

2017

Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)

Peter K. Yu

Texas A&M University School of Law, peter_yu@msn.com

Follow this and additional works at: <https://scholar.smu.edu/scitech>

 Part of the [Intellectual Property Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)*, 20 SMU Sci. & Tech. L. Rev. 97 (2017).

Available at: <https://scholar.smu.edu/scitech/vol20/iss2/3>

This Symposium Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Science and Technology Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)

*Peter K. Yu**

I.	INTRODUCTION	97
II.	HISTORICAL ORIGINS	100
III.	ON LIFE SUPPORT	101
IV.	DEAD OR ALIVE	110
	A. TRIPS-Plus Intellectual Property Agreement	110
	1. Justifications	110
	2. Potential Concerns	113
	B. Regional Investment Agreement	115
	1. Justifications	116
	2. Potential Concerns	119
	3. Potential Improvements	124
	C. Plurilateral Trade Agreement	127
	1. Package Deal	127
	2. Potential Concerns	129
V.	CONCLUSION	132

I. INTRODUCTION

On February 4, 2016, the Trans-Pacific Partnership (TPP) Agreement was signed in Auckland, New Zealand.¹ Covering “40% of global GDP [gross domestic product] and some 30% of worldwide trade in both goods and services,”² this Agreement was the result of nearly six years of negotiations between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.³ For

* Professor of Law, Professor of Communication, and Director, Center for Law and Intellectual Property, Texas A&M University. An earlier version of this article was presented at the Intellectual Property and Trade: Law and Practical Experience Conference at VNU University of Economics & Law in Ho Chi Minh City, Vietnam. The Author is grateful to Xuan-Thao Nguyen for her kind invitation and the conference participants for valuable comments and suggestions. This article draws on research from the Author’s earlier articles in the *American University Law Review*, the *Fordham International Law Journal*, the *Vanderbilt Journal of Transnational Law*, and *The Conversation*.

1. Press Release, Office of the U.S. Trade Rep., Trans-Pacific Partnership Ministers’ Statement (Feb. 4, 2016), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>.
2. David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT’L & COMP. L. 57, 59 (2016).
3. See Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT’L L.J. 1129, 1129 (2014) (listing the negotiating parties).

the United States, the TPP would not only have increased trade and exports,⁴ but it would also have provided important strategic benefits.⁵ It is therefore no surprise that the partnership was the Obama Administration's "cardinal priority and a cornerstone of [its] Pivot to Asia."⁶

Less than a year after the signing of the TPP Agreement, however, the new U.S. Administration made an about turn. On the first day of his first full week in office, President Donald Trump signed a memorandum directing the

4. See PETER A. PETRI ET AL., *THE TRANS-PACIFIC PARTNERSHIP AND ASIA-PACIFIC INTEGRATION: A QUANTITATIVE ASSESSMENT* 35 (2012) (noting that the TPP, once implemented, will yield global annual benefits of \$295 billion by 2025).

5. As Paul Buchanan observed,

[F]or the US, the [TPP Agreement] has strategic implications beyond trade per se. The [Agreement] would provide the US with a trade-based counterbalance to Chinese ambitions as well as a means by which to redress the current soft power imbalance that favours the Chinese in the South Western Pacific. Beyond any material benefits that accrued, the establishment of a US-led eight-country [now twelve-country] trading bloc across the Pacific Rim, with potential to expand to other APEC [Asia-Pacific Economic Cooperation Forum] members, would help offset Chinese "checkbook diplomacy" as a form of influence and leverage in that part of the world.

Paul G. Buchanan, *Security Implications of the TPPA*, in *NO ORDINARY DEAL: UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT* 82, 89 (Jane Kelsey ed., 2010); see also Avery Goldstein, *U.S.-China Interactions in Asia*, in *TANGLED TITANS: THE UNITED STATES AND CHINA* 263, 281 (David Shambaugh ed., 2012) ("[W]hen American support for realizing the TPP was given a high priority two years later in conjunction with the November 2011 [APEC] meeting in Honolulu, the prominence accorded the initiative was widely viewed as having a new political significance related to the turbulence in the U.S.-China relations during the years following Obama's 2009 trip to China."); Meredith Kolsky Lewis, *Achieving a Free Trade Area of the Asia-Pacific: Does the TPP Present the Most Attractive Path?*, in *THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT* 223, 226 (C.L. Lim et al. eds., 2012) (recalling the speech made by the chair of the House Ways and Means Trade Subcommittee that "the TPP 'at least begins the process of positioning the US as a counterweight to China in the Asia-Pacific Region'"); Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 3, at 1146 ("[S]ome negotiating parties simply do not see the TPP solely as a trade pact. Instead, they consider it as an important alliance that helps foster regional security."); Jagdish Bhagwati, *Deadlock in Durban*, *PROJECT-SYNDICATE* (Nov. 30, 2011), <http://www.project-syndicate.org/commentary/deadlock-in-durban> (stating that the TPP "will principally aid countries that are worried about an aggressive China and seek political security rather than increased trade").

6. KURT M. CAMPBELL, *THE PIVOT: THE FUTURE OF AMERICAN STATECRAFT IN ASIA* 268 (2016).

United States Trade Representative (USTR) to “withdraw the United States as a signatory to the [TPP and] . . . from TPP negotiations.”⁷ As the document stated, “it is the intention of [the new] Administration to deal directly with individual countries on a one-on-one (or bilateral) basis in negotiating future trade deals.”⁸ Not only did the Administration abandon the TPP after nearly six years of exhaustive negotiations, but it also shifted the policy emphasis away from regional and plurilateral trade agreements.⁹

In light of this dramatic policy change on the part of the new Administration, a retrospective, and at times counterfactual, analysis of the TPP Agreement is in order. Part II begins with a historical overview of this partnership. Part III examines the partnership’s status in light of the United States’ withdrawal and contends that the TPP will exert considerable influence regardless of whether it is dead or alive. Part IV identifies three interrelated but distinct aspects of the TPP: (1) as an international intellectual property agreement that contains provisions exceeding the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO),¹⁰ known commonly as a TRIPS-plus intellectual property agreement; (2) as a regional investment agreement; and (3) as a plurilateral trade agreement.¹¹ The analysis

7. *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, 82 Fed. Reg. 8497 (Jan. 23, 2017) [hereinafter *Presidential Memorandum*]. For discussion of issues raised by the “unsigning” or exit of international agreements, see generally Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003); David C. Scott, Comment, *Presidential Power to “Un-sign” Treaties*, 69 U. CHI. L. REV. 1447 (2002).

8. *Presidential Memorandum*, *supra* note 7.

9. See Peter K. Yu, *Trump’s Trade Policy Is More Predictable and Less Isolationist Than Critics Think*, MARKETWATCH (Feb. 3, 2017, 8:20 AM), <http://www.marketwatch.com/story/trumps-trade-policy-is-more-predictable-and-less-isolationist-than-critics-think-2017-02-02> (discussing the shift from multilateralism to bilateralism).

10. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

11. As the Author noted in an earlier book chapter,

Although the WTO has used this term to refer to those nonmultilateral agreements included in Annex 4 of the WTO Agreement—namely, the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement—commentators have generally used this term to cover multi-country, multi-region agreements that are being negotiated outside the WTO, WIPO and other multilateral fora.

Peter K. Yu, *Intellectual Property Negotiations, the BRICS Factor and the Changing North-South Debate*, in THE BRICS-LAWYERS’ GUIDE TO GLOBAL COOPERATION 148, 158 (Rostam Neuwirth et al. eds., 2017).

in Part IV will be applicable to not only the TPP Agreement, but also the development of future bilateral, regional, and plurilateral trade agreements.

Because this article is published as part of a symposium on intellectual property and international trade, its primary focus on intellectual property issues may not do justice to an agreement that is as complex and lengthy as the TPP Agreement.¹² Nevertheless, the narrower and more specific focus will provide useful insights and practical lessons for policymakers and commentators working in the intellectual property field.

II. HISTORICAL ORIGINS

The origin of the TPP Agreement can be traced back to the early 2000s. The predecessor of this Agreement was a quadrilateral agreement known as the Trans-Pacific Strategic Economic Partnership Agreement,¹³ more commonly referred to as the “P4” or “Pacific 4.” As Meredith Lewis recounted,

[The negotiations were initially] launched by Chile, New Zealand and Singapore at the APEC [(Asia-Pacific Economic Cooperation Forum)] leaders’ summit in 2002. These original negotiations contemplated an agreement amongst the three participating countries, to be known as the Pacific Three Closer Economic Partnership However, Brunei attended a number of rounds as an observer, and ultimately joined the Agreement as a “founding member”. The Agreement was signed by New Zealand, Chile and Singapore on July 18, 2005 and by Brunei on August 2, 2005, following the conclusion of negotiations in June 2005.¹⁴

In March 2010, negotiations for an expanded agreement began between Australia, Peru, Vietnam, the United States, and the P4 members.¹⁵ Since then, Malaysia, Mexico, Canada, and Japan joined the TPP negotiations.¹⁶

12. See *Trans-Pacific Partnership: Vast Trade Deal Made Public*, BBC (Nov. 6, 2015), <http://www.bbc.com/news/business-34742074> (“The TPP is one of the world’s most extensive trade agreements. . . . The full text is about 6,000 pages long . . .”).

13. Trans-Pacific Strategic Economic Partnership Agreement, Brunei-Chile-N.Z.-Sing., Aug. 2, 2005, https://www.mfat.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/P4/Full-text-of-P4-agreement.pdf.

14. Meredith Kolsky Lewis, *Expanding the P-4 Trade Agreement into a Broader Trans-Pacific Partnership: Implications, Risks and Opportunities*, 4 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 401, 403–04 (2009).

15. Press Release, Office of the U.S. Trade Rep., USTR Begins TPP Talks in Australia (Mar. 15, 2010), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2010/march/ustr-begins-tpp-talks-australia> [hereinafter TPP Launch Press Release].

16. See Press Release, Office of the U.S. Trade Rep., Statement of the Ministers and Heads of Delegation for the Trans-Pacific Partnership Countries (Feb. 25,

From its inception, the TPP was negotiated as a highly ambitious and comprehensive trade agreement. As then-USTR Ronald Kirk declared at the first round of the TPP negotiations in Melbourne, Australia,

Trans-Pacific Partnership negotiations offer a unique opportunity to shape a high-standard, broad-based regional pact. In line with the President's goal of supporting two million additional American jobs through exports, a robust TPP agreement would expand our exports to one of the world's fastest-growing regions. . . . Our team's aim is to achieve the biggest economic benefits for the American people, and these negotiators will be working to set a new standard for 21st century trade pacts.¹⁷

After nearly six years of negotiations, an agreement was finally reached in October 2015.¹⁸ This Agreement contains thirty chapters, covering a wide range of issues, such as market access, textiles and apparel, sanitary and phytosanitary measures, investment, financial services, telecommunications, electronic commerce, government procurement, competition, intellectual property, labor, the environment, and regulatory standards.¹⁹ In addition, the Agreement includes various annexes and side letters regarding tariff commitments, product-specific rules, country-based arrangements, and non-conforming measures.²⁰

III. ON LIFE SUPPORT

Despite the strong support from the Obama Administration, the 2016 presidential candidates from both the Democratic and Republican Parties harshly criticized the TPP Agreement. While Hillary Clinton called for “a new paradigm for trade agreements that [does not] give special rights to corporations,”²¹ Donald Trump made his opposition loud and clear by lambast-

2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/Statement-of-Ministers-and-Heads-of-Delegation-for-TPP-countries> (listing the negotiating parties).

17. TPP Launch Press Release, *supra* note 15.
18. *See Statement by the President on the Trans-Pacific Partnership*, WHITE HOUSE (Oct. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership> (noting that the TPP negotiating parties reached agreement in Atlanta).
19. *See TPP Full Text*, OFFICE OF THE U.S. TRADE REP. (last visited Feb. 20, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP Agreement].
20. *See id.*
21. Press Release, Oregon Fair Trade Campaign, Clinton and Sanders Oppose “Lame Duck” Vote on the Trans-Pacific Partnership (May 6, 2016), <http://www.citizenstrade.org/ctc/oregon/2016/05/05/clinton-and-sanders-oppose-lame-duck-tpp-vote>.

ing the TPP as “another disaster, done and pushed by special interests who want to rape [the] country.”²²

Shortly after the election, a few countries took a “wait and see” approach, continuing their effort to ratify the TTP Agreement. On November 15, 2016, New Zealand passed the requisite bill to ratify the Agreement.²³ A month later, Japan became the first country to provide such ratification.²⁴ Compared to Japan and New Zealand, other TPP partners, however, were more skeptical of the partnership’s future. Vietnam, for example, suspended its ratification process less than two weeks after the U.S. election.²⁵ A growing number of policymakers and commentators also began wondering whether the United States would eventually lose ground to China,²⁶ which

22. Jessica Hopper & Ines de la Cuetara, *Donald Trump Slams Trans-Pacific Partnership as “a Continuing Rape of Our Country”*, ABC NEWS (June 29, 2016, 7:17 AM), <http://abcnews.go.com/Politics/donald-trump-slams-trans-pacific-partnership-continuing-rape/story?id=40213090>.
23. *See TPP Bill Signed by Parliament as US Signals Its End*, RADIO N.Z. (Nov. 15, 2016), <http://www.radionz.co.nz/news/political/318141/tpp-bill-signed-by-parliament-as-us-signals-its-end> (“The [New Zealand] government’s Trans Pacific Partnership (TPP) legislation has passed its third reading at Parliament this afternoon, despite the likelihood the trade deal won’t proceed.”).
24. *See Kaori Kaneko & Yoshifumi Takemoto, Japan Ratifies TPP Trade Pact to Fly the Flag for Free Trade*, REUTERS (Dec. 9, 2016, 12:51 AM), <http://www.reuters.com/article/us-japan-tpp-idUSKBN13Y0CU> (reporting Japan’s ratification).
25. *See Ho Binh Minh, Vietnam PM Backs Off from U.S.-Led TPP, Emphasizes Independent Foreign Policy*, REUTERS (Nov. 17, 2016, 12:18 AM), <http://www.reuters.com/article/us-vietnam-economy-tpp-idUSKBN13C06V> (“Vietnam will shelve ratification of a U.S.-led Pacific trade accord due to political changes ahead in the United States . . .”).
26. *See Giovanni Di Lieto, If the TPP Dies, Australia Has Other Game Changing Trade Options*, THE CONVERSATION (Sept. 4, 2016), <https://theconversation.com/if-the-tpp-dies-australia-has-other-game-changing-trade-options-64291> (“Given the TPP agreement may never enter into force due to the uncertain political landscape in the US, Australia and the other six countries (New Zealand, Japan, Singapore, Malaysia, Brunei and Vietnam) that are members to both the TPP and the RCEP are focusing their international trade policies on the latter economic partnership.”); Nicholas Ross Smith, *China Will Be the Winner if US Backs Out of the TPP*, THE CONVERSATION (Aug. 1, 2016), <https://theconversation.com/china-will-be-the-winner-if-us-backs-out-of-the-tpp-63328> (“[I]f Clinton or Trump make good on their pledge to torpedo the TPP if elected, the United States will not only miss an opportunity to consolidate its position in Asia-Pacific, it will also allow China to emerge as the uncontested trade power there.”).

has actively championed the establishment of an alternative pact, the Regional Comprehensive Economic Partnership (RCEP).²⁷

On January 23, 2017, the first day of his first full week in office, President Trump fulfilled his campaign promise by signing a memorandum directing the United States to withdraw from the TPP.²⁸ Such withdrawal, which put the TPP Agreement on life support, is problematic for two reasons. First, Article 30.5 of the TPP Agreement states that ratification requires the support of “at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013.”²⁹ Without the United States, one of the twelve original signatories in 2013, that eighty-five percent figure will never be reached.³⁰

Second, as Japan and other TPP partners readily acknowledged, the TPP Agreement would be “meaningless” without the United States’ participation.³¹ For some partners, the Agreement is not only a trade pact, but also a

27. See ASEAN Plus Six, Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership (Nov. 20, 2012), <http://dfat.gov.au/trade/agreements/rcep/news/Documents/joint-declaration-on-the-launch-of-negotiations-for-the-regional-comprehensive-economic-partnership.pdf> (launching the RCEP negotiations). For the Author’s analysis of the RCEP, see generally Peter K. Yu, *TPP, RCEP and the Crossvergence of Asian Intellectual Property Standards*, in GOVERNING SCIENCE AND TECHNOLOGY UNDER THE INTERNATIONAL ECONOMIC ORDER: REGULATORY DIVERGENCE AND CONVERGENCE IN THE AGE OF MEGAREGIONALS (Peng Shin-yi et al. eds., forthcoming 2018); Peter K. Yu, *TPP, RCEP and the Future of Copyright Normsetting in the Asia-Pacific*, in MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC? JUXTAPOSING HARMONISATION WITH FLEXIBILITY (Susan Corbett & Jessica Lai eds., forthcoming 2018); Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT’L L. 673 (2017).

28. *Presidential Memorandum*, *supra* note 7.

29. TPP Agreement, *supra* note 19, art. 30.5.2–.3.

30. As explained in an article in *The Diplomat*,

The United States and Japan between them represent just shy of 80 percent of the GDP of the twelve original TPP signatories (specifically, the U.S. represents nearly 62 percent of TPP GDP and Japan accounts for 17 percent). Basically, the TPP can’t come into force if either of these states fail to ratify the agreement in their domestic legislatures because there would be no way for the remaining signatories to fulfill the 85 percent of GDP requirement (even if the United States and all states but Japan ratify, the eleven would stand at 83 percent of GDP).

Ankit Panda, *Here’s What Needs to Happen in Order for the Trans-Pacific Partnership to Become Binding*, THE DIPLOMAT (Oct. 8, 2015), <http://thediplomat.com/2015/10/heres-what-needs-to-happen-in-order-for-the-trans-pacific-partnership-to-become-binding/>.

31. Kaneko & Takemoto, *supra* note 24 (“Japanese Prime Minister Shinzo Abe has said the TPP would be ‘meaningless without the United States.’”); see Joshua

strategic partnership that reaffirms the United States' crucial position in the Asia-Pacific Region.³² Having the United States refocus its attention on Asia will help alleviate the growing economic and military threats posed by China.³³

Shortly after the United States' withdrawal, Australia, Japan, Singapore, and New Zealand explored ways to resuscitate the TPP Agreement.³⁴ At a May 2017 APEC meeting in Hanoi, Vietnam, the eleven remaining TPP partners reaffirmed their commitment to establishing the regional partnership and agreed to explore the development of a process to move the partnership forward even without the United States' participation.³⁵ A few months later, these countries "agreed on the core elements of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)."³⁶ This newly

Berlinger, *TPP Unravels: Where the 11 Other Countries Go from Here*, CNN (Jan. 24, 2017, 9:59 PM), <http://www.cnn.com/2017/01/24/asia/tpp-other-11-countries-what-next/> (registering the reactions of the leaders of other TPP partners after the United States' withdrawal).

32. See *supra* note 5 (providing sources concerning the strategic value of the TPP).
33. For discussions of the so-called China threat, see generally CHINA'S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT (Ted Galen Carpenter & James A. Dorn eds., 2000); BILL GERTZ, THE CHINA THREAT: HOW THE PEOPLE'S REPUBLIC TARGETS AMERICA (2000); STEVEN M. MOSHER, HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD (2000); PETER NAVARRO, THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON (2007); PETER NAVARRO & GREG AUTRY, DEATH BY CHINA: CONFRONTING THE DRAGON—A GLOBAL CALL TO ACTION (2011).
34. See Bhavan Jaipragas, *Can the Trans-Pacific Partnership Be Salvaged? Forget Trump—Malaysia, Australia, New Zealand Think So*, S. CHINA MORNING POST (Jan. 24, 2017), <http://www.scmp.com/week-asia/geopolitics/article/2065021/trans-pacific-partnership-salvageable-forget-trump-malaysia> ("Australian Prime Minister Malcolm Turnbull said he had held . . . talks with his Japanese, New Zealand and Singaporean counterparts [in regard to options following the United States' withdrawal]."); see also *id.* ("Australia, New Zealand and Malaysia were among the nations that signalled enthusiasm to continue with an 11-member partnership in the absence of the United States.").
35. See Associated Press, *Pacific Ministers Commit to Move Ahead with Pact Without US*, U.S. NEWS & WORLD REP. (May 21, 2017, 6:11 AM), <https://www.usnews.com/news/business/articles/2017-05-21/pacific-ministers-commit-to-move-ahead-with-pact-without-us> (last visited Feb. 15, 2018) (reporting the meeting).
36. *Trans-Pacific Partnership Ministerial Statement* ¶ 3, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/statement-declaration.aspx> (last modified Nov. 11, 2017).

concluded transition instrument sought to “incorporate provisions of the TPP, with the exception of a limited set of provisions, which will be suspended.”³⁷

On January 23, 2018, exactly a year after President Trump signed his presidential memorandum, the CPTPP negotiations were concluded in Tokyo, Japan.³⁸ Notwithstanding its completion, the CPTPP is not the same as the mega-regional agreement negotiated by the twelve original TPP members. Without the United States, which “represents nearly 62 percent of TPP GDP,”³⁹ the total size of the new pact will be less than half of the original. In the intellectual property area, the new agreement will also suspend the following provisions:

8. National Treatment—Article 18.8 footnote 4—suspend last two sentences
9. Patentable Subject Matter—Article 18.37.2 and 18.37.4 (Second Sentence)
10. Patent Term Adjustment for Unreasonable Granting Authority Delays—Article 18.46
11. Patent Term Adjustment for Unreasonable Curtailment—Article 18.48
12. Protection of Undisclosed Test or Other Data—Article 18.50
13. Biologics—Article 18.51
14. Term of Protection for Copyright and Related Rights—Article 18.63
15. Technological Protection Measures (TPMs)—Article 18.68
16. Rights Management Information (RMI)—Article 18.69
17. Protection of Encrypted Program-Carrying Satellite and Cable Signals—Article 18.79
18. Legal Remedies and Safe Harbours—Article 18.82 and Annexes 18-E and 18-F.⁴⁰

Thus far, it is too early to predict whether the CPTPP will enter into force. It is even more unclear whether the new partnership will rescue the

37. *Id.*

38. See *Statement by Minister of International Trade on Successful Conclusion of Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, GLOBAL AFFAIRS CANADA (Jan. 23, 2018), https://www.canada.ca/en/global-affairs/news/2018/01/statement_by_ministerofinternationaltradeonsuccessful-conclusiono.html.

39. Panda, *supra* note 30.

40. *Trans-Pacific Partnership Ministerial Statement, Annex II*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/annex2-annexe2.aspx> (last modified Nov. 11, 2017) (providing a list of suspended provisions).

TPP from life support. If the United States refused to rejoin the pact in the end,⁴¹ one has to wonder the legal and economic significance of this watered-down version of the TPP Agreement.

At the time of writing, no country is actively pursuing the ratification of either the TPP Agreement or the CPTPP. Unless the latter is ratified by an adequate number of parties or unless the United States changes its policy position, the TPP Agreement will likely be relegated to the dustbin of history. If so, the developments surrounding this Agreement will resemble another ill-fated agreement that was once highly controversial in the intellectual property arena. The Anti-Counterfeiting Trade Agreement (ACTA) was signed by most negotiating parties in April 2011, yet it failed to attain the requisite number of ratifications.⁴² Since its adoption, it has been ratified by only a single country—Japan, the country of depositary.⁴³

Notwithstanding this potentially gloomy future, the TPP will exert four types of influence that will deeply affect future norm setting in the trade and intellectual property areas, whether the partnership is dead or alive. To begin with, the various chapters in the TPP Agreement, including the intellectual property chapter, will continue to provide the much-needed templates for drafting future bilateral, regional, and plurilateral trade agreements. Thus far, the United States has relied heavily on templates to maximize effectiveness and efficiency in trade negotiations.⁴⁴ As policies change and new issues

41. See Adam Edelman, *Trump Says He Would Consider Trans-Pacific Partnership with "Better Deal"*, NBC NEWS (Jan. 25, 2018), <https://www.nbcnews.com/politics/donald-trump/trump-says-he-would-consider-trans-pacific-partnership-better-deal-n841046> (“[President Trump said] he would consider re-entering the Trans-Pacific Partnership trade pact if he got a ‘substantially better’ deal.”).

42. See Anti-Counterfeiting Trade Agreement art. 40.1, 50 I.L.M. 243 (2011) [hereinafter ACTA] (“This Agreement shall enter into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval as between those Signatories that have deposited their respective instruments of ratification, acceptance, or approval.”).

43. See Maira Sutton, *Japan Was the First to Ratify ACTA. Will They Join TPP Next?*, ELEC. FRONTIER FOUND. (Oct. 26, 2012), <https://www EFF.ORG/deeplinks/2012/10/japan-ratify-acta-will-they-join-tpp-next> (reporting Japan’s ratification); see also ACTA, *supra* note 42, art. 45 (“The Government of Japan shall be the Depositary of this Agreement.”).

44. See Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 1011–12 (2011) (noting the “template-oriented U.S. FTAs [free trade agreements], which often include standardized terms to maximize the effectiveness and efficiency of the negotiations”). As the Author explained in an earlier article,

The United States uses FTA templates for at least three reasons. First, the U.S. Trade Act of 2002, based on which these FTAs were negotiated, calls on negotiators to develop provisions that “reflect a standard of protection

arise, these templates will be updated. Indeed, many terms in the United States' earlier free trade agreements have found their way to later agreements. In the intellectual property arena, for instance, ACTA and the TPP Agreement have all incorporated terms from these agreements, most notably the United States-Korea Free Trade Agreement.⁴⁵

Even more disturbing, South Korea injected the terms of its free trade agreement with the United States into the RCEP negotiations, despite the fact that the United States is not even a party to those negotiations.⁴⁶ As Jeremy Malcolm lamented,

Far from setting up a positive alternative to the TPP, South Korea is channeling the USTR at its worst here—what on earth are they thinking? The answer may be that, having been pushed into accepting unfavorably strict copyright, patent, and trademark rules in the process of negotiating its 2012 free trade agreement with the United States, Korea considers that it would be at a disadvantage if other countries were not subject to the same restrictions.⁴⁷

The second type of influence relates to the development of new international intellectual property norms that will incorporate the TPP Agreement

similar to that found in United States law.” Although FTA provisions are similar, they were not based on their predecessors, but rather the ultimate template: U.S. laws. Second, such an approach would encourage standardization of protections. In doing so, FTAs would help foster an environment where countries can consolidate negotiation gains through FTAs at the multilateral level. Third, . . . [t]he use of templates . . . has practical significance: it enhances the possibility for congressional approval.

Id. at 1012–13.

45. See Peter K. Yu, *Trade Agreement Cats and the Digital Technology Mouse*, in SCIENCE AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS 185, 196 (Bryan Mercurio & Ni Kuei-Jung eds., 2014) (“[T]he copyright provisions in both [the United States-Australia Free Trade Agreement] and [the United States-Korea Free Trade Agreement] illustrate well the United States’ use of templates and standardized terms in FTA negotiations to maximize effectiveness and efficiency.”).
46. See Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, *supra* note 27, at 724 (“To the extent that [the high intellectual property standards required by the United States-Korea Free Trade Agreement] have increased the costs of its goods and services and thereby undercut its global competitiveness, South Korea will have a strong incentive to level the playing field by introducing similar cost-raising standards to other ASEAN+6 members through the RCEP.”).
47. Jeremy Malcolm, *Meet RCEP, a Trade Agreement in Asia That’s Even Worse Than TPP or ACTA*, ELEC. FRONTIER FOUND. (June 4, 2015), <https://www.eff.org/deeplinks/2015/06/just-when-you-thought-no-trade-agreement-could-be-worse-tpp-meet-rcep>.

by reference. A widely cited example of such development is the TRIPS Agreement's incorporation of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits.⁴⁸ Although the latter treaty has never entered into force, Article 35 of the TRIPS Agreement explicitly incorporates its obligations as follows:

Members agree to provide protection to the layout-designs (topographies) of integrated circuits . . . in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits⁴⁹

The third type of influence concerns the use of the terms of the TPP Agreement to determine whether a country has adequately protected intellectual property rights. The USTR's Section 301 process is particularly notorious regarding this type of determination.⁵⁰ As the U.S. Trade Act stipulates, the USTR can take Section 301 actions against countries that have failed to provide "adequate and effective protection of intellectual property rights notwithstanding the fact that [they] may be in compliance with the specific obligations of the [TRIPS] Agreement."⁵¹

For instance, the USTR has repeatedly put Canada on the Section 301 Watch List, citing the country's failure to ratify the two Internet treaties of the World Intellectual Property Organization (WIPO), among other reasons.⁵² Likewise, before China acceded to those treaties, the USTR stated in the *2005 National Trade Estimate Report on Foreign Trade Barriers* that "the United States consider[ed] the WIPO treaties to reflect many key international norms for providing copyright protection over the Internet."⁵³ The re-

48. Treaty on Intellectual Property in Respect of Integrated Circuits, May 26, 1989, 28 I.L.M. 1477.

49. TRIPS Agreement, *supra* note 10, art. 35.

50. See generally AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (collecting articles discussing Super 301 and Special 301); Joe Karaganis & Sean Flynn, *Networked Governance and the USTR*, in MEDIA PIRACY IN EMERGING GOODS 75 (Joe Karaganis ed., 2011) (critically evaluating the USTR's Section 301 process); Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87 (1994) (discussing the operation of the Section 301 process and its relation to U.S. trade negotiations).

51. 19 U.S.C. § 2411(d)(3)(B)(i)(II) (2012) (emphasis added).

52. See OFFICE OF THE U.S. TRADE REP., 2010 SPECIAL 301 REPORT 25 (2010) (stating that "Canada will remain on the Priority Watch List in 2010" and "should fully implement the WIPO Internet Treaties, which Canada signed in 1997").

53. OFFICE OF THE U.S. TRADE REP., 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 96 (2005).

port further stated that “China’s accession to the WIPO treaties [was] an increasingly important priority for the United States.”⁵⁴

The final type of influence pertains to the potential misguidance provided by technical assistance experts. Given the politically driven circumstances surrounding the United States’ withdrawal from the TPP, these experts may continue to treat the intellectual property provisions in the TPP Agreement as the world’s best practices—or, worse, the gold standard for intellectual property protection and enforcement.⁵⁵ Oftentimes, these so-called “best practices” are introduced without regard to a particular country’s local needs, interests, conditions, or priorities.⁵⁶ For developing countries, an overemphasis on the high TPP intellectual property standards as international benchmarks may undermine the countries’ individual abilities to take advantage of the traditional limitations, safeguards, and flexibilities provided in the TRIPS Agreement or other WIPO-administered international intellectual property agreements.⁵⁷

In sum, even if the newly concluded CPTPP was to enter into force, it would no longer have the same legal or economic significance as the original agreement would have upon ratification. Nevertheless, regardless of the fate of either agreement, the TPP Agreement will continue to exert considerable influence on international trade and intellectual property norm setting—both within the Asia-Pacific Region and across the world. Policymakers and commentators should therefore be conscious of this lingering influence, and not overlook the ramifications of the original agreement. When contemplating

54. *Id.*

55. See Kimberlee Weatherall, *Intellectual Property in the TPP: Not “the New TRIPS”*, 17 MELB. J. INT’L L. 257, 276 (2016) (“The TPP has been described, at various times, as a ‘gold standard’ trade agreement. By this logic, the aspiration would be that the [Intellectual Property] Chapter, too, would be ‘gold standard.’” (footnote omitted)); see *id.* at 260 (arguing that the TPP intellectual property chapter “is backward-looking, incoherent, inconsistent and unbalanced, and ought not become a multilateral standard”).

56. See Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 871 (2007) (“With the proliferation of recent bilateral and regional trade agreements ratcheting up protection . . . , this slight room for maneuvering has been further reduced to the point that countries are now required to introduce an intellectual property system that achieves uniformity at the expense of local needs, national interests, technological capabilities, institutional capacities, and public health conditions.”).

57. See *id.* at 869–70 (discussing the limitations, flexibilities, and public interest safeguards in the TRIPS Agreement). For commentaries emphasizing the flexibilities within the TRIPS Agreement, see generally CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT (2d ed. 2017); UNCTAD-ICTSD PROJECT ON INTELLECTUAL PROPERTY RIGHTS AND SUSTAINABLE DEVELOPMENT, RESOURCE BOOK ON TRIPS AND DEVELOPMENT (2005).

new rounds of bilateral, regional, and plurilateral trade negotiations, they should also be mindful of the intended and unintended legacies of international treaty negotiations.

IV. DEAD OR ALIVE

After discussing the status and ramifications of the TPP following the United States' withdrawal, this Part examines three interrelated but distinct aspects of the partnership: (1) as a TRIPS-plus intellectual property agreement; (2) as a regional investment agreement; and (3) as a plurilateral trade agreement. The analysis in this Part will be applicable to the TPP, regardless of whether it is dead or alive. Such an analysis will also be relevant to the development of future bilateral, regional, and plurilateral trade agreements.

A. TRIPS-Plus Intellectual Property Agreement

Out of the thirty chapters in the TPP Agreement, Chapter 18 focuses on intellectual property protection and enforcement.⁵⁸ This chapter covers a wide variety of areas, including cooperation (Section B), trademarks (Section C), country names (Section D), geographical indications (Section E), patents and undisclosed test or other data (Section F), industrial designs (Section G), copyright and related rights (Section H), enforcement (Section I), and Internet service providers (Section J).⁵⁹ Because other contributors to this Symposium have closely examined these sections, this article focuses on only the justifications of the TPP intellectual property chapter and the potential concerns generated by this chapter.

1. Justifications

The primary objective of the TPP intellectual property chapter is to set high standards of protection and enforcement that go beyond what is required by the TRIPS Agreement.⁶⁰ The need for such higher standards is understandable considering that the Agreement was adopted more than twenty years ago.⁶¹ Because the Internet did not become mainstream until the mid-1990s, this Agreement provides inadequate intellectual property protection and enforcement in the digital environment.⁶²

58. TPP Agreement, *supra* note 19, ch. 18.

59. *Id.* arts. 18.12–.82.

60. See TPP Launch Press Release, *supra* note 15 (“Trans-Pacific Partnership negotiations offer a unique opportunity to shape a high-standard, broad-based regional pact. . . . Our . . . negotiators will be working to set a new standard for 21st century trade pacts.”).

61. TRIPS Agreement, *supra* note 10 (entering into force on January 1, 1995).

62. See Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 614–15 (1996) (“Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already

To a large extent, the justification of the TPP intellectual property chapter is not that different from that of the TRIPS Agreement in the late 1980s and early 1990s.⁶³ During the negotiations under the Uruguay Round of Multilateral Trade Negotiations (Uruguay Round), developing countries were repeatedly “told to overlook the distasteful aspects of introducing or increasing intellectual property protection and enforcement in exchange for longer-term economic health.”⁶⁴

outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line.”); J.H. Reichman, *The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions*, 17 HASTINGS COMM. & ENT. L.J. 763, 766 (1995) (“[The principal weakness of the TRIPS Agreement] stems from the drafters’ technical inability and political reluctance to address the problems facing innovators and investors at work on important new technologies in an Age of Information. The drafters’ decision to stuff these new technologies into the overworked and increasingly obsolete patent and copyright paradigms simply ignores the systemic contradictions and economic disutilities this same approach was already generating in the domestic intellectual property systems.” (footnote omitted)); Peter K. Yu, *TRIPS and Its Achilles’ Heel*, 18 J. INTELL. PROP. L. 479, 502–03 (2011) (discussing the technological challenges that impede the TRIPS Agreement’s ability to provide effective global enforcement of intellectual property rights); see also Peter K. Yu, *Enforcement: A Neglected Child in the Intellectual Property Family*, in THE INTERNET AND THE EMERGING IMPORTANCE OF NEW FORMS OF INTELLECTUAL PROPERTY 279, 286–90 (Susy Frankel & Daniel Gervais eds., 2016) (identifying the current enforcement challenges in the digital environment).

63. See generally DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 3–27 (3d ed. 2008) (describing the origins and development of the TRIPS Agreement); DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT* (2002) (examining the role of intellectual property industries in the TRIPS negotiations); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 96–120 (2003) (recounting the trilateral discussions among the United States, the European Union, and Japan); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371–79 (2006) (examining four different accounts of origins of the TRIPS Agreement).
64. Daniel J. Gervais, *The TRIPS Agreement and the Doha Round: History and Impact on Economic Development*, in 4 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 23, 43 (Peter K. Yu ed., 2007); see also Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166 (1994) (arguing that less developed countries agreed to stronger intellectual property protection during the TRIPS negotiations because they found such protection in their self-interests).

Although governments in developing countries and academic and policy commentators have repeatedly criticized the mismatch between high intellectual property standards and the weak economic and technological conditions in the developing world, one cannot ignore the considerable economic and technological growth in China, India, and other emerging countries in the Asia-Pacific Region.⁶⁵ Had these countries not embraced the reforms required by the WTO, they certainly would not have been as economically developed and technologically proficient as they are today.⁶⁶

To be sure, we could debate the extent to which these countries have benefited from TRIPS reforms, as opposed to WTO-induced trade liberalization.⁶⁷ Nevertheless, it is difficult to deny the TRIPS Agreement's contribu-

65. For discussions of China, India, and other BRICS countries (Brazil, Russia, India, China, and South Africa), see generally BRICS AND DEVELOPMENT ALTERNATIVES: INNOVATION SYSTEMS AND POLICIES (José Eduardo Cassiolato & Virginia Vitorino eds., 2011); THE BRICS-LAWYERS' GUIDE TO GLOBAL COOPERATION (Rostam Neuwirth et al. eds., 2017); ANDREW F. COOPER, THE BRICS: A VERY SHORT INTRODUCTION (2016); AMRITA NARLIKAR, NEW POWERS: HOW TO BECOME ONE AND HOW TO MANAGE THEM (2010); JIM O'NEILL, THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND (2011); Peter K. Yu, *The Middle Intellectual Property Powers*, in LAW AND DEVELOPMENT IN MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP 84 (Randall Peerenboom & Tom Ginsburg eds., 2014); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 386 (2008).

66. As the Author noted in an earlier article,

To some extent, the push for China to strengthen intellectual property protection has resulted in the slow and paradoxical erosion of the United States' competitive position. This point sounds counterintuitive, but it actually makes a lot of sense. From a long-term competition standpoint, greater intellectual property protection will make China more innovative and therefore more competitive. Such increased competitiveness will slowly erode the competitive advantage the United States has traditionally enjoyed as a result of its much higher intellectual property standards.

Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 550–51 (2012) (footnotes omitted); see also CAMPBELL, *supra* note 6, at 195 (“The last time China signed on to a difficult trade agreement was when it joined the WTO, and after a period of costly but necessary domestic reforms, it benefited dramatically.”); Gordon G. Chang, *TPP vs. RCEP: America and China Battle for Control of Pacific Trade*, NAT'L INTEREST (Oct. 6, 2015), <http://nationalinterest.org/feature/tpp-vs-rcep-america-china-battle-control-pacific-trade-14021> (“[China] reaped large gains after it joined the World Trade Organization in December 2001, due mostly to the reforms required by its accession agreement.”).

67. While there is an important distinction between those improvements that originated from the TRIPS Agreement and those that originated from WTO rules outside the intellectual property area, the WTO's “single undertaking”

tions to the economic development and technological proficiency in these countries. As much as policymakers and commentators are eager to criticize the deleterious effects of the TRIPS Agreement and TRIPS-plus bilateral, regional, and plurilateral trade agreements, we cannot lose sight of the Agreements' positive benefits.

2. Potential Concerns

Although higher standards of intellectual property protection and enforcement can be beneficial, unsuitable standards can be highly problematic, especially for developing countries. First, through the transplant of high standards from the developed world, the TPP intellectual property chapter can potentially ignore developing countries' "local needs, national interests, technological capabilities, institutional capacities, and public health conditions."⁶⁸ Because of the differences in economic conditions, imitative or innovative capacities, research and development productivities, and availability of human capital, an innovative model that works well in one country may not suit the needs and interests of another country.⁶⁹ Thus, unquestioned adoption of foreign intellectual property laws may not only fail to result in greater innovative efforts, industrial progress, and technology transfers, but it may also drain away the resources needed for dealing with the socio-economic and public health problems created by the new legislation.⁷⁰

Second, the introduction of reforms based on foreign laws may exacerbate the dire economic plight of many developing countries, as the newly transplanted laws would enable foreign rights holders in developed and emerging countries to crush local industries through litigation threats or ac-

approach has virtually guaranteed this distinction to be a non-issue. Under this approach, any country acceding to the WTO cannot have the non-intellectual property reforms and benefits without also implementing the TRIPS-based reforms. See Marrakesh Agreement Establishing the World Trade Organization art. 2.2, Apr. 15, 1994, 1867 U.N.T.S. 154 ("The agreements and associated legal instruments included in Annexes 1, 2 and 3 [including the TRIPS Agreement] . . . are integral parts of this Agreement, binding on all Members."); see also *Legal Texts: The WTO Agreements*, WORLD TRADE ORG., https://www.wto.org/English/docs_e/legal_e/ursum_e.htm (last visited Oct. 17, 2016) ("The WTO framework ensures a 'single undertaking approach' to the results of the Uruguay Round—thus, membership in the WTO entails accepting all the results of the Round without exception.").

68. Yu, *The International Enclosure Movement*, *supra* note 56, at 828.

69. See Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regime*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 89, 93–97 (Mitchel B. Wallerstein et al. eds., 1993) (arguing that countries should tailor their intellectual property system by taking into account their economic needs, productive and research capabilities, and institutional and budgetary constraints).

70. See Yu, *The International Enclosure Movement*, *supra* note 56, at 828.

tual lawsuits.⁷¹ Even if the new laws were beneficial *in the long run*, many of these countries might not have the wealth, infrastructure, and technological base to take advantage of the opportunities created by the system *in the short run*.⁷² For countries with urgent and desperate public policy needs and a population dying due to a lack of access to essential medicines, the realization of the hope for a brighter long-term future seems far away, if not unrealistic. If protection were strengthened beyond the point of an appropriate balance, the present population would undoubtedly suffer greatly.

Third, greater harmonization of legal standards, while potentially beneficial,⁷³ can take away valuable opportunities for experimentation with new regulatory and economic policies.⁷⁴ In addition, the creation of diversified rules can facilitate competition among jurisdictions. It could also enable each jurisdiction to decide for itself what rules and systems it wants to adopt.⁷⁵ Such decisions, in turn, would render the lawmaking process more accountable to the local populations.⁷⁶ In the digital age, when governments or legislatures hastily introduce laws, often without convincing empirical evidence, greater experimentation and competition are badly needed.⁷⁷

Finally, whether intended or not, bilateral, regional, and plurilateral trade agreements may call for higher levels of protection and enforcement than what is currently offered in developed countries.⁷⁸ Notably, the TPP

-
71. See Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 30–31 (2002) (discussing the lawsuit major pharmaceutical manufacturers brought against the South African government).
 72. See KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 237 (2000) (noting that “long-run gains would come at the expense of costlier access in the medium term”).
 73. See John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 693–703 (2002) (advancing the case for harmonization).
 74. See *id.* at 707–08 (discussing how countries can develop legal systems by experimenting with new regulatory and economic policies).
 75. See *id.* at 703–06 (discussing how jurisdictional legal variation enables each jurisdiction to match its laws to local preferences).
 76. See *id.* at 706–07 (discussing how interjurisdictional competition could serve as a check on government).
 77. See Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 40–58 (2006) (criticizing the inappropriateness of anti-circumvention protection for developing countries).
 78. See Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT'L L. 79, 93 (2004) (“[B]y creating through bilateral negotiations standards of protection higher than those applied domestically, the powerful U.S. [industries] may be able to force an amendment of U.S. domestic law in ways simpler and less costly than through lobbying in Congress.”); Yu, *Anticircumvention and Anti-*

intellectual property chapter has omitted the important limitations and exceptions that these countries have introduced to ensure balance in their intellectual property systems.⁷⁹ Among the oft-cited examples are the many exceptions found in the U.S. anti-circumvention provision.⁸⁰ If a major intellectual property power like the United States did not even find it beneficial to have high anti-circumvention standards without the qualifying exceptions, why would these unqualified standards be appropriate for developing countries with limited resources, insufficient safeguards, and inadequate correction mechanisms?⁸¹

B. Regional Investment Agreement⁸²

The second way to think about the TPP Agreement is to view it as a regional investment agreement. Although policymakers and commentators in the intellectual property field tend to focus their attention on the TPP intellectual property chapter, they should not lose sight of the fact that the TPP Agreement also includes two chapters that are highly relevant to intellectual

anticircumvention, *supra* note 77, at 41 (noting that “the [anti-circumvention] protection under the free trade agreements is often stronger than what is required under the [Digital Millennium Copyright Act]”).

79. See TPP Agreement, *supra* note 19, ch. 18.

80. Compare *id.* art. 18.68 with 17 U.S.C. § 1201(d)–(j) (2012).

81. See COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 4 (2002), http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf (“[W]e consider that, if anything, the costs of getting the [intellectual property] system ‘wrong’ in a developing country are likely to be far higher than in developed countries. Most developed countries have sophisticated systems of competition regulation to ensure that abuses of any monopoly rights cannot unduly affect the public interest.”); MASKUS, *supra* note 72, at 237 (noting that developed countries “have mature legal systems of corrective interventions” where “the exercise of [intellectual property rights] threatens to be anticompetitive or excessively costly in social terms”); Yu, *The International Enclosure Movement*, *supra* note 56, at 890 (“Many of these countries also may not have the ability to put in place a correction mechanism once they have exhausted their financial and human resources to update or strengthen their intellectual property system. Even worse, because reforms based on foreign models always incur political costs on those pushing the reforms, policymakers may have limited political capital to put in place further ‘correction’ reforms once their initial reforms fail.” (footnote omitted)).

82. This Section includes material that is condensed from Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 AM. U. L. REV. 829, 844–75 (2017).

property matters—the investment chapter (Chapter 9)⁸³ and the dispute settlement chapter (Chapter 28).⁸⁴

1. Justifications

Supported by the TPP investment and dispute settlement chapters, the investor-state dispute settlement (ISDS) mechanism⁸⁵ is particularly attractive to those conducting business in countries that have a limited respect for the rule of law or an underdeveloped judicial system.⁸⁶ While business or contractual disputes are inevitable, they are highly problematic if injured investors cannot seek compensation through a fair and independent judicial system. The lack of such a system would make it difficult for businesses to recoup or benefit from their investments, such as those made when “buying or leasing land, building new facilities, establishing relationships, and recruiting and training employees.”⁸⁷ Having mechanisms that prevent for-

83. TPP Agreement, *supra* note 19, ch. 9.

84. *Id.* ch. 28.

85. For the Author’s discussions of ISDS in the TPP context, see generally Peter K. Yu, *Investor-State Dispute Settlement and the Trans-Pacific Partnership*, in *INTELLECTUAL PROPERTY AND THE JUDICIARY* (Christophe Geiger et al. eds., forthcoming 2018); Peter K. Yu, *Crossfertilizing ISDS with TRIPS*, 49 *LOY. U. CHI. L.J.* 321 (2017); Yu, *The Investment-Related Aspects of Intellectual Property Rights*, *supra* note 82.

86. As Charles Brower and Stephan Schill observed,

In many developing and transitioning countries, independent courts that decide cases in accordance with pre-established rules of law in a timely fashion are missing altogether. Corruption in the judiciary is a sad but daily business in the courts of many countries. Additionally, lengthy and inefficient court proceedings dragging on over years, if not decades, remain too commonplace. Under such circumstances, it is difficult to argue convincingly that dispute resolution in many host states’ courts constitutes a way for investors to make a recalcitrant host state comply with its investment treaty commitments.

Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT’L L.* 471, 479 (2009) (footnotes omitted); see also SCOTT MILLER & GREGORY N. HICKS, *INVESTOR-STATE DISPUTE SETTLEMENT: A REALITY CHECK*, at v (2015) (“Disputes are . . . most frequent in states with weak legal institutions. Argentina (53 claims) and Venezuela (36 claims) are the leading respondent states.”).

87. MILLER & HICKS, *supra* note 86, at 13; see also Christoph Schreuer, *Do We Need Investment Arbitration?*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY* 879, 879 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015) (“An investor typically must commit considerable resources before it can hope to reap the expected profits. In doing so, it makes itself dependent on the benevolence of the host State. This situation of dependence calls for strong legal protection.”).

eign investors from being subjected to unreasonable political risks would also send important signals to attract investments from abroad.⁸⁸

In addition, the provision of an internationalized process for businesses to seek redress directly from governments is important considering that courts, especially those in developing countries, tend to protect their own governments.⁸⁹ For instance, these courts may provide sovereign immunity, thereby taking away the businesses' opportunities to file lawsuits against local governments.⁹⁰ The courts may also be biased, especially if corruption is

-
88. See LONE WANDAHL MOUYAL, *INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE: A HUMAN RIGHTS PERSPECTIVE* 8 (2016) (noting the political risks concerning “the likelihood of changes to the operation and profitability of the investment as a result of the policy or administration, which impacts on the existence and/or an investor’s ownership of the investment, on the continuous operation of the investment as well as on the possibility of transfer of returns”); August Reinisch, *The Future of Investment Arbitration*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 894, 899 (Christina Binder et al. eds., 2009) (stating that a legal framework that includes the potential for highly enforceable investment awards “creates a positive investment climate that attracts foreign investment that is beneficial to the economy of recipient states”); Schreuer, *supra* note 87, at 879 (“From the host State’s perspective, the most obvious advantage of investment protection is improvement of its investment climate.”); SURYA P. SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE* 87 (2d ed. 2012) (discussing the role of bilateral investment treaties as “insurance against political risks”); Cynthia M. Ho, *Sovereignty Under Siege: Corporate Challenges to Domestic Intellectual Property Decisions*, 30 *BERKELEY TECH. L.J.* 213, 231–32 (2015) (“All of these rights help to ensure that host governments will not subject foreign investors to inappropriate risks, and consequently induce them to invest.”).
89. See Peter Muchlinski, *Policy Issues*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 3, 40 (Peter Muchlinski et al. eds., 2008) (“[I]nvestors may perceive host country laws and procedures not to be sufficient as a means for the resolution of disputes with the host country. They may prefer an internationalized approach to dispute settlement. This allows the investor the freedom to choose between national and international dispute settlement mechanisms.”).
90. See Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 *HASTINGS L.J.* 241, 254 (2007) (“Municipal courts in the home state of the investor will often be unavailable either for lack of jurisdiction over the host state, or because foreign sovereign immunity protects the host government.”); see also Brower & Schill, *supra* note 86, at 479 (“Various legal obstacles—including state immunity and doctrines of judicial restraint such as the act-of-state doctrine—constitute significant limits to the subjection of host states to third-country jurisdiction.”); Ho, *supra* note 88, at 232 (“Although foreign investors previously might have attempted to sue the state in its own courts, those

involved.⁹¹ For businesses in locations with armed conflicts or civil strife, resolving disputes through local means can be quite dangerous.⁹²

At the macro level, ISDS can promote global harmony by insulating investor-state disputes “from the realm of politics and diplomacy.”⁹³ As Christoph Schreuer pointed out, “[a] major benefit that is often overlooked is the impact on the relations between the States concerned.”⁹⁴ Diplomatic benefits aside, greater protection of investment, through ISDS or otherwise, could help ensure “the introduction and promotion of principles of good governance in domestic legal systems.”⁹⁵

Finally, it will be worthwhile to compare ISDS with state-to-state dispute settlement. Unlike the WTO process, which limits complaints to those brought by state governments,⁹⁶ ISDS will give investors independence and

courts could be biased; alternatively, the state might be able to claim sovereign immunity. Sometimes the investor could not even directly pursue an action.”).

91. See Hilmar Raeschke-Kessler & Dorothee Gottwald, *Corruption*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 584 (Peter Muchlinski et al. eds., 2008) (examining the legal effects of corruption on international investment); Schreuer, *supra* note 87, at 883 (“Lack of independence and impartiality . . . and a sense of loyalty towards local interests are recurring problems that arise for foreign investors that try to vindicate their rights before domestic courts against the forum State.”); see also OFFICE OF THE U.S. TRADE REP., FACT SHEET: INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) (2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> [hereinafter ISDS FACT SHEET] (“While countries with weak legal institutions are frequent respondents in ISDS cases, American investors have also faced cases of bias or insufficient legal remedies in countries with well-developed legal institutions.”).
92. See MILLER & HICKS, *supra* note 86, at 17–19 (discussing the change of investment policy from gunboat diplomacy to bilateral investment treaties); Ho, *supra* note 88, at 232 (“In the worst-case scenario, home states used, or at least threatened to use, military force.”).
93. Schreuer, *supra* note 87, at 882.
94. *Id.* at 881; see also LUKAS VANHONNAEKER, INTELLECTUAL PROPERTY RIGHTS AS FOREIGN DIRECT INVESTMENTS: FROM COLLISION TO COLLABORATION 161 (2015) (stating that ISDS arbitrators will be “able to issue a directly enforceable award holding the Host Government accountable for [an international investment agreement] violation without risking the political interferences that may occur in conflicts between States”); Reinisch, *supra* note 88, at 900 (noting that ISDS “is supposed to lead to a de-politicization of investment disputes”).
95. Schreuer, *supra* note 87, at 882.
96. See Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 2–3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 401–03 (outlining the dispute settlement process and limiting access to WTO member states).

more control over the dispute resolution strategies.⁹⁷ The latter process will enable investors to determine for themselves when to file complaints and whether to focus on the short or long term.⁹⁸ The ability to make these decisions is particularly important because governments do not always meet industry demands for initiating WTO complaints.⁹⁹

2. Potential Concerns

Notwithstanding these many benefits, investment chapters in bilateral, regional, and plurilateral agreements, including the ISDS mechanisms they provide, have been criticized in four directions. First, ISDS erodes national sovereignty and regulatory space by allowing transnational corporations to challenge legitimate regulations, such as those concerning public health, labor, or the environment.¹⁰⁰ Such challenges would create what commentators, intergovernmental bodies, and civil society organizations have widely

-
97. See Christopher Gibson, *A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation*, 25 AM. U. INT'L L. REV. 357, 407–08 (2010) (“[T]he investor in an investor-state arbitration will have the greatest degree of control over its case without any involvement from its own government.”).
98. See *id.* at 408 (“[The investor in an investor-state arbitration] can prepare and implement its own strategy for litigating potential investment claims in connection with the compulsory license based only on the investor’s assessment of the circumstances and merits of the case.”).
99. See *id.* at 407 (“[I]nvestors choosing the WTO forum will be forced to rely upon their government’s willingness to bring a claim, which is not a foregone conclusion and may be subject to the vagaries of other considerations in the relations between the two countries concerned. The private investor will thus need considerable political sway to induce its government to initiate the state-to-state dispute.” (footnotes omitted)); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 923–26 (2006) (noting that the USTR initially took a “‘wait-and-see’ approach” and refused to file a WTO complaint against China despite repeated complaints and demands from the business community).
100. See MOUYAL, *supra* note 88, at 68 (discussing the adverse implications of the foreign mining industry’s threat of using the U.K.-Indonesia or Australia-Indonesia bilateral investment agreement to challenge an Indonesian forestry act that bans open-cast mining in protected forest areas); Yu, *The Investment-Related Aspects of Intellectual Property Rights*, *supra* note 82, at 833–35 (recounting Philip Morris’s attempts to use ISDS to challenge the plain-packaging regulations for tobacco products in Australia and Uruguay and Eli Lilly’s effort to invalidate the patentability requirements in Canada); Jane Kelsey & Lori Wallach, “Investor-State” Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems, PUB. CITIZEN (Apr. 2012), <https://www.citizen.org/documents/isds-domestic-legal-process-background-brief.pdf> (“Over \$350 million in compensation has already been paid out to corporations in a series of Investor-State cases under NAFTA alone. This included attacks

referred to as “regulatory chill”¹⁰¹—a chilling effect that undermines a country’s sovereign ability to regulate the foreign investors’ harmful conducts.¹⁰² Recent examples of such chill include Philip Morris’s failed attempts to use ISDS to challenge the plain packaging regulations for tobacco products in Australia and Uruguay,¹⁰³ as well as Eli Lilly’s equally unsuccessful effort to invalidate the patentability requirements in Canada.¹⁰⁴

Second, ISDS can impose heavy burdens on governments, especially those in the developing world. The costs of ISDS arbitrations “have averaged over USD 8 million with costs exceeding USD 30 million in some cases.”¹⁰⁵ In addition, arbitral awards can be very large, as evidenced by a \$50 billion ISDS award that was initially given as compensation for Russia’s wrongful

on natural resource policies, environmental protection and health and safety measures, and more.”).

101. See, e.g., MOUYAL, *supra* note 88, at 67–68 (providing examples of “regulatory chill”); Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 606 (Chester Brown & Kate Miles eds., 2011) (using political science to analyze the “regulatory chill” hypothesis); U.N. CONFERENCE ON TRADE & DEVELOPMENT, *WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE* 128 (2015) (considering “regulatory chill” to be a concern of ISDS).
102. See Ho, *supra* note 88, at 233 (“A major issue is that the suits appear to improperly encroach on domestic authority and even have a chilling effect on legitimate state regulatory functions due to substantial awards, as well as legal costs of defending such cases.”).
103. Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award (July 8, 2016), <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>; Philip Morris Asia Ltd. v. Commonwealth of Austl., UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf.
104. Eli Lilly & Co. v. Government of Can., ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), <http://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf>.
105. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 19 (OECD, Working Paper on International Investment No. 2012/03, 2012); see also Matthew Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY* 748, 749 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015) (“The average Party Costs for Claimants and Respondents are in the region of U.S. \$4.4 million and U.S. \$4.5 million, respectively. To this can be added average Tribunal Costs of around U.S. \$750,000. The average ‘all in’ costs of an investment treaty arbitration are therefore just short of U.S. \$10 million. The median figure is notably lower, but still substantial, at around U.S. \$6 million.” (footnotes omitted)).

expropriation of the now-defunct Yukos Oil, the country's once biggest oil producer.¹⁰⁶ Because private investors initiate the arbitrations, they may also file more complaints than governments would have under the WTO dispute settlement process.¹⁰⁷

Third, ISDS arbitrations are procedurally flawed. For instance, arbitral tribunals may be filled with partial and unaccountable lawyers¹⁰⁸ who have worked in law firms that have clients in the same industry.¹⁰⁹ They may also

106. See Henry Meyer, *Russia Faces \$50 Billion Fight in U.S., U.K. for Yukos Damages*, BLOOMBERG (July 24, 2015, 9:40 AM), <http://www.bloomberg.com/news/articles/2015-07-24/russia-faces-50-billion-fight-in-u-s-u-k-for-yukos-damages> (reporting the \$50 billion initial arbitration award, which was later struck down on appeal); see also Simon Shuster, *Why a Win in a Dutch Court Is Making Vladimir Putin So Happy*, TIME (Apr. 20, 2016), <http://time.com/4301475/russia-appeal-case-yukos-the-hague/> (reporting the appeal).

107. As the Author noted in an earlier article,

By providing alternative fora, ISDS will allow private actors to bypass these widely used processes. Even worse, the investors' home governments can still file complaints through traditional state-to-state dispute settlement processes. As a result, ISDS is likely to spark a vicious cycle that will generate more disputes. After all, diplomatic and other nontrade reasons may induce governments to exercise restraint in filing state-to-state complaints.

Yu, *The Investment-Related Aspects of Intellectual Property Rights*, *supra* note 82, at 860–61; see also ISDS FACT SHEET, *supra* note 91 (“For some critics there is a discomfort that ISDS provides an additional channel for investors to sue governments, including a belief that all disputes (even international law disputes) should be resolved in domestic courts.”).

108. See Ho, *supra* note 88, at 234 (“Some . . . contend that arbitrators lack the independence and impartiality of typical domestic or international tribunals.”); Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT’L L. 761, 783 (2015) (noting that, “on average, WTO panelists tend to be relatively low-key diplomats from developing countries (very few U.S./EU nationals), with a government background, and often without a law degree or legal expertise, whereas ICSID [International Centre for Settlement of Investment Disputes] arbitrators are likely high-powered, elite private lawyers or legal academics from western Europe or the United States” and that “the pool of ICSID arbitrators [is] an ideologically divided, closed network with a small number of individuals attracting most nominations, whereas the universe of WTO panelists is ideologically more homogeneous, with a relatively low reappointment rate and nominations more evenly distributed (with the consequence that panelists, on average, have relatively little experience)”).

109. See Pauwelyn, *supra* note 108, at 780 (“ICSID arbitrators . . . get referred to as ‘elite lawyers,’ ‘ambitious investment lawyer[s] keen to make a lucrative living,’ a ‘mafia,’ ‘super arbitrators’ who are ‘not just the mafia but a smaller, inner mafia,’ adjudicators—not faceless—but with conflicts of interest and a

have a tendency to serve corporate clients who are similar to those filing ISDS complaints.¹¹⁰ In addition, critics have complained about a lack of transparent proceedings¹¹¹ and a potential for frivolous claims.¹¹² Worse still, those states that find it costly to go through the ISDS process may be too eager to settle disputes even when their laws have already met international standards.¹¹³

Fourth, ISDS arbitrators may have tunnel vision, causing them to over-emphasize intellectual property rights as investors' rights. With respect to intellectual property investments, the arbitrators may focus narrowly on the

'hidden agenda' ('one minute acting as counsel, the next framing the issue as an academic, or influencing policy as a government representative or expert witness'.)'' (footnotes omitted); *see also* Gaukrodger & Gordon, *supra* note 105, at 44 ("It appears that over 50% of ISDS arbitrators have acted as counsel for investors in other ISDS cases while it has been estimated about 10% of ISDS arbitrators have acted as counsel for States in other cases.").

110. *See* Pauwelyn, *supra* note 108, at 764 (noting "the closed network of specialist ISDS arbitrators and lawyers" in "the terrain of subject-matter specialists").
111. *See* Kate Miles, *Reconceptualising International Investment Law: Bringing the Public Interest into Private Business*, in *INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY* 295, 295–96 (Meredith Kolsky Lewis & Susy Frankel eds., 2010) ("Although [ISDS] cases resolve questions that can affect significant matters of public policy, the public generally does not have access to the documents, the proceedings are conducted behind closed doors, and the submission of amicus curiae briefs is restricted, if permitted at all."); Ho, *supra* note 88, at 234 (noting that "the proceedings and decisions may lack the same level of transparency as most judicial decisions"); Yu, *The Investment-Related Aspects of Intellectual Property Rights*, *supra* note 82, at 853 ("[M]any of the ISDS proceedings have been kept in secret, and policymakers, commentators, and civil society organizations continue to have great difficulty uncovering what happens in these proceedings.").
112. *See* ISDS FACT SHEET, *supra* note 91 ("Others believe that ISDS could put strains on national treasuries or that ISDS cases are frivolous."); Yu, *The Investment-Related Aspects of Intellectual Property Rights*, *supra* note 82, at 854 ("[I]nvestors may file frivolous lawsuits, thereby wasting the host state's scarce resources.").
113. *See* TPP's ISDS: *Moving from State-to-State to Company-to-World Dispute Resolution*, LEGAL READER (May 1, 2015), <http://www.legalreader.com/tpps-isds-moving-from-state-to-state-to-company-to-world-dispute-resolution/> (surmising that New Zealand "decided against changing their smoking laws out of fear of . . . retribution through ISDS"); *see also* MOUYAL, *supra* note 88, at 68 ("In response to [the foreign mining industry's threat based on the U.K.-Indonesia or Australia-Indonesia bilateral investment agreement], Indonesia retreated from the ban [on open-cast mining in protected forest areas], first by exempting several of the companies from the ban and promising to assess the situation of other affected companies. Subsequently the government decided to repeal the ban.").

intellectual property side of the investment bargain. As a result, they may ignore the existence of concessions outside the intellectual property field, such as free lands, tax breaks, exemption from export custom duties, and preferential treatment on foreign exchange.¹¹⁴ They may also subscribe to a narrow view of intellectual property rights, thereby focusing primarily on the protection levels without adequately considering the corresponding limitations or exceptions. They may even ignore the many limitations, flexibilities, and safeguards that have been carefully built into the TRIPS Agreement.¹¹⁵

Finally, unlike court cases or WTO panel decisions, ISDS arbitrations are not subject to appeal within the dispute settlement process.¹¹⁶ They also do not follow precedents, as in common law jurisdictions.¹¹⁷ As a result,

114. As Peter Muchlinski observed,

Incentives are used by governments to attract investment, to steer investment into favoured industries or regions, or to influence the character of an investment, for example, when technology-intensive investment is being sought. They can take two major forms, fiscal incentives, based on tax advantages to investors, and financial incentives based on the provision of funds directly to investors to finance new investments, or certain operations, or to defray capital or operational costs. Other types of incentives may not be easy to discern but they can have a positive effect on the overall profitability of an investment. These may include general infrastructure development by the host country, market preferences or preferential treatment on foreign exchange.

Muchlinski, *supra* note 89, at 33 (footnote omitted); *see also* Anastasia Telesetsky, *A New Investment Deal in Asia and Africa: Land Leases to Foreign Investors*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 539 (Katie Miles & Chester Brown eds., 2011) (discussing the various concessions that states in Asia and Africa have made to attract foreign direct investment).

115. *See supra* note 57 (providing sources discussing the flexibilities within the TRIPS Agreement).

116. As Cynthia Ho observed in regard to the problems raised by a lack of an appellate mechanism in ISDS proceedings,

A major complaint is that the system results in inconsistent decisions because there is no binding precedent, tribunals interpret provisions broadly, and there is no appeal system. Although tribunals often rely on prior decisions and awards, and counsel for parties regularly cite prior decisions, the lack of hierarchy among tribunals as compared to traditional court systems, as well as the lack of an appellate system, may result in unpredictability.

Ho, *supra* note 88, at 234; *see also* Yu, *Crossfertilizing ISDS with TRIPS*, *supra* note 85 (advocating the establishment of an appellate mechanism that features WTO experts).

117. Compare Marc Bungenberg & Catharine Titi, *Precedents in International Investment Law*, in *INTERNATIONAL INVESTMENT LAW: A HANDBOOK* 1505, 1508 (Marc Bungenberg et al. eds., 2015) (“Despite the absence of a formal doctrine

arbitration rulings can vary according to party, tribunal, or subject matter. The outcomes can be quite unpredictable and inconsistent.¹¹⁸

3. Potential Improvements

To respond to these criticisms, the TPP Agreement has built some substantive and procedural safeguards into its investment and related chapters. Regarding sovereignty and regulatory space, the Agreement reserves to each TPP partner the ability to regulate to ensure financial stability¹¹⁹ and to achieve “environmental, health or other regulatory objectives.”¹²⁰ The Agreement also explicitly recognizes the health authorities’ ability to introduce tobacco control measures.¹²¹

of binding precedent, investment tribunals generally rely on earlier awards to buttress their legal reasoning, often treating them as determinative or authoritative statements of applicable rules or principles of law.” (footnote omitted), and Loretta Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 789, 792 (Peter Muchlinski et al. eds., 2008) (“While it cannot be said that the rule of legal precedent (*stare decisis*) applies in international arbitration in general, investment arbitration has witnessed a growth in reported jurisprudence. Litigation parties frequently rely on this jurisprudence to support their legal arguments and tribunals often apply these precedents as grounds for their findings.”), with Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188, 1196 (Peter Muchlinski et al. eds., 2008) (“[I]n some cases tribunals did not follow earlier decisions but adopted different solutions. At times, they simply adopted a different solution without distancing themselves from the earlier decision. At other times, they referred to the earlier decision and pointed out that they were unconvinced by what another tribunal had said and that, therefore, their decision departed from the one adopted earlier.”). For discussions of the doctrine of precedent in relation to international investment arbitration, see generally Bungenberg & Titi, *supra*; Joshua Karton, *Lessons from International Uniform Law*, in RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 48 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015); Andrés Rigo Sureda, *Precedent in Investment Treaty Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 830 (Christina Binder et al. eds., 2009).

118. See Reinisch, *supra* note 88, at 905–08 (discussing the danger of inconsistent investment arbitral awards).

119. See TPP Agreement, *supra* note 19, art. 9.3.3 (stating that the investment chapter does not cover financial services).

120. *Id.* art. 9.16.

121. *Id.* art. 29.5.

To address the procedural flaws of the ISDS process, the TPP Agreement empowers arbitral tribunals to review and dismiss frivolous claims,¹²² as well as to award costs and attorneys' fees.¹²³ In addition, the Agreement imposes on investors "the burden of proving all elements of [their] claims, consistent with general principles of international law applicable to international arbitration."¹²⁴ The TPP Agreement also limits claims to those that have occurred within three and a half years¹²⁵ as well as those involving more than mere expectations of profits.¹²⁶ The Agreement further permits the consolidation of ISDS claims,¹²⁷ while requiring claimants to "waive the right to initiate parallel proceedings in other fora challenging the same measures."¹²⁸

122. *See id.* art. 9.23.4 ("[A] tribunal shall address and decide as a preliminary question any objection by the respondent that . . . a claim is manifestly without legal merit.").
123. *See id.* art. 9.29.4 ("If the tribunal determines [the] claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney's fees.").
124. *Id.* art. 9.23.7.
125. *See* TPP Agreement, *supra* note 19, art. 9.21.1 ("No claim shall be submitted to arbitration . . . if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged . . ."); *see also* ISDS FACT SHEET, *supra* note 91 ("A three-year statute of limitations protects respondents against old claims, which are difficult for governments to defend in part because access to documents and witnesses becomes more difficult over time.").
126. *See* TPP Agreement, *supra* note 19, art. 9.6.4 ("[T]he mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach . . . even if there is loss or damage to the covered investment as a result.").
127. *See id.* art. 9.28.1 ("If two or more claims have been submitted separately to arbitration under Article 9.19.1 . . . and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10."); *see also* ISDS FACT SHEET, *supra* note 91 ("On request, tribunals may consolidate claims raising common questions of fact and law, which may increase efficiency, reduce litigation costs, and prevent strategic initiation of duplicative litigation.").
128. OFFICE OF THE U.S. TRADE REP., TPP CHAPTER SUMMARY—INVESTMENT 5 (2016), <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Investment.pdf> [hereinafter INVESTMENT CHAPTER SUMMARY]; *see also* TPP Agreement, *supra* note 19, art. 28.4.2 ("Once a complaining Party has requested the establishment of, or referred a matter to, a panel or other tribunal under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of other fora.").

Concerning transparency, arbitral proceedings under the TPP Agreement will remain open and publicly accessible.¹²⁹ TPP partners will also establish a code of conduct for ISDS arbitrators to ensure independence and impartiality.¹³⁰ In addition, disputing parties will have an opportunity to review and comment on proposed arbitral awards before any final rulings.¹³¹ TPP partners can further agree on joint interpretations that will bind arbitral tribunals.¹³²

Finally, to avoid tunnel vision that may lead to an overemphasis on intellectual property rights as investors' rights, the TPP Agreement allows civil society organizations, environmental groups, labor unions, and other interested stakeholders to file *amicus curiae* briefs.¹³³ The Agreement also enables

129. Article 9.24.1 specifically requires the respondent to make publicly available the following documents:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);
- (d) minutes or transcripts of hearings of the tribunal, if available; and
- (e) orders, awards and decisions of the tribunal.

TPP Agreement, *supra* note 19, art. 9.24.1.

130. See INVESTMENT CHAPTER SUMMARY, *supra* note 128, at 6; see also TPP Agreement, *supra* note 19, art. 28.10.1(d) (explicitly requiring all members of dispute settlement panels, including ISDS arbitrators, to “comply with the code of conduct in the Rules of Procedure”). For discussions of issues relating to the independence and impartiality of international arbitrators, see generally Malintoppi, *supra* note 117; Audley Sheppard, *Arbitrator Independence in IC-SID Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 131 (Christina Binder et al. eds., 2009).

131. See TPP Agreement, *supra* note 19, art. 28.17.7 (specifically granting to these parties the opportunity to “submit written comments to the panel on its initial report”); see also INVESTMENT CHAPTER SUMMARY, *supra* note 128, at 4 (noting that the TPP Agreement “[e]nsur[es] that disputing parties will be able to review and comment on proposed arbitral awards prior to their issuance, and to allow both disputing parties the option to challenge a tribunal award”).

132. See TPP Agreement, *supra* note 19, art. 9.25.3 (“A decision of the Commission on the interpretation of a provision of this Agreement . . . shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.”); see also INVESTMENT CHAPTER SUMMARY, *supra* note 128, at 5 (noting that the TPP Agreement “[e]nsur[es] that TPP Parties, at any time, can agree on interpretations of the agreement that are binding on tribunals”).

133. See TPP Agreement, *supra* note 19, art. 9.23.3 (“After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae*

non-disputing parties, such as the investors' home governments, to make submissions to arbitral tribunals.¹³⁴

C. Plurilateral Trade Agreement

1. Package Deal

The third way to think about the TPP Agreement is to view it as a plurilateral trade agreement. Such a perspective is particularly important considering the wide variety of issue areas covered in a trade agreement. As noted earlier, the TPP Agreement includes not only intellectual property and investment chapters, but also chapters relating to other trade and trade-related issues.¹³⁵

Given the Agreement's wide coverage, some TPP partners may have obtained attractive benefits in the areas of intellectual property and investment in exchange for concessions in other areas, such as beef, dairy, pork, sugar, textiles, wheat, or wool.¹³⁶ Policymakers and commentators should therefore exercise caution when evaluating the bargains in the TPP intellectual property chapter on their own. After all, the TPP trade negotiators focused on striking an appropriate balance in the whole package, not in each individual chapter.¹³⁷

submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings.”).

134. *See id.* art. 28.13(e) (“[The dispute settlement] panel shall consider requests from non-governmental entities located in the territory of a disputing Party to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties.”).

135. *See id.* chs. 1–30.

136. *See* Deborah Kay Elms, *The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch*, 8 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 379, 384 (2013) (discussing the various outstanding issues covered at the final stages of the TPP negotiations); *see also* Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 60 *DRAKE L. REV. DISCOURSE* 16, 26 (2012) (noting that, in the TPP negotiations, “New Zealand may find it beneficial to make greater concessions in the intellectual property area if the United States is willing to allow for more exports in lamb, wool, and other sheep products”).

137. *See* Kevin Outterson, *Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets*, 5 *YALE J. HEALTH POL'Y L. & ETHICS* 193, 243 (2005) (“Small, poor countries offered a free trade deal with the United States may well agree to provisions which undermine health in order to serve commercial interests.”); Yu, *The International Enclosure Movement*, *supra* note 56, at 894 (noting that “the negotiators had considered intellectual property protection as merely one of the many bargaining chips in international trade”); Michael Geist, *Why We Must Stand on Guard Over Copy-*

The linkage of these different issue areas—or, what commentators have described as “linkage bargaining”—was a key feature of the Uruguay Round negotiations.¹³⁸ As Michael Ryan observed, the linkage between trade and intellectual property via the TRIPS Agreement has enabled members of the General Agreement on Tariffs and Trade (GATT), and later the WTO, to “achieve treaties in diplomatically and politically difficult areas in which agreement would otherwise be elusive.”¹³⁹

Before the TRIPS Agreement, intellectual property negotiations were conducted primarily at WIPO or its predecessor, the United International Bureau for the Protection of Intellectual Property, known commonly through its French acronym “BIRPI.”¹⁴⁰ As a result, the negotiated agreements had a narrow intellectual property focus. While the Berne Convention for the Protection of Literary and Artistic Works protects copyright and neighboring rights,¹⁴¹ the Paris Convention for the Protection of Industrial Property covers industrial property, such as patents, utility models, industrial designs, and trademarks.¹⁴²

By the time the Uruguay Round negotiations were launched in the mid-1980s, the negotiating parties broadly expanded the negotiation focus. In exchange for greater intellectual property protection and market access, devel-

right, TORONTO STAR, Oct. 20, 2003, at D3 (noting that Australian negotiators “are increasingly willing to treat intellectual property as little more than a bargaining chip as part of broader negotiation”).

138. See MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 12 (1998) (discussing the linkage bargaining involved in the TRIPS negotiations).

139. *Id.*

140. See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 330–54 (2004) (discussing the negotiations of the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property). For detailed discussions of these two conventions, see generally STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938); STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION (1975); SAM RICKETSON, THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY: A COMMENTARY (2015); SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND (2d ed. 2005).

141. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris July 24, 1971).

142. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1538, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

oped countries offered concessions in agriculture and textiles, and agreed to abide by the mandatory dispute settlement process.¹⁴³

Since the TRIPS negotiations, intellectual property standards, including those in the TPP Agreement, have been frequently negotiated as part of a package trade deal. While intellectual property obligations are often found in an intellectual property chapter, they can also emerge from other chapters.¹⁴⁴ As a result, policymakers and commentators should carefully study the entire TPP Agreement, as opposed to the TPP intellectual property chapter alone.

The discussion in the previous Section has already shown how the TPP investment and dispute settlement chapters will have considerable impacts on the protection and enforcement of intellectual property rights. It is also worth noting that the carve-out for tobacco control measures in the TPP Agreement is found in the exceptions chapter (Chapter 29),¹⁴⁵ not in the intellectual property, investment, or dispute settlement chapter.

2. Potential Concerns

Owing in large part to the deadlocks at both the WTO and WIPO, the TPP Agreement emerged out of plurilateral negotiations between developed and like-minded countries.¹⁴⁶ In view of this development, policymakers and

143. See Yu, *TRIPS and Its Discontents*, *supra* note 63, at 371 (“While developed countries received stronger protection for intellectual property rights and a reduction in restrictions against foreign direct investment, less developed countries obtained, in return, lower tariffs on textiles and agriculture and protection via the mandatory dispute settlement process against unilateral sanctions imposed by the United States and other developed countries.”); see also *id.* at 371–73 (discussing the bargain narrative concerning the formation of the TRIPS Agreement).

144. See Peter K. Yu, *The Non-Multilateral Approach to International Intellectual Property Normsetting*, in *INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH* 83, 114 (Daniel J. Gervais ed., 2015) (“The [proposed Transatlantic Trade and Investment Partnership] Agreement’s electronic commerce chapter may . . . include provisions on internet service providers, even though issues concerning the audiovisual sector are not being negotiated at the moment.”); Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, *supra* note 27, at 709 (noting that “detailed TPP-like provisions on Internet service providers, secondary liability for copyright infringement and the notice-and-takedown mechanism . . . could easily have been negotiated as part of the yet-to-be-disclosed electronic commerce chapter, if that chapter indeed exists”).

145. See TPP Agreement, *supra* note 19, art. 29.5 (explicitly recognizing the health authorities’ ability to introduce tobacco control measures).

146. See Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 3, at 1140 (“[I]f including China in the TPP negotiations would slow down the discussions or create deadlocks similar to what the Doha Round now experiences, it makes great strategic sense to exclude China from the negotiations—or, at least, from the initial stages of these negotiations.”); see also Mitsuo Matsushita, *Japanese*

commentators have expressed concern about the growing fragmentation of the multilateral trading systems.¹⁴⁷ As former WTO Director-General Pascal Lamy observed, “proliferation is breeding concern—concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations.”¹⁴⁸

To be sure, the TPP Agreement alone may not present as significant a challenge to the multilateral trading system as its critics have claimed. Nevertheless, the proliferation of bilateral, regional, and plurilateral trade agreements have led to considerable fragmentation within the system. Commentators, most notably Jagdish Bhagwati, have widely referred to such fragmentation as the “spaghetti bowl”¹⁴⁹—or, in the Asian context, the “noodle bowl”¹⁵⁰—which is filled with “a mish-mash of overlapping, supporting,

Policies Toward East Asian Free Trade Agreements: Policy and Legal Perspectives, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 41, 42 (Ross Buckley et al. eds., 2008) (“[T]he power relationship in the WTO has changed, that is, the majority of WTO members today are developing countries and they have been successful in rallying their forces to act as countervailing powers vis-à-vis the hegemony of developed-country Members, such as the United States and the European Union.”).

147. See Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596–600 (2007) (discussing growing “proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries”); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 13–21 (discussing development of “international intellectual property regime complex”).
148. Pascal Lamy, Dir.-Gen., World Trade Org., Opening Remarks at the Conference on “Multilateralizing Regionalism” in Geneva (Sept. 10, 2007), http://www.wto.org/english/news_e/sppl_e/sppl67_e.htm.
149. Jagdish Bhagwati coined the term “spaghetti bowl.” Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995).
150. In the Asian context, this term has been widely used by the Asian Development Bank and other commentators. See, e.g., Wang Jiangyu, *Association of South-east Asian Nations-China Free Trade Agreement*, in BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 192, 224 (Simon Lester & Bryan Mercurio eds., 2009); Yu, *Sinic Trade Agreements*, *supra* note 44, at 978; Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism* (Asian Dev. Bank, Working Paper on Regional Economic Integration No. 7, 2007), <http://www.adb.org/documents/papers/regional-economic-integration/WP07-Baldwin.pdf>; Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends and Challenges* 3 (Asian Dev. Bank, Working Paper No. 144, 2009), <http://www.adb.org/documents/Working-Papers/2010/Economics-WP226.pdf>.

and possibly conflicting, obligations.”¹⁵¹

Although fragmentation has its benefits, commentators tend to agree that it would hurt developing countries more than it would help them. Eyal Benvenisti and George Downs, for example, described a number of ways in which the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries has helped powerful states to preserve their dominance:

First, [fragmentation] limits the ability of weaker states to engage in the logrolling that is necessary for them to bargain more effectively with more powerful states. . . . Second, by creating a multitude of competing institutions with overlapping responsibilities, fragmentation provides powerful states with the opportunity to abandon—or threaten to abandon—any given venue for a more sympathetic venue if their demands are not met. . . . Third, a fragmented system’s piecemeal character suggests an absence of design and obscures the role of intentionality. . . . This has helped obscure the fact that fragmentation is in part the result of a calculated strategy by powerful states to create a legal order that both closely reflects their interests and that only they have the capacity to alter.¹⁵²

More importantly, the existence of a dense web of bilateral, regional, and plurilateral trade agreements could create conflicting obligations within many developing countries.¹⁵³ Such conflicts can be quite problematic in the

151. Simon Lester & Bryan Mercurio, *Introduction to BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 1, 2* (Simon Lester & Bryan Mercurio eds., 2009).

152. Benvenisti & Downs, *supra* note 147, at 597–98.

153. As Robert Scollay noted,

A particular problem for convergence arises if more than one major economy establishes its own FTA “template”, and if there are inconsistencies between the different “templates”. The outlook then is for the establishment of multiple “hub and spoke” configurations centred on each major economy as a “hub”, where the FTAs in each configuration converge on the “template” of the “hub”, but where the prospect of convergence between the configurations with their inconsistent “templates” is remote. Other economies may then either seek to follow one of the “hub” templates in their own FTAs, as Mexico has tended to do (essentially following the NAFTA template), or, if they seek to participate in more than one “hub and spoke” configuration, be willing to adapt the design of their FTAs to the “template” of each configuration, as Chile and Singapore have tended to do.

Robert Scollay, *Prospects for Linking Preferential Trade Agreements in the Asia-Pacific Region*, in *AN APEC TRADE AGENDA? THE POLITICAL ECONOMY OF A FREE TRADE AREA OF THE ASIA-PACIFIC* 164, 185 (Charles E. Morrison &

Asia-Pacific Region, considering that seven TPP partners are also negotiating the RCEP.¹⁵⁴ For developing countries in this region, it is bad enough to be induced to sign an agreement that does not meet local conditions, but it is even worse to be put in a position where they have to juggle two potentially conflicting regional pacts that do not meet local conditions and that are very difficult, if not impossible, to honor.

V. CONCLUSION

In retrospect, the TPP intellectual property chapter has strong justifications, but it has also raised many policy concerns. In determining whether an overall agreement like the TPP Agreement should be ratified, and how its intellectual property chapter should be implemented, policymakers should carefully balance the chapter's deleterious effects against the Agreement's overall positive benefits. How beneficial an intellectual property chapter of a plurilateral trade agreement will be is largely dependent on whether a country can take full advantage of the agreement's built in flexibilities. How much overall impact this chapter will have also depends on whether the country has received offsetting benefits from other chapters in the Agreement.

Given the Trump Administration's preference for bilateral negotiations and the United States' withdrawal from the TPP, there is a strong likelihood that the original agreement will remain on life support, even if it will not be completely dead. Nevertheless, the eleven remaining TPP partners have now successfully concluded the CPTPP. If this agreement enters into effect, a significant portion of the TPP Agreement will survive.

Regardless of the fate of this newly concluded transition instrument, however, the original agreement, whether dead or alive, will continue to exert influence the same way ACTA has. Because of this lingering influence, policymakers and commentators will need to pay attention to not only the specific provisions of the TPP intellectual property chapter, but also other chapters in the trade and nontrade areas.

To a large extent, the lingering influence of the TPP Agreement has provided an important lesson for policymakers. When contemplating new rounds of bilateral, regional, and plurilateral trade negotiations, they should be mindful of the intended and unintended legacies of international treaty

Eduardo Pedrosa eds., 2007); *see also* Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, *supra* note 65, at 386 (suggesting that "conflicts may arise if less developed countries sign the trade agreements supplied by both the European Communities and the United States without appropriate review and modification"); Yu, *TRIPS and Its Discontents*, *supra* note 63, at 407 (highlighting the need to better understand the tension between the European Union and the United States so as to avoid making commitments to conflicting FTA obligations).

154. These seven countries are Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, and Vietnam. Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 3, at 1177.

negotiations. Even if a mega-regional agreement were to be placed on life support, it would still have serious ramifications for future international trade and intellectual property negotiations.