in three eras: first, the domestic trade politics giving way to the tariff truce; second, nondiscrimination and beginning of international institutionalization; third, the era of global governance. The completion of NAFTA and WTO agreements marked the beginning of the third era, when trade obligations expanded to various other and new dimensions, such as improving access to foreign markets, streamlined and effective dispute resolution, and embracing rules on investment and intellectual property. See also Kaul, *supra* note 7, *passim*.

194. Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passé?*, 53 VA. J. INT'L L. 623, 632-39 (2013).

195. Lester, *supra* note 193, at 222-41; see also Kaul, *supra* note 7, *passim*.

196. Lester, *supra* note 193, at 263-66.

197. Cho & Kelly, *supra* note 194, at 640; see *Soft Law*, USLEGAL, <http://definitions.uslegal.com/s/soft-law> (last visited Oct. 22, 2016). "Soft" laws refer to rules that are neither strictly binding in nature nor completely lacking legal significance. In the context of international law, soft laws refer to guidelines, policy declarations or codes of conduct that set standards of conduct. However, they are not directly enforceable unlike binding hard laws such as treaties or international agreements. Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 *passim* (2010); see also Kaul, *supra* note 7, *passim*. See generally Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171 *passim* (2010) (highlighting the role of soft law in international law and international governance).

“Currency manipulation”<sup>198</sup> is one such matter upon which various stakeholders and scholars argued for a stronger multilateral mechanism to check it under the TPP. During President Barack Obama’s tenure, bipartisan majorities of both houses of the U.S. Congress insisted that “the TPP forcefully address the manipulation of exchange rates, the practice through which some countries keep their currencies artificially weak and thus unfairly made their exports more competitive.”<sup>199</sup> Even some industry segments, such as the auto industry, indicated an opposition to the TPP unless the currency manipulation issue was effectively addressed.<sup>200</sup>

One of the critiques was the adverse implications of currency manipulation on trade: “Changes in exchange rates can affect trade flows and trade balances far more than any of the border, or even behind-the-border, barriers that are the usual focus of trade agreements.”<sup>201</sup> In other words, currency manipulation may cause as much economic distortion as what may be caused by high tariff barriers and direct subsidies.<sup>202</sup> C. Fred Bergsten estimated that due to the currency manipulation in the past by some of its trading partners, the United States (in some periods) suffered much larger trade deficits and significant job losses than it would have had otherwise.<sup>203</sup> There are other vectors too that, in a larger picture, exhibit the complexities involving currency manipulation. The exchange rate is an “endogenous” variable, “largely determined by other variables in the economic and financial system and policies designed to affect those

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198. ROBERT E. SCOTT, ECON. POLICY INST., *TRANS-PACIFIC PARTNERSHIP AGREEMENT: CURRENCY MANIPULATION, TRADE, WAGES AND JOB LOSS* (Jan 13, 2016), <https://www.epi.org/files/2015/tpp-currency-manipulation.pdf>; C. Fred Bergsten & Jeffrey J. Schott, *TPP and Exchange Rates*, PETERSON INST. FOR INT’L ECON. (Nov. 6, 2015, 4:30 PM), <https://piie.com/blogs/trade-investment-policy-watch/tpp-and-exchange-rates>; Edwin M. Truman, *Currency Manipulation and US Trade Agreements*, PETERSON INST. FOR INT’L ECON. (May 29, 2015, 12:00 PM), <https://piie.com/blogs/trade-investment-policy-watch/currency-manipulation-and-us-trade-agreements>. Currency manipulation may refer to the practice by some countries of artificially depressing the value of their currencies in order to increase exports and reduce imports. The term is most likely to be applied to a country that keeps its currency undervalued for the purpose of making its goods more competitive. Therefore, currency manipulation becomes the action of one country in managing its exchange rate that another country does not like because of impacts on trade flows but sometimes because of impacts on inflation. *See also* Interview with Cathleen Cimino-Isaacs, *TPP and Exchange Rates—Short Video Featuring Cathleen Cimino-Isaacs*, PETERSON INST. FOR INT’L ECON. (July 18, 2016), <https://piie.com/newsroom/short-videos/tpp-and-exchange-rates>.

199. C. Fred Bergsten, *The Truth About Currency Manipulation: Congress and the Trans-Pacific Partnership*, FOREIGN AFF. (Jan. 18, 2015), <https://piie.com/commentary/op-eds/truth-about-currency-manipulation-congress-and-trans-pacific-partnership> [hereinafter Bergsten, *The Truth About Currency Manipulation*].

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

variables.”<sup>204</sup> Managing exchange rates is a sovereign act, albeit with an array of policies, such as monetary and fiscal policies, and international borrowing and investment policies influence the exchange rate.<sup>205</sup>

The international economic system has largely been ineffective in dealing with the issue.<sup>206</sup> The IMF, in spite of having clear rules against the competitive devaluations, does not possess any enforcement mechanism, and its highly politicized decision-making process is easy for the currency manipulators to block.<sup>207</sup> Notwithstanding the WTO’s tough sanctions regime, the organization also does not present a viable alternative to check currency manipulation due to its vague and untested rules on exchange rates.<sup>208</sup> In the case of the United States as well, no effective action, legal or executive, materialized against this issue in the past three decades.<sup>209</sup>

Joseph Gagnon noted:

Economic circumstances determine whether CM [currency manipulation] has any effect on total employment. In the recent past, CM held down US employment to a major extent. In the near future, CM probably will have a negligible effect on employment.

However, CM imposes costs on the US economy even when we are at full employment. These costs are roughly comparable in magnitude to all of the gains that are projected from trade agreements with Asia-Pacific countries

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CM is an investment by a foreign government in the US economy, typically in US Treasury bonds. This investment pushes up the value of the dollar, making US exports less competitive and imports from abroad more attractive to US consumers. CM destroys jobs in exporting and import-competing industries and moves the US trade balance into deficit.

Operating under its mandate to maintain full employment, the Federal Reserve (Fed) responds to CM by lowering US interest rates. Lower interest rates spur investment and consumption in the United States. Jobs are created in sectors that are less exposed to trade, keeping workers fully employed. In

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204. Truman, *supra* note 198.

205. *Id.*

206. Bergsten, *The Truth About Currency Manipulation*, *supra* note 199.

207. *Id.*; Truman, *supra* note 198. Since its inception, IMF’s principal objective was to “constrain the exchange rate policies of members, in particular to limit the scope for countries to depreciate their currencies to gain competitive advantage.” Although many countries, from time to time, were found by observers manipulating their currencies, no judgment (IMF’s exchange rate are obligations are not self-enforcing and require judgments about intent) of manipulation could be carried out within the IMF due to want to agreement fully.

208. Bergsten, *The Truth About Currency Manipulation*, *supra* note 199.

209. *Id.*

principle, CM should have only small and temporary effects on total employment.<sup>210</sup>

Making a reference to the 2008 financial crisis, Gagnon remarked that pursuing growth through domestic demand in place of currency manipulation by America's trading partners would have been beneficial for the United States itself.<sup>211</sup> Along these lines, Gagnon in another article specified that currency manipulation could be a job-stealer in tough times and it distorted American and world economies even when times were good.<sup>212</sup>

Conversely, however, noted economist Edwin M. Truman discerned the macroeconomic costs of exchange rate manipulation as exaggerated.<sup>213</sup> He surmised that currency manipulation, not being a significant issue affecting American macro-economic performance in the recent years, inferred a weaker case for involving a strong regime against currency manipulation in its trade agreements or in any accompanying legislation.<sup>214</sup> Several grounds are proposed that discourage including currency manipulation in the TPP.

First, Japan, Malaysia, Singapore, and once a probable future member, Korea have been identified as currency manipulators at some moment or other during the 20th century.<sup>215</sup> America's demand of a TPP provision that would prompt withdrawal of concessions instead of aspiring to pursue existing obligations would have been a deal breaker and was probably not received well by the other eleven countries.<sup>216</sup> Second, in order to achieve a strong currency manipulation provision, the United States would have had to compromise with some core grounds of trade and investment by making concessions with other member countries in lieu of what it desired.<sup>217</sup> Third, along the lines of the IMF, the TPP's currency provision would not be self-enforcing due to the requirement of judgment by independent experts about the facts and intent of any

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210. Joseph E. Gagnon, *Why Currency Manipulation Matters*, PETERSON INST. FOR INT'L ECON. (June 10, 2015, 1:00 PM), <https://piie.com/blogs/trade-investment-policy-watch/why-currency-manipulation-matters>.

211. *Id.* (as a result of which, the dollar would have been weaker, the U.S. trade deficit—smaller, and the U.S. growth and employment—higher).

212. Joseph E. Gagnon, *Currency Manipulation: A Clarification*, PETERSON INST. FOR INT'L ECON. (Nov. 6, 2015, 1:45 PM), <https://piie.com/blogs/trade-investment-policy-watch/currency-manipulation-clarification>.

213. Truman, *supra* note 198.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

enforcement.<sup>218</sup> Conflict of interest, political, and other considerations would likely hamper the designation process of experts, just as the precedents at the IMF executive board exhibit.<sup>219</sup> Fourth, a TPP chapter on currency manipulation would have also jeopardized the U.S. monetary policy independence and made it more politicized domestically and internationally.<sup>220</sup> Fifth, implanting the currency manipulation mechanism through the TPP may result in a further weakening of the IMF's legitimacy and credibility.<sup>221</sup> Drifting away from the IMF's global and multilateral apparatus undermines not only its central role in the international monetary and financial system but also the progress attained as a consequence of a global multilateral pursuit culminating into recent achievements, including greater flexibility of exchange rates, reduced intervention, and greater transparency.<sup>222</sup>

As for imposing measures in the form of countervailing duties (CVDs) to offset the impact of currency manipulation domestically, some of the abovementioned grounds remain valid (the exceptions being the need to obtain international agreement on manipulation and the threat to the U.S. monetary policy).<sup>223</sup> There are other considerations that go against the CVD remedy. First, CVD duties are not a macroeconomic remedy but a microeconomic one.<sup>224</sup> Second, viewed as a trade barrier, the WTO may not endorse such a CVD remedy, which could harm an already fragile trading system.<sup>225</sup>

With respect to the United States, the relevant law dating from 1988 only permits the Secretary of the Treasury to initiate a negotiation with the indicted country so as to correct the affairs.<sup>226</sup> Besides, past experiences

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218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* Truman illustrated that the United States played an instrumental role by mobilizing the G-7 and G-20 to achieve progress in IMF's agenda of further reforms. With a currency manipulation chapter in the TPP, the United States would have played a part in bypassing the IMF, at a time when there was already an incredulity about U.S. support for the IMF for the failure of the former to implement the 2010 IMF reform package, which the United States crafted.

223. *Id.*

224. *Id.*

225. *Id.*; Gary Clyde Hufbauer & Cathleen Cimino-Isaacs, *Looming US-China Trade Battles?: Currency Manipulation (Part I)*, PETERSON INST. FOR INT'L ECON. (Mar. 6, 2015, 2:15 PM), <https://piie.com/blogs/trade-investment-policy-watch/looming-us-china-trade-battles-currency-manipulation-part-i>; see also C. Fred Bergsten, *China Is No Longer Manipulating its Currency*, PETERSON INST. FOR INT'L ECON. (Nov. 18, 2016, 9:45 AM), <https://piie.com/blogs/trade-investment-policy-watch/china-no-longer-manipulating-its-currency>.

226. Bergsten, *supra* note 225; see also Andrew Mayeda & Saleha Mohsin, *China No Currency Manipulator, Obama Treasury Says for Last Time*, BLOOMBERG (Oct. 14, 2016),

show that designating a country a manipulator has “no significant operational consequences,” and thus, such actions have not transpired in recent years.<sup>227</sup> Although currency manipulation by trading partners is serious, there appears a vehemence against the parallel global and regional track on the currency manipulation issue.<sup>228</sup> Truman recognized that a currency chapter in the TPP would bring economic and financial casualties with a substantial collateral damage.<sup>229</sup> He aptly surmised that “it would, in effect, amount to an abandonment of the IMF as the arbitrator of exchange rate issues.”<sup>230</sup> International obligations consistent with the IMF regime and a collective international action drawing voluntary agreements from the currency manipulators to rectify their intervention show a more promising way ahead.<sup>231</sup> Even so, the TPP’s regional mechanism could

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<https://www.bloomberg.com/news/articles/2016-10-14/china-no-currency-manipulator-obama-treasury-says-for-last-time>; Andrew Mayeda, *U.S. Puts China, Japan on New Watch List for FX Practices*, BLOOMBERG (Apr. 29, 2016), <https://www.bloomberg.com/news/articles/2016-04-29/u-s-puts-china-japan-on-new-watch-list-for-unfair-fx-practices>. The Treasury created new “monitoring list” in April 2010, after Congress passed a law requiring closer scrutiny of foreign exchange regimes. The three-point criteria to determine whether a country was being unfair being: an economy having a trade surplus with the United States above \$20 billion; having a current-account surplus with the United States amounting to more than 3% of its GDP; and, one that repeatedly depreciates its currency by buying foreign assets equivalent to 2% of output over the year.

227. Bergsten, *supra* note 225; see also JONATHAN E. SANFORD, CONG. RES. SERV. REP., RS22658, CURRENCY MANIPULATION: THE IMF AND WTO 2-3 (2011). Although the IMF Articles of Agreement prohibit countries from manipulating their currency for the purpose of gaining unfair trade advantage, the IMF cannot force a country to change its exchange rate policies. While the WTO is the global body that regulates the rules governing international trade; WTO rules do not seem to encompass currency manipulation effectively, if at all currency disputes fall under WTO’s jurisdiction. The WTO rules specify against providing subsidies by a country to help promote its national exports. There is a consensus on an undervalued currency helping in encouraging exports as it lowers the production cost comparable to global prices. The WTO rules against subsidies are very narrow and specific and under its definition for subsidy, “currency manipulation would not appear to qualify.” However, WTO entitles countries to levy countervailing duties in imported products, which receive subsidies from their national government.

228. Edwin M. Truman, *Don’t Involve the TPP Negotiations in Currency Wars*, PETERSON INST. FOR INT’L ECON. (Feb. 20, 2015, 9:00 AM), <https://piie.com/blogs/trade-investment-policy-watch/dont-involve-tpp-negotiations-currency-wars>.

229. *Id.*

230. Truman, *supra* note 198. Truman further highlighted the adversity of this action by stating, “as such it would be symptomatic of a US withdrawal from the cooperative, multilateral, global system that we have designed and nurtured since the end of World War II in favor of unilateralism.”

231. See C. FRED BERGSTEN & JOSEPH E. GAGNON, PETERSON INST. FOR INT’L ECON., PB12-25, CURRENCY MANIPULATION, THE US ECONOMY, AND THE GLOBAL ECONOMIC ORDER (Dec. 2012), <https://piie.com/sites/default/files/publications/pb/pb12-25.pdf>.

renew the currency commitments to spot manipulations, initiate new consultation processes, and to name and shame.<sup>232</sup>

### 3. TPP and the Neoliberal Critique

Notwithstanding the TPP's potential to raise the overall GDP of the member countries by 1.1% and for developing country members to the extent of 11% by 2030, any significant gains are implausible without appropriate and difficult policy reforms, particularly in the realms of institutional capacity building, liberal rules of origin, and liberalizing labor and resource-intensive industries.<sup>233</sup>

The TPP has remained in the news not only for its economic benefits or trade creation but also due to the adverse coverage it received, and long before the 2016 presidential campaign.<sup>234</sup> Some of the primary contentions were the amount of secrecy through which its negotiations were carried and the claims that it mostly served the interests of the pharmaceutical and other industries eyeing a bigger market and higher profits.<sup>235</sup>

Joseph Stiglitz, former chief economist of the World Bank and Nobel laureate, opined that the free trade agreements may not be free at all, rather, they present the example of “managed” trade.<sup>236</sup> He asserted that agreements like the TPP are one of the aspects of the larger problem of our gross mismanagement of globalization and has invariably criticized the TPP on various grounds.<sup>237</sup>

First, trade negotiators are not to decide intellectual property or property rights in general but rather by “democratic” and transparent processes involving groups of experts in their respective fields, the scientific community, civil society, and the business community.<sup>238</sup> Professor Stiglitz noted:

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232. See *Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries*, U.S. DEP'T TREASURY, [https://www.treasury.gov/initiatives/Documents/TPP\\_Currency\\_November%202015.pdf](https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf) (last visited Mar. 8, 2017).

233. GLOBAL ECONOMIC PROSPECTS 2016, *supra* note 11, at 229.

234. Joseph E. Stiglitz, Comment, *On the Wrong Side of Globalization*, N.Y. TIMES (Mar. 15, 2014, 5:06 PM), <https://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization> [hereinafter Stiglitz, *On the Wrong Side of Globalization*].

235. *Id.*

236. Joseph Stiglitz, *In 2016, Let's Hope for Better Trade Agreements—and the Death of TPP*, GUARDIAN (Jan. 10, 2016), <https://www.theguardian.com/business/2016/jan/10/in-2016-better-trade-agreements-trans-pacific-partnership> [hereinafter Stiglitz, *Death of TPP*].

237. Stiglitz, *On the Wrong Side of Globalization*, *supra* note 234.

238. MFJ Int'l, *Prof Stiglitz on TPP 2015*, YOUTUBE (Feb. 4, 2015), <https://www.youtube.com/watch?v=NX3-ogcwFQ0> [hereinafter *Stiglitz Video*].

[T]he irony is that the president [Obama] came out and said, “This is about who makes the trade rules—China or the United States?” But I think the big issues is, this is about who makes the rules of trade—the American people, our democratic process, or the corporations? And who they’re made for, which is, for the corporations or for all of us?<sup>239</sup>

Second, in that negotiation process, one of the questions to discuss is the degree of harmonization necessary to have a diverse group of countries work together in an effective way and without the corporations meddling with them.<sup>240</sup>

Third, over the past thirty-five years, the rules have been rewritten in a way that has weakened labor power and increased financial sector power, and the TPP is furthering the imbalance in power.<sup>241</sup> The rules need to be rewritten to bring a balance of power and check the financial sector power and their ability to twist such processes in their favor.<sup>242</sup> Professor Stiglitz observed that the intellectual property of pharmaceutical companies needs to be balanced with the need of the ordinary people to obtain medicines at an affordable price.<sup>243</sup> The TPP served the interests of pharmaceutical companies in trying to restrike the balance in their favor.<sup>244</sup> Besides, the research mostly takes place in the universities and at National Institutes of Health government-sponsored research labs.<sup>245</sup>

Fourth, Professor Stiglitz has criticized the investment chapter and the investor-state dispute settlement framework, which in his opinion “severely constrains environmental, health, and safety regulation, and even financial regulations with significant macroeconomic impacts” and undermines the conventional dispute settlement processes by national judicial means and the WTO standard of government to government suits.<sup>246</sup>

Whereas the TPP could raise the price of medicines by making the introduction of generic drugs more difficult, poorer member countries would face more consequences and unnecessary deaths.<sup>247</sup> Although the

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239. “A Very Big Mistake”: Joseph Stiglitz Slams Obama for Pushing the TPP, DEMOCRACY NOW! (Nov. 12, 2015), [https://www.democracynow.org/2015/11/12/a\\_very\\_big\\_mistake\\_joseph\\_stiglitz](https://www.democracynow.org/2015/11/12/a_very_big_mistake_joseph_stiglitz) [hereinafter *Stiglitz Interview Transcript*].

240. *Id.*; *Stiglitz Video*, *supra* note 238.

241. *Stiglitz Interview Transcript*, *supra* note 239.

242. *Id.*

243. *Id.*

244. *Id.*; see also Joseph Stiglitz, *Don’t Trade Away Our Health*, N.Y. TIMES (Jan. 30, 2015), <https://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html>.

245. *Stiglitz Interview Transcript*, *supra* note 239.

246. Stiglitz, *Death of TPP*, *supra* note 236.

247. *Stiglitz Interview Transcript*, *supra* note 239.

TPP would enrich corporations, it “will not necessarily help those in the middle, let alone those at the bottom.”<sup>248</sup>

Professor Jagdish Bhagwati has also been a staunch opponent of the TPP.<sup>249</sup> Being a symbol of distorted priorities, Professor Bhagwati noted that it was being hard-sold to the American public as a political justification against aggressive China.<sup>250</sup> Specifically, the TPP ended up as the playing field for an array of lobbyists.<sup>251</sup> Professor Bhagwati observed:

From the outset, the TPP’s supposed openness has been wholly misleading. Towards this end, the TPP was negotiated with the weaker countries like Vietnam, Singapore, and New Zealand, which were easily bamboozled into accepting such conditions. Only then were bigger countries like Japan offered membership on a “take it or leave it” basis.

The PR machine then went into overdrive by calling the inclusion of these extraneous conditions as making the TPP a “high-quality” trade agreement for the twenty-first century, when in fact it was a rip-off by several domestic lobbies.<sup>252</sup>

He maintained that there was nothing wrong with regionalism as long as it lowered tariffs and was “open” regionalism; however, the TPP was not an appropriate exercise of regionalism as it was fragmenting Asia into three blocks: first, the TPP block; second, China; and third, India.<sup>253</sup>

Another steadfast critic of the TPP, Noam Chomsky, designated it a “neoliberal assault” on working people intended to further corporate domination and to set the working people in the world in competition with one another to lower wages and increase insecurity.<sup>254</sup> Chomsky called the TPP a “half-secret,” since it was not secret from the hundreds of

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248. *Id.*; see also Blayne Haggart, *TPP Is About Many Things, but Free Trade? Not So Much*, GLOBE & MAIL (Nov. 9, 2015), <http://www.theglobeandmail.com/report-on-business/tpp-is-about-many-things-but-free-trade-not-so-much/article27169740>.

249. Bhagwati, PROJECT SYNDICATE, *supra* note 182.

250. Bhagwati’s Interview, *supra* note 19; Bhagwati, PROJECT SYNDICATE, *supra* note 182.

251. Bhagwati’s Interview, *supra* note 19; see Thomas B. Edsall, *Free Trade Disagreement*, N.Y. TIMES (Feb. 4, 2014), <https://www.nytimes.com/2014/02/05/opinion/edsall-free-trade-disagreement.html>.

252. Bhagwati, PROJECT SYNDICATE, *supra* note 182.

253. Bhagwati’s Interview, *supra* note 19.

254. Zach Carter & Ryan Grim, *Noam Chomsky: Obama Trade Deal a ‘Neoliberal Assault’ to Further Corporate ‘Domination,’* HUFFINGTON POST (Jan. 25, 2014), [http://www.huffingtonpost.com/2014/01/13/noam-chomsky-obama-trans-pacific-partnership\\_n\\_4577495.html](http://www.huffingtonpost.com/2014/01/13/noam-chomsky-obama-trans-pacific-partnership_n_4577495.html) [hereinafter *Noam Chomsky Interview Transcript*]. See generally Noam Chomsky, *Noam Chomsky on Trans-Pacific Partnership*, YOUTUBE (May 31, 2015), <https://www.youtube.com/watch?v=bgqwfCyZpao>; Natasha Lennard, *Chomsky: The Trans-Pacific Partnership Will Lower Wages and Increase Insecurity*, ALTERNET (Jan. 13, 2014), <http://www.alternet.org/news-amp-politics/chomsky-says-trans-pacific-partnership-will-lower-wages-and-increase-insecurity>.

corporate lawyers and industrial lobbyists but, at the same time, was kept secret from the public.<sup>255</sup>

Professor Bhala categorized the TPP as a paradigm of “managed” trade because it tolerated tariff and nontariff impediments in some sectors for some time.<sup>256</sup> He noted:

Also evident once the text was published was that TPP was not a resolutely development-friendly undertaking. It advanced the interests of large capitalist firms and created opportunities for small and medium enterprises (SMEs). It raises legal and regulatory standards.

But, when implemented and across decades, what *TPP* might do to generate economic growth that leads to poverty alleviation, or simply to reduce the gap between Main Street and Wall Street that exists in America and every other *TPP* Party, is not certain. Arguably the most disappointing feature of the September 2015 *Detailed Summary* [USTR–TPP Detailed Summary of the U.S. Negotiated Objectives, September 2015] was the failure of the USTR to take poverty-alleviating growth as a serious negotiating objective.<sup>257</sup>

In his analysis on the TPP being castigated and vilified despite its potential to be the most economically and strategically significant FTA in the Pacific Rim, Professor Bhala presented a variety of reasons for the breakdown of the pro-trade liberalization consensus.<sup>258</sup>

First, free trade is not about free trade anymore.<sup>259</sup> Free trade is about enhanced intellectual property protection for multinational companies, regulatory coherence (if not harmonization), competition policy, state-owned enterprise disciplines, and investor-state dispute settlement mechanisms.<sup>260</sup> He noted, “These are not negotiating points [Adam] Smith or [David] Ricardo . . . had in mind . . . . What trade negotiators now discuss is not easily amenable to Smith’s Law of Absolute Advantage, Ricardo’s Law of Comparative Advantage, or the Stolper-Samuelson Theorem.”<sup>261</sup> In addition to efficiency, trade negotiators discuss “fairness”; however, the benchmark for fairness does not concern what workers, environmentalists, women, religious minorities, or LGBTQ communities would consider important in commercial life, but more by the shareholder interest than any other constituency in a modern business

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255. *Noam Chomsky Interview Transcript*, *supra* note 254.

256. BHALA, *TPP OBJECTIVELY*, *supra* note 56, at 82.

257. *Id.*

258. *Id.* at 387-95.

259. *Id.* at 387.

260. *Id.*

261. *Id.*

association.<sup>262</sup> Poverty alleviation is arguably the most pressing matter in the Asia-Pacific region, and yet, the TPP text merely paid it lip service.<sup>263</sup>

Second, the massive overselling of free trade explains the backlash against the trade-liberalization agenda.<sup>264</sup> As per the classical conventions, mercantilism was a foremost aspect to endorse free trade.<sup>265</sup> Lately, this aspect has been undermined by the other, and instead, as a theoretical matter, the logic of lower tariffs and nontariff barriers has been adduced in favor of “issues that have little or nothing to do with those conventional impediments to trade.”<sup>266</sup> Professor Bhala observed, “Referring back to Smith’s and Ricardo’s Laws to justify inclusion of dilated data exclusivity periods and excluding currency manipulation rules is unpersuasive.”<sup>267</sup> As a practical matter, free trade was over-sold with respect to other externalities including the issue of human rights.<sup>268</sup> However, many WTO member states still have a bleak human rights record.<sup>269</sup> In other words, freer trade has not advanced fundamental human freedoms.<sup>270</sup>

Third, there is a failure to distinguish between trade and trade adjustments as a policy matter.<sup>271</sup> Professor Bhala remarked:

Free trade is a misnomer that arguably hurts the cause of trade liberalization. There is no such thing as “free” trade, if there ever was. All trade is managed to a greater or lesser degree, depending on the good or service in question, and the time frame at issue. All trade deals require attention to their adjustment costs.<sup>272</sup>

An acrimonious relationship between trade and human rights is not at all hidden.<sup>273</sup> Regardless of that, multilateral negotiations ought to be characterized as a democratic exercise, which is the essential prerequisite to advance a collective and progressive agenda ahead. Sadly, the TPP had been embroiled with insinuations terming it as a “half-secret” and “managed trade” and characterizing the agreement as furthering the agenda of the corporations and their lobbyists.<sup>274</sup> Coincidentally, notable

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262. *Id.* at 387-88.

263. *Id.* at 388.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 391.

273. *Id.*

274. *Id.*

academics and trade experts were vocal about the need to address poverty alleviation, enhancing the question of fairness in the TPP's trade negotiations and balancing the corporate interests with other factors in the matrix (e.g., pharmaceutical companies' interests and the affordability factor).<sup>275</sup> In one estimation, this is symptomatic of TPP negotiations embedded with high democratic deficits.<sup>276</sup>

#### IV. TPP IN NEW U.S. TRADE TERMINOLOGY—AN ACRONYM FOR “TRUMP’S POLITICAL PREEMINENCE”

##### A. *Take Ahead the Trans-Pacific Alliance sans USA?*

President Trump's formal sign-off bidding America's goodbye to the TPP also meant that its negotiations for the same with the other eleven countries of the Asia-Pacific region were over.<sup>277</sup> Nonetheless, the other erstwhile TPP partner countries that had already agreed to undergo certain changes regarding their economic policies have continued with the reforms.<sup>278</sup> For example, notwithstanding Trump's stand on the TPP, Japan adopted a legislation on November 10, 2016, that legitimized the TPP's execution in the domestic sphere and the resultant economic and structural reforms.<sup>279</sup> New Zealand is another country that already has ratified the TPP.<sup>280</sup> Similarly, other TPP countries such as Vietnam went ahead with their TPP-related economic and other domestic reforms.<sup>281</sup> There remains a good bit of skepticism among trade officials of partner countries, such as Australia, about how the outcome would be without the United States being in the TPP.<sup>282</sup> Peterson Institute's Jeffrey J. Schott noted the erstwhile TPP partner countries' prospect of stretching TPP

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275. *Id.*

276. *Id.*

277. *See generally* Kaul, *supra* note 7.

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

279. *Id.*; *see* John Edwards, *What's Next After the US Withdrawal from the TPP?*, AL JAZEERA (Jan. 26, 2017), <http://www.aljazeera.com/indepth/opinion/2017/01/withdrawal-tpp-170126092759229.html> (although on other occasions, Japan expressed that pursuing the TPP without the United States in it would be “meaningless”).

280. Editorial Board, *Trans-Pacific Partnership Can Succeed Without the U.S.*, BLOOMBERG (May 28, 2017), <https://www.bloomberg.com/view/articles/2017-05-28/the-trans-pacific-partnership-can-succeed-without-the-u-s>.

281. Schott, *supra* note 278.

282. Gareth Hutchens, *Trans-Pacific Partnership: Trade Officials Don't Know How It Would Work Without US*, GUARDIAN (Jan. 22, 2017), <https://www.theguardian.com/australia-news/2017/jan/22/trans-pacific-partnership-trade-officials-dont-know-it-would-work-without-us>.

benefits out provisionally among each other while “leaving the door open” for the United States in the near future.<sup>283</sup>

Regardless, the eleven other countries have ventured to go ahead with the TPP and without the United States, to chart a new TPP-11 deal (Comprehensive and Progressive Agreement for Trans-Pacific Partnership, or the CPTPP) that could be adopted by all partner countries individually.<sup>284</sup> Canada and New Zealand were among the first to express their interest.<sup>285</sup> Canada showed the intent of signing the deal once its issues were appropriately addressed.<sup>286</sup> Likewise, New Zealand indicated some concerns about the TPP’s dispute resolution clauses but was still overall supportive of the agreement.<sup>287</sup> In fact, one of Trump’s objections to the TPP—the investor-state dispute settlement provisions (including some controversial intellectual property provisions) were eventually

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283. Schott, *supra* note 278. Schott mentioned a similar set of events happening with the General Agreement on Tariffs and Trade (GATT), which remained a provisional *de facto* arrangement pending congressional ratification of the proposed International Trade Organization (ITO)’s amending Havana Charter. Although Congress did not succeed in adopting the Charter, GATT continued to operate as a *de facto* global trade regime until the WTO took over in 1995.

284. Alex Capri, *The TPP Moves Forward Without Trump’s America*, FORBES (May 22, 2017), <https://www.forbes.com/sites/alexcapri/2017/05/22/the-tpp-moves-forward-without-trumps-america/#37dc41264fed>; Nyshka Chandran, *Who Needs the USA? These 11 Countries Are Trying to Cement a Free-Trade Deal Without It*, CNBC (July 18, 2017), <https://www.cnbc.com/2017/07/18/trans-pacific-partnership-members-look-to-move-on-without-us.html>; Alexandra Stevenson & Motoko Rich, *Trans-Pacific Trade Partners Are Moving On, Without the U.S.*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/business/trump-tpp-trade.html>; see also *Chapter 30: Final Provisions, Final Text of the Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE (2016), <https://ustr.gov/sites/default/files/TPP-Final-Text-Final-Provisions.pdf>. There was a requirement of the ratification by at least six (who represent 85% of the total GDP of all the [erstwhile] partner countries) of the twelve members for the TPP to go ahead. As a result, the agreement could not effectuate in the event the major economies—United States or Japan—chose not to ratify the agreement since both of them totaled 79% of the GDP of the whole TPP region. *Id.*; see also Hutchens, *supra* note 282.

285. Matthew Brockett, *New Zealand’s PM Sees Benefits for Her Country in the TPP Trade Deal*, BLOOMBERG (Nov. 6, 2017), <https://www.bloomberg.com/news/articles/2017-11-06/ardern-sees-benefits-for-new-zealand-in-tpp-as-apec-talks-loom>; Stevenson & Rich, *supra* note 284.

286. Stevenson & Rich, *supra* note 284 (interpreting Canada’s Minister of International Trade, François-Philippe Champagne); see Rosalind Mathieson, *Canada Wants a Good TPP Deal More Than a Fast One*, BLOOMBERG (Nov. 8, 2017), <https://www.bloomberg.com/news/articles/2017-11-09/canada-wants-good-deal-over-fast-deal-for-big-pacific-trade-pact> (matters concerning the chapters on labor and the environment); Rosalind Mathieson & Isabel Reynolds, *Trade Deal that Trump Quit Gets New Lease on Life*, BLOOMBERG (Nov. 10, 2017), <https://www.bloomberg.com/news/articles/2017-11-10/pacific-nations-get-tpp-framework-to-salvage-a-deal-trump-quit> (noting Canada’s concern about some key sections of the TPP’s intellectual property chapter; the new amended agreement comprises seven intellectual property provisions and carries forward the TPP’s original substance except the suspension of twenty sections, out of which eleven are associated with intellectual property).

287. Brockett, *supra* note 285 (summarizing New Zealand’s Prime Minister Jacinda Ardern).

dropped from CPTPP as member countries Australia, Brunei Darussalam, Malaysia, New Zealand, Peru and Vietnam signed side letters to preclude compulsory investor-state dispute settlement among them.<sup>288</sup>

Commentators feel that another economic giant, China, is looking at filling the void created under President Trump and his continuous offensive against the multilateral economic framework.<sup>289</sup> For instance, China is holding talks with sixteen Asia Pacific countries on a possible agreement.<sup>290</sup> Others, such as the European Union and Japan, are also following suit by pursuing trade negotiations with Brazil, Argentina, and other countries in South America.<sup>291</sup>

#### *B. TPP Not the Beginning of Preferential Trading, Neither the End*

Although the TPP may only be the end of a chapter of U.S. international trade policy, U.S. engagement under the Trump administration down other avenues, such as bilateral trade agreements, is unfolding. President Trump made it explicit at the outset about pursuing trade deals individually with U.S. allies.<sup>292</sup> However, past experiences show that U.S. bilateral experiences with its partners progressed so slowly that they had to give up on the negotiations, this being among the reasons for the country's turn towards multilateral agreements.<sup>293</sup> Journalist and senior White House correspondent at *Huffington Post* S.V. Date indicated that despite withdrawing from the TPP, President Trump's administration

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288. Press Release, David Parker, Gov't of N.Z., New Zealand Signs Side Letters Curbing Investor-State Dispute Settlement (Mar. 09, 2018), <https://www.beehive.govt.nz/release/new-zealand-signs-side-letters-curbing-investor-state-dispute-settlement>; Salvatore Babones, *Trump May Join the New TPP, but Only Because the Old One Was Guttered*, *Forbes* (Apr. 13, 2018), <https://www.forbes.com/sites/salvatorebabones/2018/04/13/trump-may-join-the-new-tpp-but-only-because-the-old-one-was-guttered/#73ff09e584b3>; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Signed*, INT'L INST. FOR SUSTAINABLE DEV.: INV. TREATY NEWS (Apr. 24, 2018), <https://www.iisd.org/itn/2018/04/24/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp-signed/>; *Joint Declaration on Investor State Dispute Settlement*, N.Z. FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/assets/CPTPP/CPTPP-Joint-Declaration-ISDS-Final.pdf> (last visited Nov. 13, 2018) (whereas Canada, Chile, and New Zealand chose to commit to evolve the practice of ISDS among themselves).

289. Edwards, *supra* note 279; Stevenson & Rich, *supra* note 284.

290. Stevenson & Rich, *supra* note 284.

291. *Id.*

292. Mireya Solís, *Trump Withdraws from the Trans-Pacific Partnership*, BROOKINGS (Mar. 24, 2017), <https://www.brookings.edu/blog/unpacked/2017/03/24/trump-withdrawing-from-the-trans-pacific-partnership>.

293. *Id.*

is trying to secure the provisions in Asia that are similar to the ones in TPP and against which he asserted his strong dislike in the past.<sup>294</sup>

After withdrawing from the TPP, President Trump turned his attention to another preferential trade agreement, NAFTA, and warned against leaving it as well in case of a failure in renegotiating it on more favorable terms.<sup>295</sup> As per the USTR, the TPP promised an upgradation of certain prevalent grievances in NAFTA particularly in the areas of the environment, labor standards, digital freedom, state-owned enterprises, and dispute settlement.<sup>296</sup> An eminent figure in international economic

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294. S.V. Date, *Trump Pulled Out of the TPP. Now He's Trying to Win TPP Provisions in Asia*, HUFFINGTON POST (Nov. 7, 2017), [https://www.huffingtonpost.com/entry/trump-tpp-asia-trip\\_us\\_5a01ebe0e4b06ff32c93c4a2](https://www.huffingtonpost.com/entry/trump-tpp-asia-trip_us_5a01ebe0e4b06ff32c93c4a2) (lower trade barriers, strengthened intellectual property, and improved transparency in banking—to name a few).

295. *Id.*

296. See *TPP Upgrading the North American Free Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE (2016), <https://ustr.gov/sites/default/files/TPP-Upgrading-the-North-American-Free-Trade-Agreement-NAFTA-Fact-Sheet.pdf>. Specifically, the TPP promised (1) wholly enforceable commitments toward enhancing the environmental protection and against harmful fishery subsidies, illegal wildlife trafficking; (2) completely enforceable conditions to safeguard the labor standards including “the freedom to form unions and bargain collectively,” “acceptable conditions of work,” and protection against child labor and discrimination in employment; (3) ensuring that unfair subsidies to the state-owned enterprises did not have an adverse impact on American parties; (4) pledging to dispute settlement provisions, particularly in the areas of labor and the environment; and (5) standards for “digital freedom” protection and safeguarding against any such conditions of having the infrastructure in the same market as of operations. *Id.*; see also M. ANGELES VILLAREAL & IAN F. FERGUSON, CONG. RES. SERV. R42965 26-38, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (2017), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2939&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2939&context=key_workplace). The report provides an exhaustive list of potential topics for prospective NAFTA renegotiation in the fields of “automotive sector” (new ROO and liberalized foreign investment), “services” (new services commitments including electronic modes and additional market access in areas such as audiovisual services), “E-commerce, data flows, and data localization” (deliberations on cross-border electronic data transfer or forced localization of data centers), “intellectual property rights” (enhanced intellectual property protection encompassing copyright in the digital environment, pharmaceutical patents, etc.), “state-owned enterprises” (possible adverse impact from state-owned enterprises), “investment” (stronger investor and investment protection regime including obligations on non-discriminatory treatment, protection against uncompensated expropriation, clarification on particular provisions on government’s right to regulate in the areas of health and the environment, and investor-State dispute settlement), “dispute settlement” (in the event of inclusion of non-WTO areas), “labor” (parallel reforms across the board in implementing minimum labor standards), “environment” (greater enforceability of environmental provisions and non-derogation from the laws/race-to-the-bottom approach), “energy” (enhanced bilateral cooperation in energy production and security), “customs and trade facilitation” (streamlined measures such as creation of a single-access window at entry point, and simplified procedures for customs and country of origin rules), “sanitary and phytosanitary standards” (enhancing the sanitary and phytosanitary standards regulations, and consultative framework for collective resolving of detention matters). See also PETERSON INST. FOR INT’L ECON., *PIIE BRIEFING 17-2, A PATH FORWARD FOR NAFTA* (C. Fred Bergsten & Monica de Bolle eds., June 2017), <https://piie.com/system/files/documents/piieb17-2.pdf> (Peterson Institute’s comprehensive analysis on the factors concerning NAFTA renegotiation). See generally

law, Professor David A. Gantz, in his latest article brought attention toward the TPP's element of "coexistence" whereby, and unlike the prior trade agreements, a "consultation" process was called in the event of a conflict between the provisions of the TPP and its other counterparts.<sup>297</sup> This coexistence process was a departure from the earlier practice of NAFTA "supersed[ing]" an earlier preferential trade agreement, Canada-United States Free Trade Agreement in the event of possible conflicting provisions.<sup>298</sup>

Indeed, a couple of other TPP countries (Australia and New Zealand) negotiated side agreements with their preferential trade partners to settle the question of the TPP's superseding.<sup>299</sup> The NAFTA member states, however, have not carried out such exercise save for concluding the side letters on the TPP government procurement provisions superseding the ones in NAFTA.<sup>300</sup> Noting the lack of clarity under NAFTA on this matter, Professor Gantz asserted that the confusion, owing to the absence of clear norms, "could potentially undercut the benefits of modernizing the twenty-three-year-old NAFTA through the TPP (or through TPP-like [sic] provisions incorporated in a revised NAFTA) and further undermine public support for trade liberalization, investment protection . . . ."<sup>301</sup> Nonetheless, NAFTA entered into effect in 1994 and certain amendments and upgradations may seem timely, twenty-three years down the road.<sup>302</sup> Indeed, former President Obama, during his 2008 campaign, had also vowed to renegotiate NAFTA although later, due to the global financial crisis of 2008-09, he backed down citing its potential adverse impact on an already dwindling economy back then.<sup>303</sup>

NAFTA is crucial for the United States as much as it is for the other two members (Canada and Mexico) for a variety of reasons. First, although the United States, in general, faces a trade deficit in goods within

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Mark Weisbrot, *Lessons from NAFTA for the TPP*, HUFFINGTON POST (Oct. 16, 2016), [https://www.huffingtonpost.com/mark-weisbrot/lessons-from-nafta-for-th\\_b\\_8315512.html](https://www.huffingtonpost.com/mark-weisbrot/lessons-from-nafta-for-th_b_8315512.html).

297. David A. Gantz, *The Spaghetti Bowl Revisited: Coexistence of Regional Trade Agreements Such as NAFTA with the Trans-Pacific Partnership*, 48 GEO. J. INT'L L. 557, 557-78 (2017) (with a viable option of state-to-state dispute settlement as governed under TPP Chapter 28).

298. *Id.*

299. *Id.* at 558-59.

300. *Id.*

301. *Id.* at 559.

302. See North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 8, 1993, 32 I.L.M. 289.

303. ARUNDHATI SHARMA, INDIAN COUNCIL OF WORLD AFFAIRS, SPECIAL REPORT ON TRUMP-ETING THE REQUIEM OR REVIVAL OF NAFTA? 1, 5 (July 10, 2017), <https://icwa.in/pdfs/TRUMPETINGSpecialReport10072017.pdf>.

NAFTA, it is progressively gaining a trade surplus in services trade with the other two NAFTA members.<sup>304</sup> Second, with U.S. exports to Canada and Mexico touching \$226.8 billion and \$231 billion, respectively, the other two NAFTA partners offer U.S. exports to the two largest markets in the world.<sup>305</sup> Third, the United States' one-fourth import from Canada and 40% of final good imports from Mexico compose its own domestic value addition.<sup>306</sup> Fourth, the United States boasts the greatest cut in the FDI in the NAFTA zone with \$352.9 billion worth of FDI in Canada and \$92.8 billion in Mexico in the year 2015.<sup>307</sup> Fifth, the interdependence of the United States with Canada and Mexico contributes significantly to U.S. employment with NAFTA sustaining roughly 2.8 million U.S. jobs in 2015.<sup>308</sup> Thus, it was expected that NAFTA's renegotiation agenda weighed these aspects during its modification deliberations.<sup>309</sup>

Europe nonetheless is keen on revitalizing their trade relations with the United States under these realities, as President of the European Investment Bank Werner Hoyer asserted, "If the U.S. withdraws from international and multilateral trade agreements, this creates opportunities for Europe."<sup>310</sup> In regard to the United States' plans to conclude a trade agreement with the United Kingdom, it seems very unlikely before the latter's Brexit terms of exiting the European Union are straightened out.<sup>311</sup>

As for the other Pacific Rim countries, they have carried on their negotiations regionally, and of course without the United States.<sup>312</sup> Many of them, including Australia and New Zealand, are pursuing the Regional Comprehensive Economic Partnership (RCEP) with China.<sup>313</sup> Japan and many other Pacific Rim countries already demonstrated a keen interest in pursuing the renewed CPTPP.<sup>314</sup>

### C. *Implications on the World Trading System?*

Being open-ended, this question will solicit a variety of responses at present as well as in the future. One far-fetched possibility may arise by

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304. *Id.* at 9-11, 23.

305. *Id.* at 23.

306. *Id.*

307. *Id.*

308. *Id.* at 24 (citing the International Trade Administration data).

309. *See id.* at 23-24.

310. Date, *supra* note 294.

311. *Id.*

312. Edwards, *supra* note 279.

313. *Id.*

314. Date, *supra* note 294; Stevenson & Rich, *supra* note 284.

turning the attention back to the WTO's global trade regime and resuscitating the Doha Agenda.<sup>315</sup> The preferential trade agreements are playing a role in the "WTO-plus" of transcending the WTO requisites.<sup>316</sup> In addition to the overall exceeding of trading standards, this framework also broadens the scope of trade deliberations and hence entails a trade-plus agenda.<sup>317</sup> With the TPP debacle, the implementation of a new trade-plus agenda of mega-regional scope and with implications on approximately 40% of the global economic output has, therefore, been missed.<sup>318</sup>

There are gains and losses, but the national leadership must think beyond bi-partisan politics and the next election cycle.<sup>319</sup> But does the rhetoric to externalize the causes of job loss or wage decline (and internalize the good) and solely blaming trade for rising inequalities (and thus, leading to believe protectionism as the solution to disparities)—help?<sup>320</sup> Or, does it require thinking about the long-term common good?<sup>321</sup> Indubitably, it requires thinking about the long-term common good to address the issues comprehensively. All trade deals necessitate attention to their adjustment costs with the help of disclosure about the losses from free trade and focusing the loser through the yield adjustment assistance.<sup>322</sup> At the same time, enhancing the power of labor, appropriately regulating rents, enforcing equitable tax policies, strengthening education at all levels, and other concurrent mechanisms to reduce inequality are essential.<sup>323</sup>

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315. Stevenson & Rich, *supra* note 284; see *The Doha Round*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm) (last visited Oct. 13, 2018) (providing a brief description of the Doha Round). See generally *The WTO Doha Trade Round—Unlocking the Negotiations and Beyond*, INT'L MONETARY FUND (Nov. 16, 2011), <https://www.imf.org/external/np/pp/eng/2011/111611.pdf> (detailing why the Doha Agenda was stalled and other discussions).

316. Julia Ya Qin, *WTO-Plus Obligations and Their Implications for the World Trade Organization Legal System*, 37 J. WORLD TRADE 483, 496-509 (2003) (it can mean greater transparency, strengthened dispute settlement, stronger intellectual protection, and so on); Steve Charnovitz, *Mapping the Law of WTO Accession*, GEO. WASH. U. L. FAC. PUB. & OTHER WORKS 1, 11-12 *passim* (2008). The "WTO-plus" is habitually employed by commenters to explain terms of access exceeding WTO's regular norms. Conversely, "WTO-minus" is used for a framework below the one prescribed by the WTO.

317. Abigail Cooke et al., *Trade Governance at a Crossroads: Continuity and Change in Uncertain Times*, 21 COMPETITION & CHANGE 388, 391-92 (2017).

318. *TPP: What Is It and Why Does It Matter?*, *supra* note 3.

319. BHALA, *TPP OBJECTIVELY*, *supra* note 56, at 388-91.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

## V. CONCLUSION

After the prolonged efforts focusing on reducing tariff barriers over the past decades, the onus of trade liberalization has been gravitating more toward eliminating nontariff trade barriers. In doing so, regional trade agreements could play an imperative role due to the lesser number of negotiating parties in comparison to the WTO. The TPP was yet another preferential trade agreement in the making with plenty of innovative and promising features and an array of benefits across trade in goods and services as well as intellectual property, investments, regulatory measures, and various non-trade aspects. Being a mega-regional trade agreement and the largest FTA negotiated in human history, the TPP had the potential of promoting parallel or competitive liberalization while at the same time streamlining the Spaghetti Bowl effect at the regional level. In addition, it had an immense scope of contributing to the future rulemaking at the multilateral trade and investment frameworks.

No doubt, there was plenty of research indicating the TPP's overall benefits to the United States in terms of increased economic growth; better opportunities for their domestic manufacturers, workers, service providers, and farmers; and promoting jobs.<sup>324</sup> Besides this, there were plenty of innovative provisions including strengthening labor standards and environmental protection, transparency, rules for fair competition, intellectual property protection, and meaningful market access.<sup>325</sup> Acknowledging the assorted economies and varying priorities of the erstwhile partner countries, the TPP envisaged a differentiated liberalization schedule.<sup>326</sup> Overall, the TPP had a myriad of cross-cutting and novel frameworks for trade in goods and services and in investments. The TPP would have been the first major exercise since the Uruguay Round to harmonize services rules and comprehensively reform the trade in services sector across the telecommunications, e-commerce, finance and investment, temporary movement of persons, and state-owned enterprises, multilaterally and on such a major scale.<sup>327</sup>

Even so, there have been views of denoting the TPP as an exercise of "managed" trade.<sup>328</sup> The subject of the rules of origin is one of the antagonistic factors. Although there was an advance in the ROO schedule generally, some TPP partner countries did not foresee any gains (i.e.,

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324. Petri & Plummer, *supra* note 21, at 1.

325. Consolidated TPP Text, *supra* note 20.

326. Freund et al., *supra* note 72, at 39.

327. Hufbauer, *supra* note 80, at 89.

328. BHALA, TPP OBJECTIVELY, *supra* note 56; Stiglitz, *Death of TPP*, *supra* note 236.

Vietnam, since its apparel industry is highly reliant on the non-TPP countries for raw materials).<sup>329</sup> The TPP's regime on the ROO seemed to further the hidden agenda of incentivizing the erstwhile partner countries, specifically the industry sector of finished automobile parts, with a large share of production within the Pacific Rim region.<sup>330</sup>

Similarly, trade commentators cast aspersions on the TPP as it missed an opportunity to provide strong enforceable rules against currency manipulation and sturdy human rights provisions (considering the contentious human rights record of some negotiating countries).<sup>331</sup> Notwithstanding that, it is not difficult to guess how implausible the idea of striving for robust human rights standards in an RTA would have been, considering the antagonistic interrelationship between trade and human rights and the accessibility to a variety of distinct human rights platforms, not to mention the contentious human rights track record of some erstwhile TPP member parties.<sup>332</sup> In the same way, despite some forceful voices about the currency manipulation conundrums,<sup>333</sup> the thought of diverging from the IMF's domain of exchange rate issues and embedding such pursuits in a regional framework would be a source of apprehensions relating to fragmenting the IMF's role and undermining the resolve of the collective international community in general.<sup>334</sup> That being said, the regional frameworks must not be averse to commitments such as naming and shaming, initiating new consultation processes, and identifying manipulations or discrepancies, whether in the currency exchange or any other concern.<sup>335</sup>

In terms of the geopolitics and geostrategic partnerships, the TPP did aim at entrenching deep in Asia from the economic, political, and national security perspectives.<sup>336</sup> Being a pivot to Asia, the TPP envisioned a rebalancing of the region while assessing China's meteoric rise in Asia and otherwise, China is also negotiating economic partnerships across the region through One Belt One Road, RCEP, and Asia Infrastructure Bank.<sup>337</sup> The security perspective presented one of the foremost grounds, at least, for some countries such as Singapore, Japan, and Australia to forge

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329. Elliott, *supra* note 95, at 66.

330. Oliver, *Auto Sector Liberalization*, *supra* note 102, at 62.

331. BHALA, *TPP OBJECTIVELY*, *supra* note 56.

332. *Id.*

333. *Id.*

334. BHALA, *TPP OBJECTIVELY*, *supra* note 56; Truman, *supra* note 228.

335. BERGSTEN & GAGNON, *supra* note 231.

336. Dollar & Bader, *supra* note 152.

337. Mishra, *supra* note 156, at 2.

this agreement.<sup>338</sup> Some countries did seem to have other motives.<sup>339</sup> For example, the TPP would also have meant a backdoor method of instituting an FTA between Japan and the United States, the two countries expected to be incentivized by roughly 60% of the TPP's economic rewards.<sup>340</sup>

Eminent international trade expert Professor Jagdish Bhagwati has on various occasions vociferously proscribed the regional trade agreements.<sup>341</sup> The RTAs may scale up protectionist measures against the non-member countries and cause detriment to the global trade competitiveness and the effective allocation of resources. Nevertheless, a great deal of literature points to the incentives emanating from the RTAs not only in terms of reducing tariffs but also geostrategic benefits, a favorable stance while negotiating collectively as a bloc at the global platforms, harmonizing the ROO, and rules concerning other nontariff trade barriers.<sup>342</sup> Indeed, the current era of global trade governance must address reducing nontariff trade barriers, harmonizing rules and procedures that are predictable and effective, good governance, unrestricted movement of capital and labor, and combatting protectionism and discrimination.<sup>343</sup> While the trade commentators have pitied about the failure to conclude negotiations on major trade reforms since the Uruguay Round and the setback of the Doha Round,<sup>344</sup> the RTAs have provided a platform to further the global trade governance.<sup>345</sup>

In addition, the TPP had been in the news for its undemocratic and secret negotiations, the lack of transparency therein, and its provisions gravitating towards the interests of and ensuring high profits for the pharmaceutical companies.<sup>346</sup> Joseph Stiglitz, Noam Chomsky, Jagdish Bhagwati, and the likes decried it therefore as a model of managed trade, a neoliberal assault, and for going against open regionalism.<sup>347</sup> Instead of fielding experts from the scientific community, civil society, and the

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338. *Id.*

339. *Id.*

340. *Id.*

341. BHAGWATI, TERMITES IN THE TRADING SYSTEM, *supra* note 15; Bhagwati, PROJECT SYNDICATE, *supra* note 182; Bhagwati's Interview, *supra* note 19; Bhagwati, *Dawn of a New System*, *supra* note 192; Bhagwati et al., *The World Trade System*, *supra* note 192; Bhagwati, *Why the TPP Is Undermining*, *supra* note 192.

342. Capling & Ravenhill, *supra* note 113.

343. Lester, *supra* note 193.

344. Hufbauer, *supra* note 80.

345. *Id.*

346. Stiglitz, *On the Wrong Side of Globalization*, *supra* note 234; *Stiglitz Interview Transcript*, *supra* note 239; Stiglitz, *supra* note 244.

347. Stiglitz, *Death of TPP*, *supra* note 236; *Noam Chomsky Interview Transcript*, *supra* note 254; Bhagwati's Interview, *supra* note 19.

business community alike, and harmonizing the varying interests, the TPP faced a lot of criticism following the reports that the big corporations were meddling with the negotiations of the intricate areas of intellectual property in the TPP.<sup>348</sup> For example, the pharmaceutical companies' right to incentives for their intellectual property were required to be balanced with the necessity of the ordinary people to obtain medicines at an affordable price.<sup>349</sup>

Trade has been one of the most contentious issues and was hotly debated during the 2016 U.S. presidential race. Not surprisingly, President Trump's order formalizing the United States' withdrawal from the TPP created much expected pandemonium within the United States as well as across the Pacific Rim region.<sup>350</sup> Despite the initial commotion about the "meaningless" minus-U.S. TPP, the other countries in the bloc proceeded with a reinvigorated CPTPP with countries such as the United Kingdom, Thailand, and Colombia showing candidacy interests for the same.<sup>351</sup> Some countries, including Japan, New Zealand, and Vietnam, already went forward with authorizing the TPP's execution within their domestic realms. The near future will reveal whether this trajectory chosen by the remaining TPP-11 countries bears fruit. Leaving the TPP chapter behind, the United States under the Trump administration does not seem to mind going forward with a TPP-like agreement albeit as bilateral ones with each of the concerned parties.<sup>352</sup>

As for the fate of NAFTA, which was another topic of the 2016 U.S. presidential elections discourse, there was certainly a forecast of an across-the-board renegotiating.<sup>353</sup> NAFTA's upgradation was long overdue since its inception twenty-three years back.<sup>354</sup> It drew a lot of attention even during the 2008 presidential campaign when (former) President Barack Obama, too, was in favor of renegotiating it.<sup>355</sup> NAFTA remains very

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348. *Stiglitz Interview Transcript*, *supra* note 239.

349. BHALA, *TPP OBJECTIVELY*, *supra* note 56.

350. Baker, *supra* note 1.

351. *Britain Exploring Membership of the TPP to Boost Trade After Brexit*, *GUARDIAN* (Jan. 3, 2018), <https://www.theguardian.com/politics/2018/jan/03/britain-in-talks-to-join-the-tpp-to-boost-trade-after-brexit>; Chris Duckett, *Colombia Looking to Join New TPP*, *ZDNET* (June 8, 2018), <https://www.zdnet.com/article/colombia-looking-to-join-new-tpp/>; *Thailand Wants to Join CPTPP Trade Pact This Year: Deputy PM*, *REUTERS* (Mar. 29, 2018), <https://uk.reuters.com/article/us-trade-tpp-thailand/thailand-wants-to-join-cptpp-trade-pact-this-year-deputy-pm-id-UKKBN1H51FO>.

352. Baker, *supra* note 1.

353. *Id.*

354. VILLAREAL & FERGUSON, *supra* note 296.

355. SHARMA, *supra* note 303.

pivotal for the United States owing to many different reasons: Canada and Mexico are its two largest markets worldwide and a lot of U.S. jobs are at stake.<sup>356</sup>

After the TPP's demise and there being no election around the corner, one hoped that the NAFTA renegotiations would not eventually meet a similar fate and that the United States would carefully weigh the pros and cons while examining the renegotiation platter. And, as it turned out, while President Trump fulfilled one of his campaign pledges, the renegotiated NAFTA 2.0 (rechristened as U.S.-Mexico-Canada, or the USMCA deal) has not ruffled much the United States' intra-regional trade with Canada and Mexico from its predecessor (NAFTA 1.0).<sup>357</sup> Interestingly, the revised and "rebalanced" NAFTA 2.0 replicates a number of the disavowed TPP's chapters, especially on intellectual property, labor, and environment albeit in a sturdier frame.<sup>358</sup> In addition, there are feelers from the Trump Administration about not being averse to joining the CPTPP.<sup>359</sup> Certainly, there seems to be a very oxymoronic twist to the

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356. *Id.*

357. James Freeman, *Trump Makes a Deal*, WALL ST. J. (Oct. 1, 2018), <https://www.wsj.com/articles/trump-makes-a-deal-1538426266?mod=searchresults&page=2&pos=5>; see Shawn Donnan et al., *Trump's 'Historic' Trade Deal: How Different Is It from Nafta?*, BLOOMBERG (Oct. 2, 2018), <https://www.bloomberg.com/graphics/2018-nafta-vs-usmca/>; Brian Flood, *Analysts Split on NAFTA Revamp's Impact on Auto Supply Chains*, INT'L TRADE DAILY (Oct. 3, 2018), available at Bloomberg Law by subscription; Shawn Donnan, *Trump's New Nafta Pact Looks More Like a Rebranding Than a Revolution*, BLOOMBERG BUSINESSWK. (Oct. 1, 2018), <https://www.bloomberg.com/news/articles/2018-10-01/trump-s-new-nafta-pact-looks-more-rebranding-than-revolution>; Geoffrey Gertz, *5 Things to Know About USMCA, The New NAFTA*, BROOKINGS (Oct. 2, 2018), <https://www.brookings.edu/blog/up-front/2018/10/02/5-things-to-know-about-usmca-the-new-nafta/>. The primary changes being an increase in the requirement of North-America-made parts from 62.5% to 75%, higher wages, and better access for American dairy and agricultural products into Canada. Other aspects related to reduction of trade barriers met by technology industry, rules on currency rate manipulation, promotion of sustainable forestry, and raising patent life for biological drugs from five to ten years. See also Divesh Kaul, *How India Is Navigating Global Trade Agreements: What Recent Agreements like the CPTPP and USMCA Mean for India*, DIPLOMAT (Dec. 8, 2018), <https://thediplomat.com/2018/12/how-india-is-navigating-global-trade-agreement-trends/>.

358. Greg Ip, *New Nafta Shows Limits of 'America First,'* WALL ST. J. (Oct. 3, 2018), <https://www.wsj.com/articles/new-nafta-shows-limits-of-america-first-1538568001?mod=searchresults&page=1&pos=9>; *NAFTA Update Has Both Carrots, Sticks for Logging Industry*, INT'L TRADE DAILY (Oct. 3, 2018), available at Bloomberg Law by subscription; Jacob M. Schlesinger, *New Nafta Shows Trump's Trade Strategy for Balancing Labor, Business Interests*, WALL ST. J. (Oct. 1, 2018), <https://www.wsj.com/articles/new-nafta-shows-trumps-trade-strategy-for-balancing-labor-business-interests-1538386203?mod=searchresults&page=4&pos=13>.

359. Babones, *supra* note 288; Fathin Ungku & Charlotte Greenfield, *Trump Says U.S. Could Rejoin TPP if Deal Improved. How Hard Would it Be?*, REUTERS (Apr. 16, 2018), <https://www.reuters.com/article/us-usa-trade-china-tpp-explainer/trump-says-us-could-rejoin-tpp-if-deal-improved-how-hard-would-it-be-idUSKBN1HN0TW>; Dan Satherley, *Trump Wants US Back in*

course of events in the past couple of years and yet, an optimistic turn of events at least for preferential trading in the North American trade bloc.

Regarding the implications on the global trading system, the TPP, despite being a metaphor for managed trade and unavoidable concessions, discerned a new era of comprehensive rules for a concerted economic integration composed of trade in goods and services, e-commerce, investment, and an array of other innovations. While the multilateral negotiations at the WTO platform may seemingly be turning slow or even futile,<sup>360</sup> the advances at the regional levels are more dynamic and can at least show the way ahead.<sup>361</sup> In the current scenario, the CPTPP may possibly resuscitate the TPP's agenda for comprehensive rules for a concerted economic integration. In the long run, it may not be difficult for the best practices standardization at the regional level to slink into the global trading rules.

One may come across the rising protectionist waves across the world and think that the national policies eventually carry an endorsement mark from the national ballot.<sup>362</sup> However, certain questions did evoke attention. Could better sense prevail had a commission been set up following the 2016 presidential election outcome to study the TPP's contentious provisions and salvage the labor of exhaustive negotiations that the United States had entered into since 2009? Certainly, the TPP was mired in controversies even before the election campaign set off.<sup>363</sup> At the same time, one also wonders that if only the pharmaceutical companies of the countries involved were to benefit from the TPP, why would the other eleven countries go forward and adopt it? There is another recurrent question about revisiting the manner of (re)negotiating the trade agreements given that they can easily fall prey to the campaign rhetoric or, in general, to political volatility. The long-term effects of President Trump's executive order to withdraw from the TPP will be studied in the times to come. However, the perfunctory action did draw scrutiny from various political and legal commentators, recurrently with an adverse reaction.<sup>364</sup> As for now, the TPP perhaps may also be characterized as an acronym in American trade terminology for "Trump's Political Preeminence."

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*the Trans-Pacific Partnership*, NEWSHUB NATION (Apr. 13, 2018), <https://www.newshub.co.nz/home/money/2018/04/trump-wants-us-back-in-the-trans-pacific-partnership-report.html>.

360. *The WTO Doha Trade Round—Unlocking the Negotiations and Beyond*, *supra* note 315.

361. Stevenson & Rich, *supra* note 284.

362. BHALA, TPP OBJECTIVELY, *supra* note 56.

363. Date, *supra* note 294.

364. *Id.*