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THE TRANS-PACIFIC PARTNERSHIP AGREEMENT: SOME CRITICAL CONCERNS

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The Trans-Pacific Partnership Agreement: Some Critical Concerns

Jomo Kwame Sundaram¹

Abstract

The Trans-Pacific Partnership Agreement (TPPA) involves twelve Pacific Rim economies of varying sizes and structures. Although often portrayed as a free trade agreement, the TPPA can, at best, be expected to deliver paltry overall growth gains from trade liberalization. The much higher figures touted by TPPA advocates are largely due to dubious 'non-trade measures', most of which have been rejected by the US International Trade Commission (ITC). Nevertheless, the ITC expects significant growth due to greatly increased foreign direct investment, which is exaggerated. The TPPA also brings costs and risks to developing countries threatening their development prospects as well as the public interest, as illustrated by claims for Malaysia, financial liberalization, intellectual property and investor-state dispute settlement provisions. Politically driven by the Obama administration, the TPPA has undermined progress on multilateral trade negotiations as well as ASEAN and ASEAN+ regional economic cooperation.

Keywords: Asia-Pacific; Economic Performance; Developing Regions; Trade.

1- No partnership of equals for developing countries

Negotiations for the Trans-Pacific Partnership initially involved relatively small economies in the South Pacific such as Brunei, New Zealand from 2005. Later, the United States of America (US) joined and took over the grouping for its own corporate and political purposes. As most TPP partner countries already have trade agreements with

¹ Jeronim Capaldo and Alex Izurieta did most of the heavy lifting from 2014 for the original paper which triggered my involvement in the TPP debate. Subsequent involvement in trying to understand the TPP, especially the TPPA, during early and mid-2016 led to broader concerns, especially about its investor-state dispute settlement (ISDS) and intellectual property rights provisions, which have prompted this summary assessment of the TPPA's likely implications for Malaysia written in accessible language. Tim Wise of Tufts University's GDAE was crucial in enabling my initial involvement. All three continued to provide much valued advice and feedback in responding to various subsequent challenges. Gurdial Singh Nijar and Jane Kelsey provided much appreciated advice, especially on legal matters. Sanya was particularly crucial in drawing attention to the complexity of intellectual property rights issues. The doyen of Geneva trade journalists, Mr C. Raghavan, has been generous in his guidance. Tham Siew Yean, Junaidi Mansor, Meredith Weiss, Anis Chowdhury, Joe Studwell, Lim Chang Boong and Maryam Halim helped me at various stages of preparing this paper. My greatest debt is to Aidonna Jan Ayub and another reader, who both carefully read several drafts and provided valuable critical feedback. While I am very grateful to all of them for their advice and suggestions, I am solely responsible for the views expressed and for any remaining shortcomings.

one another, additional trade from the Trans-Pacific Partnership Agreement² (TPPA) will be modest, while growth gains are expected to be negligible with TPP developing countries projected to get more than TPP developed countries³. Instead, the TPPA will mainly advance certain politically influential US corporate interests by strengthening foreign investors' influence, intellectual property rights and financial liberalization while constraining state-owned enterprises (SOEs) and other instruments of national development policy and the public interest.

Negotiations for the TPPA, by twelve Pacific Rim countries led by the United States,⁴ were concluded in Atlanta in October 2015, with the Agreement signed in Auckland in February 2016. It has been touted by the US as a 'gold standard' 21st-century trade deal. Hence, it is critical to ascertain what gains can really be expected and whether these exceed the costs involved⁵. One should also consider the costs and benefits of not

² In this paper, the Trans-Pacific Partnership (TPP) refers to the 'project', including political and diplomatic relations and processes, such as the negotiations and the Agreement (TPPA) itself. Thus, TPPA refers to the actual 6350 page document agreed to in Atlanta in October 2015 and signed in Auckland in February 2016, whereas TPP refers to the political, diplomatic and other relations, processes and arrangements which led to and follow from the Agreement.

³ James K. Jackson. 'The Trans-Pacific Partnership (TPP): Analysis of Economic Studies'. Congressional Research Service, June 30, 2016. This report analyses some of the most influential studies of the economic impacts of the TPP affecting the public policy as well as the economic models used to assess the methodology and assumptions used to generate these estimates.

⁴ The participating countries – Canada, US, Mexico, Chile, Peru, Japan, Vietnam, Malaysia, Singapore, Brunei, Australia and New Zealand – have finalized and signed the text of the agreement. The treaty comes into force if at least six of the original signatories, which together account for at least 85 percent of the combined output (gross domestic products) of the original signatories ratify it. Hence, the US and Japan must ratify the Agreement for it to come into force; together, the US, with 60 percent, and Japan, with 18 percent, represent 78 percent of total TPP GDP.

Article 30.5.2 (Entry into force) of the TPPA reads as follows: "In the event that not all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures within a period of two years of the date of signature of this Agreement, it shall enter into force 60 days after the expiry of this period if at least six of the original signatories, which together account for at least 85 percent of the combined gross domestic product of the original signatories in 2013 have notified the Depositary in writing of the completion of their applicable legal procedures within this period."

This requires implementing legislation by the US Congress. In 2015, the US Congress reauthorized Trade Promotion Authority (TPA). TPA sets trade policy objectives to negotiate in trade agreements, requires the President to engage with and keep Congress informed of negotiations, and provides for Congressional consideration of legislation to implement trade agreements on an expedited basis, based on certain criteria. In considering the TPPA, the US Congress may consider various economic studies to assess the likely impact of the agreement. Their results vary depending on the model and the assumptions used to generate results.

⁵ Cost-benefit and other assessments of the likely economic impacts of new trade deals increasingly depend on the definition and size of NTMs. A critical paper – including a section on NTMs used for many TTIP studies – is available at: <http://www.guengl.eu/policy/action/ttip-a-threat-to-democracy-and-public-interest>. Section V.b on NTM estimation in the earlier critical review may be most relevant.

A more recent model developed for assessing the TTIP covering similar issues is available in Werner Raza, Lance Taylor, Bernhard Tröster and Rudi von Arnim. 'Modelling the impacts of trade on employment and development: A structuralist CGE-model for the analysis of TTIP and other trade agreements'. Austrian Foundation for Development Research, 15 March 2016.

The growing criticisms of the Transatlantic Trade and Investment Partnership (TTIP) build on earlier criticisms of the Multilateral Agreement on Investment (MAI) in 1997 and the Anti-Counterfeiting Trade Agreement (ACTA) in 2012. Many studies claim that free trade and investment agreements are

participating in such an agreement. All this becomes especially difficult if the estimation methods used are problematic and biased, or if lobbyists are able to influence the presentation of estimates and projections, or if there is no informed public discussion and debate, as has happened in most, if not all TPP countries.

Most people still think the TPPA is about greater growth from freer trade. Nothing could be further from the truth. Even the problematic computable general equilibrium (CGE) projections, made on methodologically moot grounds, recognize that more trade does not necessarily mean more growth. After all, freer trade not only implies the production of more exports, but also more imports replacing previously locally produced goods and services.

The net growth gains from increased trade are difficult to reliably estimate, and depend very much on crucial assumptions made in modelling trade projections. Even the CGE models used by TPP advocates show limited net economic benefits from trade liberalization *per se*. Hence, while the TPPA will probably result in greater trade (despite some projections to the contrary), there is no reason for assuming that increased trade will improve economic welfare for all, and no guarantee of mechanisms to ensure such an

drivers of growth, jobs, and sustainable development for all partners. This study scrutinizes their findings and the methodologies used to challenge the findings of five such TTIP studies.

By proving problematic flaws and shortcomings in the outdated methodologies used in the studies, the researchers show how the estimated benefits of the TTIP for employment and growth are not only insignificant, but are also dependent on the removal or harmonization of regulations, administrative procedures and standards, which would pose a serious threat to existing European social policies, consumer standards, public health and environmental safety.

The researchers also highlight some negative effects of the TTIP on the EU budget, due to revenue lost from the elimination of customs duties, and on the internal market by accentuating economic differences between member states. Developing countries would also suffer as a result of decreased EU demand for exports, in clear contradiction to its professed development commitments. The study's key findings include:

- considerable downside risks associated with reducing or removing remaining trade tariffs and very few actual economic gains in terms of GDP, jobs, trade flows and real wages.
- reduced trade among EU countries by up to 30 percent as their output will not be able to compete with cheaper imports from the US.
- increased US imports could also increase trade deficits in the EU, where imports exceed exports. Lower EU demand for exports from developing countries would reduce their GDP.
- reducing or eliminating tariffs will mean less budget financing as revenue raised from customs duties will be lost, estimated to be €2.6 billion a year, or a two percent loss to the EU budget.
- rising unemployment due to job displacement over the 10-year implementation period, estimated to cost €5-14 billion for unemployment adjustment due to lost tax revenue and increased unemployment benefits.
- 80 percent of the ostensible estimated economic benefits depend on the removal or harmonization of regulations, administrative procedures and standards including NTMs which threaten consumer health, public health and environmental safety.
- an ISDS mechanism would not only compel governments to compensate foreign investors, but also cause governments to refrain from enacting regulations inimical to foreign investor interests.
- problematic methodological flaws and shortcomings in influential European Commission-endorsed TTIP impact assessments which weaken the predictions these reports make about its supposed positive impacts, partly by not considering social costs.

outcome is likely. Without adequate compensatory mechanisms, there is nothing to ensure that everyone will be better off following trade liberalization.

Production for export will grow while production for domestic markets is likely to decline in the face of import competition. But the net effects will differ considerably among industries/sectors, TPP members and over time. Exports may be less labor-intensive with adverse consequences for employment⁶ while more imported inputs for export-oriented production will reduce national linkages and multiplier effects compared to domestic production. Businesses may seek to become more competitive by cutting labor costs. This will negatively affect income distribution, in turn weakening domestic demand. Hence, greater realism in TPPA modelling exercises is important. It is also important not to exaggerate the significance of very minor changes after long periods, an approach that has characterized TPP advocacy from the outset.

As a middle income country, it will be difficult for Malaysia to compete successfully with Vietnam and other such developing economies on the basis of labor costs for labor-intensive primary commodity production and export-oriented manufacturing. Furthermore, the expansion of such labor-intensive activities is unlikely to accelerate the transition to ‘higher value-added’ economic activities to lift Malaysia out of its ostensible ‘middle income trap’.

As it is generally agreed that the TPPA offers modest quantifiable benefits from trade liberalization, most of the benefits projected by the well-known US globalization cheerleader, the Washington, DC-based Peterson Institute of International Economics (PIIE) and the World Bank are significant growth gains attributed to ‘non-trade measures’ (NTMs) and related, but nonetheless questionable, projected increases in foreign direct investment (FDI). Even the World Bank’s (2016: 228, 229) report⁷, which draws from the PIIE’s 2016 projections⁸, acknowledges that “estimating the impact of deep and comprehensive trade agreements is still very much a work in progress” and the TPPA’s “ultimate implications, however, remain unclear”.

There is considerable evidence that the ostensible benefits of trade liberalization are really the thin edge of a wedge advancing influential corporate interests which fundamentally threaten and undermine the public interest in TPP countries. Even the notion of the national or public interest can be problematic as it may be presented as, or associated in public discourse with powerful corporate interests. Much of the official TPP discourses and some analytical exercises privilege foreign investors while barely recognizing, let alone considering substantial costs and risks for partner countries. Exercises in comparative statics, such as the preferred CGE trade projections methodology used in most TPP analyses, do not capture, let alone reflect development

⁶ Estimating the employment effects from a trade agreement is never precise because estimates can vary widely as a result of the model and assumptions used, limited information available, and the difficulty of entangling the effects of trade and trade agreements from other factors affecting an economy.

⁷ World Bank. ‘Potential Macroeconomic Implications of the Trans-Pacific Partnership’. *Global Economic Prospects*, January 2016: 219-237.

⁸ Peter A. Petri and Michael G. Plummer. ‘The Economic Effects of the Trans-Pacific Partnership: New Estimates’. Peterson Institute for International Economics WP 16-2, January 2016.

dynamics⁹, including the ever-changing capabilities of developing countries to improve their own industrial and service capabilities and capacities.

Malaysia's Parliament has authorized the government to both sign and ratify the TPPA¹⁰ before anyone else even though parliamentary approval is not required under Malaysian law to enter into such agreements. The minister has announced that the legislature will make changes to 18 existing laws to comply with the TPPA, while changes to other laws as well as new laws are also expected. TPP countries have to do more to ratify and implement the deal, and can even withdraw after that, although neither option will be costless. Hence, it is urgent to carefully consider the agreement as well as its many implications for the economic welfare and development prospects of TPP partner country populations before the corporate-led TPP ratification, implementation and enforcement juggernaut continues to roll on.

2- Paltry trade gains consensus

Typically using methodologically-problematic CGE models (see Addendum 1), all studies so far project very modest direct economic growth gains from TPP trade liberalization. Actual net gains may be even more modest, if not negative, as many assumptions made for the projection exercises are not in the final TPPA deal.¹¹ In fact, most merchandise trade among TPP countries has already been liberalized by earlier trade agreements as well as unilateral initiatives. The TPPA will not actually do much more for trade liberalization, not only because of its modest impact on tariff reductions,

⁹ For example, the 2016 PIIE projections assume that trade balances will remain at their present levels for at least fifteen years in every TPP and non-TPP country. This assumption disregards the large changes in actual trade balances observed in recent decades and the consequences of persistent current imbalances for global economic stability.

¹⁰ The Lower House (Dewan Rakyat) of Malaysia's Parliament passed the motion on 27 January 2016 while the Senate or Upper House (Dewan Negara) did so on the following day, a week before the ministerial signing ceremony in Auckland in the first week of February.

¹¹ As noted in a paper on the economic implications of the TPPA for New Zealand by Tim Hazledine, Rod Oram, Geoff Bertram, and Barry Coates. 'The Economics of the TPPA'. Expert paper #5, Trans Pacific Partnership Agreement New Zealand Expert Paper Series, January 2016. The Law Foundation New Zealand. <https://tpplegal.files.wordpress.com/2015/12/ep5-economics.pdf>

According to its projections, NZ's gross domestic product will grow by 47 percent by 2030 without the TPPA, or by 47.9 percent with it. Even that small benefit may be an exaggeration, and the real benefits will be even smaller, as the modelling makes dubious assumptions. The paper concludes that if the full costs of the TPPA are included, net economic benefits to the NZ economy are doubtful. The paper estimates that the gains from tariff reductions are less than a quarter of the projected benefits according to official NZ government modelling. Although most of the projected benefits are due to reducing non-tariff barriers (NTBs), the official projections rely on inadequate and dubious information that does not even identify the NTBs that would be reduced by the TPPA!

One obvious limitation of all modelling exercises (including ours) is the assumption that the rest of the world will not change policies in response to the TPPA. This is undoubtedly convenient and often deemed necessary as no modeler (including us) has much basis to presume that another country will respond in any particular way in a specific time frame. But this is clearly unrealistic. And ignoring such effects biases the simulated effects of the TPPA and underscores the need to be modest about the likely predictive accuracy of such exercises.

but also because it does not do much to address existing non-tariff barriers experienced by TPP developing country members.

The first US government study of likely TPP effects¹², published in 2014, found zero growth for the US and very modest growth elsewhere at best. Although the US Department of Agriculture's Economic Research Service (USDA-ERS) also used CGE modelling to project likely TPP impacts, it projected additional one-time growth after ten years of only 0.1 percent by 2025¹³.

More optimistic claims about the TPP's economic impacts are largely based on economic modelling projections published by the PIIE¹⁴. Its researchers also used a CGE model to project net output or gross domestic product (GDP) gains for all countries involved¹⁵ using GTAP¹⁶. These figures have been widely cited in many countries to justify TPPA approval and ratification. Updated estimates, released in January 2016, now claim US income gains of US\$131 billion by 2030, or 0.5 percent of GDP, and a 9.1 percent increase in exports.¹⁷ The PIIE studies make heroic assumptions about growth, mainly by attributing relatively large, but very dubious growth gains from 'non-trade measures'. Thus, whereas USDA-ERS (2014) only projected 0.1 percent growth after a decade (not per annum), PIIE claimed 0.4 percent after 10 years (in its first 2012 publication) and then, 1.1 percent after 15 years (in its 2016 update).

In its report also published in January 2016, the World Bank¹⁸ goes on to assert that "The impact could be considerably more in countries facing currently elevated barriers to trade

¹² See <http://www.ers.usda.gov/media/1692509/err176.pdf>

¹³ See Table 8 in Mary E. Burfisher, John Dyck, Birgit Meade, Lorraine Mitchell, John Wainio, Steven Zahniser, Shawn Arita, and Jayson Beckman. *Agriculture in the Trans-Pacific Partnership*. Economic Research Report No. 176, United States Department of Agriculture, Washington, DC, October 2014.

¹⁴ Peter Petri, Michael Plummer and Fan Zhai (2012). 'The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment'. Policy Analyses in International Economics 98, Peterson Institute for International Economics, Washington, DC. The PIIE study has also been criticized by others, e.g. Geoff Bertram and Simon Terry. 'Economic Gains and Costs from the TPP: Review of Modelled Economic Impacts of the Trans-Pacific Partnership'. Sustainability Council of New Zealand, Wellington, February 2014. http://www.sustainabilitynz.org/wp-content/uploads/2014/02/EconomicGainsandCostsfromtheTPP_2014.pdf.

¹⁵ Some studies recognize some limitations of the CGE modelling exercises used for TPP advocacy, e.g. see John Gilbert, Taiji Furusawa and Robert Scollay (2016). 'The economic impact of Trans-Pacific partnership: What have we learned from CGE simulation?' ARTNeT Working Paper Series No. 157, ESCAP, Bangkok. Available at: <http://artnet.unescap.org>

¹⁶ GTAP (Global Trade Analysis Project) is an international network of researchers – mostly from universities, international organizations or government economic ministries – who conduct quantitative analysis of international economic policy issues, especially trade policy. The database includes trade patterns, production, consumption and intermediate use of goods and services. GTAP is coordinated by the Center for Global Trade Analysis (CGTA), Agricultural Economics Department, Purdue University. It maintains a global CGE model, which uses the GTAP database, and provides software for aggregation to different levels of sectoral and regional detail.

¹⁷ Peter Petri and Michael Plummer. 'The Economic Effects of the Trans-Pacific Partnership: New Estimates'. January 2016, Working Paper 16-2, Peterson Institute for International Economics, Washington, DC.

¹⁸ See *Global Economic Prospects, Spillovers Amid Weak Recovery*. World Bank Group, Washington, DC, January 2016.

(as much as...8 percent in Malaysia)!” In an earlier footnote, it is noted that “The impact on Malaysia is slightly higher than estimated in Petri, Plummer and Zhai (2012) due to several updates to data and assumptions”.

However, there is no explanation of what these “currently elevated barriers to trade” are, as Malaysia has long been an open economy with friendly trade relations with most TPP members, and most remaining trade barriers are of a non-tariff nature. The TPPA does include provisions on tariff peaks in sectors such as pork as well as textiles and clothing. Non-tariff measures, such as sanitary and phytosanitary (SPS) regulations and technical barriers to trade (TBT), are addressed in the TPPA. However, implementation and enforcement of such provisions have rarely been in the interest of developing countries, in terms of both exports as well as public health, as has been the experience with such provisions in other agreements so far.

Thus, the USDA-ERS government projections about the TPP’s likely effects due to trade growth is far more pessimistic than both PIIE as well as the World Bank’s exercises. These very significant differences could be due to differences in data used, model assumptions and other factors, but it is likely that the major difference is due to the USDA-ERS’s non-consideration of non-trade measures which the PIIE studies acknowledge to be the main sources of the growth they project. Not surprisingly then, the only US government study of likely TPP impacts has been largely ignored in favor of the PIIE’s, with the latter also embraced and endorsed by the World Bank by inclusion in its January 2016 *Global Economic Prospects* report.

3- Getting much more growth from the TPP

Petri and Plummer (2016: Table 2) estimate real income for all TPP members to rise by 1.1 percent by 2030 after 15 years due to the TPPA¹⁹, instead of their earlier finding of 0.5 percent growth after a decade (Petri, Plummer and Zhai, 2012). Although it still remains modest by most standards, this is more than ten times what the USDA-ERS CGE modelling exercise yielded²⁰. The key questions which then arise are how such much higher estimates were arrived at, and whether they are credible.

¹⁹ To get their results, Petri and Plummer (2016) map TPPA provisions, such as projected tariff changes, non-tariff barriers on goods and services as well as barriers to foreign direct investment (FDI). Unlike their previous study with Zhai, they now assume that 20 percent of NTB liberalization also applies to non-TPP trading partners. They make clear that the model assumes that the TPP will not affect countries’ total employment, national savings or trade balances, and acknowledge that “inevitable deviations from normal values in the future will be caused by factors *other* than trade policy changes” (Petri and Plummer, 2016: 7; italics in the original). They insist that their analysis “does indicate that the benefits of the TPP to the US economy will greatly outweigh adjustment costs, and that economy-wide price and employment consequences will be limited”.

²⁰ The World Bank (2016: 225) noted that three assumptions were especially important to the new results: first, *strictly* restrictive enforcement of the new *rules of origin* which would limit the likely benefits from tariff reduction on garments in light of the ‘yarn forward’ rule limiting items which would qualify; second, *reduced barriers to services*, such as through strict enforcement of more restrictive intellectual property rights; and third, presumed positive spillovers from *regulatory harmonization*, mainly through stricter enforcement of US-determined rules. Petri and Plummer (2016: Box 1) also note that the TPPA has

The growth gains for specific TPP countries are presented by the World Bank²¹ (2016: 226) as ranging from “0.4-10 percent” although the highest optimistic projection by Petri and Plummer (2016: Table 4) is 8.7 percent for Vietnam. Most gains are projected by them to go to the Southeast Asian four (Vietnam 8.1 percent, Malaysia 7.6 percent, Brunei 5.9 percent and Singapore 3.9 percent), followed by Peru (2.6 percent), Japan (2.5 percent) and New Zealand (2.2 percent). NAFTA members (US, Canada, Mexico) would only gain 0.6 percent on average. According to Petri and Plummer (2016: Table 4), the biggest loser will be Thailand (-0.8 percent), leading the Association of South East Asian Nations (ASEAN) trio of Myanmar, Cambodia and Laos (collectively -0.4 percent), with Indonesia and the Philippines slightly worse off (both -0.1 percent). Needless to say, such a predicted outcome is likely to jeopardize the future of economic relations in the ASEAN Economic Community (AEC) as well as the Regional Comprehensive Economic Partnership (RCEP).

With four of the ten ASEAN members involved with the TPP, the AEC as well as the RCEP, which involves all ASEAN members plus other Asian countries including the Republic of Korea and India, negotiations appear to have become more difficult, with TPP members seeking to protect their TPPA privileges, others (e.g. Japan and Republic of Korea) apparently seeking to secure even stronger ‘TPPA+’ intellectual property rights (IPRs) provisions and foreign investor rights in the RCEP, and yet others (notably India and Indonesia) seeking to avert the most onerous TPP provisions (e.g. on IPRs and ISDS) in the RCEP.

The TPP is projected by them to raise Malaysian exports by 20.1 percent and inward FDI stocks by 17.2 percent, with Vietnam’s rising by 30.1 percent and 14.4 percent respectively, compared to TPP members’ 11.5 percent and 3.5 percent respectively (Petri and Plummer, 2016: Table 3). Vietnam’s garments exports are now only expected to grow by 28 percent by 2030²², while Malaysian growth is estimated to be higher than previously projected due to data and assumption updates mentioned in Box 4.1.1 on ‘Regulatory convergence in mega-regional trade agreements’ (World Bank 2016). Thus, most of the additional growth attributed to the TPPA is due to revisions of data and assumptions where the devil is to be found in unpublished details.

Petri and Plummer (2016: Box 2) note that “Using a similar methodology, Kenichi Kawasaki (2014) estimates *annual gains* of 1.8 percent of GDP for TPP members vs. 1.1 percent in this study. His estimates assume that 50 percent of TPP liberalization is nonpreferential, rather than 20 percent in this study” (my italics). Considering the

stronger rules than the Korea-US Free Trade Agreement (KORUS) in some areas, while breaking new ground in others.

²¹ The World Bank (2016) chapter describes itself as macroeconomic, and based on work done by Petri and Plummer, some of which is presumably published in their joint 2016 paper.

²² The rules of origin affect the share of exports that benefit from tariff preferences. These shares are assumed to rise from 30 percent to 69 percent over a decade in the case of apparel, but more quickly for other products. It also assumes that the rules of origin will lead to the replacement of 40 percent of imported inputs with higher cost inputs from TPP partners without justifying such assumptions in terms of historical experience or cost differentials or market opportunities.

methodology used, it is important to recognize that Kawasaki's higher estimate of gains, by assuming higher non-preferential TPP liberalization, suggests that more gains will accrue from unilateral and multilateral liberalization rather than ostensibly regional, plurilateral economic liberalization.

Despite downward adjustments in non-tariff barrier (NTB) liberalization compared to their 2012 projections for agriculture, food, beverages, tobacco, automobiles, textiles and services as well as for FDI (Petri and Plummer, 2016: Table B2), the new baseline data from GTAP9 up to 2011, unlike the earlier data until 2007, suggest greater growth gains for Malaysia of USD52bn by 2030, instead of the 2012 estimate of USD24bn for the decade up to 2025. The 2012 estimate of USD24bn for 2015-2025 is now "scaled" up by over half to USD38bn for 15 years to 2030, much more than for all TPP members, scaled up from USD285bn to USD343bn.

TPPA growth claims exaggerated

In the interest of getting more realistic projections, besides incorporating the actual details of the final deal, projected gains need to be compared against expected costs and risks previously ignored and unaccounted for. Given the modest projected benefits from trade liberalization *per se*, it is all the more important to carefully scrutinize the other purported sources of growth attributed to the TPPA.

Hence, it is crucial to consider the nature and scale of costs and risks currently ignored by available modelling and cost-benefit exercises. As such risks and costs are rarely considered, the CGE exercises do not provide the bases for seriously plausible cost-benefit assessments, as they often purport to be. Needless to say, ostensible net country gains projected also need to be discounted for such reasons²³.

Nevertheless, even unadjusted for costs and risks, the gains are small relative to the GDPs of TPP partner economies. Also, while projected trade benefits are expected by the recent CGE trade modelling exercises to take a decade and a half to fully realize, the major risks and costs will be more immediate. Most of the projected trade benefits largely represent one-time gains, with no recurring addition to the growth rate, e.g. in terms of sustainably raising productivity, and thus do not raise the economies' growth rates.

Moreover, the distribution of benefits and costs has not been much analyzed in these exercises. If the gains mainly go to a few influential big corporations, with losses borne by many others, e.g. consumers paying for more expensive pharmaceutical medicines, etc., or workers experiencing downward wage and employment pressures, or national treasuries obliged to compensate foreign corporations, the TPPA could exacerbate inequalities at both national and international levels.

It is also unclear why and how extending the timeline by five years results in such significant gains as it has supposedly been extended to allow delayed – and reduced – TPPA provisions to take effect. Also, it remains unclear how less growth gains due to the TPPA's reduced and delayed reduction of trade barriers, produces greater total gains.

²³ See Bertram and Terry. *op. cit.*, 2014.

Also, one-time efficiency gains, due to the TPPA's reduction of 'deadweight losses', are now presented as cumulative gains raising the growth rate.

Also, it is not clear how one-time efficiency gains, due to the elimination of 'deadweight losses' owing to greater international specialization, appear to have increased by more than half simply by extending the period under consideration. Another USD22bn is due to new data, including higher NTBs in services, and USD7bn to TPPA-related non-preferential liberalization effects for growth, while the more conservative new NTB approach reduces growth gains by USD14bn (Petri and Plummer, 2016: Table B1).

Clearly, most of the purported gains from the TPPA are not from goods trade liberalization. The World Bank (2016: 226) acknowledges that the TPPA growth gains from its CGE trade modelling projections would mostly come from reductions in non-tariff barriers and measures promoting services trade.

The ITC²⁴ acknowledges that the TPPA will not deliver many economic benefits promised by its proponents. Its May 2016 report²⁵ acknowledged that the TPPA will not deliver many gains claimed by its advocates, including the US Trade Representative (USTR) and the PIIE although it used a similar CGE trade modelling methodology and made many comparable assumptions. Tasked with providing the official US government estimate of the economic effects of the agreement, the ITC expects growth to rise due to a significant increase in FDI, although there is no strong evidence or even logic that the TPPA provisions will ensure the increase in FDI and growth projected²⁶. In fact, the procedure used involves many arbitrary elements, such as the impact on the OECD's Regulatory Restrictiveness Index, and the impact of the latter on productivity, FDI flows and GDP, both in the US and abroad.

However, the ITC accepts only a fraction of the overall growth attributed to NTMs by the 2016 PIIE – and World Bank – assessment, effectively rejecting many claims of growth attributed to other NTMs by the PIIE and World Bank. Hence, for the US, the additional growth attributed to the TPPA is only about a seventh of the 2016 PIIE estimate.

²⁴ The ITC has been criticized in recent years for uncritically supporting FTAs and grossly underestimating US trade deficit increases following virtually every 'free trade' pact it assessed. With the benefit of hindsight, it is clear that its projections understated the large US deficit increase with Mexico following NAFTA, the huge trade deficit explosion with China following 'permanent normal trade relations', and the trade deficit spike with South Korea following the US-Korea trade agreement.

[PNTR is a US legal designation for free trade with a foreign nation, changed from '[most favored nation](#)' (MFN) in 1998. MFN status (or treatment) is awarded by one nation to another, meaning that the receiving nation will be granted all trade advantages, such as low [tariffs](#), that any other nation also receives. Thus, a nation with MFN status will not be discriminated against and will not be treated worse than any other nation with MFN status.]

²⁵ ITC. *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*. United States International Trade Commission, Washington, DC, 18 May 2016.

²⁶ UNCTAD (2014). 'The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014'. IIA Issue Note, United Nations Conference on Trade and Development, Geneva.
http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep_percent2024.pdf

Relatedly, the ITC estimates US exports will increase by only one percent due to NTMs by 2032 as against the PIIE's estimate of 9.1 percent by 2030.

Thus, the economic gains from the TPP are much more modest for the ITC, with US GDP growing by only US\$42.7 billion (0.15 percent) between 2017 and 2032. Indeed, the ITC (2016: Table 4.4) found that US manufacturing output in 2032 would be US\$10.843 billion lower with the TPP than without it, with manufacturing employment lowered by 0.2 percent! And while vehicles production would gain, automotive parts, textiles and chemicals output would contract.

Overall projected gains to US real national income by 2032 are US\$57.3 billion, or 0.23 percent, implying a modest increase over the 15 years from 2017. The much larger increase in US national income compared to GDP suggests that the TPPA will significantly increase (mainly corporate) income from economic activity abroad, presumably from outward FDI. It is not clear how much of this is due to enhanced IPRs or TPP-related financial liberalization, or if such income changes have been considered. An alternative possibility is that the terms of trade will change in favor of the US, but no explanation is available.

The ITC expects the TPPA to have small positive effects for the US economy. Dropping the usual CGE modelling assumption of an unchanging trade balance, it projects changing trade balances. According to the ITC, US exports and imports would be US\$27.2 billion (1.0 percent) and US\$48.9 billion (1.1 percent) higher than 'baseline projections' without the TPPA, thus increasing the US trade deficit to US\$21.7 billion in 2032. It projects that US exports to all 'new free trade agreements (FTA) partners' would grow by US\$34.6 billion (18.7 percent) while US imports from them would rise by US\$23.4 billion (10.4 percent).

The ITC (2016: Table ES.3) projects increased exports of US\$27.2 billion in 2032 (in 2017 US dollars), less than a tenth of the PIIE's projection of US\$357 billion in 2030 (in 2015 dollars). It expects exports of "manufacturing, natural resources, and energy" to rise by US\$15.2 billion, while such imports would increase by US\$39.2 billion, raising the net manufactures' trade deficit by US\$24.0 billion²⁷. Although US services are projected to increase by US\$42.3 billion (0.1 percent) due to the TPPA, the net services' trade surplus is expected to contract as the increased services' imports of US\$7.0 billion would

²⁷ "The TPP Agreement is likely to have a limited impact on U.S. production and trade of manufactured goods and natural resource and energy (MNRE) products. The U.S. manufacturing sector is already more liberalized than other sectors, such as agriculture and services, and duties are generally low. The *value of dutiable U.S. MNRE imports from TPP partners in comparison to the size of total U.S. trade and production is small*. The Commission expects that U.S. production in all sectors modeled will increase on an absolute basis over time. Model results indicate that TPP would result in an *increase in exports of US\$15.2 billion* (0.9 percent) above the projected 2032 baseline, and an *increase in imports of US\$39.2 billion* (1.1 percent) above the baseline. Output would be US\$10.8 billion (0.1 percent) less than the projected 2032 baseline and employment 0.2 percent less. Given the gains projected in many of the agricultural and services industry sectors, this model feature results in the *already more liberalized U.S. manufacturing sector generally projected to post less output growth with TPP than would be expected in its absence*. Some individual industries (e.g., titanium metal) may experience more adverse impacts from TPP than other MNRE sectors, while others such as passenger vehicles may benefit from TPP." (my italics)

exceed the increased exports of US\$4.8 billion. Exports of services to non-TPP partners are projected to fall by US\$11.8 billion, less than the projected increase of US\$16.6 billion to TPP partners.

The ITC report also projected worsening trade balances for 16 of the 25 US sectors it featured, including vehicles, wheat, corn, auto-parts, titanium products, chemicals, seafood, textiles and apparel, rice and even financial services. It projected a declining market share of US manufactures, natural resources and energy of US\$10.8 billion as such exports increase by US\$15.2 billion while imports rise by US\$39.2 billion by 2032. In the US, agriculture would gain most, with output US\$10.0 billion, or 0.5 percent, higher by 2032. However, the costs and implications of the still growing US agricultural – including biofuel – production subsidies are largely ignored in the report.

While dropping the typical CGE modelling assumption of constant labor supply, the ITC nevertheless seemed to assume that the economy naturally tends to full employment. It thus projected overall employment will increase by 128,000 full-time jobs, or by 0.07 percent, due to the TPP. The trade deficit increase due to TPP implementation would result in 129,484 American job losses, including a manufacturing employment drop of 0.2 percent. Hence, this had to be largely attributed to services employment growth despite the expected fall in the services trade surplus.

Even if a more comprehensive and balanced assessment of the costs and risks of TPPA provisions found the potential for improved net economic welfare for all in TPP countries (which the ITC report did not show), TPPA measures would not compensate losing participating economies and stakeholders. And while there may be measures available for beneficiaries to compensate losers in some national economies, nothing in the TPPA will ensure such compensation, let alone adequately compensate those who will lose. Needless to say, the TPPA does not include any mechanisms for international competition.

Furthermore, the ITC analysis does not seem to consider public health risks and consumer welfare losses due to higher prices, and reduced access due to broader, stronger and longer patent and copyright²⁸ protection – although higher prices for pharmaceutical medicines, software and other intellectual property will impose substantial costs on the public and governments.

Implementing the TPPA will greatly profit some large corporations, especially those getting IPR and financial rents. Meanwhile, real incomes for employees, especially the less skilled, are likely to be further depressed, as in recent decades, due to greater

²⁸ The TPPA will also extend copyright by another 20 years beyond the current TRIPS provision for the life of the author plus 50 years. The Malaysian ISIS study of the TPP found that “Malaysian consumers may incur increased burden from additional royalty payments to foreign content creators amounting to \$USD115 million a year due to copyright extension from 50 to 70 years for books, music and films. Cost of education is unlikely to be affected by the extension because textbooks are frequently updated and only the latest textbooks are widely used.” ISIS Malaysia. ‘National Interest Analysis of Malaysia’s Participation in the Trans-Pacific Partnership’. Institute of Strategic and International Studies (ISIS) Malaysia, Kuala Lumpur, 2015. http://fta.miti.gov.my/miti-fta/resources/ISIS_The_Grand_Finale.pdf.

international competition following trade liberalization. Compensation for those worse off due to trade liberalization is virtually unheard of in developing countries, and continues to decline in most developed countries, as they are rarely mentioned, let alone advocated by current conventional wisdom, let alone in the TPPA.

Conjuring growth gains from NTMs

To make the case for the TPPA, the PIIE studies claimed very significant additional growth gains from NTMs²⁹, mainly by projecting economic benefits from NTMs and huge FDI boosts, while ignoring risks and costs, or even presenting them as benefits. According to the abstract of Petri and Plummer (2016), “The new estimates suggest that the TPP will increase annual real incomes in the United States by US\$131 billion, or 0.5 percent of GDP, and annual exports by US\$357 billion, or 9.1 percent of exports, over baseline projections by 2030, when the agreement is nearly fully implemented”. According to the World Bank’s 2016 report, “For TPP members, only 15 percent of the GDP increase would be due to tariff cuts, whereas cuts in NTMs, in goods and services, would account for 53 percent and 31 percent of the total increase in GDP, respectively”, i.e. 84 percent *in toto*.

FDI is assumed to increase dramatically, which contributes a significant boost to economic growth in the PIIE projections, accounting for more than a quarter of projected US economic gains. They further assume that investor income will be invested and will result in broad-based growth although neither assumption is supported by evidence.

The 2016 PIIE study claimed huge benefits by assuming that the TPPA will catalyze large exports by lowering the fixed costs of entering foreign markets. Although the gains claimed have no analytical, empirical or historical bases, the report assumed that half the impact of the TPPA would be from cutting fixed trading costs, largely associated with non-tariff measures. If the modelling used conventional methods for estimating gains from trade, the results would have been much more modest, according to the ITC assessment.

TPPA provisions were fed into the CGE trade analysis model as simple cost reductions, with scant consideration given to downside risks and costs, e.g. due to reductions in national regulatory autonomy or much higher prices for pharmaceutical medicines. Provisions to extend the scope for IPR rent seeking simply become cost reductions that will increase the trade in services,³⁰ while completely ignoring its adverse impact on consumer welfare, e.g. in paying more for the same medicines, and its likely adverse consequences for public health. More generally, it has nothing to say about the likely

²⁹ The most widely cited study making such a case for the TPP was published by the PIIE in 2012.

³⁰ The World Bank (2016: 224) report acknowledges that “Some of the IP-related TPP provisions are highly controversial, including those for biologics and trademarks. Proponents argue that strong rules and enforcement are necessary in order to support investments in innovation, whereas critics maintain that current levels of IP protection already stifle innovation and generate monopoly rents”.

The TPPA secured a five year monopoly on biologic medicines, such as vaccines and some cancer treatments, even when not patented, through Article 18.51.

adverse consequences for technology transfer³¹ as well as capacity and capability building so crucial to development prospects.

Several other claims of the 2016 PIIE report affecting the US deserve mention:³²

- US income gains from the TPPA of 0.5 percent of GDP in 2030 after fifteen years when the agreement is nearly fully implemented. This is higher than the previous 0.4 percent in 2025 after a decade in its 2012 version, after extending the implementation and enforcement period from 10 to 15 years. In any case, additional growth of 0.5 percent over 15 years is small.
- Exports rise by 9.1 percent, but imports rise as much, as the CGE model assumes fixed trade balances. This excludes, by assumption, the possibility of rising trade deficits, which have been common problems after previous trade agreements involving the US, notably after NAFTA, the North American Free Trade Agreement (NAFTA), and KOR-US, the Korea-US Free Trade Agreement.
- All displaced workers are absorbed costlessly by other sectors – again, by assumption. The 2016 PIIE paper acknowledges that manufacturing employment will increase more slowly because of the TPPA, and that some 53,700 more US jobs per year will be ‘displaced’ annually. But these are simply explained as a small addition to normal labour market ‘churn’.

The 2016 PIIE study, which is also the basis for the World Bank’s favorable assessment of the TPPA, projects average growth gains for all TPP members of 1.1 percent over fifteen years, i.e. more than double the 0.4 percent additional growth projected by the PIIE’s 2012 study over ten years. Taking a longer term perspective is explained by the delayed growth gains owing to provisions of the TPPA.

The PIIE studies have overstated growth and income gains, while costs to working people, consumers and governments have been understated, ignored or even misrepresented as benefits. The possibility of lower economic growth, job losses and declining or stagnant labor incomes are excluded from consideration. In turn, all these will lower economic growth by reducing aggregate demand.

The only quantified gains, consistent with economic theory and evidence, are tariff-related benefits that make up a small share of projected gains. The supposed gains from trade liberalization are quite modest, given the fifteen year time horizon under consideration; some critics even suggest that the TPPA amounts to ‘much ado about nothing’. However, this criticism ignores other non-trade dimensions of the TPPA which give cause for even greater concern.

³¹ Technology transfer requirements are explicitly restricted in TPPA Article 9.10.1(f), i.e. governments cannot require investors, foreign (TPP or non-TPP) or local, to transfer technology, unless all other TPP governments first agree to each country’s (positive) list of sectors in scheduled exceptions.

³² See, for example, Dean Baker, ‘Peterson Institute Study Shows TPP Will Lead to \$357 Billion Increase in Annual Imports’. Center for Economic and Policy Research, Washington, DC, 26 January 2016.

Nevertheless, despite the exaggerated claims of its proponents, TPPA provisions for the trade in goods may be less dangerous than other aspects of the deal.

4- More Realistic Economic Projections

The Tufts paper³³ used the United Nations' macroeconomic Global Policy Model (GPM) to generate more realistic projections of likely TPP impacts. Unlike most CGE models, the GPM incorporates more realistic assumptions about economic adjustment and income distribution, assessing likely TPP trade liberalization impacts on them as well as on economic growth over a ten-year period. Importantly, it does not assume large FDI surges or very significant investment, growth and income gains due to NTMs.

To facilitate comparison with the 'counter-factual', despite serious reservations, Capaldo and Izurieta (2016), often referred to as the Tufts study, used the PIIE's projected estimates of the TPP's impact on exports, applying the GPM to assess some macroeconomic effects of projected TPP trade increases.³⁴ The GPM analyses macroeconomic sectors – primary commodities, energy, manufacturing and services – but does not contain data on specific markets such as car parts or poultry. The main relevant findings of the Tufts study include the following:

- The TPP will generate net GDP losses in the USA and Japan. Ten years after the treaty comes into force, US GDP is projected to be 0.54 percent lower than it would have been without the TPP. Similarly, the TPP is projected to reduce Japan's growth by 0.12 percent.
- For other TPP countries, economic gains will be negligible – less than one percent over ten years for developed countries, and less than three percent over the decade for developing countries³⁵. Chile and Peru's combined gain of 2.84 percent comes to an average of only about a quarter of one percent per year.
- The TPP is projected to cause employment losses overall, with a total of 771,000 jobs lost. The US will be hardest hit, losing 448,000 jobs.
- The TPP will also likely lead to higher inequality due to declining labor shares of national incomes. In the US, labor shares are projected to fall by 1.31 percent over ten years, continuing an ongoing multi-decade downward trend.

³³ Jeronim Capaldo and Alex Izurieta, with Jomo Kwame Sundaram. 'Trading Down: Unemployment, inequality, and other risks of the Trans-Pacific Partnership Agreement'. Global Development and Environment Institute, Tufts University, Medford, MA.

http://www.ase.tufts.edu/gdae/policy_research/TPP_simulations.html

³⁴ A robust debate over such modeling followed the release of the GDAE paper, with a critique from Robert Lawrence for the PIIE ('Studies of TPP: Which is Credible?') and two responses from GDAE: 'Are the Peterson Institute Studies Reliable Guides to Likely TPP Effects?' and 'Modeling TPP: A response to Robert Z. Lawrence'. The GPM is documented in the UNCTAD publication, 'The UN Global Policy Model: Technical Description'. United Nations Conference on Trade and Development, Geneva.

³⁵ The time horizon for the different CGE studies differ significantly, with most before 2015 (PIIE1, USDA-ERS) over a decade, while recent projections are over 15 years, beginning after 2015 (PIIE2, World Bank) or 2017 (USITC).

CGE modelers typically make claims regarding trade expansion and growth gains using models which assume full employment and unchanging trade and fiscal balances. What Capaldo and Izurieta (2016) did was to accept the 2012 PIIIE trade projections, to make different growth, employment, wages and income distribution projections, drawing attention to some implications for inequality. The GPM modelling exercise by the Tufts study suggests that the agreement's likely adverse impacts on growth, labor incomes, employment and inequality will be uneven and adverse, giving good reason to doubt the PIIIE's and other similarly optimistic projections.

But Capaldo and Izurieta (2016) never claimed to be the authoritative projection on the likely impact of the TPPA on growth, jobs, labor incomes and inequality. Rather, it shows that with the trade growth projected by the PIIIE in 2012, the consequences for employment, wages and income distribution would be quite different if one makes more realistic macroeconomic projections. The results suggest more nuanced, and even negative impacts in some, if not all these areas.

Projections based on more realistic methodological assumptions give some TPP critics good reason to be concerned. Using the trade growth forecasts of the PIIIE's 2012 study, Capaldo and Izurieta (2016) found that the TPP was likely to lead to net employment losses in many countries (771,000 jobs lost overall, with 448,000 in the US alone) and higher inequality in all country groupings. Declining labor shares of total income would weaken aggregate demand, slowing economic growth. The US (-0.5 percent) and Japan (-0.1 percent) were projected to suffer small net income losses, not gains, from the TPP.

As elaborated in Addendum 1, the CGE projections methodology assumes away critical economic problems and boosts economic growth estimates with unfounded assumptions. The full employment assumption is particularly problematic. Workers will inevitably be displaced due to the TPPA, but CGE modelers assume that all dismissed workers will be promptly rehired elsewhere in the national economy as if TPPA-caused job losses were simply a normal part of labor 'churning'. The full-employment assumption thus inflates projected GDP gains by assuming away job losses and adjustment costs.

The CGE modelers also dismiss the possibility of increases in inequality by assuming that the wage share of national income remains constant or increases with the profit share remaining constant or decreasing accordingly. Again, this is not supported by empirical evidence, as past trade agreements have tended to reduce labor's share, especially in higher income countries, owing to greater pressures from price competitiveness, although employment generation in developing countries has eventually exerted upward wage pressure, as predicted by W. A. Lewis³⁶.

In sum, the TPPA is expected to increase downward pressures on labor incomes, weakening domestic demand in all participating countries, in turn leading to lower employment and wages as well as higher inequality. Even though countries with lower

³⁶ W. Arthur Lewis. 'Economic development with unlimited supplies of labour'. *Manchester School of Economic and Social Studies*, XXII, May 1954: pp. 139–191.

labor costs may gain greater FDI as well as market shares and small GDP increases, employment is still likely to fall and inequality to increase. Of course, different interest groups are likely to be effected differently, and thus, to respond differently to the TPPA and its likely consequences.

In response, as Addendum 2 elaborates, Robert Lawrence of the PIIIE came out with his own, much lower numbers for those who will be adversely affected, after misrepresenting what the Tufts study did. More recently, the pro-US labor Economic Policy Institute³⁷ has come out with its own much higher and more detailed numbers using a different methodology and referring to the impacts of earlier FTAs.

5- Benefits and Costs to Malaysia?

The international consultancy, Pricewaterhouse Cooper (PwC) was commissioned by the Malaysian Ministry of International Trade and Industry (MITI) to produce one of two government commissioned studies on the TPP³⁸. The 2015 PwC study on potential economic impact of TPP on the Malaysian economy and selected key economic sectors is the major reference for any serious consideration of the likely consequences of Malaysia's participation in the TPP. It therefore deserves careful scrutiny, but a short and selective review cannot do full justice to it, or more importantly, to the 6,350 page TPPA document itself.

Although released after the TPPA was concluded, the CGE modelling for the study was probably undertaken on the basis of information available before the negotiations ended in October 2015 as well as information provided by industry lobbyists³⁹. It would thus be unfair to criticize the study and its implications for not fully anticipating the final text or for its unrealistic sectoral projections. The PwC study claims net economic gains for Malaysia from the TPP on rather dubious premises. These include a GDP increase of between US\$107 billion and US\$211 billion between 2018 and 2027, if all TPP countries eliminate tariffs and reduce non-tariff barriers by 25 to 50 percent⁴⁰; more than 90 percent

³⁷ The Washington, DC-based Economic Policy Institute (EPI) has used a different methodology to simulate the employment and distributional impacts of the TPP. See Robert E. Scott and Elizabeth Glass. 'Trans-Pacific Partnership, currency manipulation, trade, and jobs: U.S. trade deficit with the TPP countries cost 2 million jobs in 2015, with job losses in every state'. Report, Economic Policy Institute, Washington, DC, 3 March 2016.

³⁸ Price Waterhouse Cooper (PwC). 'Study on Potential Economic Impact of TPPA on the Malaysian Economy and Selected Key Economic Sectors: Final Report'. Ministry of International Trade and Investment, Putrajaya. December 2015. http://fta.miti.gov.my/miti-fta/resources/TPPA_PwC_CBA_-_Final_Report_021215_FINAL_%28corrected%29.pdf

³⁹ The PwC (2015: p. 5) study notes that "The key findings of the study were updated following the conclusion of the negotiations on 5 October 2015 and the public release of the text, annexes and side letters on 5 November 2015." The sectoral studies seem to be based on uncorroborated 'industry' submissions to the Malaysian government.

⁴⁰ PwC (2015: p. 61) shows the percentage changes. In the best case scenario, the projected change in GDP for the year 2027 is 1.15 percent. Given a baseline projection for Malaysian GDP of US\$500bn, the gain in 2027 would be approximately US\$6bn. The GDP increase of between US\$107bn and US\$211bn between 2018 and 2027 seems to be calculated by capitalizing all annual gains because a simple sum gives US\$72bn

of these gains are supposed to come from NTMs. However, it will not even improve its goods trade balance since imports into Malaysia will increase by more than exports from Malaysia due to the TPP.

Provisions allowing foreign investors to sue governments in private tribunals or undermining national bank regulation are seen as trade-promoting cost reductions, ignoring the costs and risks of side-lining national regulation and judicial processes.

Many TPPA provisions have asymmetric implications, which are largely ignored in much of the commentary. For instance, compared to many other governments including Malaysia's, the US federal government has much less scope for discretionary spending compared to US state governments while the converse is true for Malaysia. Although some US state governments are larger than many TPP economies, they are subject to rules in some TPPA chapters such as those on investment and services. Thus, exempting state governments from TPPA provisions, e.g. on government procurement, will have very different implications for Malaysia and the US.

As noted earlier, by excluding crucial costs, TPP advocates exaggerate its projected trade benefits by claiming dubious growth gains. All these changes will necessarily entail both short- and long-term macro-economic and social adjustment costs, such as those due to unemployment, public revenue losses and changes to the current account. By ignoring such costs, the gains from reducing NTMs are easily overestimated.

Trade balance

Contrary to many suppositions, the PwC expects that the TPPA will reduce Malaysia's trade surplus⁴¹: "The trade surplus will be smaller at US\$29.7 billion to US\$35.1 billion than in the baseline scenario (US\$41.9 billion), where TPPA does not exist." "Export gains range from US\$75 billion to US\$116 billion over 2018-2027. Import gains range from US\$130 billion to US\$225 billion over 2018-2027... In the event Malaysia does not participate in the TPPA, the trade balance is projected to remain largely unchanged from the baseline scenario. In the non-participation case, the slight increase in the trade surplus in 2027 is due to the larger decline in import growth relative to export growth." Thus, the PwC report expects Malaysia's trade surplus to increase if it does not join the TPP, and to fall by between US\$2 billion to US\$12 billion in 2027 if it joins.

The PwC's apparent binary choice between the TPP or nothing implies that Malaysia has no other policy options, and can only choose between joining the TPP and doing nothing. While methodologically convenient, this obscures the history of Malaysian industrialization efforts and the use of trade and other policy instruments in this regard. Hence, there is no serious consideration of alternative policies for structural

at most. The interest rate used clearly makes a huge difference. But capitalizing GDP only makes sense if the entire GDP generated every year thanks to the TPPA is invested with nothing consumed.

⁴¹ The faster rise of imports compared to exports will reduce Malaysia's trade surplus vis-à-vis other TPPA countries as argued earlier by Rashmi Banga. 'Trans-Pacific Partnership Agreement (TPPA): Implications for Malaysia's Domestic Value-Added Trade'. UNCTAD Background Paper No. RVC-12, Geneva, January 2015.

transformation, including emulating or, at least, learning from the rapid industrialization and productivity growth experiences of the first-tier East Asian newly-industrialized economies.

There is also no serious consideration of the effects of TPP financial liberalization on the capital account, how it may be affected by the reduced current account surplus, as well as the likely implications of the drastically reduced scope for national prudential regulation required by the TPPA's demands for greater financial liberalization primarily driven by the US, despite the problematic experiences of the last two decades, including the 1997-1998 Asian financial crisis⁴².

The greater growth of imports over exports implies greater domestic market competition, likely to displace many domestic (presumably medium and small) firms, with related employment and other effects. Ironically, Malaysia's competition law and policy enforced in a relatively small economy may well have inhibited firms from growing to become internationally competitive in its efforts to reduce domestic market dominance.

Uneven gains

Surprisingly, the PwC study projects that "in all scenarios with the TPPA being implemented, there is a slight decline in output for crops as well as vegetable oils and fats". This is presumably due to increased competition from subsidized agricultural imports from other TPP countries after Malaysia removes its trade barriers on imported farm products, or because Malaysian agricultural exports are less competitive due to higher labor costs after foreign workers are more effectively organized and collectively represented. Nevertheless, despite Malaysia's tight labor market situation, with possibly 30-40 percent of the labor force from abroad, the report observes: "The benefit from tariff cuts is projected to be small, raising wage growth by only 0.08 ppt. In contrast, wage growth is projected to be largely unchanged in the event of non-participation in the TPPA".

There is also nothing in the TPPA to check, let alone reverse the US's own huge and growing, World Trade Organization (WTO)-compliant ('green box') domestic farm production subsidies. The October 2015 TPPA agreement does not require any reduction in these already high, and still rising domestic agricultural subsidies, even though they effectively displace agricultural production and exports by other TPP countries.⁴³

Extensive agricultural tariff and non-tariff barriers remaining in Japan, Canada and the US are likely to be almost impossible to remove in the future as they will be 'locked in' by the TPPA. The TPPA's Sanitary and Phytosanitary Measures' limits on labelling can also reduce opportunities for food exporters to distinguish themselves by establishing

⁴² Jomo K S. 'Growth After The Asian Crisis: What Remains Of The East Asian Model?' G-24 Discussion Paper No. 10, Harvard Center for International Development, Cambridge, and UNCTAD, Geneva, March 2001.

⁴³ For example, the US domestic cotton subsidies have been held illegal by WTO following a dispute brought by Brazil. Instead of implementing the ruling, the US has 'bought off' Brazil, by enabling it to subsidize its own cotton producers.

high quality, differentiated niche market positions while constraining coordinated multilateral efforts to regulate the excessive use of anti-biotics, hormones and other problematic substances in breeding and cultivating food to improve human nutrition and public health.

The TPPA provisions can both help and hinder ambitions to add value to raw materials and commodities, and to progress up value chains. By presuming a static international division of labor or specialization, the TPPA is also likely to constrain primary commodity producers from undertaking more processing, and thus progressing up the value chain where greater economic returns presumably lie. Interventions to promote such downstream activities will effectively be deterred by various TPPA provisions. Also, greater imports of intermediate products may reduce domestic value-added content in exports and displace existing domestic supply chains. The World Bank (2016: p. 228) notes that “In developing countries, they [sectoral shifts] benefit manufacturing, especially in unskilled labor-intensive industries, and some primary production”.

Malaysia has used de-escalating export duties on crude palm oil (CPO), timber and scrap metal to encourage processing industries such as palm oil refining and products, furniture and steel. The TPPA prohibits export taxes on raw materials going to other TPP countries which can then re-export to the rest of the world. Malaysia secured an exception for the products and export tax rates in TPPA Annex 2C, but this only seems to lock in Malaysia’s current export duty rates for existing export products. If so, the currently low palm oil price will mean a permanently low export tax on palm oil. Then, when palm oil prices rise again, Malaysia may not be able to raise its CPO export taxes to TPP countries such as Singapore which can, in turn, re-ship it to Indonesia to be processed. If, for example, there is excess palm oil processing capacity in both Indonesia and Malaysia, TPPA can actually disadvantage Malaysian CPO processing factories. Similarly, the new arrangements will discourage research and development efforts to develop new palm oil exports, such as palm oil bio-diesel, if trade policy instruments can no longer be used to promote industrial innovation and technology learning and capability building⁴⁴.

In claiming that the textiles sector will deliver the most benefits to Malaysia, the PwC study seems to underestimate the full implications of the ‘yarn forward’ rule (of origin) in the TPPA, which militates against any significant increases in textile and garments exports from Malaysia and Vietnam to the US. The rule requires yarn for garments and apparel exports to originate from TPP member countries⁴⁵, meaning that manufacturers must use yarn from the US, Japan or other TPP member countries, instead of much cheaper yarn currently being sourced from China, Korea, Indonesia, Taiwan and other non-TPP economies. Even the PwC study itself concludes: “Downstream companies that rely largely on non-TPPA inputs could relocate out of Malaysia”. Yet, there is a great

⁴⁴ Jomo K. S., Rajah Rasiah, Rokiah Alavi, Jaya Gopal. ‘Industrial Policy and the Emergence of Internationally Competitive Manufacturing Firms in Malaysia’. In Jomo K. S. [ed.]. *Manufacturing Competitiveness: How Internationally Competitive National Firms And Industries Developed In East Asia*. RoutledgeCurzon, London: 106-172.

⁴⁵ The Agreement also includes a short supply list that allows for the use of certain yarns and fabrics not widely available – presumably easily sourced – from TPP countries, but it remains to be seen how this provision will be interpreted and enforced.

deal of wishful thinking that the ‘short supply’ exception can be successfully invoked indefinitely to ensure that the rules of origin can be circumvented.

FTAs have famously low utilization rates due to rules of origin (ROO) requirements being different in different FTAs and to the expensive, difficult and laborious requirements to comply with⁴⁶. Hence, if the cost of complying with a TPPA ROO is 15 percent, then there is little point exporting invoking TPPA provisions instead of under existing WTO rules unless the ‘most favored nation’ (MFN) applied tariff under WTO rules is greater than 15 percent. But there are not many products with tariff peaks greater than 15 percent in significant TPP export markets that Malaysia does not yet have an FTA with (e.g., USA and Canada) which Malaysia has an interest in exporting (except for textiles and clothing which are subject to the ‘yarn forward rule’).

Also, no evidence is provided that the yarn price differentials will be sufficiently offset by the TPPA tariff reductions. And if the ‘short supply’ provision is successfully invoked to continue to use yarn from non-TPP sources, there is no reason to expect garments manufacturers to relocate in Malaysia instead of, say, Vietnam or Peru. After all, over the last three decades, according to official Malaysian statistics, the previously mainly female labor force employed in the textiles sector has shrunk by more than 90 percent, from over two hundred thousand to under fifteen thousand, as Malaysian garments manufacturers face increasingly tough competition from China, Vietnam, Bangladesh and other countries.

The expectation that Vietnam can only expect garments exports growth of only 28 percent over the fifteen years to 2030 is therefore difficult to fathom. It is also unclear how PwC’s high expectations of textiles sector growth are supposed to be consistent with the claim that Malaysia will shift to higher value-adding activities and employment. Most of the other manufacturing activities deemed likely to benefit from the TPPA are similarly labor-intensive and not associated with high value addition.

Similarly, it is unclear where high value-added services employment, which is supposed to grow very significantly thanks to the TPP, is going to come from, as high value-added services do not figure prominently among the ten sectors the PwC focuses on in its report. If the World Bank (2016: p. 228) is correct that “competition from TPP member countries may shift resources away from the manufacturing sectors of non-member economies towards services sectors”, exporting services is going to become even more competitive and difficult. The only services sub-sector considered in the PwC report is retail trade which is hardly ‘high value-added’. However, if retail trade becomes a major focus of FDI, as expected by TPP advocates, it is likely to result in the ‘commanding heights’ of retail trade being taken over by foreign transnationals.

⁴⁶ In the Brexit debate, the UK Parliament noted that the costs to the UK of complying with EU ROO (which to my knowledge don’t have a yarn forward rule, so they’re less difficult than the TPP) are “from 4 percent to perhaps 15 percent of the cost of goods sold. For low tariff products, it is therefore likely that firms would instead simply opt to pay the common external tariff of the EU, and so avoid costs linked to rules of origin. This means that, for low tariff products, there would be very little difference between no trade agreement, and one involving free trade combined with rules of origin”.
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7213#fullreport>.

The PwC study implicitly acknowledges that the TPPA will mainly benefit a small number of big Malaysian firms. Its survey of the private sector concentrated on firms with the capacity to invest significantly in other TPP countries. Ironically, past competition policy and regulation may well have served to prevent greater firm expansion and realization of economies of scale which would put most Malaysian firms at a disadvantage post-TPPA. Despite inclusion of a chapter on small and medium enterprises, the TPPA's impact on SMEs is probably of greatest concern to much of the Malaysian private sector which would be considered SMEs by US and Japanese criteria.

The TPPA's SME chapter is generally recognized to be legally unenforceable through the dispute settlement mechanism among states, and hence, effectively 'non-binding', not unlike some other chapters, e.g., on development, capacity building, business facilitation, etc. But even if the chapter were enforceable, there are no hard or binding obligations to help SMEs cope with the impacts of other TPPA chapters such as increased competition from imports, reduced market share due to SOE procurement liberalization, and higher input costs due to stronger IP protection. In effect, the chapter only requires the provision of some information.

NTM reduction gains

According to the PwC study, reductions of NTMs will be higher for Malaysia compared with other TPP countries although it is not clear why this will be the case and what it implies. Reductions in NTMs include reductions in "quotas, subsidies, trade defence measures, export restrictions, and technical measures". PwC does not exhaustively list everything they consider an NTM, but simply say "Examples include quotas, subsidies, trade defence measures, export restrictions, and technical measures", and provide a reference [UNCTAD 2010] not listed in its bibliography, providing no way to ascertain what they consider to be NTMs. The TPPA's IP chapter is about strengthening IPRs, and cannot be credibly modelled as a reduction in NTMs⁴⁷.

Acknowledging the modest growth impact of trade liberalization *per se*, the PwC study notes that "more than 90% of the economic gains are driven by the reduction in NTMs", due to assumed cuts in NTMs, many of which were not included in the October 2015 agreement. Much of the predicted gains are dependent on "the simulations where TPPA participation eliminates tariffs and reduces NTMs by 25-50%" during 2018-2027. Thus, as with the PIIE, the PwC case for the TPPA largely rests on benefits from reducing NTMs, which is also the most problematic part of the study.

While removal of NTMs may bring trade gains, it is methodologically hazardous to try to estimate their investment and growth impacts. Although there is no bases for doing so in economic theory, and the methods used are moot, to say the least, trade modelers

⁴⁷ UNCTAD includes IP strengthening as equivalent to reducing an NTM; see *Non-Tariff Measures To Trade: Economic and Policy Issues for Developing Countries*. UNCTAD, Geneva, 2013. http://unctad.org/en/PublicationsLibrary/ditctab20121_en.pdf; *International Classification of Non-Tariff Measures: 2012 Version*. UNCTAD, Geneva, 2015. http://unctad.org/en/PublicationsLibrary/ditctab20122_en.pdf.

quantify NTM reductions without much hesitation.⁴⁸ Like the PIIE, the PwC study does so –problematically – by attributing ‘tariff equivalence’ to various different types of NTMs to simulate the effects of reducing such supposedly ‘proxy tariffs’. With such a methodology, the higher the ascribed tariff equivalence, the higher will be the estimated gains from reducing these proxy tariffs.

Given the significance the report attributes to the reduction of NTMs, it is important to carefully consider how it makes these estimates, and the implications of doing so. The PwC (2015: p. 285) study uses ad-valorem tariff equivalents for different NTMs and for various countries, asserting that “NTMs in Malaysia’s manufacturing sector is equivalent to a 22.1% tariff, while NTMs in the manufacturing sectors of the other TPP countries averaged to be equivalent to a 11.8% tariff” while citing different sources for these estimates⁴⁹.

As the report acknowledges, “The robustness of the CGE results are also subject to data limitations and the assumptions of the economic model”. All this suggests that far greater caution is needed in considering the most serious, yet methodologically problematic report considering the case for Malaysia signing up for the TPPA. While also using the GTAP CGE trade model, the ITC report has largely rejected the alleged growth effects of most NTMs in the PIIE studies except for the FDI effects, although these too should be subject to more critical scrutiny.

Perhaps more importantly, costs hardly come into the picture in what is ostensibly a cost-benefit analysis by the PwC. As the final TPPA fell quite short of the scenario assumed in the PwC study, claims of significant growth gains for Malaysia from the TPPA hinge heavily on what is widely acknowledged to be problematic claims about TPPA-induced NTM reduction since the gains from trade liberalization are generally acknowledged to be paltry. As there is no serious consideration of the risks and costs of joining the TPP and the estimates of purported gains are clearly problematic, there is no sound basis for the unseemly haste to approve and ratify the TPPA.

6- TPPA mainly benefits foreign investors

Instead of promoting growth and employment through trade liberalization, the TPPA is mainly about imposing new rules favored by large multinational corporations. For example, there are concerns that Article 25.8: Engagement with Interested Persons –

⁴⁸ The WTO acknowledged some problems with different methods for estimating the tariff equivalents of specific NTMs; see *World Trade Report 2012: Trade and public policies: A closer look at non-tariff measures in the 21st century*. UNCTAD has noted that “NTMs are relatively more restrictive in high- and middle-income countries”; see UNCTAD. *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*. Geneva, 2012.

⁴⁹ The NTMs are modelled as ad-valorem equivalents based on K. Kawasaki, 2010, 2014. ‘The Relative Significance of Economic Partnership Agreements in Asia Pacific’. Processed; [Kee, Hiau Looi](#), Alessandro Nicita and Marcelo Olarreaga. 2008. ‘[Import Demand Elasticities and Trade Distortions](#)’. *Review of Economics and Statistics*, 90 (4): pp 666-682; [Kee Hiau Looi](#), Alessandro Nicita and Marcelo Olarreaga. 2009. ‘Estimating trade restrictiveness indices’. *Economic Journal* 119: pp 172-199.

“The Committee shall establish appropriate mechanisms to provide continuing opportunities for interested persons of the Parties to provide input on matters relevant to enhancing regulatory coherence” – can be interpreted to mean that foreign investors will be able to influence national legislation. While this chapter is not enforceable via state-state dispute settlement, there are equivalent provisions in other TPPA chapters that are enforceable.

The TPPA goes much further into shaping the role and functioning of governments than is needed for trade liberalization. There are concerns that its provisions will serve to further reduce the costs to, and increase the earnings of, transnational or multi-national businesses, with little commensurate gain for host countries. As they also undermine and compromise the ‘integrity’ of trade agreements, serious advocates of free trade and trade liberalization have sharply criticized the inclusion of such non-trade provisions in ostensible FTAs⁵⁰.

The TPPA promises to ease many restrictions on cross-border transactions and to harmonize regulations. TPP proponents have claim significant economic benefits, citing modest overall net GDP gains, ranging from half of one percent in the US to 10 percent in Vietnam after fifteen years; Petri and Plummer (2016) project 8.1 percent while the World Bank (2016) projects 10 percent using the same modelling exercise, suggesting the possibility of considerable variation in projections ostensibly based on the same modelling exercise. For Vietnam, Petri and Plummer (2016) project 8.1 percent growth while the World Bank (2016) expects 10 percent although its report is based on the former study.

However, both claims rely on many unjustified assumptions, including full employment in every country and no resulting impacts on working people’s incomes; crucially, more than 90 percent of overall growth gains are attributed to ‘non-trade measures’ with varying impacts. They arbitrarily assume that every dollar of FDI within the TPP bloc would generate additional annual income of 33 cents, divided equally between source and host countries (Petri, Plummer and Zhai, 2012) – without any economic theory, modelling procedure or empirical evidence for this supposition.

Financial liberalization

Many governments have eased restrictions on cross-border financial transactions from the 1990s⁵¹. Most developing country economies started with more restricted capital

⁵⁰ For example, see Jagdish Bhagwati. ‘India should not toe the US line on the Trans-Pacific Partnership’. *Hindustan Times*, 28 September 2015. <http://www.hindustantimes.com/analysis/india-should-not-toe-the-us-line-on-the-trans-pacific-partnership/story-LfURUi5Fpvmq5vDmxrH5FM.html>; Jagdish Bhagwati.

‘Dawn of a New System’. *Finance & Development*, December 2013, 50 (4).

⁵¹ In October 1997, the IMF argued for the elimination of restrictions on the movement of funds in and out of a country despite the earlier outbreak of the 1997-1998 East Asian financial crisis. Then first Deputy Managing Director Stanley Fischer characterized such liberalization as “an inevitable step on the path of development which cannot be avoided and should be embraced.” Fischer, now vice chair of the US Federal Reserve Board, noted that liberalization ensures that “residents and governments can borrow and lend on favorable terms, and domestic financial markets become more efficient as a result of the introduction of advanced financial technologies, leading to better allocation of both saving and investment”. While

accounts, and generally still remain less open than developed economies. Capital account liberalization allows domestic companies access to foreign capital, and – through foreign direct investment – to technology that may come with it. It also allows savers to invest outside their home country which may be an attractive option for those with illicit income and wealth or who believe their assets will be safer abroad.

However, capital account liberalization episodes have been followed by increased income inequality, especially in the medium term after a lag. Such liberalization also affects the relative bargaining power of companies and workers, as capital is generally able to move across national borders more easily than labor. Hence, capital account liberalization has been associated with large declines in labor shares. Increasing income inequality following capital account liberalization tends to be greater when followed by financial crisis and in economies where financial institutions are small and access to such institutions remains limited. The threat of more easily relocating production abroad weakens workers' bargaining power and hence, labor's share of income declines following capital account liberalization.

The impact of the loss of bargaining power may be more severe for workers in advanced economies than in emerging market economies for two reasons. First, companies in advanced economies may be in a better position to make a credible threat to relocate abroad – where wages are lower. Second, in many emerging market economies capital is scarce relative to labor. Thus, the arrival of foreign investment capital can raise the demand for labor, mitigating some effects of the relative change in bargaining power due to the opening of the capital account.

Thus, inequality often worsens following international financial liberalization. This has also been attributed to greater volatility and likelihood of crisis, with unpredictable cycles of large capital inflows followed by sudden and massive outflows⁵². In many economies characterized by limited, uneven and shallow financial development, where financial institutions offer a limited range of services, and many people do not have access to credit, liberalization may exacerbate inequality by favoring those better off.

Volatile capital flows – particularly given their magnitude relative to domestic markets – can threaten financial stability. But not all financial crises increase inequality, often due to offsetting factors. Financial crises may greatly reduce income inequality as collapsing asset prices will adversely affect the better off much more. However, financial crises and ensuing economic slowdowns tend to hurt those worse off, thus worsening inequality. Inequality effects also vary with financial depth and inclusion⁵³.

acknowledging that liberalization “increases the vulnerability of the economy to swings in [market] sentiment”, Fischer argued that the benefits of capital account opening outweighed its costs. Stanley Fischer. ‘Capital-Account Liberalization and the Role of the IMF’. Essays in International Finance No. 207, Princeton University International Finance Section, Princeton, New Jersey, 1998.

⁵² Dani Rodrik. ‘Has Globalization Gone Too Far?’ Peterson Institute for International Economics, Washington, DC, 1997.

⁵³ Davide Furceri, and Prakash Loungani. ‘Capital Account Liberalization and Inequality’. IMF Working Paper 15/243, Washington, DC, 2015. Davide Furceri and Prakash Loungani. ‘Opening Up to Inequity’. *Finance & Development*, 53 (1), March 2016.

The impact of liberalization on inequality is more likely to be mitigated when economies are at higher levels of financial development or if financial crises after liberalization are averted with appropriate capital account management techniques. Then, growth benefits are more likely to materialize, the risks of crisis as well as of higher inequality and lower labor shares are also smaller. Thus, financial liberalization under the TPPA is likely to have unpredictable effects as some past vulnerabilities following earlier financial liberalization and crises have been mitigated through side agreements.

Hence, even among TPP developing economies, the consequences are likely to be uneven owing to uneven financial development among them. For example, TPPA provisions for further liberalization of financial services may undermine national prudential regulation, exposing Malaysia to greater vulnerability from highly volatile external capital inflows once again. Nevertheless, lessons from its experience of the 1997-1998 Southeast Asian financial crises and the 2008-2009 global financial meltdown and the ensuing protracted Great Recession, as well as greater financial and capital market development in recent decades, may mitigate some vulnerabilities⁵⁴.

However, although the TPPA allows for certain types of prudential measures for financial services liberalization, the Agreement is likely to undermine existing as well as potential regulations which are not allowed by the TPPA as prudential regulations⁵⁵. Many lawyers believe that the prudential defense provision in the TPPA cannot be used to override financial liberalization provisions in the Agreement⁵⁶.

Intellectual property⁵⁷

⁵⁴ See the powerpoint presentation by Emeritus Professor Salim Rashid of Universiti Utara Malaysia to Malaysia's central bank: 'TPPA and Malaysia: The Impact on Banking and Finance', June 2016. While he may be correct that prudential regulation and other safeguards in Malaysia are in place and adequate, as they were before the 1997-1998 Asian crisis, Malaysia's vulnerability to that earlier crisis was due to capital market liberalization, which is a major thrust of what is being sought with the TPPA provisions for financial liberalization. See Jomo K. S. "Causes of the 1997-1998 East Asian Crises and Obstacles to Implementing Lessons". In Richard W. Carney [ed.]. *Lessons from the Asian Financial Crisis*. Routledge, London: 33-63 (chapter 3).

⁵⁵ US Senator Elizabeth Warren, the former Harvard Law School dean asked by President Obama to set up the Consumer Financial Protection Bureau and Chair of the Congressional Oversight Panel for the Troubled Asset Relief Program (TARP), and two other US Senators commented that "The consequence would be to strip our regulators of the tools they need to prevent the next crisis".

⁵⁶ The prudential defense in the TPPA has been copied from the WTO which has a heavily criticized sentence: "If these measures do not conform with the provisions of this Agreement to which this exception applies, they shall not be used as a means of avoiding the Party's commitments or obligations under those provisions". This sentence is considered so problematic that the EU has deleted it from its FTAs, e.g. with Canada.

⁵⁷ This section on intellectual property draws heavily on: TWN. 'Intellectual Property in Free Trade Agreements'. Third World Network, Penang, 2008; Carlos M. Correa. 'Innovation and the Global Expansion of Intellectual Property Rights: Unfulfilled Promises'. South Centre Research Paper No. 70, Geneva, August 2016. <https://www.southcentre.int/research-paper-70-august-2016/> as well as the excellent summary by Kanaga Raja. 'The unfulfilled promises of innovation and expansion of IPRs'. SUNS 8306, Geneva, 1 September 2016.

The incorporation of intellectual property (IP) into trade and investment agreements⁵⁸ has not brought about its promised benefits⁵⁹. The presumption that innovation will increase with such agreements has not been realized. While IP does not work in developed countries as claimed by its advocates, the situation is worse in developing countries with weak science and technological infrastructures, scarce venture capital and less sophisticated production profiles. IP is widely assumed to be necessary to drive private investment in medicine R&D, believed to be the primary source of new treatments, although in fact, the underlying basic research for most new medicines with genuine therapeutic impacts has been undertaken by public, not private, research.

International IP advocates claimed that new disciplines would bring many advantages to all in the multilateral trading system, including developing countries, such as greater innovation and growth, thanks to greater FDI flows and technology transfer. Although several statistical studies claimed to find strong correlations, none conclusively showed that the supposed benefits were due to enforcement of higher IP standards. Apparently, patents are not effective incentives for innovation and relatively few firms consider patents important for securing enhanced returns due to innovation. “Overall, the weight of the existing historical evidence suggests that patent policies, which grant strong intellectual property rights to early generations of inventors, may discourage innovation.”⁶⁰ Nevertheless, enhanced IP protection seems to account for the doubling of US receipts from abroad for the use of IP between 1994 and 2014.

⁵⁸ International IP law has developed since the end of the 19th century. Three international conventions were adopted at the end of the 19th century, two of which have become the foundation of an international system on industrial property and copyright law. Subsequently, it took a long time to develop additional international IP rules, with a new convention on copyright only established in 1952.

IP internationalization gained momentum in the 1960s and 1970s when negotiations led to new IP treaties. The new specialized IP bodies and rules created by these international conventions and instruments were initially separate from the multilateral trade system established by the General Agreement on Tariffs and Trade (GATT) in 1947. The two were connected due to the efforts of a group of US-based industries that set up a framework for IP protection abroad capable of ensuring the recognition and effective enforcement of IPRs.

Developing countries refused developed countries’ interpretation of the ambiguous Uruguay Round mandate approved at the GATT Ministerial Conference in Punta del Este in 1986, and avoided engaging in IP negotiations to establish a comprehensive IP agreement under GATT auspices until 1989. The subsequent change was mainly due to the US-EU efforts to link concessions on agriculture and textiles, the main priorities of developing country negotiators, to accepting new, binding international IP rules reflecting the interests of influential developed country corporations.

This copyright term extension in the TPP worried the New Zealand government sufficiently to get an eight year transition period to implement this provision after first accepting 60 years, whereas Malaysia only got a two year transition period for this. This was the only extended transition period NZ secured, whereas Malaysia got extended transition periods for some other TRIPS+ provisions as well.

⁵⁹ Also see Giovanni Dosi and Joseph E. Stiglitz. ‘The Role of Intellectual Property Rights in the Development Process, with Some Lessons from Developed Countries: An Introduction’. In Mario Cimoli, Giovanni Dosi, Keith E. Maskus, Ruth L. Okediji, Jerome H. Reichman, Joseph E. Stiglitz [eds]. *Intellectual Property Rights. Legal and Economic Challenges for Development*. Oxford University Press, New York, 2014: pp 3-4.

⁶⁰ Petra Moser. ‘Patents and Innovation: Evidence from Economic History’. *Journal of Economic Perspectives*, 27 (1), Winter 2013: pp 23-44.

A key argument for granting or strengthening IP rights is that such rights are crucial for promoting innovation. This too is the supposed rationale for implementing or enforcing IP standards higher than those of the Agreement on Trade-Related Intellectual Property Rights (TRIPS); such higher standards are often referred to as ‘TRIPS-plus’ or ‘TRIPS+’. In fact, the TRIPS Agreement has failed to stimulate more innovation and to generate benefits equitably among all WTO members. The same is true of investment and trade agreements promoted by the US and the European Union that entail further expansion of IP protection by imposing higher ‘TRIPS+’ standards: strengthened enforcement measures, extended patent protection, linking medicine registration with patent protection, and data exclusivity for pharmaceuticals and agrochemicals.

Higher standards of protection are supposed to improve welfare for all by enhancing innovation, while the evidence suggests opposite effects. Research and development (R&D) capabilities have not improved much in most developing countries in the last two decades, with a few notable exceptions, notably China, India and Brazil⁶¹. Together, the US, China, Japan and Europe still account for 78 percent of the US\$1.6 trillion worth of total R&D investment. There are few indications of significant improvements in the near term.

The uneven adverse effects of the geographically broader and more extensive IP protection provided for by the TRIPS Agreement is well illustrated by subsequent pharmaceutical industry innovation. The same standards of protection were not suitable for countries at different levels of development as a ‘one-size-fits-all’ approach to IP is not in the interest of developing countries. An IP system developed for a developed country often had more adverse effects in a developing country⁶². Increased development of new medicines attributable to implementation of TRIPS rules in developing countries has been minimal; hence, “global welfare is maximized by letting low-income nations free-ride on the patented inventions of first-world nations”⁶³.

⁶¹ It is not clear that increased R&D investment in these three countries is due to the introduction of TRIPS. Importantly, none of these countries has entered into free trade or other agreements imposing TRIPS-plus standards, granting greater IPR protection.

⁶² “As badly designed as the American IPR regime is for the United States, it is even worse suited for developing countries. But even if the American IPR regime were ideal for the United States, that does not mean that it would be ideal for others... In particular, the IPR regimes of the advanced developed countries are likely to be inappropriate for many developing countries, and this is likely to be especially so in areas like health and agriculture... Indeed, one-size-fits-all, policy prescriptions are rarely a good idea in any field, but this is one area where they may work particularly badly... There are, for instance, large distributional consequences of different IPR regimes, and developing countries may not have the resources to easily offset those effects”.

“[W]hile the proponents of the TRIPS Agreement operated on the premise that minimum standards of protection would be equally beneficial for countries with diverse levels of socio-economic and technological development, the dominant view flowing from academic and other analyses seems to strongly reject that premise”, particularly for pharmaceuticals (Dosi and Stiglitz, 2014).

⁶³ F. M. Scherer. ‘A note on global welfare in pharmaceutical patenting’. Working Paper No. 03-11, Federal Reserve Bank of Philadelphia, 2003. Available at <https://www.philadelphiafed.org/research-and-data/publications/working-papers/2003/wp03-11.pdf>, p. 10.

Patents are considered especially important for securing higher returns to innovation in pharmaceuticals. The pharmaceutical industry was crucial to US efforts to secure adoption of the TRIPS Agreement which may never have come into existence without effective industry lobbying. Enforcement of global regulations for patenting pharmaceutical products – for which there were no international rules before the TRIPS Agreement – was presented as crucial to sustain and increase investment in developing new pharmaceutical medicines.

This finding was confirmed by a later report: “patents alone do not drive sufficient investment to counter diseases that predominantly affect poor people, because they do not offer a sufficiently profitable market; as a result, some diseases – or rather, some populations – are neglected”. While only 1.1 percent of new therapeutic products had been developed for neglected diseases during 1975-1999, of the 336 new chemical entities approved during 2000-2011, only four new ‘chemical entities’ were approved for ‘neglected diseases’, three for malaria and one for diarrhea.

Furthermore, most new medicines do not perform better than previously existing treatments, but are generally more expensive⁶⁴. By the 1980s, medicines were less than four times better than placebos; they were twice as good as a placebo in the 1990s, and only 36 percent better by the 2000s.

The TRIPS Agreement’s minimum standards were supposed to lead to more innovation in pharmaceuticals in developing countries, especially in countries with significant scientific and technological capacities and capabilities⁶⁵. Analysis of pharmaceutical patents in 85 countries during 1978-1999 found that “national patent protection did not stimulate domestic innovation activities, except at higher development levels, and that above a certain level of patent protection, innovation activities are actually reduced”.

The TRIPS Agreement provides protection for twenty years from the date of filing for patents. But this standard period of two decades is quite arbitrary as there is no evidence that the twenty year period is optimal, particularly for inventions and innovations of very different significance, and requiring different human capabilities and financial investments.

TRIPS has done little to stem the decline in pharmaceutical innovation in developed countries, or to induce much more R&D for ‘neglected diseases’ in developing countries. Instead, the TPPA is likely to contribute to a significant proliferation of patents, as drug firms seek to ‘evergreen’ the patents they hold by filing for patents for derivatives, formulations and other new forms of existing medicines to block market entry by cheaper generic manufacturers. New patents can also be filed for new uses for existing medicines.

⁶⁴ For example, “a ‘new generation’ of anti-psychotics was systematically prescribed by doctors, yet these drugs proved to be no more effective than the prior generation and were 10 times more expensive”.

⁶⁵ Although Indian pharmaceutical industry R&D to improve existing medicines accelerated following the TRIPS Agreement, “in the absence of TRIPS, such activities would still have been undertaken. With larger domestic operations, Indian companies...would have had access to larger resources and would have been better placed to undertake such research”.

As such changes strengthening IP protection are enabled, if not required by the TPPA, it is considered ‘TRIPS+’.

There has, in fact, been a continuous decline in pharmaceutical innovation over the decades, as measured by the number of new medicines approved for marketing since the TRIPS agreement. The average number of new medicines developed after the TRIPS Agreement became enforceable in developing countries in 2000 was barely half the average of the previous five years. Strengthening patents and test data protection for pharmaceuticals and extending them to developing countries appear to have done little if anything to encourage the pharmaceutical industry to develop new medicines⁶⁶.

Diseases prevalent in developing countries continued to be ‘neglected’ due to limited interest in and low R&D investment by the pharmaceutical industry. The World Health Organization (WHO) Commission on Intellectual Property, Innovation and Public Health report of April 2006 noted that “[t]here is no evidence that the implementation of the TRIPS Agreement in developing countries will significantly boost R&D in pharmaceuticals on TYPE II and particularly Type III diseases. Insufficient market incentives are the decisive factor”⁶⁷.

Higher pharmaceutical prices, due to stronger enforcement of patent rights, adversely affects developing countries. Often, governments are not in a position to exercise their ostensible rights under the ‘public health’ exceptions to the TRIPS agreement. Furthermore, limited fiscal capacities constrain their purchasing capacity and hence their ability to negotiate lower prices through bulk purchases. Consequently, higher pharmaceutical prices are also testing the financial sustainability of social security systems in most countries offering medical benefits. In countries not providing such benefits, medicines have to be bought by the patients themselves if they can afford them.

Thus, consumers, especially in developing countries, pay for a system which enables international monopolies to extract higher rents from higher prices and royalty payments while doing little to promote local innovation and economic development. The innovation rate has not only not increased, but has in fact declined. And while developing countries struggle to cope with higher prices for medicines, the R&D needed to address their particular health needs continue to be marginalized.

The failure of the TRIPS Agreement to deliver on its ostensible justifications have led to critical analyses and alternative proposals for new models for encouraging innovation. Some have even called for the abolition of the patent system⁶⁸. The Consultative Expert

⁶⁶ According to Correa, the “number of new drugs approved per billion US dollars spent on R&D has halved roughly every 9 years since 1950, falling around 80-fold in inflation-adjusted terms”.

⁶⁷ Quoted by Kanaga Raja, *op. cit.* 2016.

⁶⁸ “[I]n general, public policy should aim to decrease patent monopolies gradually but surely, and the ultimate goal should be the abolition of patents. After six decades of further study since Machlup’s testimony in 1958 failed to find evidence that patents promote the common good, it is surely time to reassess his conclusion that it would be irresponsible to abolish the patent system”. Michele Boldrin and David K. Levine. ‘The Case Against Patents’. *Journal of Economic Perspectives*, 27 (1), Winter 2013: pp 3-22.

Working Group on Research and Development: Financing and Coordination established by the World Health Assembly of the WHO in 2010, produced recommendations to address the failure of the existing IP incentive systems to generate needed R&D to meet the health and medicine priorities of developing countries. The report recommended an open approach to R&D, with R&D results treated as public goods not subject to the exclusive monopoly rights of patents. It recommended new arrangements for shared financing, direct subventions, prizes for inventions and innovation as well as patent pools in order to increase access to health products, including a legally binding convention on R&D.

Such ‘disciplines’ significantly constrain the policy space needed for countries to accelerate economic development and to protect the public interest including human rights⁶⁹. As Malaysia is a net IP importer and will remain so for the foreseeable future, like most developing countries, it is not worthwhile to agree to TRIPS+ unless there are benefits to outweigh the costs of TRIPS+, which this paper disputes.

The TPPA has stronger intellectual property protection than TRIPS requires (‘TRIPS+’) in a number of other areas besides copyright including:

- Requiring patents on new uses of old inventions, e.g., finding that a herbicide can be used to kill another weed qualifies for getting a second patent.
- Requiring a patent to last for more than 20 years if the patent office takes too long to approve it, or the government health agency takes too long to check if the medicine is effective in treating the disease and is safe (e.g., it does not cause problematic side effects). Patented medicines are much more expensive than their generic equivalents. For example, patented versions of medicines to treat AIDS cost around US\$15,000 per patient

⁶⁹ The TPPA requires members to join the International Convention for the Protection of New Varieties of Plants as revised on 19 March 1991 (UPOV91) which requires farmers to pay royalties for 20-25 years, and effectively prohibits the exchange of seeds, for all plant varieties that meet the criteria. For a discussion of this and some other anticipated implications for human rights, see Sanya Reid Smith. ‘Potential human rights impacts of the TPP’. Third World Network, Penang, 2015. <http://www.twn.my/title2/FTAs/General/TPPHumanRights.pdf> As this paper was published before the TPPA text was released in late 2015, reference should also be made to the final TPPA document.

In a statement on the TPP and other FTAs, ten UN Special Rapporteurs and Independent Experts expressed concern about the secretive manner in which FTAs have been negotiated and their potential adverse impacts on human rights such as the rights to life, food, water, sanitation, health, housing, education, science and culture, as well as improved labor standards, an independent judiciary and a clean environment. The relevant proposed TPP provisions which go beyond WTO rules are included. Since TPP governments refused to release the text during negotiations, the assessment was based on leaked documents available; hence, the documents referred to are largely reports by human rights bodies. While other WTO, FTA and bilateral investment treaty (BIT) disputes are unlikely to become precedents for TPP interpretation, these are likely to be followed, so some such interpretations were included in the document.

Relevant background is provided in an earlier publication: TWN. *Intellectual Property in Free Trade Agreements*. Third World Network, Penang, 2008.

per year, but a generic version only costs US\$67 per patient per year.⁷⁰ Thus, the TPPA can mean longer monopolies at higher patented prices.

- Requiring originator agricultural chemicals (e.g., herbicides and pesticides) get a 10 year monopoly, even without a patent. Agricultural chemicals make up 10 to 14 percent of total input costs for Australian farmers, and generic versions of agricultural chemicals are a third to half the price of their counterparts that are patented or have ‘data (effectively market) exclusivity,⁷¹ but farmers in TPP countries will have to wait 10 years for such cheaper agricultural chemicals, even when they are not patented.
- Requiring medicines (including biologics) get a five year monopoly, even when there is no patent. Biologic medicines at monopoly prices can cost more than US\$500,000 per patient per year and comprise an increasing share of the medicine market (in 2010, they accounted for a quarter of new medicines approved by the US government).⁷²

Thus, the TPPA will raise prices to consumers by extending IPRs and by blocking or delaying generic production and imports. The TPPA will especially strengthen IPRs for big pharmaceutical, information technology, media and other firms, e.g. by allowing pharmaceutical companies longer monopolies on patented medicines, keeping cheaper generics of the market, and blocking the development and availability of ‘similar’ new medicines. As the relevant Malaysian legislation provided higher IP protection than TRIPS, pre-TPPA Malaysian laws are already ‘TRIPS+’. The TPPA will effectively ‘lock in’ existing legislation meeting the higher TPPA standards while raising IP protection where Malaysian law currently falls short of the new TPPA standards. Hence, the TPPA is effectively ‘TRIPS++’.

*ISDS effects*⁷³

⁷⁰ http://www.doctorswithoutborders.org/publications/reports/2011/MSF_Access_Report_13th_edition.pdf and http://www.msf.org/msfinternational/invoke.cfm?objectId=63C0C1F1-E018-0C72-093AB3D906C4C469&component=toolkit.article&method=full_html.

⁷¹ Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America by the Pastoralists and Graziers Association of W.A. (Inc) And Generic Agricultural Chemical Association.

⁷² See ‘Preliminary analysis of biologics exclusivity’. TWN Info Service on Health Issues (Aug15/02), Third World Network, 21 August 2015, <http://www.twn.my/title2/health.info/2015/hi150802.htm> As this report was also based on leaked information available earlier, its analysis of the TPPA provisions needs to be checked against the final TPPA text.

⁷³ This section draws heavily on ‘Remarks at the National Press Club Panel on the Proposed Inclusion of ISDS in the TPP’ by Lise Johnson, Head of Investment Law and Policy, at the Columbia University Center on Sustainable Investment, at the National Press Club in Washington, DC, on 17 February 2016; Public Citizen (2015). ‘Secret TPP Investment Chapter Unveiled: It’s Worse than We Thought’. Public Citizen, Washington, DC; Chris Hamby. ‘The Court That Rules the World’. BuzzFeed, August 28, 2016. https://www.buzzfeed.com/chrishamby/super-court?utm_term=.ju8Ay3Wgk#.oo5D4JqVv

Rob Howse has observed that the BuzzFeed investigative series has exposed “troubling examples where the harm came from the *threat* of an ISDS claim, which could bring small developing states to their knees”. See ‘Could the Critics of ISDS Save TPP? An opportunity for Hillary Clinton to strike a new national bargain on trade’. September 11, 2016

Investor-state dispute settlement (ISDS) provisions in trade and investment agreements have effectively created a powerful, privileged system of protections for foreign investors that often undermines domestic law and institutions. ISDS in the TPPA will allow foreign corporations to sue governments for causing them losses due to legal or regulatory changes. ISDS cases are decided by extrajudicial tribunals composed of three corporate lawyers. Although ISDS has existed for decades, the TPPA would greatly broaden its scope and the bases for ISDS claims and the number of foreign investors who can sue TPP governments such as Malaysia. Its impact will be exacerbated by the very broad coverage of the TPPA's Investment and Services chapter, which provides for a 'negative list' approach to exclusion. One major effect will be to constrain the policy and regulatory space for government initiative to promote desired investments and technological innovation.

As ISDS is now written into over 3,000 bilateral investment treaties (BITs) and numerous ostensible FTAs, the opportunities for ISDS claims are huge and growing. Originally justified as necessary to protect foreign corporate investments abroad from nationalization or expropriation by governments also controlling national judiciaries, foreign corporations have used it to change sovereign laws and undermine national regulations. As there is no cap on the amount of awards in the TPP, claims and awards can be huge as foreign corporations can seek damages on future profits indefinitely. The system is dominated by unaccountable corporate lawyers. Lawyers acting as advocates in one case can be arbitrators in other cases.

<http://worldtradelaw.typepad.com/ielpblog/2016/09/could-the-critics-of-isds-save-tpp-an-opportunity-for-hillary-clinton-to-strike-a-new-national-barga.html#comments>

Howse then raised the possibility of the US Congress adopting the TPPA subject to the United States filing a reservation opting out of the provisions for investor-state arbitration as there is no language in the TPPA that implies that the door is shut to such reservations. He notes, "As a political matter, it is unlikely that the other TPP parties will refuse to consent to the US reservation if it is a necessary condition for US approval of the agreement". The US and Australia already decided to leave ISDS out of their bilateral trade and investment agreement. He goes on to note "many of the critics' concerns with investor-state arbitration (lack of predictable jurisprudence, no arbitrator accountability and professional standards, weak conflict of interest and ethics rules, lack of diversity in the arbitrator pool etc.)", but doubts that "an ISDS reservation is enough to make TPP a meritorious agreement, in the sense of moving in a progressive direction on trade".

Simon Lester had earlier argued that Hillary Clinton should try to pass a revised version of TPP with ISDS taken out entirely. See 'How President Hillary Could Reverse Course on TPP'. August 25, 2016. <http://nationalinterest.org/feature/how-president-hillary-could-reverse-course-tpp-17476> He noted that Australia and NZ have already established a precedent in the TPP for excluding ISDS: <http://worldtradelaw.typepad.com/ielpblog/2015/11/no-isds-as-between-australia-and-new-zealand.html> Also see Simon Lester. The TPP's Contribution to Public International Law. *Insights* (American Society of International Law) 19 (26), December 02, 2015.

<https://www.asil.org/insights/volume/19/issue/26/tpps-contribution-public-international-law>

However, in response to both Howse and Lester, Linda Dempsey noted that "The Senate overwhelmingly REJECTED Senator Warren's anti-ISDS amendment last year and TPA [sic] as enacted by majorities of both the House and Senate directly calls for ISDS". Her observation suggests that reliance on the US Congress to oppose US corporate interests may well be an exercise in futility. Nevertheless, a recent letter signed by over 200 professors of law and economics, including Joseph Stiglitz and Laurence Tribe, urges members of the US Congress to reject the TPP "as long as ISDS is included".

<https://www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf>

ISDS proponents claim that the outcomes of cases are uncertain, and corporations only win about a quarter of the cases they pursue. But this does not include settlements agreed to before the conclusion of arbitration proceedings from which corporations often secure handsome benefits of some kind or other. ISDS arbitration is certainly far more attractive to foreign investors who would otherwise shy away from pursuing claims in developing country and other national courts, particularly against host governments.

Recent ISDS decisions have involved significantly greater delegation of authority to arbitrators in interpreting and applying the agreements concerned, without any meaningful review or opportunity to appeal the arbitrators' decisions. There is no guarantee⁷⁴ that tribunals will interpret treaty provisions in ways consistent with governments' understandings of what treaty obligations mean⁷⁵.

ISDS also allows investors to challenge the actions of officials at any level of government – local, state, and federal – as well as conduct by any branch – executive, legislative and judicial. A measure entirely consistent with domestic law is no defense against liability. ISDS thus empowers private arbitrators to decide on cases that are essentially matters of domestic constitutional and administrative law, but are presented as treaty claims.

Instead of national judicial institutions, with ISDS, foreign investors will be able to ask a panel of appointed international arbitrators to determine 'proper' administrative, legislative and judicial conduct. Since many legal decisions involve matters of interpretation, it makes a great deal of difference to have non-national judges deciding on 'national' issues. It greatly helps foreign investors if they can bring their claims against a government before international arbitrators, and not domestic courts.

First, there is no provision for meaningful appeal; a tribunal's decision will probably stand even if it gets the law or facts wrong. Second, ISDS decision makers are not required to be independent and impartial with the high ethical standards expected of judges. Third, if a domestic court issues a decision inconsistent with legislative intent, the legislature can correct it through domestic legislation, but it has no power to override an ISDS decision⁷⁶. Fourth, procedural rules and remedies are significantly different

⁷⁴ Article 9.25.3 (Governing Law) of the investment chapter provides the ostensibly strongest safeguard, which is negated by the nature of the Commission itself: "A decision of the Commission on the interpretation of a provision of this Agreement under Article 27.2.2(f) (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision."

⁷⁵ According to statistics for disputes under US trade or investment treaties, there was a ruling of a 'fair and equitable treatment' (FET) violation 74 percent of the time when investors won, while FET was found to have been violated in 81 percent of the cases won by investors who alleged such violations. Even if ISDS tribunals actually take Annex 9-B into account, the wording in its last paragraph may not be sufficient to safeguard all regulatory actions that TPP governments may need to undertake.

<http://www.citizen.org/documents/MST-Memo.pdf>

⁷⁶ In a variation of this, Singapore-based arbitrators ruled against India for having acted according to a ruling of the Supreme Court of India which is binding throughout the country as law. This is one reason leading to India's decision to revise all its BITs with reference to a new model treaty; it has not renewed already expired old BITs and has given notice to terminate others. Indonesia and South Africa are among

depending on whether an investor claim is through ISDS or domestic courts, with significant consequences for the TPP government's potential exposure to claims and liability. Fifth, the law is not the same, even it may look similar, implying that similar sounding legal texts may be interpreted very differently in different contexts.

The threat of supranational adjudication has many, often complex legal and policy implications⁷⁷. ISDS will inadvertently dilute constitutional protections, weaken the judiciary, and 'outsource' national legal systems to a system of private arbitration devoid of essential checks and balances in most national judicial systems. Investors seem to have 'persuaded' many researchers and politicians to support their ISDS promotion and extension efforts. In short, ISDS is an extreme, discriminatory and unnecessary form of supranational adjudication that will have undue negative effects on national law and institutions.

The best governments for international investors to sue are typically those already in some trouble. When a country resorts to emergency economic measures to protect its citizens, investors can more easily claim that these undermine earlier understandings. The likely wave of ensuing lawsuits typically further hurt the country's credit ratings, raising the cost of capital and undermining its ability to attract investment.

As public and private insurance and other forms of foreign investment protection are already available for the protection of 'legitimate' investor rights and interests, growing numbers doubt whether ISDS is even necessary for the situations it was originally designed for. Already, India, Indonesia and Ecuador have advised their treaty partners that they are considering terminating BITs because of ISDS. To reduce abuses, investors

other countries also withdrawing from their BITs. See <http://www.citizen.org/documents/isds-quote-sheet.pdf>

⁷⁷ Officials from most non-US TPP governments have privately indicated that ISDS was very much demanded by the USTR. They also point out that it has largely benefited large US corporations and is very much part of the US legal 'culture of litigation'. Large Japanese corporations, it has been pointed out for example, prefer to find other recourses to protect their corporate interests.

Almost as if to confirm this widespread perception, the Obama administration has noted that the US Government has yet to lose an ISDS case. The past, of course, does not predict the future, and the experience of many other governments, especially of developing countries, has been quite different. US exposure has been limited in the past, but this has been changing. Interestingly, although the US has been 'fortunate' to have never lost an ISDS case so far, apparently even US government lawyers have expected otherwise and were surprised to win some cases.

Although it has never lost any of the 17 cases adjudicated so far, the US government has actually lost on key legal issues that have resulted in greater exposure to future claims and damages. It has been suggested that arbitrators have been reluctant to rule against the US, and thus risk the US authorities opposing the ISDS system, ultimately jeopardizing the 'incestuous' community of arbitrators and lawyers involved with ISDS cases.

The US Trade Representative has claimed that the protection investors receive under the TPPA's ISDS does not go beyond the protection provided by domestic law, implying that therefore ISDS does not change or undermine national laws. However, such claims have been challenged on several counts. Protections under investment treaties appear to give foreign investors more rights than under domestic law; otherwise, the former would be considered redundant and unnecessary. Thus, for example, TransCanada is pursuing its US\$15 billion claim for denial of the Keystone gasline permit through NAFTA, rather than through domestic litigation.

could be required to first prove discrimination in national courts before being allowed to proceed to ISDS arbitration⁷⁸. Alternatively, national courts could exercise judicial review over ISDS awards. Also, arbitrators could be required to be independent of the ISDS process, with set salaries, security of tenure and no financial ties to litigants. The investor in ISDS could be defined more strictly. More importantly, other better solutions have recently been proposed by the governments of India, Brazil and South Africa⁷⁹, e.g., no ISDS, no FET, etc.⁸⁰

In recent years, ISDS has increasingly provided a means for investors to make money by speculating on lawsuits, winning huge awards and forcing foreigners to pay⁸¹. Financiers have purchased corporations able to bring winnable ISDS claims to use such claims profitably. They have sometimes used ‘shell companies’ to pursue cases. Some hedge funds and private equity firms finance ISDS cases as third parties. Thus, ISDS has become the *raison d’être* for such investments. Such ‘third-party funding’ of ISDS claims has been expanding quickly, according to a ‘litigation finance’ pioneer. If financing such claims was not worthwhile, the industry would not have boomed so quickly in recent years.

Third-party financing protects corporations from some litigation costs and makes it easier to sue. Foreign corporations typically do not have to declare that they have received third-party funding for an ISDS case. Not surprisingly then, the ISDS claims-financing industry is booming as different types of investors have been drawn to financing lawsuits, treating ISDS claims as a speculative asset. The International Council for Commercial Arbitration estimates that at least three fifths of those considering ISDS claims have inquired about possible third-party financing before pursuing them⁸². Financing firms

⁷⁸ But this does not help with the TPPA which allows compound interest to accrue to the investor from the date the government takes the action. Thus, requiring them to go to domestic courts first only increases the amount the government will eventually have to pay the investor.

⁷⁹ For examples, see Kavaljit Singh and Burghard Ilge [eds]. *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*. Jointly Published by Both ENDS, Madhyam and SOMO, 2016.

⁸⁰ For a comparative perspective to foreign investment protection, see Kinda Mohamadieh and Daniel Uribe. ‘Approaches to international investment protection: Divergent approaches between the TPPA and developing countries’ model investment treaties’. Research paper 68, South Centre, Geneva, June 2016. Kavaljit Singh and Burghard Ilge [eds]. *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*. Jointly published by Both ENDS, Madhyam and SOMO, 2016.

⁸¹ The next three paragraphs draw heavily from David Dayen. ‘The Big Problem With The Trans-Pacific Partnership’s Super Court That We’re Not Talking About.’ Huffington Post, 29 August 2016. http://www.huffingtonpost.com/entry/isds-lawsuit-financing-tpp_us_57c48e40e4b09cd22d91f660

⁸² “Third-party funding in the context of investor-state disputes is a recent phenomenon, but it is clearly on the rise and gaining momentum. In a meeting of the International Council for Commercial Arbitration (ICCA) Queen Mary Task force on Third-Party Funding, a funder present at the meeting shared that for two-thirds of the cases registered by ICSID in 2014, claimants or claimants’ counsels had inquired about third party funding (if not sought funding) by this one company. To date, six international funds and one broker are active participants in the task force. *There is little doubt that the availability of third-party funding, in addition to other means of support for impecunious claimants or claimants preferring to finance their claims, will have an impact on investment disputes and, therefore, also on the risks for states to be subject to investor-state cases, including poor states with a small track-record of claims.* Globalization of ISDS has reached its cruising altitude, and no state is immune from investment treaty cases in the short run. The development of third-party funding for claimants raises acutely the issue of potential financial support

provide clients with litigation packages from the outset, advising on what treaties to exploit and which law firms to hire, even recommending arbitrators who are generally part of a very small group of international corporate lawyers.

By extending the meaning of the ‘minimum standard of treatment’ clause, which enables the most flexible types of ISDS claims, to cover financial services, the TPPA will enable challenges to almost any regulatory changes which can be construed as affecting expected future bank profits. While bondholders do not actually develop productive capacities or sell services in a host country, they too can resort to ISDS arbitration to maximize returns on their debt purchases. Thus, bondholders who have lost value can use the ISDS back door to sue countries for compensation. Hence, ISDS allows investors with little connection to the initial investment to benefit financially.

The TPPA’s ISDS provisions will enable foreign investors to sue a TPP government in an offshore tribunal by claiming that government-induced changes, e.g., new regulations, reduce their expected future profits, even if such changes are improvements in the public or national interest. A foreign investor can initiate a challenge alleging a government measure is in breach of disciplines under the TPPA’s Investment Chapter. Request for damages and calculation of damages may include the loss of expected future profits.

The TPPA will thus strengthen foreign investors’ rights at the expense of local businesses and the public interest. The TPPA’s ISDS system can thus oblige governments to compensate foreign investors for losses of expected profits due to national regulations following binding private arbitration. ISDS has been and can be invoked even when rules are non-discriminatory, or profits come from causing public harm. ISDS will thus also strengthen foreign investor rights at the expense of local businesses and the public interest.

US investors are well known as the most litigious in the world, bringing twice as many ISDS claims as investors from the next most litigious country. As the US is a TPP party, US investors will be able to sue under the TPPA investment chapter. A study of all publicly available investment treaty awards to May 2010 found that tribunals gave US investors broad interpretations of their jurisdictional rights 98 percent of the time⁸³.

TPP governments’ policy decisions will be increasingly influenced and circumscribed by fears of foreign investor retaliation compared to the public interest. Such pro-investor legal measures will impose significant costs, especially on developing countries who can less afford expensive effective legal representation for such cases⁸⁴. Hence, ISDS will

or assistance for respondent states and the possibility to provide defense services at a lower cost or on a contingency basis.” (my emphasis)

⁸³ Gus Van Harten. ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’. *Osgoode Hall Law Journal*, 50, 2012.

<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1036&context=ohlj>

⁸⁴ Legal fees can be high, with law firms charging US\$1000 an hour; for example, the Philippines has spent US\$58 million defending itself against one investor. One study found that even when governments win, they still have to pay their own costs in 70 percent of the cases. However when investors win, they only

exert a deterrent or chilling effect on important government responsibilities, including undermining government capacity to promote the growth of indigenous capabilities, to promote national development and protect the public interest. Thus, ISDS will constrain policy and regulatory space for governments seeking to serve the public or national interest, including the acceleration of economic growth, transformation and progress.

Will TPP governments introduce legislation or policies in the national, public, consumer, workers' or farmers' interests when it faces the prospect of retaliation through ISDS? This TPPA-endowed or strengthened inherent threat of retaliation has already induced 'regulatory chill'. The TPPA's ISDS provisions and restrictions on SOEs will also deter governments from regulations and policies in the public interest, for fear of litigation by corporate interests⁸⁵. The TPPA's SOE chapter was driven by the US despite considerable initial resistance from other TPP parties. Although its provisions are more onerous, extensive and intrusive than in other existing FTAs, it does not require other TPP economies to privatize as required by the US-Singapore FTA. Nevertheless, they serve to lock in the status quo, not allowing policy space for future use of SOEs to achieve the national or public interest.

Even frivolous ISDS claims have served investor interests by deterring regulation⁸⁶. The ISDS regime has undergone a major shift, with a majority of claims dealing with regulation in 'democratic states', implying 'high rule of law' countries, and not with 'direct takings' by 'low rule of law' countries. This shift towards indirect expropriation has affected firms' incentives, as claimants may gain even when they lose a challenge as long as the litigation tempers governments' 'regulatory ambitions'. The result has been

have to cover their own costs in 40 percent of cases. See also <http://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf>

⁸⁵ See Jane Kelsey. 'The Risks of Disciplines on State-Owned Enterprises in the Proposed Trans-Pacific Partnership Agreement'. Processed, Faculty of Law, University of Auckland, 3 March 2016. Jane Kelsey. 'Analysis of the TPPA SOE Chapter'. Processed, Faculty of Law, University of Auckland, June 2016. *The Economics of the TPPA*. Barry Coates, Rod Oram, Dr Geoff Bertram and Tim Hazledine. Expert paper #5, Trans-Pacific Partnership Agreement New Zealand Expert Paper Series. New Zealand Law Foundation. January 2016.

⁸⁶ This paragraph draws heavily on Krzysztof Pelc. 'Does the Investment Regime Induce Frivolous Litigation?'. Department of Political Science, McGill University, Montreal, February 2016. Using recently released data on 696 investment disputes, he concludes:

"In trying to defend the legitimacy of the investor-state regime, policymakers often point out that investors fail to win most of the claims they bring...this is precisely where the problem may lie. A legal regime where litigation is both costly and generally unsuccessful fails at its primary function of reliably selecting measures for enforcement. The incentives it generates may be skewed, if claimants gain even when they bring weak cases..."

"Are indirect expropriation claims more prone to frivolous litigation? First, I show that the legal merit of cases has declined precipitously over time, and that this decline is concentrated in indirect expropriation cases. Investors have won only 21 percent of indirect expropriation disputes in the last decade. Contrast this to the trade regime, where complainants win about 90 percent of all disputes that produce a ruling – precisely because states are loath to file a dispute against another country if they are unsure of its merit.

"Secondly, indirect expropriation cases, which are more apt to generate positive spillovers for the investor by deterring regulation, are systematically less successful than other types of claims. Conversely, direct expropriation claims, which carry no analogous spillover benefit, are associated with far higher odds of success for the investors bringing them."

an increase in the number of cases and a sharp decline in their legal merit. Investors bringing indirect expropriation claims seemed far less inclined to settle, and more inclined to publicize their disputes.

As developing country corporations invest abroad, TPP governments claim that the TPPA will protect their interests as well. However, in the case of Malaysia, this claim ignores where most Malaysian investments are, namely in non-TPP countries, and the relative size of Malaysian corporations operating internationally compared to, say, their US or Japanese counterparts. Meanwhile, the perverse incentive for Malaysians to invest abroad in order to ‘round-trip’ investments back into Malaysia from abroad, with the privilege of becoming foreign investors, has barely been considered.

To give just one example of a likely ‘chilling’ impact on public and occupational health regulation in a TPP developing country, the most widely used herbicide in Malaysia has been declared carcinogenic by the World Health Organization, but has not been proscribed by the Malaysian government. It is unlikely to be banned in future due to the ‘chilling deterrent effect’ of the recent sharp increase in ISDS cases⁸⁷.

Thus, ISDS provisions make it hard for governments to fulfil their basic obligations – to protect their citizens’ health and safety, safeguard the environment, contribute to reversing global warming⁸⁸, and ensure economic stability. For example, if a government banned toxic chemicals, it would have to compensate suppliers for lost profits, instead of requiring them to compensate the victims of their toxic products! The taxpayer will be hit twice – to pay for the health and environmental damage caused, and also to compensate the manufacturer for ‘lost profits’ due to the ban. The ‘chilling effect’ of ISDS puts the public at risk⁸⁹.

Available evidence shows that ISDS has not achieved its three commonly stated objectives⁹⁰. Contrary to claims made by its proponents, its track record so far – involving over three thousand BITs and as provisions in ostensible bilateral and plurilateral FTAs – does not include significantly *increased investment flows*, or stronger *international legal rights for investors*, or *improved rule of law* in host countries.

⁸⁷ While ISDS provisions are not new, the evidence is very strong that there have been huge increases in cases taken to arbitration and in the size of arbitration awards while the main beneficiaries are very large corporations and high net worth individuals – as documented by Gus Van Harten of Osgoode Hall Law School, York University, Canada.

⁸⁸ See IATP. ‘The Climate Cost of Free Trade: How the TPP and other trade deals undermine the Paris climate agreement’. Institute for Agriculture and Trade Policy, Minneapolis, September 2016. <http://www.iatp.org/climate-cost-of-free-trade>

The report suggests how the TPP will impact participating governments’ abilities to meet their climate commitments under the 2015 Paris Agreement. It also looks at how existing FTAs and WTO rules impact climate goals. According to the report, the TPP will strengthen the ability of earlier FTAs to reject renewable energy programs supporting green jobs, provide agribusiness with more opportunities to challenge regulations that protect farmers and consumers, and limit government ability to regulate fossil fuel energy generation.

⁸⁹ Risk assessment associated with regulatory analysis is beyond the scope of this paper.

⁹⁰ Lise Johnson, and Lisa Sachs. ‘The TPP’s Investment Chapter: Entrenching, rather than reforming, a flawed system’. Vale Center on Sustainable Investment, Columbia University, New York, November 2015.

Hence, including ISDS in the TPPA would not only consolidate a failed experiment, but also significantly extend it, more than doubling the share of ISDS-covered investments⁹¹. Potential ISDS compensation payments or settlements could far outweigh the limited economic benefits of the TPPA. Even when cases are successfully defended, the legal costs will be very high. Thus, the ISDS threat, if not its actual repercussions, will be good enough to ‘discipline’ governments through ‘regulatory chill’.

7- Threatening Trade Multilateralism

Meanwhile, the TPPA is being touted as a regional trade deal for the 21st century, and will most certainly encourage other plurilateral and bilateral agreements. While such arrangements undermine trade multilateralism, WTO officials and others continue to maintain the pretense of complementarity and coherence. The threat to scuttle the Doha Round of multilateral trade negotiations under WTO auspices, has already been used by the US and the EU to extract more concessions from developing countries, the South, which still hopes that the Round can achieve at least some of their developmental (and food security) aspirations.

Concluding the TPPA before the mid-December 2015 Nairobi WTO ministerial was used by USTR Michael Froman to derail the WTO Doha Round of trade negotiations, apparently also in line with the current European Trade Commissioner’s preferences. Thus, the biennial meeting saw the US and its European allies thrust the WTO into an existential crisis with their demands for the addition of previously rejected agenda item suggestions after the failure to come to agreement after 14 years of negotiation.

Following the Seattle WTO ministerial failure, the Doha Round negotiations had begun in late 2001, after 9/11, with the promise of rectifying the anti-development and food security outcomes of the previous Uruguay Round. Ending the Doha Round inconclusively will enable WTO members to renege on promised concessions to bring all countries back to the negotiating table. Not surprisingly, most developing countries want the Doha Round to continue, hoping to finally realize the 2001 promises to rectify the Uruguay Round outcomes, which have undermined food security and development prospects.

Meanwhile, the US and many other OECD countries have been increasingly unwilling to make any meaningful concessions to developing countries in multilateral economic negotiations over the last decade, especially since the 2008 financial crisis. The declining fate of and fading prospects for economic multilateralism were reflected in 2015 in the ministerial conference outcomes on UN financing for development at Addis and at the WTO meeting in Nairobi as well as various other recent developments. These include the

⁹¹ The first investment treaty with ISDS was concluded in the late 1960s, but investment treaties with investor-state dispute settlement (ISDS) provisions were not widely negotiated until the 1990s. ISDS claims only really emerged from the late 1990s. Hence, ISDS remains a new area of law, an experiment with huge implications for the national and public interest.

typically self-serving political posturing in the ‘war on terror’ which threatens to transform contemporary international relations, at the expense of sustainable development and the developing countries.

By undermining WTO multilateral trade negotiations, bilateral and plurilateral trade agreements are the very anti-theses of what they purport to do, namely advance trade liberalization. In Southeast Asia, the plurilateral regional TPPA also undermines existing commitments, e.g. to the ASEAN Free Trade Area (AFTA) and, more recently, the ASEAN Economic Community (AEC), which includes AFTA, and thus, the economic bases for regional solidarity and cooperation.

It is also expected to undermine the RCEP involving the ten ASEAN member states and the six states with which ASEAN has existing FTAs (Australia, China, India, Japan, South Korea and New Zealand). RCEP negotiations were formally launched in November 2012, and have been portrayed by President Obama as being dictated by China in his attempt to seek Congressional approval and ratification for the TPPA⁹². The Obama administration is suggesting that the RCEP will therefore be inimical to the interests of East Asian partners, thus jeopardizing progress on this front.

The 2016 World Bank report also projects adverse growth consequences for non-TPP economies, including contractions of over 0.3 percent for Korea and Thailand over the decade and a half after 2015. It is impossible to anticipate how the authorities in these supposedly adversely affected economies will respond, but it may well exacerbate the ‘race to the bottom’ responsible for the adverse TPP effects for wages and income inequality that Capaldo and Izurieta (2016) warn of.

TPPA’s real focus not trade liberalization

Despite being portrayed and advocated as a FTA, the TPPA is not mainly about ‘free trade’ or even ‘freer trade’. The USA and many of its TPP partners are already among the most open economies in the world. One important reason for the paltry trade gains from the TPPA is existing trading relations, facilitated by inherent openness as well as earlier trade agreements of various types. For example, Singapore’s existing bilateral economic arrangements with the US go much further than the TPPA on many fronts in line with its own unique strategic considerations. In any case, the main trade constraints involve non-tariff barriers, such as ballooning US agricultural subsidies, only a few of which the TPPA addresses except in the case of Vietnam – for specific political historical reasons due to the legacy of the Vietnam War and its aftermath.

OECD countries, with more competent trade negotiating capacity, had delayed agreement on the TPPA at an earlier meeting in Honolulu in mid-2015 before the October deal in Atlanta. The delay was due to squabbling over how to manage trade in particular areas, reflecting vital interests and influential lobbies. Thus, ironically, the TPPA will actually protect and even advance interests contrary to free trade.

⁹² ‘Obama says Chinese-led trade deal shows need for TPP’. *Washington Post*, 3 May 2016.

The TPPA will strengthen monopolistic IPRs, well beyond the already onerous provisions of TRIPS, especially for big pharmaceutical, media and information technology companies. The TPPA will allow ‘Big Pharma’ longer monopolies on patented medicines, keep cheaper generics off the market for longer, and block the development and availability of ‘similar’ new medicines. All this is happening despite growing evidence that IPRs do little to promote research, and may actually impede or delay innovation⁹³. Contemporary IPR regimes not only impede innovation, but most certainly undermine public health and consumer welfare by limiting competition and raising prices.

The USTR and many transnational corporations insist that the TPPA investor-state dispute settlement (ISDS) is necessary where the rule of law and credible courts are lacking. But in fact, the US is seeking the same ISDS content in the Trans-Atlantic Trade and Investment Partnership (TTIP) with the EU, impugning the integrity of European legal and judicial systems. The TTIP’s provisions will similarly oblige governments to compensate foreign investors for the loss of expected profits.

8- TPP also politically driven⁹⁴

Considering the paltry trade-related gains and dubious economic benefits as well as great risks involved, it is widely presumed that TPP developing country governments are mainly signing up for political reasons, while hoping that they will not have to pay high domestic economic and political costs for the TPPA’s consequences.

It is no secret that the main US motive for the TPP has been to confront China. In President Obama’s stirring words in his last State of the Union address, “With TPP, China does not set the rules in that region, we do”⁹⁵. This has to be seen against the

⁹³ Helpman, Elhanan, 1993. ‘Innovation, Imitation, and Intellectual Property Rights’. *Econometrica* 61: 1247-1280, showed that not only would developing countries and the world as a whole lose from the international harmonization and strengthening of IPRs, the welfare of developed countries could fall as well. In

‘Regulatory Reform and Innovation’, the OECD (p. 33) noted “in a globalised economy, patenting may be becoming more of a competitive weapon than a stimulus to innovation”.

<http://www.oecd.org/sti/inno/2102514.pdf>

Williams, Heidi L., 2010. ‘Intellectual Property Rights and Innovation: Evidence from the Human Genome’. NBER Working Paper No. 16213, July 2010, found “evidence that ... IP led to reductions in subsequent scientific research and product development on the order of 20 to 30 percent. Taken together, these results suggest that ... IP had persistent negative effects on subsequent innovation relative to a counterfactual ... having always been in the public domain.”

⁹⁴ For a similar assessment, albeit more sympathetic to the TPP project, see Sanchita Basu Das. ‘The Trans-Pacific Partnership (TPP) Agreement Holds Strategic Underpinnings’. Yusof Ishak Institute for South East Asian Studies, Singapore, 10 May 2016.

⁹⁵ For evidence that President Obama was not exaggerating, see Todd Allee and Andrew Lugg. ‘Who wrote the rules for the Trans-Pacific Partnership?’. *Research and Politics*, July-September 2016: 1-9. The article argues that the TPPA rules are heavily skewed in favor of the US, actually referring to influential US corporate interests rather than, say, those of labor. Much of the TPPA language is said to have been “copy-pasted verbatim” from earlier US agreements, particularly for controversial issues such as investment,

background of American efforts to check the rise of China ever since the collapse of the Soviet Union and the Russian economy during Boris Yeltsin's first presidential term. Broad support for the China-mooted Asian Infrastructure Investment Bank (AIIB) in 2015, even from traditional US allies, was a major embarrassment which the White House was desperate to overcome.

The international political re-alignment abandons former Prime Minister, the late Tun Razak's commitment to make ASEAN a 'zone of peace, freedom and neutrality' (ZOPFAN), an irony for Malaysia, the host of the November 2015 ASEAN summit, held on the eve of the 40th anniversary of Razak's untimely passing.

One may understand why Vietnam, at war with the US until four decades ago, is keen to join the TPP. Clearly, the desire for political rapprochement with the US has played its part. So too has Hanoi's desire to strengthen its hand vis-a-vis China. Yet, the economic price for Uncle Sam's 'protection' may be high. TPPA provisions will hamstring Vietnam's capacity to continue its impressive catch-up developmental record of recent decades besides undermining peasant support for the regime due to the likely impact of the liberalization of agricultural imports, especially of livestock and poultry⁹⁶.

Even then Philippine President Benigno Aquino Jr, who had his own bilateral problems with China, chose not to participate in the negotiations. Pre- and post-military coup Thailand, with an economy even more open than Malaysia's, also chose to stay away.

Of course, no serving government leader in Southeast Asia is going to offend the US by rejecting the TPPA outright and some will undoubtedly keep open the option of future TPPA membership, perhaps in the hope of getting some meaningful concessions for themselves. While not denying some minor advantages, all dwarfed by the high costs and risks reviewed in summary above, it is unclear to most observers what great advantage Malaysia has secured by joining the TPP.

Some sections of the national elite would like to imagine the TPP serving as a 'white knight' to improve Malaysian economic governance in the face of powerfully entrenched vested interests in the ethno-populist cum clientelist regime, but this constitutes wishful thinking by an otherwise cynical and dissident, but politically impotent elite. The Malaysian negotiators secured some notable exclusions of political value to the regime (e.g. some 'carve-outs' for ostensible affirmative action purposes⁹⁷), but constituting more of a hindrance than a help to the country's development ambitions.

where up to 90 percent of the text from past US investment chapters is "inserted word-for-word" into the TPPA.

⁹⁶ For a detailed discussion of the likely impact of the TPP on Vietnam, see Nguyen Anh Tuan. *Hiep Dinh Do'i Tac Xuyen Thai Binh Du'o'ng (TPP) Va Tac Dong Toi Viet Nam*. Hoc Vien Ngoai Giao, Ha Noi, 2016.

⁹⁷ For a broader perspective on TPPA concerns for the majority ethnic Malay community in Malaysia, see MTEM. *TPPA and its impact on Malay community*. Majlis Tindakan Ekonomi Melayu, Kuala Lumpur, 2013.

Already, some other, mainly European, governments have privately expressed their dismay at the TPPA provisions which will weaken their own negotiating positions for the Trans-Atlantic Trade and Investment Partnership (TTIP). Undoubtedly, by concluding the TPPA, the US has secured 'first-mover' advantage.

In the US, besides interests aligned with organized labor, the libertarian Cato Institute has denounced the TPP as a tool of corporate lobbyists. Like many other recent bilateral and plurilateral economic agreements, the TPP has little to do with liberalizing trade, but instead advances the interests of powerful foreign business interests. The collective drafting of the TPPA was 'assisted' by about seven hundred official advisers to the USTR, mostly from the US corporate sector.

TPPA criticisms have spread among US politicians, with not only both presidential nominees, but also most presidential aspirants of both parties in the earlier presidential primary rounds. The TPPA has more support from Republican than Democrat Party legislators, but the Republican leaders of both houses of Congress have blocked it for the time being. It seems likely that there will be an attempt to push the TPPA through the US Congress during the 'lame duck period' after the early November 2016 election and before the Christmas recess. Republicans will be more inclined to support it than as the President will get less personal or political credit at this time. Outgoing legislators from both parties may also be more inclined to support it than with a view to their post-Congressional careers as lobbyists while re-elected incumbents will be reminded of the main sources of their re-election campaign finance.

Given the difficulties in getting Congressional passage for the TPPA as currently negotiated and signed, the US is likely to try to get some of its TPP partners to take on additional obligations to satisfy specific demands. The US can still achieve this by adding new bilateral side agreements on particular matters with specific TPP partner countries. For example, some of the US objections have been over the 'red herring' of 'currency manipulation' recently mainly directed against China; agreement to such a side agreement can be more easily achieved by implying that it is to satisfy Congress, but is really intended to block China from joining the TPP.

The 'certification' process provides an option when the US government has to certify that its TPP partners have taken adequate measures to meet its TPPA obligations to become eligible for TPPA benefits. For previous trade and investment agreements, the US has required countries to take on additional obligations after negotiations have concluded. For example, the US Congress insisted on renegotiating some parts of its KOR-US bilateral agreement with the Republic of Korea before ratifying it. In effect, negotiating with the US does not end with the US Trade Representative, ostensibly on behalf of the President, but continues, albeit indirectly, with the US Congress. Thus, the certification process has been successfully used by the US to impose additional commitments.

Ironically, a Democrat President has promoted the TPP without strong support from his own party. After touting the TPP as his top foreign policy priority for 2016, it merited 38 seconds in Obama's hour-long final State of the Union address in mid-January, perhaps

reflecting his recognition of its unpopularity with the party base. Nevertheless, he continues his efforts despite lack of public political support for the TPPA. He is now making a big bipartisan push to get Congressional approval during the 'lame duck' session after the early November elections and the Christmas recess.

9- Reconsider TPPA in public interest

More careful consideration through more informed public discussion of the TPPA's many provisions can only help. According to a mid-2015 Pew Research Center survey⁹⁸, the strongest support for the TPP was in Vietnam, where 89 percent of the public backed it, while the weakest support was in Malaysia (38 percent) and the US (49 percent). The greatest opposition was in Canada (31 percent), Australia (30 percent) and the US (29 percent).

Malaysians (14 percent) were the least supportive of closer economic relations with the US. The greatest support for deeper economic ties with China, by contrast, was in Australia (50 percent) and South Korea (47 percent). Large numbers of Malaysians (43 percent) and Chileans (35 percent) wanted stronger commercial relations with both China and the US. The greatest opposition to the US defense pivot was in Malaysia, where 54 percent believed it is bad because it could lead to conflict with China.

To come into effect, the TPPA must first be ratified at the national level. Malaysia's parliament has approved ratification of the TPPA although Malaysia still needs to pass amendments to eighteen different sets of laws in line with its TPPA commitments. Although the TPP has not received majority public support in any country except Vietnam, the TPPA is likely to be approved in every country except the US whose Congress may still deny approval.

Most TPP countries have already begun to amend their national laws, regulations and policies to comply with the TPPA. For example, Malaysia has announced eighteen major changes to its legislation, but more changes to its laws should be expected. But once a country amends its laws, it will be difficult to turn the clock back even if the TPPA does not come into force or if it is further amended in ways costly to a country or diminishing its previously anticipated benefits.

But if a powerful country such as the US chooses not to honor some of its obligations, most other countries are often quite helpless, even if they succeed in winning their dispute settlement cases. And as the track record of WTO implementation and enforcement suggests, the costs of appealing are often prohibitively expensive while the odds of success appear stacked against most less well-resourced and experienced governments. Although the US was responsible for insisting on the dispute settlement process being included in the WTO over two decades ago, it has recently undermined its

⁹⁸ Pew Research Center. 'Global Publics Back U.S. on Fighting ISIS, but Are Critical of Post-9/11 Torture'. 23 June 2015. <http://www.pewglobal.org/2015/06/23/global-publics-back-u-s-on-fighting-isis-but-are-critical-of-post-911-torture/>

functioning by blocking a second term for an Appellate Body Member, sitting in a division bench of three, who decided against the US in one case and another appointment to complete its complement of seven.

Some well-intentioned Malaysians, opposed to government abuses of various kinds, support the TPPA, hoping that it will somehow eliminate corruption, improve governance and address other problems in the country. However, from past experience, there has been little achieved by previous foreign interventions in such matters, e.g. requiring the Malaysian government to allow (in-house or company) trade unions for electronic workers in the late 1980s. As the outstanding TPPA labor issues mainly involve foreign workers, who are barely acknowledged, let alone fully accounted for, there is little prospect of much progress on this front.

If the TPPA were simply a trade deal, there would be less grounds for concern. Unfortunately, its other provisions will undermine Malaysian development prospects and the public interest in the longer term, with diminished ability for the Government, Parliament and the public to set things right. The TPPA is not a costless ‘hop-on, hop-off’ option, as often suggested.

Instead of being the regional FTA it is often portrayed as, the TPPA seems to be “a managed trade regime that puts corporate interests first”, as suggested by many critics such as Nobel laureate Joseph Stiglitz. Thus, the supposed benefits from trade liberalization constitute the thin edge of a wedge which will fundamentally challenge the national and public interest. Significant net gains for most TPP partner countries and their publics seem doubtful at this stage. Of course, some powerful corporate interests in many countries will be able to take advantage of TPPA provisions for their own benefit, but it is misleading to equate their interests with either the national or the public interest.

The TPPA will certainly limit governments’ ability to innovate and address national challenges, and is likely to worsen rapidly escalating problems such as environmental and public health threats by deterring governments from acting in the public interest. The TPPA favors incumbent businesses, especially US transnational corporations. The agreement’s benefits are likely to be asymmetric as it is more favorable to big US business practices and will exacerbate the disadvantages of small size and remoteness. Thus, the TPPA inadvertently holds back the economic structural transformation and sustained long-run growth that the world and Malaysia need.

The TPPA has, in fact, already been used to subvert the Doha ‘Development’ Round of multilateral trade talks, and may well also undermine multilateralism more broadly. It is crucial for a TPP developing country’s future and national interest that the public has adequate opportunities to more carefully consider the agreement and its full implications for the country’s future in the short-, medium- and long-term.

The TPPA falls well short of being “a trade agreement for the 21st century”, as its cheerleaders claim⁹⁹. A more comprehensive, balanced and objective cost-benefit analysis on the basis of the February 2016 deal should be completed before amending domestic legislation to meet a country’s TPPA obligations. Although the Malaysian Parliament has voted to ratify the TPPA, it cannot actually be ratified for some time as other TPP legislatures have yet to approve it. Hence, it is still not too late to avoid the damage that the TPPA will cause.

Historically, accelerated capital accumulation in developing countries has been associated with the opposite of what TPP advocates propose: with governments maintaining close control of domestic banking and investment regimes, and only then ceding such control as deemed appropriate to ensure sustained investments. The contrasting experiences of Japan and the Republic of Korea in response to external pressures from the late 1980s for accelerated financial liberalization¹⁰⁰ offer much of relevance to other developing countries facing similar pressures and dilemmas.

The peoples of the TPP countries are at a critical crossroads with the TPPA. They can either make serious efforts to thoroughly evaluate its provisions’ costs and benefits, in order to do the right thing, or simply amend laws in order to implement the TPPA, condemning present and future generations to its consequences. We need to carefully evaluate the TPPA and its many implications for present as well as future generations of Malaysians before changing national legislation to meet TPPA commitments.

Addendum 1. Modelling gains from trade¹⁰¹

Estimating benefits from a trade agreement, especially when it involves a group of very different economies, is not an easy task. TPPA advocates exaggerate benefits, and downplay or ignore costs, although standard economic theory recognizes that any customs union or free-trade area will involve trade-creation and trade-diversion with winners and losers – both within and among trading partner countries – depending on the various effects of trade-creation and trade-diversion. Thus, for example, the prospect of job losses is assumed away with the CGE models’ full employment assumption.

To be sure, assessing the benefits and costs of a trade pact involves much more than just applying some generalized econometric or simulation models. The claimed effects of the TPPA have been misrepresented by different parties for various reasons. It is therefore

⁹⁹ For a different perspective, see ‘Promotion of a democratic and equitable international order’. Fourth report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, submitted in accordance with Assembly resolution 69/178, 5 August 2015. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285

¹⁰⁰ Park Yung Chul and Hugh Patrick [eds]. *How Finance Is Shaping the Economies of China, Japan, and Korea*. Columbia Business School, New York, 2013.

¹⁰¹ An assessment of TPP modelling studies by the Congressional Research Service is available at: <https://www.fas.org/sgp/crs/row/R44551.pdf>. A critical perspective is offered by Jeronim Capaldo and Alex Izurieta (2016). ‘Modeling TPP: Should Policy Makers Assume They Operate in a Perfect World?’ GDAE Globalization Commentaries, Tufts University, Medford, MA. URL: http://www.ase.tufts.edu/gdae/policy_research/globalcommentaries.html

crucial to better understand what the evidence actually shows, rather than to jump to hasty conclusions. The ongoing controversy over estimating ostensible gains from TPP trade liberalization associated has drawn attention to the use of modelling techniques to make such projections.

To monetize the purported benefits of freer trade, many economists use CGE models. Unlike the different type of economic models to make theoretical points, it is possible to feed actual numbers into such computerized *computable* models in order to generate new numbers. These models are considered *general equilibrium*, a core idea of a school of economics in which the economy consists of many separate equilibria matching supply with demand, with all markets continuously clearing simultaneously. General equilibrium theory and modelling simply ignore Keynesian economic theory, analysis and interventions as well as their rationale and consequences.

The CGE data requirements for parameters and base year variables are tremendous, and trade elasticities, in particular, are often mere ‘guesstimates’, which nonetheless have crucial implications for the modelling results¹⁰². CGE models make strong assumptions, which have been shown to be hugely problematic. Most modelers use heavily constructed data sets. Static CGE modelers typically use such sets provided by GTAP for trade modelling purposes, rather than real data, on the grounds that the latter are not easily available. A growing literature criticizes CGE models, challenging their theoretical premises, modelling requirements and results reached by using them. Several issues are especially relevant here as these models tend to make some problematic assumptions.

First, they generally assume that each economy always adjusts smoothly. For example, the very nature of CGE models necessarily leads to the foregone conclusion that trade liberalization will increase ‘overall gains’,¹⁰³ as the ‘price system’ is expected to always ensure the improved overall well-being of all. They also assume that trade balances will remain unchanged, with exchange rates fluctuating continuously to ensure this.

Second, most CGE models assume that ‘full’ employment is constantly achieved everywhere, precluding any consideration of employment effects. The CGE methodology has no way to consider, let alone predict, employment impacts, e.g. to consider which wages grow or fall, and which workers are affected. As the PwC report acknowledges: “A CGE model is an equilibrium model, and typically assumes full employment... the focus of the model is on overall economic welfare rather than job creation”.

¹⁰² ‘USTR, Public Citizen at Odds on Methodology for Assessing TPP Tariff Cuts’. *Inside U.S. Trade*, 29 April 2016, sums up the debate between the USTR and a leading civil society critic of the TPP over their respective estimates of tariffs and tariff cuts to be attributed to the TPPA.

¹⁰³ See Lance Taylor and Rudiger von Arnim (2006). ‘Computable General Equilibrium Models of Trade Liberalization: The Doha Debate’. New School for Social Research for Oxfam, Oxford. Also see Jomo K. S. and Rudiger von Arnim. ‘Trade liberalization for development?’. *Economic and Political Weekly* 43 (48), 29, November 2008: 11-12. See more at: <http://www.themalaysianinsider.com/sideviews/article/pwcs-problematic-case-for-the-tpa-jomo-kwame-sundaram#sthash.t7hwalZq.dpuf>

Third, TPPA provisions requiring financial liberalization are also presumed to have no effect on the state's ability to prudentially regulate finance¹⁰⁴. These models typically assume perpetual macroeconomic stability, with no business cycles, booms, busts or bubbles. Such models also assume that a country's investment rate will equal its savings rate, with every dollar saved being productively invested, following Say's law, 'supply creates its own demand'. Thus, both underinvestment and unemployment are assumed to be impossible.

Fourth, the models also assume that each economy always adjusts smoothly, and government budget balances will not change due to greater trade, but will instead remain fixed at present levels. Thanks to the assumed completely flexible tax incidence impact on households, a government will easily compensate for any lost government revenue, say from tariff elimination, by simply increasing other taxes.

Problematic assumptions, such as these, are justified as necessary to simplify models enough in order to use them. But use typically occurs without caveats that the model assumptions are at great variance with economic theory, empirical evidence and historical experience, and are therefore unlikely to hold in the real world. For example, income elasticities of imports and exports often differ, and mere exchange rate adjustment or a flexible exchange rate regime cannot ensure continued external balance.

Furthermore, exchange rates often over-react to events and take time to stabilize. Apart from exchange rate or currency manipulation, capital account developments can push exchange rates out of alignment with the current account for extended periods. Thus, financial, rather than trade factors can cause protracted distortions.

The CGE models' standard Armington assumption (of unique country-specific product specialization) is not only unrealistic, but also systematically underestimates the potential for domestic displacement due to cheaper imports. CGE models generally also ignore transition costs while the World Bank (2016: p. 227, footnote 11) acknowledges, "member countries could experience sizeable adjustment costs and transitional losses in the short-run". These may seem small and temporary, but such transitions may take many years.

As the world economy is constantly evolving, transition costs are always changing: they may increase or decrease, affecting different people differently, depending on how the transitions are managed. While some economic transformations are more desirable than others, such transition costs should be considered in any serious effort to honestly weigh costs against benefits.

CGE models typically estimate 'static gains' or 'long-term gains', ignoring short-term 'adjustment costs', thus overestimating 'total gains'. Most CGE models provide static

¹⁰⁴ Kevin P. Gallagher, Annamaria Viterbo, Sarah Anderson. 'The Trans-Pacific Partnership and Regulating Capital Flows: Recommendations for Strengthening Proposed Safeguards in the Leaked TPP Investment Chapter'. GEGI Exchange 004, Global Economic Governance Initiative, Pardee School of Global Studies, Boston University, Boston, April 2015.

results, i.e., ‘before’ and ‘after’ an actual or simulated change. A more recent generation of ‘dynamic’ CGE models claims to overcome such problems, but these have not been used by those making claims about the TPP’s likely impacts.

Yet, the CGE modelers offer ‘long term’ projections, usually after ten years, by assuming away all possibility of disruption, such as employment losses, due to domestic production drops. Calculations only relevant within certain parameters, e.g. one-time gains, have also been extrapolated far beyond. Thus, CGE modelling exercises in favor of the TPP typically, but inappropriately, offer ‘long term’ *hockey stick*-shaped projections. Owing to recognition of the implications of the actual TPPA provisions, these gains are now expected to be fully realized after 15 years, as in Petri and Plummer (2016) and ITC (2016), instead of within the decade used in earlier projections, such as Petri, Plummer and Zhai (2012) and USDA-ERS (2014).

But as most of them are ‘one-time’, it is methodologically incorrect to project continued growth in the future after that, as if the TPPA effects will continue to enhance growth indefinitely. Instead, as the growth effects are largely ‘one-time’, the growth trajectory should be raised to a higher level over the fifteen years due to the agreement, but with its subsequent projected trajectory otherwise remaining almost ‘parallel’ to what it would have been without the one-time growth boost.

As such models project the future, they are necessarily speculative, but also prone to manipulation. For example, predictions of gains from trade can be inflated, and expected losses ignored or underestimated. They also typically exaggerate gains, even resorting to theoretically and empirically dubious methods to do so, while understating losses and risks. Thus, the CGE models are typically deployed to lead to the foregone conclusion that trade liberalization will increase ‘overall gains’, as it is presumed that the functioning of the ‘price system’ will always ensure improved overall well-being.

Addendum 2. PIIE: No job losses, less inequality

Explicitly addressing concerns that the TPP may cause job losses and increase income inequality, the PIIE paper¹⁰⁵ by Robert Lawrence and Tyler Moran does little more than

¹⁰⁵ Acknowledging criticisms of the Petri-led studies, the PIIE ‘complemented’ them with Robert Z. Lawrence and Tyler Moran. ‘Adjustment and Income Distribution Impacts of the Trans-Pacific Partnership’. WP 16-5, Peterson Institute of International Economics, Washington, DC, March 2016. <http://www.piie.com/publications/interstitial.cfm?ResearchID=2931>

One response to this was Timothy A. Wise and Jomo Kwame Sundaram. ‘Assuming Away Unemployment and Trade Deficits from the TPP’. 21 March 2016. <http://triplecrisis.com/assuming-away-unemployment-and-trade-deficits-from-the-tpp/>

US Congressman Sander Levin had highlighted problems with the PIIE modelling by calling on the US International Trade Commission (ITC) to not use models that assume away problems in its TPP assessment for the US government due in May 2016. He argued that its analysis must include an examination of how the TPP will affect wages and income inequality; a review of whether the ITC’s economic model should assume full employment; and an analysis of who will experience gains or losses as a result of the TPP and other factors. A more recent paper by the pro-labor Economic Policy Institute argues that “the U.S. trade deficit with the TPP countries cost 2 million jobs in 2015, with job losses in every state”. See Scott and Glass, 2016, *op. cit.* Lawrence and Moran, 2016, *op. cit.* is the Institute’s response.

reiterate flawed assumptions, which understate costs and exaggerate benefits, in presenting them as serious cost-benefit analysis. The authors do so by assuming away the possibility that trade liberalization could induce a ‘race to the bottom’, thus exerting downward pressure on wages and employment.

In response to Capaldo and Izurieta (2016), Harvard Professor Robert Lawrence¹⁰⁶ poses three seemingly reasonable questions to draw the conclusion that his PIIE colleagues’ trade policy work on the likely consequences of the TPPA is superior to the macroeconomic policy exercise by the Tufts study. In doing so, he confuses the issues by misrepresenting the nature of the Capaldo-Izurieta paper as well as the significance of the differences.

First, the Tufts study never pretended to be a comprehensive analysis of the TPP and its effects, as Lawrence’s PIIE colleagues’ studies claim to be. Capaldo and Izurieta (2016) never presented the GPM as a trade policy model to substitute for the trade projections made by Lawrence’s colleagues. In fact, despite expressed reservations, the Tufts study accepted the 2012 PIIE projections on the likely trade outcomes of expected TPP tariff reductions as its starting point, but proceeded to show that the PIIE projections about the TPP’s likely growth and employment effects were problematic and did not necessarily follow.

Second, the GPM model incorporates macro-financial dynamics as well as distribution and employment variations, which more realistically represent the world economy compared to the PIIE’s self-equilibrating, full employment model. But in line with its limited scope and purpose, Capaldo and Izurieta (2016) never claimed to have provided comprehensive, reliable and definitive projections of the TPP’s likely trade effects. The Tufts study simply sought to inject a greater dose of realism into understanding some likely macroeconomic implications of the PIIE TPP trade growth projections.

The USDA-ERS’s CGE model¹⁰⁷ projections of the TPP are far more pessimistic than the PIIE’s. If the differences between the Tufts study results and the PIIE findings were simply due to using different types of models, then Lawrence would have to explain why and how the USDA-ERS model came to its very different conclusions compared to his colleagues. Clearly, CGE models can come to very different findings using different assumptions.

Crucially, by assuming full employment, the PIIE model assumes away important macroeconomic implications of the TPP. The Tufts study showed that using the PIIE trade projections, but with more realistic modelling and assumptions, the TPP would result in more modest growth, net job losses, greater pressure on wages and a declining labor share of income. These effects may well be eventually offset by other developments

¹⁰⁶ Robert Z. Lawrence. ‘Studies of TPP: Which is Credible?’ <http://blogs.piie.com/trade/?p=553>

¹⁰⁷ There are several critiques of CGE models as well as of their underlying general equilibrium premises. See, for example, Lance Taylor and Rudi von Arnim (2006). ‘Modeling the Impact of Trade Liberalization’. Oxfam International, Oxford.

having nothing to do with the TPPA, but they nevertheless remain the pact's likely effects.

Lawrence also makes much of the fact that the Global Trade Analysis Project (GTAP)¹⁰⁸ has made its template for CGE modelling available to all. Undoubtedly, the well-resourced GTAP has done a great deal to promote CGE modelling in various ways. Those involved in developing and using a new generation of dynamic CGE models have pointed to the limitations of the GTAP's promotion of an early static CGE model. Furthermore, the underlying equations and other details of the GPM are also available¹⁰⁹ to all those interested although they have hardly been promoted in the same way.

More importantly, it is misleading to give the false impression that the PIIE studies are fully transparent, while the Tufts study is not. As Lawrence should know, modelling exercises are not spreadsheet exercises. Inevitably, there are many details of all complex computable modelling exercises, involving myriad judgements of various types, which are never fully identified, let alone disclosed.

How does the new PIIE modelling exercise come to even more optimistic findings than the earlier PIIE report? Total growth due to the TPP is projected to rise 0.5 percent after 15 years – compared to the earlier projection of 0.4 percent over ten years – by allowing more time for implementation and for growth effects to set in. Adding data for 2008-2011 may also have driven up growth owing to the effects of the 2008 financial crisis and the stimulus efforts in those years. Conversely, the post-2011 withdrawal of various stimulus packages, which would limit growth effects, is not considered.

But the most important contributions to growth in the PIIE studies come from their treatment of NTMs, i.e. “growth through the back door”, as Dani Rodrik has put it. In essence, these are little more than contrived growth effects from other TPPA features, not core results using established CGE trade modelling methods.

Thus, while the PIIE exercises acknowledge modest growth gains from tariff reductions, most of the growth they project comes from the purported growth impacts of the many NTM reductions in the TPPA even though the World Bank (2016: p. 223) acknowledges that “Restrictions caused by NTMs, measured as ad-valorem equivalents, appear to be less prevalent among TPP member countries than elsewhere”.

Each NTM is treated by the PIIE as equivalent to a further tariff reduction using a methodology which has no bases in theory, evidence or past experience¹¹⁰. For example,

¹⁰⁸ The Global Trade Analysis Project (GTAP) is a global network of researchers and policy makers conducting quantitative analysis of international policy issues. GTAP is coordinated by the Center for Global Trade Analysis in Purdue University's Department of Agricultural Economics.

¹⁰⁹ See Francis Cripps and Alex Izurieta. *The UN Global Policy Model: Technical Description*. United Nations Conference on Trade and Development, Geneva, 2014.

<http://triplecrisis.com/are-the-peterson-institute-studies-reliable-guides-to-likely-tpp-effects/>

¹¹⁰ Even the World Bank's (2016: 223) report acknowledges that “assessing NTMs and their impact is particularly fraught with uncertainty since data on the existence of restrictive NTMs are highly uneven.

strengthening IPRs is projected to promote growth by enhancing the trade in services. The cost implications of stricter enforcement and more expensive medicines for consumer welfare, public health, government budgets, etc. are hardly considered. It is also presumed that additional rents to the firms concerned and the shift of income from labor to capital will be reinvested for further growth in TPP economies.

The ITC has rejected most other additional growth projections due to NTMs in the PIIE reports. Without the NTMs, modest benefits from the TPPA's trade liberalization measures remain. While accepting most other NTMs, the ITC accepts NTM reductions which induce a significant increase in FDI which in turn raise economic growth. Thus, the ITC projects much higher growth than the 2014 USDA-ERS projections of the TPP's likely impact after a decade.

This difference is presumably largely due to the ITC's acceptance of more additional growth due to FDI supplementing baseline investment levels. With the information available in the ITC report, it is not clear whether the additional investment projected with FDI is realistic. This, in turn, depends on many considerations, e.g. whether the projected investment diversion from non-TPP economies to TPP economies is realistic.

The PIIE studies correctly draw attention to the implications of the TPPA's NTMs, which have not been subject to careful analysis anywhere. Even though the PIIE studies' treatment of NTMs remains moot to say the least, NTMs clearly matter, and have consequences which need to be considered, albeit in a more balanced manner. NTMs should therefore be central to cost-benefit analyses of the TPPA.

Lawrence may well find the PIIE studies' novel innovations to boost the TPP's growth effects acceptable and satisfactory, but this involves an expression of faith, or perhaps, of collegial solidarity. This should be made explicit, instead of comparing apples with oranges, inadvertently misrepresenting the nature and significance of our differences, thus confusing rather than elucidating.

Lawrence and Moran (2016) is based on the then ongoing work by Petri and Plummer (2016). It claimed to take the Petri-Plummer projections to estimate "adjustment costs" for workers displaced by TPPA implementation while assuming that it will not cause any long-term job losses. Thus, *permanent job loss is excluded by assumption*, with all job displacement assumed to be temporary.

Nor did their findings allow for any change in trade balances. They assume that the TPPA does not change trade surpluses or deficits. This, of course, flies in the face of growing US trade deficits with partners, such as Mexico following NAFTA and the Republic of Korea, with whom the US has seen its bilateral trade deficit nearly double since the Korea-U.S Trade Agreement took effect in 2012.

Unlike tariffs, data on the intensity of NTMs is typically only inferred from bilateral trade flows", whereas the PIIE has presumably done so for plurilateral flows.

Thus, by assuming away trade deficit-related job losses, Lawrence and Moran only estimate ‘adjustment costs’ for the remaining few displaced workers awaiting new jobs assumed for them, offering three scenarios, each smaller than the last. The first assumes that no displaced workers get new jobs. They estimate 1.69 million U.S. workers could be displaced in the first decade. The second drastically reduces that to 278,000 – interestingly, nearly all in manufacturing – by invoking the full-employment assumption that rising demand will generate new jobs and limit job loss. The third scenario reduces this further to 238,000, who voluntarily leave manufacturing jobs, which, of course, the TPPA cannot be blamed for.

Using a formula to estimate the temporary adjustment costs (essentially lost wages) from those “displaced”, Lawrence and Moran compare these to Petri and Plummer’s projected TPPA gains of US\$131 billion for the United States. Their cost-benefit calculation does not report the costs, only the ratios, for the three scenarios. They report that for their “most realistic” scenario (#3), with the least displaced jobs, the benefits are 18 times the costs over the 10-year “adjustment period” (2017-2026). Then, incredibly, they add in the “post-adjustment years” 2027-2030, and the ratio sky-rockets to 115:1. Presumably this is because, with their full-employment assumption, all displaced workers are, by then, fully employed in their new post-TPP jobs.

Finally, Lawrence and Moran claim that the TPPA will be mildly progressive for US income distribution as the assumed income gains will be much the same for each quintile of the US income distribution, with the bottom quintile seeing an increase of 0.007 of a percentage point higher than the top quintile, which is, technically, very mildly progressive! To do so, they assume that US wages will increase at the same rate as productivity, raising most workers’ incomes in their analysis, although this correspondence between worker productivity and remuneration has no empirical basis.

Thus, Lawrence and Moran find that the benefits of the TPPA far exceed the adjustment costs as they, like Petri and Plummer, assume full employment and fixed trade balances. With such assumptions, the possibility of wage and employment losses are conveniently written off, at most, as temporary adjustment costs on the way back to full employment.

The resulting cost-benefit calculations are thus misleading. Costs are minimized while benefits are exaggerated. Petri and Plummer’s projections’ growth-boosting assumptions mainly rely on growth gains from non-trade measures, including surges in foreign investment. The gains claimed are thus large, although even the 2016 Petri and Plummer estimates of gains from trade liberalization remain small.

Petri and Plummer (2016: fn 14) also dismiss Capaldo and Izurieta (2016) for ignoring microeconomic analysis and using “a macroeconomic model that has no equations or variables to handle trade policy, trade barriers or structural change. In their simulations, the TPP is represented with exogenous macroeconomic assumptions that are unrelated to the agreements’ provisions, and simply predetermine job losses and a worsening of the income distributions”. Curiously, they cite criticisms of an earlier paper by Capaldo

(2014) on the TTIP, but do not cite their PIIE colleague Robert Lawrence's 2015 criticism of Capaldo and Izurieta (2016).

Without any hint of irony, they cite Krugman (1993: 25) in their defense: "The level of employment is a macroeconomic issue, depending in the short run on aggregate demand and depending in the long run on the natural rate of unemployment, with microeconomic policies like tariffs having little net effect. Trade policy should be debated in terms of its impact on efficiency, not in terms of phony numbers about transitions, the large majority of economic agents and markets are likely to see small, mostly expansionary wage and exchange rate changes during implementation". To make this defense, they cherry-pick, ignoring the growing critical literature on employment, wage and distributional consequences of trade liberalization policies and agreements¹¹¹.

It is therefore necessary to reiterate that the Tufts study used Petri, Plummer and Zhai's dubiously optimistic trade and economic growth projections of the TPP in their 2012 paper as its starting point. The Capaldo-Izurieta paper never pretended to make its own TPP trade growth projections, but instead tried to show that with different, more realistic macroeconomic assumptions about their claimed trade policy impacts, TPP macroeconomic and equity impacts are likely to be more adverse than suggested by the PIIE. As Capaldo and Izurieta (2016) had used the dubious 2112 PIIE TPP trade projections as its starting point, the Tufts study never claimed that the TPPA would definitely result in the specific growth, employment, wage and inequality projections made owing to the problematic nature of its underlying trade projections, among many reasons.

Rather, the main purpose of that exercise was to highlight the consequences of unrealistic CGE assumptions. After all, it is uncontroversial that purported efficiency gains from trade liberalization can have mixed macroeconomic consequences, with both winners and losers in the event of failure to adequately compensate the latter, which is all the more difficult in the absence of cross-border compensatory mechanisms. The TPPA's ISDS, expanded IPRs and (financial) services trade liberalization have been incorporated into the PIIE CGE modelling exercise as un-problematically growth-enhancing. Such dubious projections, not addressed by Capaldo and Izurieta (2016), have broadened the causes for concern about the likely consequences of the TPPA.

¹¹¹ For example, see Daron Acemoglu, David Autor, David Dorn, Gordon Hanson, and Brendan Price. 'Import Competition and the Great US Employment Sag (Saga?) of the 2000s'. NBER Working Paper No. 20395, Cambridge, MA, 2014. David Autor and David Dorn. 'The Growth of Low Skill Service Jobs and the Polarization of the US Labor Market'. *American Economic Review*, 103 (5), 2013: 1553-1597. David Autor, David Dorn, and Gordon Hanson. 'The China Syndrome: Local Labor Market Effects of Import Competition in the United States'. *American Economic Review*, 103 (6), 2013: 2121-2168.