

WHAT WE HAVE LOST WITH THE TPP: VALUE-DRIVEN TRADE, A TRIGGER FOR WTO REFORM

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I. INTRODUCTION

President Trump's animosity toward free trade agreements is well known. Not only has he fulfilled his pledge to withdraw from the Trans-Pacific Partnership (TPP), but he has also threatened to leave the United States-Korea Free Trade Agreement, the North American Free Trade Agreement (NAFTA), and the World Trade Organization (WTO) itself, if more favorable terms are not obtained.¹ As effective as his protectionist message might have been in attracting blue-collar voters to his side, running a campaign and running a country are two very different things. Just as President Obama secured the ratification of three bilateral trade agreements negotiated under the Bush administration following a three-year hiatus,

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¹ William Mauldin, *Donald Trump Withdraws U.S. From Trans-Pacific Partnership*, WALL ST. J. (Jan. 23, 2017), <https://www.wsj.com/articles/trump-withdraws-u-s-from-trans-pacific-partnership-1485191020>; see also Ben Morris, *Trump and Trade: A Radical Agenda*, BBC NEWS (Nov. 9, 2016), <http://www.bbc.com/news/business-37923448>.

it is not far-fetched to think that President Trump might resurrect several TPP provisions in the future.²

A strong indicator that the TPP will eventually reach Congress and pass under the Trade Promotion Authority³ comes from the fact that the TPP is considered on a bipartisan basis to be vital for advancing America's political, economic, and security goals in the Asia-Pacific region by at least 17 top military leaders, as well as numerous former secretaries of agriculture and commerce.⁴

In fact, one ought to look no further than the Trump White House to find one of the TPP's staunchest supporters: Vice President Mike Pence. Before becoming Trump's running-mate, Mike Pence lead trade missions to China and Japan, and publicly supported the TPP. As Governor of Indiana, he urged Indiana's U.S. Congressional delegation to do the same.⁵ Yet, public opposition to the deal, which if ratified would bring 12 nations⁶ into a regional trading block accounting for 40% of world trade and a total population of 800 million people, quickly grew out of concern that the deal's terms would exacerbate labor force competition between member-states.⁷ The lack of transparency during trade negotiations, along with the inclusion of an investor-state dispute settlement mechanism through which

² David Nakamura & Ylan Q. Mui, *Donald Trump Promised to Rip Up Trade Deals. TPP is the First Casualty*, WASH. POST (Nov. 11, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/11/donald-trump-promised-to-rip-up-trade-deals-tpp-is-the-first-casualty/?utm_term=.0ff05dd80c8b (specifically discussing the FTAs with Korea, Colombia and Panama).

³ Commonly known as Fast-Track, it allows for a straight up-down Congressional vote of trade agreements without amendments. Renewed on June 29, 2015, expires on July 1, 2021. See generally IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 1 (Congressional Research Service 2017).

⁴ Alexander Neill, *Does Trump Victory Spell End of US as Pacific Power?*, BBC NEWS (Nov. 13, 2016), <http://www.bbc.com/news/world-asia-37946719>; Letter from General Colin Powell et al., to Congressional Leadership, TPA is a Strategic Imperative (May 7, 2015) (on file at <https://waysandmeansforms.house.gov/news/documentsingle.aspx?DocumentID=398596>); see also News Release, USDA Off. of Comm., Bipartisan Group of Former Agriculture Secretaries Urges Congress to Pass Trans-Pacific Partnership, (Nov. 20, 2015) (on file at <http://nppc.org/wp-content/uploads/2016/03/TPA-former-secretaries-of-ag-support-letter.pdf>); Letter from John Bryson et al., to Congress, Former Secretaries of Commerce Urge Congress to Pass Trade Promotion Authority (Mar. 25, 2015) (on file at <https://www.commerce.gov/news/press-releases/2015/03/former-secretaries-commerce-urge-congress-pass-trade-promotion-authority>).

⁵ Jim Tankersley, *A Leading Candidate to Be Donald Trump's VP Is Totally at Odds with Him on a Major Issue*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/11/a-leading-candidate-to-be-donald-trumps-vice-president-is-totally-at-odds-with-him-on-a-major-issue/?utm_term=.76aeea3ba721.

⁶ The United States, Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile and Peru. *TPP: What Is It and Why Does It Matter?*, BBC NEWS (July 27, 2017), <http://www.bbc.com/news/business-32498715>.

⁷ *Id.*

corporations can sue governments if said government replaces private enterprise with state-run services, are additional sources of criticism.⁸

Still, no set of provisions is more controversial within the TPP than those extending patent protection obligations to its member-states as part of a larger commitment to better enforce intellectual property rights. On one hand, non-governmental organizations like Doctors Without Borders argue that the TPP, by lowering the standards of patentability, creating data-exclusivity rights, extending market-exclusivity, and creating a single regulatory process for all members, will negatively impact the production of generics, and further restrict access to medicines for the most vulnerable populations.⁹

On the other hand, the United States government is under constant pressure to protect its comparative advantage in the intellectual property (IP) sector, which in 2010 accounted for one-fifth of direct employment at home, and two-thirds of all export merchandise.¹⁰ Although the WTO's agreement on intellectual property rights (TRIPS) provides standards for IP protection, it is largely limited to ensuring that countries abide by the WTO's non-discrimination principles while giving governments ample room to balance IP rights and the public benefits of non-enforcement. This includes giving developing countries deference on how they should implement patent obligations.¹¹

The United States led the world in IP exports by collecting close to \$128 billion in license and royalty fees in 2013.¹² The magnitude of this statistic is tarnished when one considers that Chinese IP theft alone cost the American economy around \$240 billion that year.¹³ Nevertheless, the TPP is not simply about getting more protection and better remedies against the theft of patents, trademarks, copyright and trade secrets. Considering that services (as opposed to goods) are responsible for 80% of the economy and employment in the United States, it should come as no surprise that one of the TPP's main objectives is to reduce non-tariff barriers by harmonizing investment and regulatory procedures. The deal also seeks to raise labor and environmental protection standards, as well as open up new service and government procurement markets for American businesses seeking greater access to the Asia-Pacific region.¹⁴

The TPP emerged in part because the WTO has failed to reach an agreement that guarantees, among other things, greater market access for services,

⁸ *TPP: What Is It and Why Does It Matter?*, *supra* note 6.

⁹ Médecins Sans Frontières, *Trading Away Health: The Trans-Pacific Partnership Agreement (TPP)*, MSF ACCESS CAMPAIGN (2016), http://www.msfacecess.org/sites/default/files/IP_Brief_TPP_ENG_2016_0.pdf.

¹⁰ SHAYERAH ILIAS AKHTAR & IAN F. FERGUSON, CONG. RESEARCH SERV., IFI0033, INTELLECTUAL PROPERTY RIGHTS (IPR) AND INTERNATIONAL TRADE 1 (2015).

¹¹ *Id.*

¹² *Id.* at 2.

¹³ WAYNE M. MORRISON, CONG. RESEARCH SERV., IFI0030, U.S.-CHINA TRADE ISSUES 43 (2016).

¹⁴ EXEC. OFFICE OF THE PRESIDENT, THE ECONOMIC BENEFITS OF U.S. TRADE, 34, 43 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_trade_report_final_non-embargoed_v2.pdf.

investment, and electronic commerce as promised at the start of the Doha Round 15 years ago.¹⁵ In a rapidly changing economy, the WTO's rule-making procedures make it particularly difficult to reach an agreement by requiring every one of its current 164 members to agree on every measure and concession as a single package, while simultaneously allowing developing countries to undertake fewer obligations as a result of their developing status.¹⁶ Some international trade scholars are worried that if the WTO does not reform its rule-making process to address modern trade issues quickly, the WTO will lose its relevance as chief arbiter of international trade.¹⁷ These concerns are not misplaced since Article XXIV of the WTO's General Agreement on Tariffs and Trade (GATT) allows the signatories of regional trade agreements (RTAs) to set special conditions among themselves which need not be extended to non-members so long as they are applied substantially to all trade within reasonable time, and benefit all of the members involved in the RTA.¹⁸ As of January 2018, there are 284 RTAs in force, which should be indicative of the extent to which the normal WTO negotiation and rule-making process is circumvented.¹⁹

Contrary to public perception, the TPP goes beyond the economic benefits of trade liberalization by delving into what I call *value-based trading*. Like other RTAs, the TPP would bring about economic benefit through trade liberalization by gradually eliminating over 18,000 tariffs currently imposed on American products by its TPP partners, which for beef exporters alone could mean over \$400,000 in additional daily sales.²⁰ However, unlike multilateral trade agreements before it, the TPP was designed to ensure that state-owned enterprises abide by international labor and environmental standards, while also making each participating government provide open internet access between their national constituencies.²¹

These value-based norms are in sharp contrast to China's state policies. China, who is not a founding member of the TPP, is proposing an alternative trade agreement between Asian countries. That agreement would advance China's

¹⁵ World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MINDEC/1, 41 ILM 746 (2002); *see also* The Editorial Board, *Global Trade After the Failure of the Doha Round*, NY TIMES (Jan. 1, 2016), <https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html>.

¹⁶ Joost Pauwelyn, *The WTO in Crisis: Five Fundamentals Reconsidered*, WTO PUBLIC FORUM (Sept. 2012), https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/article_e.htm?art=9.

¹⁷ Susan C. Schwab, *After Doha: Why the Negotiations Are Doomed and What We Should Do About It*, FOREIGN AFF. (2011), <https://www.foreignaffairs.com/articles/2011-04-09/after-doha>. *See generally* Pauwelyn, *supra* note 16.

¹⁸ WILLIAM H. COOPER, CONG. RESEARCH SERV., RL31356, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 10 (2014).

¹⁹ *Regional Trade Agreements*, WTO, https://www.wto.org/english/tratop_e/region_e/region_e.htm (last updated January 25, 2018); *see* Schwab, *supra* note 17.

²⁰ Jackie Calmes, *What Is Lost by Burying the Trans-Pacific Partnership?*, NY TIMES, (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/business/economy/donald-trump-trade-tpp-trans-pacific-partnership.html>.

²¹ *Id.*

expansionary interests in the region at the exclusion of the United States.²² Thus, the TPP allows the United States to sustain a presence and order in the Asia Pacific region that reflects American values and interests beyond trade liberalization by ensuring that its trade partners accept international rules and norms as part of their membership obligations.²³

To provide context, this note briefly discusses the TPP's role in trade liberalization and the economic impact it may have on the United States. Part II examines why the United States drafted an RTA like the TPP as a foreign policy tool to temper Chinese expansionist ambitions in the Asia Pacific region. There, I explain how the TPP's trade diversion strategy may subdue China's competitive advantage through value-based trading whether or not China joins the TPP. Finally, Part III explains how the TPP can trigger reform within the WTO to ensure that it remains the premier regulator of international trade.

II. PARTNERSHIP TERMS & ECONOMIC IMPACT

President Trump has called the TPP a terrible deal, and Senate majority leader Mitch McConnell has suggested that the new president can negotiate a better one.²⁴ Yet, common understanding of what the TPP is, and the kind of impact it can have on the economy is sparse. Media reports on the deal are usually limited to mentioning the 18,000 tariffs on American products that it plans to phase out. The reports typically include a list of the 11 other participating countries that along with the United States account for almost 40% of the world's GDP, some reference to China, and a vague description of the TPP's non-tariff commitments, such as encouraging stronger labor and environmental standards.²⁵ However, most of the public's hostility toward the TPP stems not from the deal's specific shortcomings, but from a general dissatisfaction for international trade and free trade agreements.²⁶

While this note's focus revolves around the TPP as a foreign policy tool and its role in tempering China's hegemonic ambitions in Asia, it is important to discuss the agreement's most critical provisions, its potential economic impact, and its singular contributions to future trade-agreement drafting.

First, it should be noted that instead of negotiating a unified tariff schedule, which would have provided for equal market-access terms to all members once a concession was granted (as the WTO requires), the United States conducted its trade

²² Calmes, *supra* note 20.

²³ BROCK R. WILLIAMS ET AL., CONG. RESEARCH SERV., R44361, TRANS-PACIFIC PARTNERSHIP: STRATEGIC IMPLICATIONS 3 (2016).

²⁴ Calmes, *supra* note 20.

²⁵ *Id.* See generally TPP: What Is It and Why Does It Matter?, *supra* note 6.

²⁶ TPP: What Is It and Why Does It Matter?, *supra* note 6; see also Paul Blunstein, *Why We Need a Moratorium on Trade Deals Like the TPP*, POLITICO MAGAZINE (June 19, 2016), <https://www.politico.com/magazine/story/2016/06/trade-deals-tpp-moratorium-213975>.

negotiations on a bilateral basis. This means that different countries get different tariff reductions or phase out periods depending on the sensitivity of each good.²⁷

Nevertheless, because every TPP country already has a Free-Trade Agreement (FTA) with at least four other TPP members and over four-fifths of trade in goods were already taking place between TPP members prior to the end of negotiations, it stands to reason that the supply-chain adjustments between providers would be minimal if the TPP went into effect.²⁸ In the case of the United States, NAFTA already provides for duty-free trade with Mexico and Canada on most goods. Additionally, since the United States has longstanding free trade agreements with Australia, Chile, Peru, and Singapore,²⁹ any serious concerns that substantial production will move away from the most efficient source should be quelled. Where tariff reduction is possible, TPP benefits could trickle down to consumers quickly since 80% of tariffs would be removed within the first three years for all members.³⁰ Noteworthy examples include the immediate removal of a 20% import tariff that the United States imposes on athletic shoes. The removal of this tariff would directly benefit Vietnamese shoe manufactures who currently supply 15% of footwear in the United States, second only to China. This is why New Balance Athletics Inc., which manufactures some of its shoes in the United States, vehemently opposes the TPP. Without Vietnam paying a 20% import tariff, which rises to 15% depending on the shoe type, New Balance fears that the Vietnamese producers will drive the company out of the market. Nevertheless, because the United States already imports most its shoes and apparel, the TPP would not drastically change the current manufacturing trends in the United States despite the possible increase in the supply of Vietnamese-made shoes.³¹

Agribusiness is another sector where TPP tariff reductions and quota increases would have a long-term impact among parties. Exports currently account for one-fifth of total agricultural production in the United States. Therefore, getting better market-access conditions to Japanese, Vietnamese, and Malaysian markets where no American free-trade agreements have existed before would give American producers an opportunity to sell foodstuffs to an additional 250 million consumer base. Naturally, it also means that Asian producers would be better equipped to reach the American market. However, a net gain for American agribusiness under the TPP is undisputable, with expected exports from the United States totaling \$7.2 billion and expected imports into the United States totaling \$2.7 billion by 2032.³²

²⁷ BROCK R. WILLIAMS & IAN F. FERGUSON, CONG. RESEARCH SERV., R44489, THE TRANS-PACIFIC PARTNERSHIP (TPP): KEY PROVISIONS AND ISSUES FOR CONGRESS 16 (2016).

²⁸ *Id.*

²⁹ *Free Trade Agreements*, OFF. OF U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Feb. 28, 2018).

³⁰ WILLIAMS & FERGUSON, *supra* note 27, at 18.

³¹ *Id.* at 20–22; see Robert Smith, *Shoemaker New Balance Challenges Obama On Trans-Pacific Partnership*, NAT'L PUB. RADIO (Apr. 22, 2016), <http://www.npr.org/2016/04/22/475311897/shoemaker-new-balance-challenges-obama-on-trans-pacific-partnership>.

³² WILLIAMS & FERGUSON, *supra* note 27, at 38.

A troublesome aspect of the TPP tariff schedule for agricultural products as well as other products is the time it will take each country to fully meet their tariff-reduction commitments. The usual phase out period for free-trade agreements is about 10 years. The TPP's longest phase-out period is 30.³³

The United States is the main exporter of beef products to Japan, but with the TPP in place, Japan would reduce its tariffs on chilled and frozen beef from 38.5% to 27.5% during the first year of the agreement. While this reduction would immediately benefit American beef exporters, the fact that it will take Japan an additional 15 years to reduce the 27.5% tariff to the final 9% tariff promised in the TPP can be disconcerting for those who question the parties' true commitment to liberalizing trade.³⁴

The 30-year phase-out period belongs to the auto industry, where the United States, Mexico, Canada, Japan, Malaysia, and Vietnam already compete in exports. Because of NAFTA, the American, Canadian, and Mexican auto industries are already integrated, and imports from these countries enter each other's markets duty-free notwithstanding the TPP. This leaves Japan as the only other large car market in the Pacific without a prior free-trade agreement with the United States, and even though Japan places no import tariffs on foreign cars, it does impose strict non-trade barriers (NTBs) when importers try to reach the Japanese market. These NTBs include special entry, safety and environmental standards for foreign carmakers, and local-zoning and distribution standards for car dealerships that sell foreign cars.³⁵ The absence of a unified tariff schedule where one country's tariff reductions take effect for all TPP partners at once presents a problem for American car exporters. Canada, the United States' largest export market, would eliminate import tariffs for Japanese cars within the first six years of the TPP. The complete elimination of tariffs for Japanese cars undoubtedly benefits Canadian consumers, but it would also hurt American automakers as they face greater competition from Japan in that market.³⁶

Conversely, the United States would keep its 25% tariffs on Japanese light trucks for 30 years, and a 2.5% tariff on passenger cars for 15 years. The United States opted to keep the tariffs on Japanese cars for two reasons. First, the 25 and 30-year delay protects the American auto industry from increased foreign competition longer. Second, the United States claims that this delay allows it to

³³ Kyodo, *TPP Members Mull 30-Year Tariff Phaseout*, JAPAN TIMES (Oct. 7, 2013), <http://www.japantimes.co.jp/news/2013/10/07/business/tpp-members-mull-30-year-tariff-phaseout/#.WDFtpySH5YV>.

³⁴ WILLIAMS & FERGUSSON, *supra* note 27, at 38; *see also*: Kyodo, *Japan TPP Offer Chops Beef Tariffs to 9% Over 15 Years*, JAPAN TIMES (Jan. 30, 2015), <https://www.japantimes.co.jp/news/2015/01/30/business/japan-tpp-offer-chops-beef-tariffs-9-15-years/#.Woui4BPwaCQ>.

³⁵ WILLIAMS & FERGUSSON, *supra* note 27, at 25–27; *see The Japanese and American Auto Markets at a Glance*, WAYS & MEANS COMMITTEE DEMOCRATS, https://democrats-waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/TPP%20Japan%20U.S.%20Side-by-side_0.pdf (last visited Feb. 28, 2018).

³⁶ WILLIAMS & FERGUSSON, *supra* note 27, at 25–27; *see The Japanese and American Auto Markets at a Glance*, *supra* note 35.

focus its efforts on monitoring Japan's bilateral side agreement to reduce NTBs at home. The bilateral side agreement within the TPP calls for Japan to adopt a more accessible rule-making process for all car manufacturers and grant the same financial incentives to domestic and foreign producers. As part of the bilateral agreement, Japan would also accept some American safety standards on equal basis with Japanese ones.³⁷ Still, not everyone in the American car industry is happy with the TPP. Ford Motor Company has been a vocal opponent of the TPP, arguing that the United States did not do enough to restrict Japan's manipulation of currency exchange rates which impact business profitability. While the TPP does have a side agreement on currency manipulation, some politicians agree with Ford's assertion that American free trade agreements need to meaningfully address currency manipulation, which they consider to be the mother of all trade barriers.³⁸ Nevertheless, there seems to be an immediate, if not unexpected benefit, for the United States in keeping Japanese tariffs in place for thirty years aside from reduced competition for domestic producers. The benefit is that Japanese car manufacturers will not relocate back to Japan after having "aggressively shifted production" to North America to avoid tariffs and currency fluctuations in Japan. As of 2015, at least 70% percent of Japanese-brand cars sold in the United States are built in North America.³⁹ Of course, North America includes Canada and Mexico, but as the TPP bilateral agreement pushes Japan toward regulatory integration and NBT elimination, the fact that car production is kept inside the TPP's supply-chain is a positive outcome for the United States. Japanese manufacturers could always move closer to China, who leads car production globally.⁴⁰

The TPP's biggest contributions to the United States cannot be measured economically. A study conducted at Tufts University found that the TPP would reduce GDP in the United States by 0.54% in 10 years, but this estimate has been heavily criticized because it runs counter to the principles of trade liberalization. Conversely, a study conducted by the International Trade Commission found that the TPP would increase GDP in the United States by \$42.7 billion, or .15% from the baseline by 2032, and add an additional 128,000 jobs to the American economy. Yet, a different study by the Peterson Institute for International Economics Study found that the TPP would expand GDP in the United States by .05% from the baseline by 2030, and bring about small net losses to non-participating countries of the region such as China, India, and the Philippines.⁴¹ However big or small the

³⁷ *The Japanese and American Auto Markets at a Glance*, *supra* note 35.

³⁸ Vicki Needham, *Dems Blame Trade Deal as Ford Exits Japan*, HILL (Jan. 25, 2016), <http://thehill.com/policy/finance/266981-top-senate-dem-blames-fords-exit-from-japan-on-tpp>.

³⁹ Yoko Kubota & Eric Pfanner, *Japan's Car Makers Embrace Trans-Pacific Partnership*, WALL ST. J. (Oct. 6, 2015), <http://www.wsj.com/articles/japans-car-makers-embrace-trans-pacific-partnership-1444114976>.

⁴⁰ *2016 Production Statistics Q2*, OICA, <http://www.oica.net/category/production-statistics/> (last visited Feb. 28, 2018).

⁴¹ WILLIAMS & FERGUSSON, *supra* note 27, at 7–8; *see also* William Mauldin, *Study Projects TPP Will Provide Modest Gains for U.S. Economy*, WALL ST. J. (May 18, 2016),

economic benefit of the TPP, the Obama administration had previously argued that the benefits stemming from the reduction of regulatory barriers between TPP partners cannot be adequately measured by any study, with former U.S. Trade Representative Michael Froman adding that “the cost to American leadership cannot be quantified if the TPP fails to pass, and China carves out the Asia Pacific with its own agreement.”⁴²

III. VALUE CREATION THROUGH TRADE DIVERSION

With the TPP’s economic impact being small or at least hard to appreciate, it is important to look at the deal’s non-tariff provisions that put the United States in a place where it can shape the future rules of global trade. These future rules can: 1) limit the way in which state-owned enterprises unfairly compete with private firms, 2) ensure intellectual property holders are better compensated, and 3) promote stricter compliance with international labor and environmental standards.⁴³ With or without these rules, the Asia-Pacific region is expected to grow into the most populous and profitable region in the world, but without American involvement, China is left alone to push its trade terms through the Regional Comprehensive Economic Partnership (RCEP), which surely will not include or support similar values.⁴⁴

China trades more than any other nation in the world, and has surpassed the United States as the leading manufacturer of goods, producer of steel, automaker, exporter, and holder of foreign reserves.⁴⁵ China is also the primary destination for foreign direct investment and electronic commerce.⁴⁶ The rise of Chinese influence and the simultaneous decline in American competitiveness is attributable in part to America’s unsustainable military campaigns in Iraq and Afghanistan. Aside from contributing to an economic recession in the United States starting in 2007, the military campaigns left many allies in Asia feeling neglected.⁴⁷ In an attempt to remedy this shift in influence and power, President Obama began

<https://www.wsj.com/articles/study-projects-tpp-will-provide-modest-gains-for-u-s-economy-1463614427?mod=e2tw>.

⁴² Mauldin, *supra* note 41.

⁴³ Barack Obama, *The TPP Would Let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.51a87e6b1dbd.

⁴⁴ *Id.*

⁴⁵ Graham Allison, *The Thucydides Trap: Are the U.S. and China Headed for War?* ATLANTIC (Sept. 24, 2015), <https://www.theatlantic.com/international/archive/2015/09/united-states-china-war-thucydides-trap/406756/>; see also MARY A. IRACE & SHAYERAH ILIAS AKHTAR, CONG. RESEARCH SERV., R43841, INTERNATIONAL TRADE AND FINANCE: KEY POLICY ISSUES FOR THE 114TH CONGRESS 2ND SESSION, 13 (2016).

⁴⁶ Allison, *supra* note 45.

⁴⁷ Eric Yong Joong Lee, *Trans-Pacific Partnership (TPP) as a US Strategic Alliance Initiative under the G2 System: Legal and Political Implications*, 8 J. E. ASIA & INT’L L. 323, 331 (2015).

its “Pivot to Asia” doctrine which in addition to increasing military deployments in the region named the TPP as the centerpiece of America’s economic rebalancing strategy.⁴⁸

To this point, Clyde Prestowitz argues that the United States already has strong trade relationships with several countries in the Asia Pacific region and the American market has few trade barriers for entry to begin with. Prestowitz asserts that American military presence in the region is guaranteed by previous commitments and that any new trade that the TPP fosters with New Zealand, Malaysia, Brunei, and Vietnam will bring insignificant gains to the American economy.⁴⁹ He argues that, regardless of how sophisticated the TPP might be, the TPP has not stopped several TPP and non-TPP countries in Asia from joining China’s own RCEP negotiations.⁵⁰ Prestowitz concludes that the United States, while still enjoying significant intellectual capital, too often ends up being a consumer of last resort in a global network of supply chains.⁵¹

Even though Prestowitz is critical of the TPP, he recognizes that the United States is well positioned through the TPP to set the future rules of trade because the American market is large, has few trade barriers, and is at the end of a global supply chain. Anu Bradford calls it the “Brussels Effect,” which states that when a jurisdiction has a large domestic market, significant regulatory capacity, and a propensity to enforce strict rules over inelastic targets, such as consumer markets, that country—in this case the United States—can externalize its regulations on to other countries.⁵² The Brussels Effect stands for the idea that where rival standards exist between equal powers (e.g. TPP vis-à-vis the RCEP), the more stringent regulator will prevail.⁵³ This means that even if the RCEP competes with the TPP in goods or services, any shared membership within both partnerships would be inclined to adopt the stricter regulatory standards to maximize its access and benefit from both markets. Currently Australia, Brunei, Japan, Singapore, Malaysia, New Zealand, and Vietnam intend to participate in both FTAs with many other nations expected to join later.⁵⁴

As Meredith Kolsky Lewis points out, the American push for Asia-Pacific integration allows the United States to convert the economic balance of power between the American, European, and Asian trading blocs into a bipolar system, with the United States exerting power in both Asia and the Americas.⁵⁵ While critics like Prestowitz may be right when they say that an American trade deal with countries like Vietnam brings little economic value to the United States, they fail to

⁴⁸ Lee, *supra* note 47, at 337–38.

⁴⁹ Clyde Prestowitz, *Why the TPP Deal Won’t Improve Our Security*, NY TIMES (Aug. 23, 2016), <https://www.nytimes.com/2016/08/23/opinion/why-the-tpp-deal-wont-improve-our-security.html>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 3 (2012).

⁵³ *Id.* at 9.

⁵⁴ Lee, *supra* note 47, at 345–46.

⁵⁵ Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm of Wolf in Sheep’s Clothing*, 34 B.C. INT’L & COMP. L. REV. 27, 39 (2011).

see the strategic benefits of these new relationships. Since products made in Vietnam and Malaysia are extremely similar to those made in China, the TPP's preferential market access for these countries would not only substantially reduce America's dependence on China, but it would also reduce China's trade and investment sources in the world.⁵⁶ This holds true unless, of course, China decides to join the TPP; in that case China would have to comply with the trade rules set by the United States.⁵⁷

When a RTA member, such as the United States in the TPP, is incentivized to stop importing goods from the most efficient producer, such as China, in favor of a trade agreement partner like Vietnam, the resulting supply shift is called *trade diversion*.⁵⁸ This way of trading is often criticized as having adverse effects on economic welfare because it redirects resources away from the most efficient producer to a less efficient one, causing deadweight loss.⁵⁹ However, as Senator Charles Schumer and Paul Craig Roberts suggest, comparative advantage and efficiency in today's global economy are heavily concentrated in countries like India and China, which can provide cheap labor regardless of whether other factors of production are also found there.⁶⁰ Schumer and Roberts argue that as long as factors of production like technology and capital can be transported easily across international borders, the benefits of having a comparative advantage and engaging in free trade will be undermined by countries that provide cheap labor.⁶¹ Although it is true that the emergence of India and China increased the global supply of labor, which likely resulted in a general decrease of wages worldwide,⁶² it appears that China's reliance on cheap labor as a comparative advantage is ending.⁶³ In any case, maintaining production efficiency through low wages is no more welfare-enhancing than is opposing free trade policies because American workers are facing unprecedented competition from abroad. To enhance welfare globally, the only solution is to support measures that allow market forces to work properly without government abuse or overprotection of the factors of production.

⁵⁶ Ming Du, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT'L ECON. L. 407, 415 (2015); see also John Boudreau, *The Biggest Winner from TPP Trade Deal May Be Vietnam*, BLOOMBERG (Oct. 8, 2015), <https://www.bloomberg.com/news/articles/2015-10-08/more-shoes-and-shrimp-less-china-reliance-for-vietnam-in-tpa>.

⁵⁷ Du, *supra* note 56, at 418.

⁵⁸ COOPER, *supra* note 18, at 8.

⁵⁹ *Id.*

⁶⁰ Charles Schumer & Paul Craig Roberts, *Second Thoughts on Free Trade*, NY TIMES (Jan. 6, 2004), <http://www.nytimes.com/2004/01/06/opinion/second-thoughts-on-free-trade.html>.

⁶¹ *Id.*

⁶² JAMES K. JACKSON, CONG. RESEARCH SERV., R44546, THE ECONOMIC EFFECTS OF TRADE: OVERVIEW AND POLICY CHANGES 38 (2016).

⁶³ WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 12 (2015). From 2005–2014 wages in China have increased by 309%; the average monthly wage in China is \$763; the average monthly wage in Mexico \$443 (2014 est.). *Id.*

As Ming Du points out, China is so embedded in the global supply chain that trade diversion alone will not eliminate its place in international production networks, despite its detrimental impact.⁶⁴ It would be an oversimplification to think that the United States is hoping to contain China and maintain its leadership in Asia through trade diversion alone. As Ming suggests, this would not work. Instead, the TPP engages in *value-creation*, such as when it compels countries like Vietnam to secure a minimum wage, ban child labor and forced labor, guarantee higher health standards, and allow its workers to form independent unions.⁶⁵ The following subsections discuss several ways in which the TPP is creating *value-based trading*, with a focus on how Chinese trading behavior might change because of it.

A. The TPP Ensures That State-Owned Enterprises Are Subject to Market Forces

A 2016 report by the Organisation for Economic Co-operation and Development (OECD) found that 22% of the world's top 100 firms are state-controlled.⁶⁶ While these state-owned enterprises remain active in the economic market, they often benefit from preferential treatment such as looser regulation, cheaper finance, more tax breaks, and unfettered access to domestic markets when compared to their private competitors. They can then be used as vehicles to pursue public policy goals that extend beyond commercial objectives.

Issues arise when these special privileges create an anticompetitive environment for private firms in the global market.⁶⁷ The WTO tries to lessen this problem by dictating that any purchase or sale transaction carried out by a state-owned enterprise be subject solely to economic considerations such as price, quality, availability, marketability, transportation, and other conditions of purchase or sale.⁶⁸ However, as Gary Clyde Hufbauer and Cathleen Cimino-Issacs point out, the WTO gives state-owned enterprises ample discretion to price discriminate between markets by allowing them to weigh economic considerations differently depending on the market they buy or sell to;⁶⁹ this discrimination is further obscured

⁶⁴ Du, *supra* note 56, at 418.

⁶⁵ Roger Cohen, *If the Trans-Pacific Partnership Crumbles, China Wins*, NY TIMES (June 2, 2016), <https://www.nytimes.com/2016/06/03/opinion/the-right-asian-deal-trans-pacific-partnership.html?mtref=undefined&gwh=89F0BC18EB29D690DD63E507FE08FD54&gwt=pay&assetType=opinion>.

⁶⁶ *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?*, 13, 27 OECD (Dec. 8, 2016), <http://www.oecd.org/corporate/state-owned-enterprises-as-global-competitors-9789264262096-en.htm>.

⁶⁷ *Id.*

⁶⁸ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XVII (1)(b) [hereinafter GATT].

⁶⁹ Gary Clyde Hufbauer & Cathleen Cimino-Isaacs, *How Will TPP and TTIP Change the WTO System?*, 18 J. INT'L ECON. L. 679, 686 (2015); see GATT, *supra* note 68, at art. XVII.

by GATT Article XVII(4), which grants state-owned enterprises the right to keep their business records confidential.⁷⁰

The TPP closes this gap by requiring that state-owned enterprises not only buy and sell based solely on economic considerations, but that they do so in a non-discriminatory way when competing with goods or services from other TPP countries.⁷¹ Furthermore, it prohibits TPP members from giving or receiving preferential treatment from state-owned enterprises if such treatment adversely impacts or injures the interests of other TPP countries or their domestic industries.⁷²

The TPP also closes the GATT Article XVII(4) no-transparency protection by requiring that participating state-owned enterprises disclose information regarding their ownership, management, assistance, and revenue when asked.⁷³ Finally, even though Vietnam, Malaysia, and Brunei are exempted from this transparency requirement for the first five years of the deal, and state-owned enterprises that exclusively provide government services domestically are exempted from it generally,⁷⁴ the TPP's end goal is to renegotiate and extend these non-discriminatory principles to any good or service provided by TPP members in non-member markets as well.⁷⁵

Unlike most issues concerning free-trade, the TPP's chapter regulating state-owned enterprises has received wide support from both business and labor interests in the United States, which have called it "perhaps, the most important area for new disciplines in the TPP."⁷⁶ Putting the ethos of American capitalism aside, it is easy to understand why the United States would be so keen to propose new trade norms to make sure that private firms can compete against state-owned enterprises considering that in 2015 three of the top five Fortune 500 companies in the world were Chinese state-owned enterprises.⁷⁷ Of course, not all Chinese state-owned enterprises are profitable; and that is a problem not just for China, but for the evolution of global trade more generally. The more than 100 state-owned enterprises in China enjoy more than just favorable loans and regulatory treatment when compared to their private counterparts at home. These state-owned enterprises are also used abroad to advance foreign policy goals such as the *One*

⁷⁰ See GATT, *supra* note 68, at art. XVII.

⁷¹ WILLIAMS & FERGUSSON, *supra* note 27, at 68; see Trans-Pacific Partnership, OFF. OF U.S. TRADE REPRESENTATIVE, art. 17.4, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP].

⁷² TPP, *supra* note 71, at arts. 17.3–17.4, 17.6.

⁷³ *Id.* at arts. 17.3, 17.6, 17.10.

⁷⁴ *Id.* at arts. 17.2(8), 17.10.

⁷⁵ *Id.* at arts. 17.2(8), 17.10, annex 17-C(b).

⁷⁶ Julien Sylvestre Fleury & Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership*, 19(2) J. INT'L ECON. L. 445, 448 (2016).

⁷⁷ Zhang Dan, *The Global 500: The Top 10*, FORTUNE MAG. (2017), <http://fortune.com/global500/> (ranking the world's largest companies as follows: (1) Walmart (Private – United States) (2) State Grid (State-owned enterprise – China) (3) China National Petroleum (State-owned enterprise – China) (4) Sinopec Group (State-owned enterprise – China) (5) Royal Dutch Shell (Private – UK/Netherlands)).

Belt, One Road initiative.⁷⁸ The fact that China is using its firms for development projects across Eurasia is not necessarily a bad thing, but when over 40% of these firms have reported losses in recent years, and the Chinese government's idea of reform is to merge smaller state firms into larger state-owned enterprises in order to obtain a larger market-share, it becomes an issue of efficiency and anti-competitiveness for the global economy.⁷⁹

The TPP is not the first trade agreement in which the United States includes a chapter pushing for the observance of non-discrimination principles (most-favored nation and national treatment) by state-owned enterprises. NAFTA and other FTAs also do this.⁸⁰ What is unique about the TPP is that it would be the first FTA to make sure that non-discrimination principles apply not just to the sale of goods and services of state-owned enterprises, but also to the purchase of goods and services in those markets.⁸¹ More importantly, the non-discrimination principles would apply to the sale and purchase of a good or service in the non-member market if a TPP state-owned enterprise competes with another public or private firm from a TPP country in that non-member market.⁸²

Hence, by extending non-discrimination obligations to state-owned enterprises of member states when they transact in non-member markets, the TPP gets closer to price-factor equalization in the Asia-Pacific region, particularly when it comes to wages. As President Obama remarked in a 2012 presidential debate: "We are organizing trade relations with countries other than China so that China starts feeling more pressure about meeting basic international standards."⁸³ Simply put, if the TPP makes its members treat private firms and state-owned enterprises the same way, then the price of anything the state-owned enterprise sells or buys must be based accurately on solely economic considerations, and as such, be subject to market forces. If adopted, this new norm would not only level the playing field for private firms competing against state-owned enterprises within the TPP region, it would also pressure countries like China, regardless of whether they join the TPP or not, to adopt the TPP principles when it buys or sells goods to TPP members in the future.

The provision on state-owned enterprises is likely to remain relevant regardless of President Trump's decision to withdraw from the TPP, because both political parties in Congress have made it clear that ending discrimination and market-distorting subsidies are principal trade objectives.⁸⁴

⁷⁸ Wendy Leutert, *Challenges Ahead in China's Reform of State-Owned Enterprises*, 21 *ASIA POL'Y* 83, 86–88 (2016).

⁷⁹ Gabriel Wildau, *China's: The State-Owned Zombie Economy*, *FIN. TIMES* (Feb. 9, 2016), <https://www.ft.com/content/253d7eb0-ca6c-11e5-84df-70594b99fc47>.

⁸⁰ Fleury & Marcoux, *supra* note 76, at 451.

⁸¹ *Id.* at 457.

⁸² *Id.*

⁸³ *Id.* at 450.

⁸⁴ *Id.* at 448.

B. The TPP's Investment Safeguards Are Consistent with American Legal Principles

Historically, foreign investment—particularly by multinational firms in developing countries—has been seen with hostility by many who fear that corporate practices can lead to neocolonialism. While this might be true in some cases, many developing countries now understand that the presence of foreign firms in their countries can provide new sources of employment, technology, and access to international markets. This change in mindset eventually led the WTO to negotiate multilateral rules that facilitate international investment without success.⁸⁵ Out of this failure, the United States—both a major source and receipt of foreign investment—continues to negotiate reciprocal investment agreements with its partners in order to increase market access and enhance investor protections.⁸⁶

With the TPP region totaling more than one-fifth of all American foreign direct investment in 2014 and despite preexisting investment agreements with several TPP members, this provision of the agreement seeks to address investor claims regarding continued discriminatory treatment and investment barriers in the region.⁸⁷ In other words, this provision does for foreign investors what the state-owned enterprise provision does for private firms competing against government-favored firms; it requires that each government give foreign investors fair and equitable treatment, as well as full protection and security at the same level as their domestic investors or as otherwise provided by customary international law. These core investor protections include adequate and timely compensation for government expropriation of investments with a few exceptions.⁸⁸ Additionally, the provision limits when the government may demand the use of local content as a prerequisite for investment.⁸⁹ However, unlike the widely-supported provisions on state-owned enterprises,⁹⁰ the investment provisions in the TPP are extremely controversial due to the Investor-State Dispute Settlement (ISDS) mechanism, which allows for individual investors and corporations to sue sovereign governments before an international arbitration panel for violating the terms or conditions of an investment agreement between their home country and the country where they have investments.⁹¹ Critics of the ISDS provision in the TPP, like Senator Elizabeth Warren, argue that this mechanism gives multinational corporations special rights

⁸⁵ *Development Co-operation Report 2016: The Sustainable Development Goals as Business Opportunities*, 51 OECD (July 2016).

⁸⁶ MARTIN A. WEISS ET AL., CONG. RESEARCH SERV., R44015, INTERNATIONAL INVESTMENT AGREEMENTS: F.A.Q.S, 5 (2015).

⁸⁷ WILLIAMS & FERGUSSON, *supra* note 27, at 54.

⁸⁸ *Id.*

⁸⁹ *Id.* See generally TPP, *supra* note 71, at ch. 9.

⁹⁰ See Fleury & Marcoux *supra* note 76; MORRISON, *supra* note 63, at 35.

⁹¹ BRANDON J. MURRILL & DANIEL T. SHEDD, CONG. RESEARCH SERV., R43988, ISSUES IN INTERNATIONAL TRADE: A LEGAL OVERVIEW OF INVESTOR-STATE DISPUTE SETTLEMENT I (Apr. 16, 2015); see Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, NY TIMES (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.3456a8453784.

to undermine a government's sovereign power to legislate in its country's public interest; the provision allows foreign investors to circumvent domestic courts in favor of biased arbitration panels, which can order governments to pay investors millions—even billions—of dollars in damages for breach.⁹² While this argument has some merit,⁹³ this concern is severely overstated. The United States has never lost a case in an ISDS proceeding in past 25 years despite having similar investment provisions in 50 other agreements, and the TPP provides safeguards against abuse of the ISDS mechanism by explicitly recognizing and preserving a member's right to pursue public welfare objectives such as regulating public health, safety, the environment, and the conservation of exhaustible natural resources.⁹⁴

In her article criticizing the ISDS, Senator Warren downplays the need for an alternative to national domestic courts by arguing that investors do not face a high risk of expropriation in the TPP region because member states are hardly emerging economies with weak legal systems. She then points to Japan and Australia as examples.⁹⁵ However, it is important to remember that the TPP region also includes countries like Malaysia, Mexico, Peru, and Vietnam, whose local laws impose land-use restrictions and special performance requirements on foreign investors. These are the kinds of investment barriers that the TPP was designed to remove, and the type of institutional bias that the ISDS was designed to safeguard against.⁹⁶ If the concern is that arbitration panels subvert constitutional rights otherwise provided in domestic courts, there is evidence that international arbitration panels have interpreted a host country's legal obligations to investors consistent with the concepts of due process, equal protection, and contracts found in American law.⁹⁷ Finally, if opposition to ISDS stems from a fear that international arbitrators overly favor multinational corporations as Senator Warren suggests, then blinding the appointment of arbitrators might be one way to ensure judicial objectivity without eliminating the ISDS's function as a neutral forum for dispute settlement.⁹⁸

Since tariff barriers are already low among TPP partners, it is estimated that at least one-third of gains for the United States will come from these investment

⁹² Warren, *supra* note 91.

⁹³ Matthew C. Porterfield & Christopher R. Byrnes, *Philip Morris v. Uruguay: Will Investor-State Arbitration Send Restrictions on Tobacco Marketing Up in Smoke?*, INV. TREATY NEWS (July 12, 2011), <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>.

⁹⁴ *Fact Sheet: Investor-State Dispute Settlement (ISDS)*, OFF. OF U.S. TRADE REPRESENTATIVE (Mar. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>; see TPP, *supra* note 71, at arts. 9.10 (3)(d), 9.16.

⁹⁵ Warren, *supra* note 91.

⁹⁶ WILLIAMS & FERGUSSON, *supra* note 27, at 54–56.

⁹⁷ MURRILL & SHEDD, *supra* note 91, at 18; see also Parvan P. Parvanov & Mark Kantor, *Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar than You Might Expect*, Y.B. INT'L L. & POL'Y: 2010–2011 740, 803 (Feb. 2012).

⁹⁸ Sergio Puig, *Blinding International Justice*, 56 VA. J. INT'L L. 647, 692–94 (2016). See generally Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46(2) J. LEGAL STUD. 371 (June 2017).

provisions.⁹⁹ To understand why this is the case, it is important to know that under its international investment agreements, the United States defines an investment as any asset controlled by an investor through the commitment of capital with the assumption of risk or expectation of profit to include: an enterprise, tangible property, shares, stocks, bonds, licenses, intellectual property rights, and more.¹⁰⁰ This means that under the TPP, a firm might be able to challenge a member-state under the ISDS if the government fails to provide investor protections such as adequate and prompt compensation for seizing intellectual property rights, which could occur by manufacturing pirated goods or breaking patents.

C. The TPP Protects American Comparative Advantage

It is no secret that intellectual property rights, which include patents, trademarks, copyright royalties, and trade secrets, provide the United States a global comparative advantage.¹⁰¹ Nor is it a secret that infringement of that property through piracy and cybertheft costs businesses billions of dollars annually.¹⁰² Although the WTO establishes minimum standards of protection for intellectual property to which all members must adhere,¹⁰³ the *China – IP Rights* case shows how feeble these standards can be. In that case, the United States challenged China’s intellectual property enforcement laws before the WTO’s Dispute Settlement Body (DSU) by arguing that China was violating substantive obligations to destroy and dispose of infringing goods under Article 59 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The DSU panel found, however, that China’s obligations under Article 59 were limited to ensuring that infringing products coming into the country were disposed of, but China was under no obligation to dispose of or destroy infringing products that were manufactured for domestic use or export.¹⁰⁴ Moreover, the panel found that the United States failed to prove that a particular set of confiscated goods were objectively intended for “commercial sale,” which is an element that a complaining party must prove to trigger criminal penalties under Article 61 of TRIPS.¹⁰⁵ In other words, unless an intellectual property rights holder has strong evidence to prove that a set of pirated goods were intended for sale and thus merit criminal prosecution, it is in the sovereign’s discretion to determine who to prosecute and what crime to prosecute. In sum, a member-state’s obligation to protect intellectual property rights under the

⁹⁹ Hufbauer & Ciminio-Isaacs, *supra* note 69, at 680.

¹⁰⁰ MURRILL & SHEDD, *supra* note 91, at 4.

¹⁰¹ AKHTAR & FERGUSON, *supra* note 10.

¹⁰² *Id.*

¹⁰³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 401 (as amended Jan. 23, 2017) [hereinafter TRIPS].

¹⁰⁴ JOOST H.B. PAUWELYN ET AL., INTERNATIONAL TRADE LAW 725 (2016); see Panel Report, *China – Measures Affecting the Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) [hereinafter *China – IP Rights* Panel Report].

¹⁰⁵ PAUWELYN ET AL., *supra* note 104, at 726.

WTO's TRIPS Agreement is limited to providing right holders a mechanism to seek redress, but not to proactively stop intellectual property violations.¹⁰⁶

With this in mind, it should not come as a surprise that a special commission report on intellectual property theft lead by the former American ambassador to China, Jon Huntsman, found that annual losses due to theft of American intellectual property were around 300 billion dollars, which is comparable to the United States' total exports to Asia in 2013. The same report estimates that China is responsible for seventy percent of intellectual property theft worldwide.¹⁰⁷ In the past, intelligence services have described the Chinese as "the world's most active and persistent perpetrators of economic espionage."¹⁰⁸ Acts like these led the Justice Department in 2015 to charge five members of a Chinese-sponsored cybergroup for the theft of American trade secrets intended to help Chinese state-owned enterprises.¹⁰⁹

The TPP addresses these issues by being the first FTA to criminalize trade-secret theft and clarify that state-owned enterprises are not exempt from these provisions.¹¹⁰ Furthermore, to ensure stronger enforcement of intellectual property rights, the TPP requires that member nations apply criminal penalties in cases of piracy and copyright infringement not just for infringing products on a "commercial scale," but also for significant acts not for financial gain that have a substantial prejudicial impact on the interests of a rights holder.¹¹¹ Similarly, the TPP calls for members to provide criminal penalties not just in cases of willful importation of infringing products, but also on infringing products in domestic use or in the course of trade.¹¹² Additionally, and in contrast to the *China – IP Rights* decision, the TPP's "Special Requirements related to Border Measures" provision orders its members to set up a system where border authorities of each country are able to stop suspected counterfeit and pirated goods whether they are intended for import, export, or in transit without the rights-holder having to request it first.¹¹³ These measures are pivotal to the disruption of cross-border supply chains of counterfeit goods¹¹⁴ and differ from the TRIPS agreement, which suggests that border

¹⁰⁶ PAUWELYN ET AL., *supra* note 104, at 726; see FREDERICK M. ABBOTT, THOMAS COTTIER & FRANCIS GURRY, INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY 608 (2007).

¹⁰⁷ DENNIS C. BLAIR ET AL., NAT'L BUREAU OF ASIAN RES., THE REPORT OF THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY 2–3 (May 2013).

¹⁰⁸ *Id.* at 15 (quoting 2013 *Special 301 Report*, 13 OFF. OF THE U.S. TRADE REPRESENTATIVE (May 2013), <https://ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>).

¹⁰⁹ MORRISON, *supra* note 13, at 46–47.

¹¹⁰ TPP, *supra* note 71, at art. 18.78(1); see *TPP Chapter 18: Intellectual Property Chapter Summary*, 4–5 OFF. OF U.S. TRADE REPRESENTATIVE (last visited Feb. 28, 2018), <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Intellectual-Property.pdf>.

¹¹¹ TPP, *supra* note 71, at art. 18.77-(1).

¹¹² *Id.* at art. 18.77(3).

¹¹³ *Id.* at art. 18.76(5).

¹¹⁴ *TPP Chapter 18: Intellectual Property Chapter Summary*, *supra* note 110, at 6.

authorities have discretion to confiscate goods at their own accord but are not obligated to do so.¹¹⁵

D. The TPP's Environment and Labor Provisions Transcend Economic Considerations

The TPP's provisions on workers' rights and the environment were initially touted as central to the agreement by former US Trade Representative Michael Froman, who emphasized that for trade to be done right, and for Americans to compete in a level-playing field with foreign firms, the United States would raise labor and environmental standards around the world with strong and binding provisions and would not allow countries to derogate these standards to get a trade advantage.¹¹⁶ Still, the agreement has been condemned by union leaders and environmental activists who argue that the TPP's commitments to protecting the environment and worker's rights are insufficient and that their enforcement is entirely discretionary.¹¹⁷

Historically, this last assertion is not wrong. Despite numerous cases being filed with the Department of Labor alleging labor violations in FTA partner countries like Mexico, Peru, Guatemala, Honduras, the Dominican Republic, and Bahrain—and regardless of close tracking by the State Department, as of February 2016 none of these disputes were effectively resolved between the United States and the partner country.¹¹⁸ Nevertheless, there is room for optimism. The TPP commits all its members “to adopt and maintain” laws granting workers the right to associate freely and engage in collective bargaining (unionize).¹¹⁹ The agreement also binds these governments to eliminate forced labor, child labor, and employment discrimination.¹²⁰ Furthermore, it prohibits members from derogating or weakening any of these rights to affect trade or investment between parties.¹²¹ To ensure that these rights are firmly upheld in Malaysia, Brunei, and Vietnam—countries perceived to have weaker legal and institutional standards—the United

¹¹⁵ TRIPS, *supra* note 103, at art. 58.

¹¹⁶ Michael B. G. Froman, U.S. Trade Representative, U.S. Trade Negotiations Aim to Raise Labor and Environmental Standards (June 16, 2014) (transcript available at <https://www.cfr.org/event/us-trade-negotiations-aim-raise-labor-and-environmental-standards-0>).

¹¹⁷ Compare Richard Trumka, Opinion, *TPP: A New Low*, HILL (Feb. 2, 2016), <http://thehill.com/opinion/op-ed/267968-tpp-a-new-low>, with Michael Brune, Opinion, *Congress Should Oppose TPP on Environmental Grounds*, NY TIMES (Oct. 7, 2015), <https://www.nytimes.com/roomfordebate/2015/10/06/the-future-of-trans-pacific-trade/congress-should-oppose-tpp-on-environmental-grounds>.

¹¹⁸ MARY JANE BOYLE, CONG. RESEARCH SERV., RS22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 6 (2016). See generally OFFICE OF SENATOR ELIZABETH WARREN, BROKEN PROMISES: DECADES OF FAILURE TO ENFORCE LABOR STANDARDS IN FREE TRADE AGREEMENTS (May 18, 2015).

¹¹⁹ TPP, *supra* note 71, at art. 19.3(1)(a).

¹²⁰ *Id.* at art. 19.3(1)(b)-(d).

¹²¹ *Id.* at art. 19.4.

States negotiated additional commitments with these countries which are also subject to the dispute settlement system.¹²² In Vietnam's case, for example, it is not enough that the government allows the formation of unions; the side agreement requires that the government prohibit employer interference in union affairs by selecting or supervising union leadership.¹²³ Moreover, the Vietnam side agreement also establishes a government-to-government standing committee composed of government officials from both countries to monitor, assess and respond to violation concerns quickly without resorting to formal dispute resolution procedures.¹²⁴

Finally, in order to facilitate a faster resolution of labor disputes, articles 19.11¹²⁵ and 19.12¹²⁶ of the main agreement provide an alternative to ISDS by having member governments participate in separate dialogue and capacity-building mechanisms.¹²⁷

The agreement's environmental provisions reflect similar treatment to labor rights. The Sierra Club objects to the TPP because it does not address climate change and fails to ban commercial whaling and shark-fin trade practices in places like Japan and Singapore. Joined by other environmental groups like EarthJustice and Greenpeace, it objects to the deal's ISDS mechanism arguing that investor protections have the power to undermine environmental conservation policy. Lastly, the Sierra Club cites to the government's lack of enforcement under previous trade agreements to suggest that the TPP environmental protections would remain toothless.¹²⁸

On the other hand, the impact that FTAs have on the environment had never been formally assessed until President Clinton ordered it in 1999.¹²⁹ Although the WTO allows governments to implement measures that protect the environment, it has yet to impose affirmative commitments to protect the

¹²² Cathleen Cimino-Isaacs, *Labor Standards in the TPP, in* TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT 261, 264, 271–272 (Cathleen Cimino-Isaacs & Jeffrey J. Scott eds., 2016)

¹²³ United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations, U.S.-Viet., part. II, E, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf> [hereinafter U.S.-Viet Nam Plan]. See Cimino-Isaacs, *supra* note 122, at 273.

¹²⁴ U.S.-Viet Nam Plan, *supra* note 123, part V.A.

¹²⁵ Cooperative Labour Dialogue.

¹²⁶ Labour Council.

¹²⁷ BOYLE, *supra* note 118, at 4. See generally TPP, *supra* note 71, at arts. 19.11–19.12.

¹²⁸ Ilana Solomon, *Far from a 'Progressive' Trade Deal, the Trans-Pacific Partnership Would Harm Our Environment*, SIERRA CLUB (May 15, 2015), <http://www.sierraclub.org/compass/2015/05/far-progressive-trade-deal-trans-pacific-partnership-would-harm-our-environment>. See also Letter from 350.org et al., to Members of Congress, Re: Following Announcement of TransCanada's Investor-State Case against the United States, Environmental Organizations Urge Opposition to Trans-Pacific Partnership (Mar. 9, 2016) (available at <http://financedocbox.com/Investing/69705722-March-9-dear-member-of-congress.html>).

¹²⁹ See RICHARD K. LATTANZIO & IAN F. FERGUSSON, CONG. RESEARCH SERV., IF10166, ENVIRONMENTAL PROVISIONS IN FREE TRADE AGREEMENTS (FTAs) I (2015).

environment on its members. In contrast, the United States has made negotiating environmental protections a core trade objective since 2002.¹³⁰ The limited environmental agenda that the WTO does have was inspired by NAFTA's side agreement on this issue.¹³¹

As much as environmental groups complain that commercial whaling is not banned by the TPP, the agreement does address the overfishing problem by prohibiting members from maintaining or granting fishing subsidies that negatively affect fish stocks in overfished conditions.¹³² Similarly, the agreement compels member nations to “adopt, maintain and implement laws, regulations and other measures to fulfil its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*”¹³³—another step forward in the promotion of value-based trading. While environmental groups rightly assert that climate change is not specifically mentioned in the agreement, the TPP does command its members to control the production, consumption, and trade of ozone-depleting substances.¹³⁴ Assuming the agreement makes it harder to ensure that governments uphold these commitments by recognizing each party's sovereign right to establish levels of environmental protection and investigate, prosecute and enforce compliance of these measures,¹³⁵ it is also true that this autonomy and regulatory discretion extends to countries which maintain high levels of environmental protection. This weakens the argument by environmental groups that the TPP exposes the United States to suits from overzealous investors under the ISDS system for protecting labor and the environment.

Even though it is important not to dismiss the enforcement concerns of labor unions and environmental groups regarding these provisions, it is a mistake for the United States to withdraw support from this deal because strict enforcement of all its terms is doubtful or slow. When President Clinton reset China's trading status at most-favored-nation levels prior to China joining the WTO, despite clear human rights abuses by the Chinese, he did so not because his administration decided to ignore the abuse, but rather because “de-linking” trade and China's human rights record was necessary to continue dialogue between both countries and advance American strategic interests in the face of rising tensions.¹³⁶ Economic engagement, rather than isolation, yielded results. After decades of explosive economic growth in China, and despite strict government control of trade unions and media, the media is widely reporting labor strikes involving foreign companies

¹³⁰ LATTANZIO & FERGUSSON, *supra* note 129.

¹³¹ Cimino-Isaacs, *supra* note 122, at 251.

¹³² TPP, *supra* note 71, at art. 20.16(5).

¹³³ *Id.* at art. 20.17(2).

¹³⁴ *Id.* at art. 20.5(1).

¹³⁵ *Id.* at arts. 20.3(2), 20.3(5)

¹³⁶ John M. Broder & Jim Mann, *Clinton Reverses His Policy, Renews China Trade Status: Commerce: President 'De-Links' Most-Favored-Nation Privilege from Human Rights. He Admits Failure of Earlier Course and Says Broader Strategic Interests Justify Switch*, LA TIMES (May 27, 1994), http://articles.latimes.com/1994-05-27/news/mn-62877_1_human-rights.

in China. Chinese workers have obtained significant wage increases and, in some instances, democratic union elections have been the direct result of their activism.¹³⁷

However, President Trump's embrace of trade protectionism threatens to revert the course on this liberalization process. Even though China now claims to champion economic globalization through its promise to lead the global economy in absence of Western leadership, as demonstrated by projects like "One Belt, One Road," if past behavior is any indication of future actions, the Chinese are well-positioned to continue pursuing the mercantilist practices that many foreign governments and foreign firms have accused them of having. This is especially true given that China, unlike the United States, has not experienced a drastic change in government leadership. These practices include continued market-access restrictions for foreign firms at home and the maintenance of subsidies that unfairly favor its companies.¹³⁸

Notwithstanding the risk of retaliation, President Trump's "America First" strategy seems to center around raising tariffs on imports, especially those coming from Mexico and China.¹³⁹ The Trade Representative's expressed objective under the new administration is "ensuring American workers are given a fair shot at competing across the globe."¹⁴⁰ It is strangely similar if not identical to the TPPs own objectives.¹⁴¹ If the trade policy difference between the Obama administration and the Trump administration is a matter of strategy rather than aim, then the TPP's value-based trading is preferable to tariff-raising protectionism.

IV. A TRIGGER FOR WTO REFORM

As Dani Rodrik points out, maximizing trade is not an end, but rather the means to raise quality of life around the world.¹⁴² The WTO's own charter reminds us that optimal use of the world's resources is one that promotes sustainable development by addressing economic need, while protecting the environment.¹⁴³ Critics like Anne Krueger and Jagdish Bhagwati argue that FTAs impede the optimal use of resources through trade diversion, but as Robert Z. Lawrence rightly

¹³⁷ See James Griffiths, *China on Strike*, CNN (Mar. 29, 2016), <http://www.cnn.com/2016/03/28/asia/china-strike-worker-protest-trade-union/>. The 2015 average was 74 strikes or protests per day. *Id.*

¹³⁸ Josh Chin, *China Says Prepared to Lead Global Economy if Necessary*, WALL ST. J., (Jan. 23, 2017 7:30 PM), <https://www.wsj.com/articles/china-says-prepared-to-lead-global-economy-if-necessary-1485178890>.

¹³⁹ Eric Martin, *Why Trump's 'Big Border Tax' Gets Taken Seriously: QuickTake Q&A*, BLOOMBERG (Jan. 17, 2017), <https://www.bloomberg.com/news/articles/2017-01-18/why-trump-s-tariff-threats-get-taken-so-seriously-quicktake-q-a>.

¹⁴⁰ Mergawati Zulfakar, *A Slow Death for TPPA*, STAR (Jan. 26, 2017), <https://www.thestar.com.my/opinion/columnists/mergawati/2017/01/26/a-slow-death-for-tppa-no-more-wait-and-see-if-pact-can-be-revived-malaysia-must-work-quickly-to-push/>.

¹⁴¹ See Obama, *supra* note 43; Froman, *supra* note 116.

¹⁴² Dani Rodrik, *The Global Governance of Trade as If Development Really Mattered*, 1 GISZPENC (July 2001), <http://www.giszpenc.com/globalciv/rodrik1.pdf>.

¹⁴³ *Id.*

affirms, critics fail to appreciate the welfare-enhancing characteristics of these agreements, such as the reduction of trade barriers and increased foreign investment between FTA partners. In some cases, entry into an FTA has encouraged a member country to enact unprecedented economic reform at home in order to have a more efficient economy. As Lawrence suggests, this type of economic integration likely outweighs the resource-use inefficiencies of trade diversion.¹⁴⁴ Simply put, because international trade is not a zero-sum game, increased cooperation between trading partners can be more beneficial than using comparative advantage in isolation.

Furthermore, Edward Hudgins asserts that FTAs serve as vehicles to resolve trade issues too difficult to resolve under the WTO's consensus-building approach. Alternatively, they provide momentum to move trade rounds forward.¹⁴⁵ A clear example of this came with the ratification of NAFTA, and the realization that if a developing country like Mexico was willing to adopt the same intellectual property protection obligations as two highly-developed countries—the United States and Canada—then the Uruguay Round negotiations had to move forward if the WTO was to be established as the arbiter of global commerce.¹⁴⁶

Although I believe that the TPP's value-based trading regime has enough welfare-enhancing characteristics to improve quality of life, encourage sustainable growth, and promote greater economic efficiency in line with the WTO's mission, I contend that having the TPP in force would be enough to break the WTO's current negotiation deadlock regardless of whether the TPP delivers on its economic promises. This is because the Doha Round's failure, as Susan Schwab asserts, is not due to fundamental disagreements between industrialized nations and the least-developed countries of the world; instead, it is due to the obstruction of countries like China, Brazil, and India, which oppose further trade liberalization on behalf of all developing countries.¹⁴⁷

The developing countries that have tried to reach a deal under the WTO have so far been ignored or harassed by this smaller but rather influential group of nations.¹⁴⁸ Still, Meredith Kolsky Lewis suggests that both Brazil and India might choose to reinvigorate trade talks if the TPP goes into effect.¹⁴⁹ Kolsky Lewis explains that since both Brazil and India are excluded from the TPP, granting additional concessions might be a price they are willing to pay in order to refocus trade back into the WTO and away from the trading blocs that exclude them.¹⁵⁰ Similarly, it is clear that China has a lot to gain from opening its markets, but as both Schwab and Wendy Leutert point out, if China is to grant more market access to private actors it must first deal with the forces that oppose liberalization inside that country.¹⁵¹

¹⁴⁴ COOPER, *supra* note 18, at 11–12.

¹⁴⁵ *Id.* See Edward L. Hudgins, *Regional and Multilateral Trade Agreements: Complementary Means to Open Markets*, 15 *Cato J.* 231, 231 (1995/96).

¹⁴⁶ Hufbauer & Cimino-Isaacs, *supra* note 69, at 696.

¹⁴⁷ Schwab, *supra* note 17.

¹⁴⁸ *Id.*

¹⁴⁹ Lewis, *supra* note 55, at 41.

¹⁵⁰ *Id.*

¹⁵¹ Schwab, *supra* note 17. See generally Leutert, *supra* note 78.

Yet, even the staunchest liberalization critics in China would see that a working TPP has the potential to impose strict regulatory standards on its neighbors. This would include countries outside the TPP who might adopt the strictest standards required in order to access the region's biggest markets.¹⁵² Likewise, because a working TPP threatens to hold its contracting parties liable if they sell or buy products at anticompetitive prices, those who favor state-owned enterprises in China should know that without internal reform it will be harder for them to sell in TPP markets like Canada, Japan, or Australia.¹⁵³ Finally, a working TPP would immediately help the United States shift supply chains away from China and into places like Vietnam, Malaysia, or Brunei, thus weakening the coffers of Chinese businesses who have long benefitted from protectionist policies. If this kind of pressure is not enough to convince internal critics in China that liberalizing trade under the WTO is better idea than the threat of a working TPP looming over them, nothing will.

A. Putting an End to the WTO's Spoiler Problem Once and for All

Given the WTO's consensus rule and its large membership, for trade negotiations to move forward an agreement is obtained only at the least common denominator.¹⁵⁴ This is what allows countries like Brazil, China, and India to hold the WTO hostage despite the willingness of other developing nations to grant more concessions.¹⁵⁵ A ratified TPP would change the status quo by forcing these spoiler nations to negotiate a deal or stay behind.

To better illustrate this point, I have borrowed from Stephen John Stedman's conflict management theory on Spoiler Problems in Peace Processes.¹⁵⁶ Imagine that the United States is a peace-maker, international trade is the peace process, and the WTO body is fighting for control over that process.¹⁵⁷ Currently, the WTO is not managing international trade like it is supposed to. Anticompetitive behavior of state-owned enterprises, lax enforcement of intellectual property rights, and the overexploitation of wage labor are some of the problems eroding that process. In response, the United States designs the TPP as part of its *socialization* strategy to set norms for acceptable behavior by the parties involved in international trade.¹⁵⁸ If the WTO adopts these norms or at the very least uses them as a foundation to create new norms to fix the problems of international trade, the TPP serves its purpose. The WTO retains control of international trade, and the United States goes back to participating in that process peacefully.

¹⁵² See *supra* Part III.

¹⁵³ *Id.*

¹⁵⁴ COOPER, *supra* note 18, at 12.

¹⁵⁵ Schwab, *supra* note 17.

¹⁵⁶ See generally Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22(2) INT'L SECURITY 5 (1997).

¹⁵⁷ *Id.* at 8–10.

¹⁵⁸ *Id.* at 13.

On the other hand, imagine that the WTO is unable or otherwise refuses to address these problems despite the TPP's socialization strategy. If this happens, the TPP becomes a coercive force by signaling to the spoilers within the WTO body that international trade will move forward over their objections and without their participation. This is what Stedman calls the *departing-train* strategy. Once the train leaves the station, it will leave behind anyone not on it.¹⁵⁹ Finally, Stedman proposes a *withdrawal* variation to the coercive strategy, where the peacemaker threatens to withdraw support from the entity who seeks international recognition in the process, but is otherwise uncooperative.¹⁶⁰ If the WTO ignores the TPP as a norm-setter, then as an RTA the TPP becomes a departing train, leaving spoilers like Brazil and India behind. In turn, if the WTO does not reform quickly, the TPP along with other mega-regional trade agreements like CETA¹⁶¹ and the T-TIP¹⁶² could function as an existential force that pushes trade negotiators around the world to withdraw support away from WTO, and into mega-trading blocs of their own.

Academics like Joost Pauwelyn, Gary Clyde Hufbauer, and Cathleen Cimino-Isaacs have long advocated for reform of the WTO's consensus rule.¹⁶³ Pauwelyn proposes that the WTO reinterpret the consensus rule as a procedural step rather than a decision-making requirement.¹⁶⁴ Presently, every WTO member must either vote in favor of an agreement or miss the vote for that agreement to bind all parties under the WTO. Pauwelyn suggests that a reformed interpretation of the consensus rule should only require that an effort be made to solve collective objections. Consensus itself would be met if most parties agreed to the deal.¹⁶⁵

Under Pauwelyn's proposal, the agreement would not bind those who objected to it or failed to ratify it, but at a minimum this new interpretation of the rule would prevent dissenters from blocking the progress made by the parties who have agreed to new terms.¹⁶⁶ Similarly, Pauwelyn suggests that the WTO should get rid of the presumption that its negotiations are a part of a "single-package" where countries must agree on terms on an all-or-nothing basis.¹⁶⁷ Since countries are constantly claiming exceptions and waivers to many of the obligations imposed on them through this rule, Pauwelyn argues that the WTO would be more effective at enforcing compliance with individual commitments if it allowed countries to be

¹⁵⁹ Stedman, *supra* note 156, at 14.

¹⁶⁰ *Id.*

¹⁶¹ The Comprehensive Economic and Trade Agreement is a prospective free-trade agreement between Canada and the European Union. *EU-Canada: Comprehensive Economic and Trade Agreement (CETA)*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/in-focus/ceta/> (last visited Feb. 28, 2018).

¹⁶² The Transatlantic Trade and Investment Partnership is a prospective free-trade agreement between the European Union and the United States. Kimberly Amadeo, *Transatlantic Trade and Investment Partnership (TTIP)*, BALANCE (July 18, 2017), <https://www.thebalance.com/transatlantic-trade-and-investment-partnership-ttip-3305582>.

¹⁶³ Pauwelyn, *supra* note 16. See also Hufbauer & Cimino-Isaacs, *supra* note 69, at 681.

¹⁶⁴ Pauwelyn, *supra* note 16.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

bound only by the terms they had explicitly negotiated and agreed to.¹⁶⁸ Consequently, the need to grant rule exceptions to countries claiming “developing” status would disappear.¹⁶⁹

Pauwelyn’s proposed reforms could help the WTO regain its status as chief arbiter of international trade. However, the biggest exemption and barrier to following WTO rules are RTAs themselves. The WTO exempts its members from abiding by its core non-discrimination principles when trading among nations if preferential trading happens under an RTA.¹⁷⁰ Therefore, it makes sense why every single WTO member participates in at least one of the 270 RTAs in force today.¹⁷¹

Despite the wide use of RTAs to circumvent non-discrimination principles, the WTO body in its Nairobi Declaration reaffirmed that RTAs are complementary and not a substitute to the multilateral trading system.¹⁷² Yet, the substantial revision of the Committee on Regional Trade Agreements (CRTA) to include the Transparency Mechanism for Regional Trade Agreements tells a different story.¹⁷³ Created to examine and report on systematic issues of RTAs, the CRTA was originally supposed to make sure that all regional trade agreements were transparent and consistent with WTO rules. Nevertheless, from its inception in 1996 until its revision in 2006, the CRTA did not complete a single report.¹⁷⁴

In 2006, the Transparency Mechanism (TM) for Regional Trade Agreements was incorporated into the CRTA to make sure that WTO membership is notified of the terms or the change of terms in RTAs.¹⁷⁵ For its part, the CRTA remains responsible for examining individual regional agreements. However, after the 2006 revision, the CRTA is to consider the systemic implications of RTAs in the multilateral trading system and the relationship between them.¹⁷⁶ What the revision effectively did is take away the CRTA’s obligation to examine and report on the consistency of RTAs with WTO rules. Examining the systematic implications and relationship of RTAs in the multilateral trading system and examining RTA compliance with WTO rules beyond the exceptions of GATT Article XXIV¹⁷⁷ are not the same thing. Now that the Nairobi Declaration has permanently adopted the CRTA’s revised obligations, there is less ground for the

¹⁶⁸ Pauwelyn, *supra* note 16.

¹⁶⁹ *Id.*

¹⁷⁰ *Regional Trade Agreements*, WTO, https://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Feb. 28, 2018). *See also* GATT, *supra* note 68, at art. XXIV.

¹⁷¹ *See generally Regional Trade Agreements*, *supra* note 170.

¹⁷² World Trade Organization, Nairobi Ministerial Declaration, WTO Doc. WT/MIN(15)/DEC, at pt. II art. 28 (2015) [hereinafter Nairobi Ministerial Declaration].

¹⁷³ *The Committee on Regional Trade Agreements*, WTO, https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Feb. 28, 2018).

¹⁷⁴ *Committee, Historical background on Committee Work (1996–2006)*, WTO, https://www.wto.org/english/tratop_e/region_e/historical_background_rta_e.htm (last visited Feb. 28, 2018).

¹⁷⁵ *Transparency Mechanism for RTAs*, WTO, https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (last visited Feb. 28, 2018).

¹⁷⁶ *The Committee on Regional Trade Agreements*, *supra* note 173.

¹⁷⁷ GATT, *supra* note 68.

WTO to constrain the use of RTAs in the future.¹⁷⁸ With the TPP in place, the WTO would have the cover it needs to push reform forward by positioning itself as a norm calibrator. The United States would in turn advance its interests and preserve its global influence without resorting to unilateral protectionist policies that engender retaliation and endanger relationships worldwide.¹⁷⁹

V. CONCLUSION

The TPP is not perfect, but it provides a necessary framework for international trade to move forward in an orderly fashion. As a geopolitical tool, it has the potential to temper China's expansionist ambitions by limiting its anticompetitive behavior while avoiding the pitfalls of direct confrontation. As a norm-setter, it has the ability to facilitate trade and promote international cooperation through regulatory coherence. And as a reforming force, it has the power to ensure that future international trade norms include non-economic considerations.

For the reasons mentioned above, I firmly believe that in spite of President Trump's initial withdrawal from the TPP, it is very likely that his "America First" trade policy will eventually repackage many of the TPP's elements into a new agreement. As popular as it is to campaign against free-trade agreements in the United States, it is agreements like the TPP that protect and promote American interests abroad. From leveling the playing field for American companies to compete with state-owned enterprises, to making sure that investors and their products are protected by law abroad. For the average American worker, the TPP offers a framework to hold international actors accountable for the overexploitation of labor and natural resources. At first glance, it might seem that these value-based provisions are superficial, but in fact they could be critical to constrain the governments of developing countries from gaining a comparative advantage over American workers at the expense of the environment or abusive labor practices. Lastly, it is important not to dismiss or delegitimize the popular concerns about globalization and free-trade, but to look for ways in which we can reinvest the gains of free-trade into vocational training and retraining programs for people who become displaced as the economy changes, mindful that the purpose of free trade is to improve quality of life, not to widen inequality.

¹⁷⁸ Nairobi Ministerial Declaration, *supra* note 172.

¹⁷⁹ Michael Birnbaum & Quentin Ariès, *Trump's Trade War Could Trigger E.U. Tariffs on Cranberries and Peanut Butter*, WASH. POST (Mar. 7, 2018), https://www.washingtonpost.com/world/europe/european-trade-officials-weigh-proportional-response-to-trump-tariff-plan/2018/03/07/843c5f76-2203-11e8-a589-763893265565_story.html?utm_term=.55a36e1cd398.

