

TRADING PLACES: WITH THE UNITED STATES IN RETREAT,  
WHO WRITES THE INTERNATIONAL RULES FOR TRADE?

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## I. INTRODUCTION

On January 23, 2017, President Donald Trump, upon concluding a campaign that stood squarely against multilateral trade deals, officially withdrew the United States from the Trans-Pacific Partnership (TPP) through executive order.<sup>1</sup> With a stroke of the pen, the Obama-era push towards a trans-pacific trade deal, and perhaps a decades-long American consensus around greater economic integration, came to an end. However, with or without the United States, global trade continues. In the wake of the US's withdrawal from the TPP, other global leaders have sensed an opportunity to fill the void in trade leadership left by the United States. In late 2016, Prime Minister Justin Trudeau traveled to Brussels to sign the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU).<sup>2</sup> As the "international system established by the U.S. more than 70 years ago" unravels, Europe, though it might find recent developments "unsettling" due to its "longstanding belief 'in a democratic Atlantic community governed by mutually beneficial arrangements,'" has forged on.<sup>3</sup> Indeed, in March of 2018, eleven countries resurrected the TPP by concluding the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).<sup>4</sup> Outside the West, China has likewise seized the opportunity to "expand its economic might across Asia and the Pacific with its own trade deal, the Regional Comprehensive Economic Partnership (RCEP)."<sup>5</sup> If approved, RCEP would encapsulate 24% of global Gross Domestic Product (GDP).<sup>6</sup>

Trade agreements are distinguished from one another by their varying innovations in the domains over which they govern. One such domain governed by nearly every trade agreement is labor. The TPP, CETA, and RCEP all address labor policy, and they all do so differently. This comparative piece will evaluate and contrast the labor innovations in the three agreements. CETA represents the newest generation of Western trade agreements

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<sup>1</sup> Eric Bradner, *Trump's TPP Withdrawal: 5 Things to Know*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/23/politics/trump-tpp-things-to-know/index.html>.

<sup>2</sup> Mike Blanchfield, *Trudeau Brussels-Bound to Sign CETA on Sunday*, YORKREGION (Oct. 28, 2016), <https://www.yorkregion.com/news-story/6934897-trudeau-brussels-bound-to-sign-ceta-on-sunday/>.

<sup>3</sup> Serge Halimi, 'America First', LE MONDE DIPLOMATIQUE (Feb. 2017), <http://mondediplo.com/2017/02/01/trump>.

<sup>4</sup> Dave Sherwood & Felipe Iturrieta, *Asia-Pacific Nations Sign Sweeping Trade Deal Without U.S.*, REUTERS (Mar. 8, 2018), <https://www.reuters.com/article/us-trade-tpp/asia-pacific-nations-sign-sweeping-trade-deal-without-u-s-idUSKCN1GK0JM>.

<sup>5</sup> Emiko Jozuka, *TPP vs. RCEP? Trade Deals Explained*, CNN (Jan. 26, 2017), <http://www.cnn.com/2017/01/24/asia/tpp-rcep-nafta-explained/index.html>.

<sup>6</sup> *Id.*

conducted without the United States. RCEP represents a non-Western trade agreement, and the TPP represents an Obama-era trade agreement. This piece will assess the strengths and weaknesses of the labor obligations imposed on signatories by the TPP, and the obligations (or lack thereof) imposed by the two representative next-generation trade agreements. Ultimately, a conclusion will be drawn on the impact of international trade on workers with a reduced American role in global trade regimes. Mindful of the broader trend of a growing American hesitance towards multilateral trade deals, and stateside populist backlash towards trade that extends beyond mere frustration with the TPP, this piece will decide whether decreased American participation in global trade is a boon or detriment for workers.

## II. BACKGROUND

The now-declining era of economic integration resulted from a “principled” beginning.<sup>7</sup> After the Smoot-Hawley tariffs in the United States led to global trade retaliation during the Great Depression, international commerce slowed to a standstill.<sup>8</sup> Immediately after World War II, the United States sought to “create an agreement that would ensure postwar stability and avoid a repeat of the mistakes of the recent past, including the Smoot-Hawley tariffs and retaliatory responses, which had been a contributor to the devastating economic climate that culminated in the death and destruction of the Second World War.”<sup>9</sup> The result of the United States’ postwar leadership was the General Agreement on Tariffs and Trade (GATT), which established international trade norms that would govern global trade into the 21<sup>st</sup> Century, “a set of basic rules and disciplines that participating countries were to follow.”<sup>10</sup> Along with the Bretton Woods system, American leadership in the realm of economic integration was cemented and would be periodically refined throughout the decades, notably with the creation of the World Trade Organization (WTO) in 1995.<sup>11</sup> Until very recently, free trade was the subject of bipartisan accord in the United States. Despite opposition from organized labor, the North American Free Trade Agreement (NAFTA), for instance, enjoyed the support of the political class at the time of its passage.<sup>12</sup> President

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<sup>7</sup> Chad P. Brown, *The WTO and GATT: A Principled History*, in SELF-ENFORCING TRADE 10 (2009), [https://www.brookings.edu/wp-content/uploads/2016/07/selfenforcing\\_trade\\_chapter.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/selfenforcing_trade_chapter.pdf).

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 15.

<sup>11</sup> Marci Hoffman, *The GATT and the WTO*, UNIV. OF CAL. BERKELEY L. LIB. (Nov. 19, 2014), <https://www.law.berkeley.edu/library/dynamic/guide.php?id=57>.

<sup>12</sup> Kenneth J. Cooper, *House Approves U.S.-Canada-Mexico Trade Pact on 234 to 200 Vote, Giving Clinton Big Victory*, WASH. POST (Nov. 18, 1993), <http://www.washingtonpost.com/wp-srv/politics/special/trade/stories/tr111893.html>.

Bill Clinton inherited President George H.W. Bush's promise to "create a free trade zone 'from the Yukon to the Yucatan,'" and promptly undertook a bipartisan lobbying effort to secure NAFTA's passage through a coalition of 132 Republicans and 102 Democrats.<sup>13</sup> Both Senate Majority Leader George Mitchell and Minority Leader Robert Dole were able to assure President Clinton in advance that NAFTA would pass in the Senate, and House Minority Whip Newt Gingrich, often hostile to President Clinton, "rallied House Republicans."<sup>14</sup> Both Mexican President Carlos Salinas de Gortari, of the Institutional Revolutionary Party, and Canadian Trade Minister Roy MacLaren, of the Liberal Party, celebrated the passage of NAFTA in the United States.<sup>15</sup> Like Presidents Bush and Clinton, President Barack Obama sought his own landmark free-trade agreement. Whereas President Bush dreamed of a deal that would span the continent, President Obama gazed across the Pacific and forged the "largest regional trade accord in history."<sup>16</sup> President Obama's purpose in vigorously securing twelve Pacific Rim states' approval of the TPP was to lower tariffs and increase American exports, but like his predecessors in the wake of World War II, President Obama's intentions were also political.<sup>17</sup> In liberalizing American trade with the Pacific Rim, the TPP was also to "serv[e] as a buttress against China's growing regional influence."<sup>18</sup> However, with the election of President Trump, who true to his populist campaign pledged to scrap the TPP, a TPP that would include the United States was dealt its death knell.<sup>19</sup> Even before the election of President Trump, free-trade deals had been waning in popularity in the United States. Both 2016 presidential nominees opposed the TPP as a "symbol of failed globalism,"<sup>20</sup> and economic anxiety has yielded not only the "anti-trade nativism" of President Trump but also the income and social class-based populism of Senator Bernie Sanders.<sup>21</sup> Still, the forces of globalization churn on, with or without the United States, and as the TPP fails, new agreements are given an opportunity to succeed.

However, new leadership on global trade means new priorities for the countries at the helm. And new innovations have profound consequences for

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Kevin Granville, *What Is TPP? Behind the Trade Deal That Died*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Dani Rodrik, *Economics of the Populist Backlash*, VOX: CEPR'S POL'Y PORTAL (July 3, 2017), <http://voxeu.org/article/economics-populist-backlash>.

labor, the environment, competition, foreign investment, and monetary policy. CETA is similarly aspirational to the TPP. In the Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, Canada and the EU trumpet their shared values in areas such as labor.<sup>22</sup> Furthermore, Canada and the EU agreed that they “cannot relax their labour laws in order to encourage trade or attract investment.”<sup>23</sup> RCEP, on the contrary, is the fruit of a Chinese push “to expand its economic might across Asia and the Pacific.”<sup>24</sup> China, taking the lead unlike with the TPP, is able to forge a Pacific Rim deal that reflects their trade priorities. The deal, therefore, “lacks the protections for labor, human rights and the environment set by the TPP.”<sup>25</sup> Whereas friendly labor clauses are highlighted in CETA and the TPP, representative of the Western values that underscore those trade deals, labor standards are given short shrift in rapidly urbanizing China:

[T]hey face considerable hardship in the workplace. Despite their massive number, they are a workforce without collective power. Their plight continues to dominate the news and the media; we are now all familiar with accounts of them working without proper safety equipment, living in crowded and unhygienic dormitories, receiving no medical care, paying arbitrary fines by bosses and being paid late or not at all. Despite the statutory maximum of 40 working hours a week, they are often forced to work overtime. In many cases, they are denied the statutory minimum of one day off a week.<sup>26</sup>

Despite the inclusion of labor clauses in Western free trade agreements, workers and organized labor have long been suspicious of free trade agreements. Though the GATT played an important role in fostering postwar economic integration, labor unions in the United States opposed it.<sup>27</sup> They argued that the GATT served “mainly to enrich investors to the detriment of workers by encouraging capital flight to low-wage nations.”<sup>28</sup> They also contended that global labor standards undermined the “much stronger laws”

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<sup>22</sup> General Secretariat of the Council, *Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States* (Oct. 6, 2016), <http://www.politico.eu/wp-content/uploads/2016/10/Joint-declaration-10.10.16.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> Jozuka, *supra* note 5.

<sup>25</sup> *Id.*

<sup>26</sup> Lilian Miles, *Chinese Corporate Governance: But What About the Workers?*, Co. L.N. \*2 (2011).

<sup>27</sup> ROBERT E. WEIR, *WORKERS IN AMERICA: A HISTORICAL ENCYCLOPEDIA* 283 (2013).

<sup>28</sup> *Id.*

that existed in the United States and in other high-wage nations.<sup>29</sup> Labor's suspicions again peaked upon the passage of NAFTA. Auto workers in Flint, for instance, worried that their jobs would be "shipped out" to Mexico.<sup>30</sup> Amplifying the fears of auto workers, populists at the time, like Ross Perot famously, warned:

If you're paying \$12, \$13, \$14 an hour for factory workers and you can move your factory South of the border, pay a dollar an hour for labor, . . . have no health care—that's the most expensive single element in making a car— have no environmental controls, no pollution controls and no retirement, and you don't care about anything but making money, there will be a giant sucking sound going south.<sup>31</sup>

Predictably, the TPP engendered similar opposition from labor groups, expressing the same concerns regarding trade liberalization they have levied since the United States entered into the GATT. In May of 2016, a letter from more than 1,500 labor unions and environmental groups demanded that Congress reject the TPP.<sup>32</sup> The groups' concerns that "the TPP would make it even easier to ship American jobs overseas to wherever labor is the most exploited"<sup>33</sup> echo the previously mentioned concerns about a race to the bottom that arose in criticism of the GATT. Furthermore, opposition at home, as was the case with NAFTA, was amplified by politicians aligned with labor, like Senator Ron Wyden, who grouched, "The majority of Congress is being kept in the dark" but "representatives of U.S. corporations...are being consulted and made privy to the details of the agreement."<sup>34</sup> CETA, for its part, has also been subject to the enmity of labor groups. In 2016, "320,000 people took part in rallies in seven German cities, including Berlin, Hamburg, Munich and Frankfurt" with signs that read "STOPP CETA – STOPP

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<sup>29</sup> *Id.*

<sup>30</sup> James Bennet, *The Free Trade Accord: Auto Workers; Anger, Fear but Also Hope on the Assembly Line*, N.Y. TIMES (Nov. 19, 1993), <https://www.nytimes.com/1993/11/19/us/the-free-trade-accord-auto-workers-anger-fear-but-also-hope-on-the-assembly-line.html>.

<sup>31</sup> *The 1992 Campaign; Transcript of 2d TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES (Oct. 16, 1992), <https://www.nytimes.com/1992/10/16/us/the-1992-campaign-transcript-of-2d-tv-debate-between-bush-clinton-and-perot.html>.

<sup>32</sup> Vicki Needham, *Labor, Environmental Groups Call on Congress to Oppose TPP*, THE HILL (May 23, 2016), <http://thehill.com/policy/finance/trade/280938-labor-environmental-groups-call-on-congress-to-oppose-tpp>.

<sup>33</sup> *Id.*

<sup>34</sup> Christine Taverner, *A Low Standard of Ambition at TPP Talks: Corporations Oust Environmentalists from the Negotiating Table*, GEO. INT'L ENVTL. L. REV. ONLINE (2014).

TTIP.”<sup>35</sup> Across the Atlantic, an op-ed in the *Toronto Star* highlighted the disparity labor groups often find in free trade deals: “While CETA’s safeguards for labour and the environment are mainly voluntary and weak, the investor protections are strong and fully enforceable.”<sup>36</sup>

In the West, labor has a long history of lending its voice to the debates surrounding free trade deals, and North America and the European Union reliably, at least somewhat, accommodate their concerns in the deals’ labor clauses. Western states, too, benefit from labor clauses in their free trade agreements. According to the Office of the United States Trade Representative (USTR) under the Obama Administration, “U.S. businesses can’t compete fairly if their foreign competitors aren’t required to provide their workers the same levels of protection afforded workers in the United States.”<sup>37</sup> Furthermore, the “core labor standards” that compose Western trade agreements stem from the International Labor Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>38</sup> The ILO, a United Nations (UN) agency that comprises the governments, workers, and employers of 187 member states, concurs that “a growing number of bilateral free trade agreements – particularly those signed by Canada, the United States and the European Union – contain social and labour provisions” that meet their standards.<sup>39</sup> Labor clauses are now a hallmark of American trade agreements. For example, “one of [NAFTA’s] main objectives is to ‘...protect, enhance and enforce basic workers’ rights.’”<sup>40</sup> The USTR even has an Office of Labor Affairs whose purpose is to negotiate for “commitments to respect fundamental labor rights, to effectively enforce labor laws, to provide domestic procedural guarantees, and to promote public

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<sup>35</sup> Michael Nienaber, *Tens of Thousands Protest in Europe Against Atlantic Free Trade deals*, REUTERS (Sept. 17, 2016), <http://www.reuters.com/article/us-eu-usa-ttip/tens-of-thousands-protest-in-europe-against-atlantic-free-trade-deals-idUSKCN11N0H6>.

<sup>36</sup> Scott Sinclair & Stuart Trew, *Opinion, Why Progressives Oppose Canada-EU Trade Deal*, THE STAR (Sept. 22, 2016), <https://www.thestar.com/opinion/commentary/2016/09/22/why-progressives-oppose-canada-eu-trade-deal.html>.

<sup>37</sup> Press Release, Office of the United States Trade Representative, U.S. Objectives, U.S. Benefits In the Transatlantic Trade and Investment Partnership: A Detailed View (Mar. 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>.

<sup>38</sup> Robert M. Stern, *Labor Standards and Trade Agreements*, 2 (The Univ. of Mich. Gerald R. Ford Sch. of Pub. Policy, Discussion Paper No. 496, 2003), <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r496.pdf>.

<sup>39</sup> *Free Trade Agreements and Labour Rights*, INT’L LABOUR ORG., <http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/lang--en/index.htm> (last visited Feb. 20, 2019).

<sup>40</sup> Pablo Lazo Grandi, *Trade Agreements and their Relation to Labour Standards: The Current Situation*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV. 1, 7 (2009), <https://www.ictsd.org/downloads/2011/12/trade-agreements-and-their-relation-to-labour-standards.pdf>.

awareness of labor laws, and establish consultation and dispute settlement mechanisms.”<sup>41</sup> Both CETA and the TPP reflect these Western attitudes towards labor rights. RCEP, however, does not. The rest of this Note will analyze the labor innovations in the TPP, CETA, and RCEP. Though no labor organization in the West would deem the TPP or CETA unreservedly ideal on labor issues, free trade would undoubtedly take on a very different complexion if the West were to cede its hegemony over global trade to China. Indeed, if RCEP were to go through, it would comprise 46% of the global population and include post-industrial democracies like Japan and Australia.<sup>42</sup>

### III. ANALYSIS

#### A. TPP

The TPP, like any prior trade agreement, featured a bevy of novel labor innovations. At the outset, the TPP defines labor laws in a manner that belies the Western values driving the Labor Chapter:

Labour laws means statutes and regulations . . . directly related to the following internationally recognised labour rights: (a) freedom of association . . . the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) . . . abolition of child labour; (d) . . . the elimination of discrimination . . . ; (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.<sup>43</sup>

Though states’ obligations to observe these labor laws are “soft,” signatories were required to implement statutes “with respect to minimum wages, hours of work, and occupational safety and health.”<sup>44</sup> This essentially reflects the “U.S. model language promoting ILO core labor standards.”<sup>45</sup>

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<sup>41</sup> *Bilateral and Regional Trade Agreements*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements> (last visited Mar. 6, 2019).

<sup>42</sup> Jozuka, *supra* note 5.

<sup>43</sup> See Comprehensive and Progressive Agreement for a Trans Pacific Partnership art. 23.4, Mar. 8, 2018 (available at the official depository), <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources> [hereinafter TPP].

<sup>44</sup> Joo-Cheong Tham & K D Ewing, *Labour Clauses in the TPP and TTIP: A Comparison Without a Difference?*, 17 MELB. J. INT'L L. 369, 385-86 (2016).

<sup>45</sup> Ronald C. Brown, *Labor Implications of TPP: A Game Changer?* 9 (Univ. of Hawaii Law Sch., Working Paper, 2016), <https://ssrn.com/abstract=2745524>.



Additionally the TPP encourages the adoption of corporate social responsibility (CSR), with parties agreeing to “endeavour to encourage” the adoption of such policies by domestic enterprise.<sup>46</sup> Finally, the TPP addresses the potential clash between ideal labor standards in its anti-derogation clause, under which member states are not to waive labor laws “in a manner that affects trade or commerce” if the laws bolster a right set forth by the ILO.<sup>47</sup> Still, the TPP qualifies its anti-derogation principle by forbidding states to use labor as a justification for protectionism.<sup>48</sup> With the exception of the language regarding CSR and anti-derogation, “most aspects of the TPP labour chapter are identical or similar to the US approach” to labor chapters in trade agreements.<sup>49</sup> Given U.S. leadership throughout the drafting process, “the TPP does not merely correspond to the US approach—it *adopts the US approach*.”<sup>50</sup> Therefore, though a few novel innovations appear in the TPP, the agreement’s Labor Clause largely reflects the U.S. “‘model’ labor protection language,” otherwise known as the “May 10 Standard.”<sup>51</sup>

Judging the merits of the TPP’s labor innovations elicits a wide range of responses. Proponents of the TPP’s labor innovations have heralded the agreement as a “new and compelling model for trade in one of the world’s fastest growing and most dynamic regions.”<sup>52</sup> Central to proponents’ claim of a “dynamic” new model is the promise of increased labor standards throughout the Pacific Rim. The U.S., for its part, expected that the Labor Chapter would foster a “level playing field for American businesses and American workers by raising labor standards across the Asia-Pacific.”<sup>53</sup> Therein lies the purpose behind the Obama-era U.S. approach towards labor in free trade agreements—enticing other countries to raise their labor standards through the promise of increased prosperity that trade with the U.S. could bring. This “attempt to wed free trade with international labor norms in an effort to halt the race to the bottom” limits the negative impact on labor standards that a less restrictive free trade agreement promotes.<sup>54</sup> While the TPP is clearly emblematic of the U.S. approach to labor and free trade agreements, it also goes further than prior examples of U.S.-led free trade agreements in its inclusion of language on CSR and anti-derogation. One international economics think tank concluded that “the TPP is the ‘most ambitious of US FTAs’ and while it does not address ‘all the concerns of labor

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<sup>46</sup> Tham & Ewing, *supra* note 44, at 386.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 389.

<sup>50</sup> *Id.* at 390.

<sup>51</sup> Brown, *supra* note 45, at 7.

<sup>52</sup> Tham & Ewing, *supra* note 44, at 370.

<sup>53</sup> *Id.* at 371.

<sup>54</sup> Brown, *supra* note 45, at 8.

rights advocates, it does move the labor agenda along.”<sup>55</sup> By taking the ILO standards that framed prior U.S.-led trade agreements and adding in additional labor innovations absent in prior agreements, “the TPP is progressive and moving toward securing greater labor protections for workers.”<sup>56</sup> The TPP’s labor innovations furthermore possessed the potential to positively benefit workers stateside. A pair of 2016 studies found that the TPP would raise the wages of both skilled and unskilled workers in the U.S.. So, while some individual workers would bear displacement costs, “aggregate losses are likely to be a small fraction of the agreement’s overall benefits.”<sup>57</sup> Opening up the Pacific to American goods was also a sure windfall specifically for agriculture, which was facing “a chance to erase punishing tariffs that restricted the United States—the onetime ‘breadbasket of the world’—from selling its meats, grains and dairy products to massive importers of foodstuffs such as Japan and Vietnam.”<sup>58</sup> In fact, the TPP was potentially so beneficial that farmers across the Heartland who invested in pork on the expectation that the Japanese market would become increasingly accessible are fearsome and already losing out on market share to producers in other countries.<sup>59</sup> One scholar summarized the crisis: “Instead of getting those 200 million customers we may be, in fact, at a disadvantage in those markets because these are preferential trade agreements ... so if you’re not a part of it, you are on the other side.”<sup>60</sup> The loftiness of the expectations of American agriculture, in lieu of a TPP that includes the U.S., may now be the only barometer of how successful the TPP could have been for American labor. Now the U.S. is being outpaced in its exports to Japan by the EU and Australia, and the American agricultural sector seems pessimistic about its future prospects.<sup>61</sup> Rational Japanese consumers will only be so swayed by American marketing gimmicks, like Gochipo the Pig hawking American pork products across Japan, before they opt for a lower-priced product.<sup>62</sup> Across sectors, indeed, the TPP was destined to assist American manufacturers through the reduction of tariffs. As evidence, the “U.S. exported over \$600 billion worth of U.S.

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<sup>55</sup> *Id.* at 13-14.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> Robert Z. Lawrence & Tyler Moran, *Adjustment and Income Distribution Impacts of the Trans-Pacific Partnership 2* (Peterson Inst. for Int’l Econ., Working Paper No. 16-5, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2747569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747569).

<sup>58</sup> Adam Behsudi, *Trump’s Trade Pullout Roils Rural America*, POLITICO MAG. (Aug. 7, 2017), <https://www.politico.com/magazine/story/2017/08/07/trump-tpp-deal-withdrawal-trade-effects-215459>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

manufactured products to TPP countries in 2013,” with many of these goods being subject to up to 40% tariffs.<sup>63</sup>

The TPP has engendered fierce criticism from scholars, politicians, and workers from a broad ideological spectrum, despite the promised effectiveness of the TPP’s labor innovations for the betterment of labor standards worldwide, and for American manufacturers. Critics of the TPP of a certain persuasion derided it as “underpinned by a ‘neoliberal market model.’”<sup>64</sup> Even before the election of Donald Trump, populists in the U.S. and across the world approached the TPP like they generally approached most trade deals—with a heavy dose of skepticism. While this attitude was perhaps based on the TPP’s reputation, populists objected so vehemently to the U.S.’s participation in the agreement that it quickly became “unknown . . . whether the new wave of populist protectionism mark[ed] the permanent end to the ‘mega-trade deal’, or whether it [was] simply a hiccup along the way.”<sup>65</sup> Demonstrative of the broad coalition of populists and unionists that rallied against the TPP, Senator Bernie Sanders, carrying the mantle for American laborers, labeled the TPP a “disastrous trade agreement designed to protect the interests of the largest multi-national corporations at the expense of workers . . . .”<sup>66</sup> Citing a study of the Economic Policy Institute, Senator Sanders further alleged, that the “U.S. [would] lose more than 130,000 jobs to Vietnam and Japan alone,” service sector jobs would be outsourced, manufacturing jobs would be lost as a result of the “race to the bottom,” and finally that the agreement would provide corporations a new platform to challenge domestic labor laws before international tribunals if it was adopted.<sup>67</sup> Consummating the unholy alliance against the TPP, Senator Sanders later “praised President Trump for an executive order to officially pull the United States out of the deal.”<sup>68</sup> Organized labor, for its part, praised the withdrawal while “giving little credit to Trump” in a statement issued by Richard Trumka of the AFL-CIO.<sup>69</sup>

It became so evident that labor and non-agriculture-affiliated heartlanders opposed the TPP, that Senator Sanders’ talking points (and the less coherent

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<sup>63</sup> George H. Pike, *Legal Issues: Trans-Pacific Partnership: The Devil in the Details*, 33 INFO. TODAY 1 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2963915](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963915).

<sup>64</sup> Tham & Ewing, *supra* note 44, at 370.

<sup>65</sup> *Id.* at 371.

<sup>66</sup> Press Release, Office of Bernie Sanders: U.S. Senator for Vt., Senator Bernie Sanders: The Trans-Pacific P’ship (TPP) Agreement Must Be Defeated, <https://www.sanders.senate.gov/download/the-trans-pacific-trade-tpp-agreement-must-be-defeated?inline=file>.

<sup>67</sup> *Id.*

<sup>68</sup> David Weigel, *Sanders, Joined by Rust Belt Democrats, Praises Trump for Nixing TPP*, WASH. POST (Jan. 23, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/sanders-praises-trump-for-nixing-tpp-delighted-to-work-with-him-on-pro-worker-policies/?utm\\_term=.85017569ca0a](https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/sanders-praises-trump-for-nixing-tpp-delighted-to-work-with-him-on-pro-worker-policies/?utm_term=.85017569ca0a).

<sup>69</sup> *Id.*

promises of President Trump to forge better deals) regarding depressed wages and labor outsourced to TPP countries with less labor protections in place became near-doctrine, not needing additional support to refute the touted benefits of the TPP's labor innovations. Scholars, too, have expressed that the TPP's labor innovations "will have a neutral—or worse, negative—impact on domestic labour standards; and it is only in limited situations that a credible argument can be made that these provisions will improve domestic labour standards."<sup>70</sup> The same scholars see the enhanced language of the TPP's labor clause as nothing more than pretty words, when in reality the U.S.'s own noncompliance with ILO standards would have resulted in "a general orientation to non-application of the labour clauses."<sup>71</sup> Additionally, these scholars espouse the view that "it is difficult to break free from the suspicion" that the TPP's labor clause is no more than a guise for "aggressive protectionism and expansionism" rather than an attempt to raise labor standards across the globe.<sup>72</sup> So, while the TPP's labor clause represents "an improvement in that [it] attempt[s] to wed free trade with international labor norms in an effort to halt the race to the bottom," proponents of labor issues have found plenty to take issue with in the TPP.<sup>73</sup>

While the merits of the TPP still give way to debate, the effectiveness of the agreement, insofar as its labor clause is concerned, can be gauged by evaluating how signatories planned on administering the deal. A properly administered deal has teeth. It is enforceable, and therefore likely to be adhered to. In broad strokes, "[t]he labor chapter requires each party to incorporate the rights to freedom of association and collective bargaining, the elimination of forced labor, the 'effective abolition' of child labor, and the elimination of employment discrimination into its statutes, regulations, and practice. The labor chapter also requires parties to adopt statutes regulating work conditions, including the minimum wage."<sup>74</sup> However, the agreement does not state, with any specificity, what these laws must entail.<sup>75</sup> Fueling the oft-repeated criticism that the TPP contains ambitious platitudes about labor rights, but exists for the ulterior motive of furthering U.S. interests, is this lack of specificity on the content of the statutes member states must adopt. If member states must adopt labor rights statutes, but have no standard to conform to, it is difficult to conclude that the TPP can be administered in a manner that protects labor rights across the broad swath of countries that participated in the TPP. Further undermining the requirement that signatories

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<sup>70</sup> Tham & Ewing, *supra* note 44, at 402.

<sup>71</sup> *Id.* at 392.

<sup>72</sup> *Id.* at 403.

<sup>73</sup> Brown, *supra* note 45, at 8.

<sup>74</sup> Kristina Daugirdas & Julian Davis Mortenson, *United States and Eleven Other Nations Conclude Trans-Pacific Partnership*, 110 AM. J. INT'L L. 384, 386 (2016).

<sup>75</sup> *Id.*

adopt statutes governing a host of labor issues is the penalty mechanism, or lack thereof, for not adopting proper statutes. The agreement merely “provides that a violation is not established unless the alleged violator has failed to adopt a statute or a regulation in a manner that affects trade or investment between the parties.”<sup>76</sup> Therefore, though better than no requirement whatsoever regarding domestic labor laws, the agreement makes clear that penalties will only be enforced when failure to adhere to the agreement’s labor requirements deleteriously impacts trade within the TPP. This has led many to conclude that the “TPP labor commitments are ‘vague’ and do not effectively address the lack of acceptable labor standards in signatory states.”<sup>77</sup> Furthermore, the TPP’s labor chapter would only have been as effective as the U.S.’s ability and willingness to enforce its terms. Perhaps sensing the changing political consensus on free trade in the U.S., one scholar concluded in 2016 that many “worry that the effectiveness of the labor chapter is too dependent on whether the next administration will bring enforcement actions, citing the lack of enforcement of other free trade agreements in the past.”<sup>78</sup> Indeed, these worries proved prescient upon the election of President Trump, and President Obama’s eagerness to finalize a Trans-Pacific trade deal indeed was not adopted by the subsequent administration in the same vein as President Clinton concluding the North American trade deal initiated by President Bush. Even before the 2016 Election saw both contenders pledge to withdraw from the TPP, skepticism already existed about the U.S.’s motivation to enforce the lofty goals of the TPP’s labor chapter. Despite the ILO core labor standards serving as the foundation of the TPP’s labor clause (and most labor clauses in U.S.-led trade agreements), the U.S. itself is largely in compliance with the ILO. In fact, the U.S. has failed to ratify six of the eight fundamental ILO conventions.<sup>79</sup> Furthermore, as one labor law scholar found after an extensive comparison of ILO standards versus U.S. practices:

Despite being bound to respect and promote the principles and rights established in the ILO Constitution and the principle of freedom of association, the United States tends to provide lower levels of coverage and protection for employees than required by ILO standards. The lower level of protection and coverage for U.S. employees remains especially visible in the right to strike, treatment of public employees, and rights of noncitizen workers.<sup>80</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 386-87.

<sup>79</sup> Tham & Ewing, *supra* note 44, at 384.

<sup>80</sup> David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842, 1878 (2014).

A final potential means of administering the TPP, in lieu of U.S. leadership on international labor issues, was investment arbitration. Chapter 9 of the TPP establishes a TPP Tribunal to resolve disputes between a state and an investor, and Article 9.6 the “Minimum Standard of Treatment” (MST) owed to foreign investors in TPP member states.<sup>81</sup> Because Article 9.6 protections are “informed” by the TPP’s other provisions, an investor, through the TPP’s investor-state dispute settlement (ISDS) mechanisms, could play an efficacious role in enforcing the TPP’s labor provisions.<sup>82</sup> Specifically, an investor could bring a dispute on the basis of the TPP’s anti-derogation clause, which states: “No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement.”<sup>83</sup> One scholar analogized the potential remedy an investor would have, in furtherance of the TPP’s labor goals, to a successful claim brought by a Canadian investor in eco-tourism against Barbados.<sup>84</sup> *Peter Allard (Canada) v. Barbados* was brought as a claim pursuant to the Canada-Barbados Bilateral Investment Treaty in 2010, and the plaintiff-investor received his award in 2016.<sup>85</sup> Mr. Allard claimed that, by allowing environmental degradation, Barbados had acted in violation of international laws that it had ratified and subsequently destroyed the value of his \$35 million investment in an eco-tourism resort.<sup>86</sup> Mr. Allard prevailed on his claim because Barbados’s regulatory failures in not adhering to its own marine pollution laws and international laws it had ratified amounted to a “failure to provide fair and equitable treatment” to the investor and his investment.<sup>87</sup> The “fair and equitable treatment” language from *Allard* bears close resemblance to the MST from Article 9.6 of the TPP. Furthermore, a fair reading of the anti-derogation clause alongside the MST permits an investor to bring suit against a TPP signatory that violates the conditions of the TPP’s labor clause. Therefore, it was possible under the TPP that a signatory would be responsible for damage to an investment if that damage stemmed from a failure to enforce labor obligations, similar to how Barbados was responsible to the Canadian investor for the loss his eco-tourism venture suffered in the country. If anything, a labor claim under the TPP’s ISDS mechanisms would be more potent than an environmental claim because the labor clause is “stricter” and less “lenient” than the reasonableness component built into the Environment

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<sup>81</sup> Nicholas Wall, *Investment Arbitration and Corporate Social Responsibility in the Trans-Pacific Partnership*, 16 ASPER REV. INT’L BUS. & TRADE L. 315, 329-30 (2016).

<sup>82</sup> *Id.* at 337-38.

<sup>83</sup> *Id.* at 338.

<sup>84</sup> *Id.* at 327.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 327-28.

<sup>87</sup> *Id.* at 328.

Chapter.<sup>88</sup> This led the aforementioned scholar to conclude that “a host state could theoretically be found responsible under Article 9.6 for a failure to enforce domestic laws or fulfill international legal obligations aimed at...labour.”<sup>89</sup> A qualification to this potential avenue for investor-driven enforcement of the TPP’s labor clause is that “[a]wards ordered by a TPP Tribunal are only allowable in the form of payment or restitution, and cannot include penal damages.”<sup>90</sup> How much this would have reduced the deterrent quality of ISDS in regards to member states complying with its labor obligations is subject to conjecture. Regardless, the unavailability of punitive damages is worth mentioning.

While the U.S.’s willingness to enforce the TPP’s ambitious labor standards was always questionable, ISDS offered another potential means of enforcing the TPP’s labor standards. In that vein, a closer examination of the TPP’s post-ratification mechanisms would shed light on how effectively the TPP’s labor chapter could be administered. These post-ratification mechanisms include a national labor consultative body, domestic contact points for labor, dialogue mechanisms, and dispute-resolution for member states.<sup>91</sup> A national labor consultative body was required to be formed by each signatory to the TPP as a receptacle for the views of the public of each member state on the TPP’s labor chapter.<sup>92</sup> Furthermore, each member state was to assign a point of contact who would have been required to “receive and consider written submissions from members of the public.”<sup>93</sup> Together, “these political processes [were] to be the principal domestic avenue for the public of TPP parties to raise issues related to the Labour Chapter, as the TPP (generally) prohibits parties from providing a domestic right of action against TPP parties for breaching the agreement.”<sup>94</sup> All told, these two domestic outlets for post-ratification administration amount to little. The TPP, in sum, just mandates that some governmental body be established to receive criticisms from the public regarding issues that arise under the agreement’s labor chapter, and some point of contact be designated to receive written submissions from the public, a mere address to which the public can mail its complaints. It is difficult to see how this amounts to more than, say, notice and comment rulemaking without even the bare requirement that the agency consider the comments submitted, or the ability to change course accordingly considering the national consultative body was to serve as a post-ratification mechanism. Regardless, a formalized channel through which citizens of the agreement’s signatories can air their grievances hardly amounts to an effective

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<sup>88</sup> *Id.* at 337-38.

<sup>89</sup> *Id.* at 339.

<sup>90</sup> *Id.* at 341.

<sup>91</sup> Tham & Ewing, *supra* note 44, at 387.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

means of proper administration of the TPP's labor chapter. The dialogue mechanisms, also, appear to be little more than intergovernmental versions of the domestic post-ratification mechanisms. The dialogue mechanism "envisages that the TPP Parties will cooperate on matters relating to the chapter and provides a long list of activities and topics on which they can cooperate." Moreover, "it sets up a mechanism for 'cooperative labour dialogue', a process for parties to discuss specific matters arising between them."<sup>95</sup> While the domestic mechanisms seemed to promote official channels for dissent, the dialogue mechanisms appear to have been nothing more than a loose agreement that the signatories of the TPP would meet every so often to discuss labor issues. Helpfully, the chapter even provides "a long list of activities and topics" to be discussed, a discussion group with no ability to draft resolutions and nothing at stake on the conversation table. The remaining post-ratification mechanism, dispute-resolution, therefore was likely the most potentially effective means of administering the TPP's labor chapter properly. For labor disputes, member states were first required to seek resolution through "labour consultations" before resorting to the TPP's normal dispute-resolution procedures, which under the labor chapter are "determined by a panel of three members with the complaining party (or parties) and responding party (or parties) appointing one panellist each and the chair of the panel being appointed with agreement of the disputing parties in the first instance. In relation to disputes concerning the Labour Chapter, panellists other than the chair are to have expertise or experience in labour law or practice unless selected from the roster (which is agreed to by all parties)."<sup>96</sup> Perhaps obviously, but still admirably, panelists hearing labor disputes brought pursuant to the TPP must have expertise in the labor field. Procedurally, once the panel makes its findings of fact, it releases a draft report to the parties in dispute, accepts comments from the parties, and then issues its final report.<sup>97</sup> As evidence of more teeth than any other of the labor chapter's post-ratification mechanisms, "disputing parties are obliged to implement the final report with compensation and trade sanctions in the form of suspension of benefits under the TPP available in the event of non-implementation."<sup>98</sup> With the possible exception of ISDS, then, dispute-resolution provides the only administration mechanism with actual ramifications for signatories that fail to correctly implement the TPP's labor provisions. Still, dispute-resolution is conducted by the parties themselves and lacks the independent oversight of an agency like the ILO.<sup>99</sup> Regardless, and unlike other less ambitious free

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 387-88.

<sup>97</sup> *Id.* at 388.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*



trade agreements, the TPP's dispute-resolution mechanism, as it applies to labor commitments, is "binding."<sup>100</sup>

Having expounded on the TPP's labor innovations, their merits, and whether they can be administered properly, the next issue is whether these labor innovations would have resulted in inequality or uncertainty. Given the vitriolic responses of both the populist left and right to the TPP, it is highly apparent that labor was one of the more politically controversial chapters of the agreement. Allegations from the American workforce of the TPP fomenting a race to the bottom abounded, but other details in the agreement were potential contributors to inequality.

Inequity, for example, potentially stemmed from the reality that only states could invoke the TPP's dispute-resolution procedures, not labor unions or non-governmental organizations (NGOs).<sup>101</sup> However, as previously mentioned, socially responsible corporations (or investors) potentially could have employed ISDS to enforce, rather than dispute, labor standards:

The possibility for *Allard*-structured claims also reduces disincentives for CSR adoption and provides an avenue to protect both their investment and the rights of others...socially responsible enterprises can use this standard and other investor protections to not only safeguard their own interests, but also those of the community in which they operate.<sup>102</sup>

Another potential source of inequality in the TPP's labor chapter is its vagueness.<sup>103</sup> This criticism appears valid. As mentioned before, the TPP adopts ILO labor standards, but it fails to specify exactly how signatories are to abide by these standards. Member states must adopt statutes that address domestic labor standards, but the TPP fails to specify the content of these statutes. Compounding this issue is the uncertain penalty mechanism for failing to adopt the proper statutes. Member states were only to face sanctions if their failure to adopt proper labor statutes impacted trade. Exactly what sort of impact would qualify, the TPP does not specify. Given the U.S.'s own tepid compliance with the ILO, skeptics were fair in assuming that this vagueness would be more detrimental to labor than beneficial.

Lastly, corporations, for their part, have levied their own complaints against perceived inequalities in the TPP's labor chapter, and "[a]t least one scholar has also noted that U.S. companies with supply chains outside of the

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<sup>100</sup> Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 359, 367 (2013).

<sup>101</sup> Tham & Ewing, *supra* note 44, at 387-88.

<sup>102</sup> Wall, *supra* note 81, at 347.

<sup>103</sup> Daugirdas, *supra* note 74.

TPP countries may see their competitiveness suffer both in domestic and global markets as a result of the agreement.”<sup>104</sup> This argument, per Rachel Brewster at Duke University’s School of Law, asserts that the regional agreements that proliferated with the stagnation of the WTO preference some states over others, harming U.S. companies with operations in the excluded states:

By establishing preferences for some states over others, the benefits of liberalization are limited to the members of the new group and exclude many of the U.S.’ traditional allies. In addition, the TPP may disrupt established relationships with companies from excluded states. This is particularly problematic for businesses on the East Coast that are more likely to have supply chains outside of the Pacific Partnership countries. For these U.S. businesses, manufacturing costs will not rise but they will not see the decrease in tariff levels that Pacific-oriented supply chain producers will experience, and thus their relative competitiveness in the U.S. market and global markets may suffer.<sup>105</sup>

Therefore, while labor more directly stood to reap less than the promised benefits of the TPP on account of the agreement’s vagueness, employers faced the prospect of relative losses on account of the very nature of the TPP as a regional agreement. If East Coast manufacturers lost their competitive advantage against their more Pacific-oriented West Coast counterparts, it would have been foreseeable that the labor they employ in the U.S. and in non-TPP countries would suffer as well in the form of decreased wages or reduced hiring.

In line with the administrability of the TPP’s labor chapter, and perceived inequities, another issue meriting evaluation is the likelihood the labor chapter would be adhered to by the agreement’s signatories. The TPP was laudatory in its breadth and ambition with regard to labor standards, but was it too unrealistic to expect adherence from its signatories? One issue here, alluded to previously, was the softness of the TPP’s labor requirements. For example, the ILO-based labor standard requirements dictated by the TPP were primarily to be achieved by member states adopting their own statutes governing acceptable wages, hours, and conditions. This requirement, however, is “a ‘soft’ obligation with ‘acceptable conditions of work as determined by that

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<sup>104</sup> *Id.* at 387.

<sup>105</sup> Duke Today Staff, *News Tip: Trans-Pacific Partnership Could Penalize East Coast Businesses, Expert Says*, DUKE TODAY (Oct. 5, 2015), <https://today.duke.edu/2015/10/tip-pacific-trade-sh>.

Party.”<sup>106</sup> Furthermore, as previously established, failing to implement the relevant statutes was only to be punishable if that failure impacted trade within the TPP. Therefore, the member states, with their divergent histories with labor and approaches to labor protections, were entrusted with defining what an acceptable statute was. Even given this subjective standard, member states were still only to be held liable if their failure to maintain a statute impacted trade. It would likely take an egregious legislative failure for a state to violate this obligation, so, for laborers especially, this requirement is indeed very soft. Furthermore, with regard to two of the TPP’s other more ambitious requirements, the actual obligations on member states are, again, soft. The language of the labor chapter on CSR and compulsory labor speaks of encouragement and discouragement rather than any sort of mandate.<sup>107</sup> Signatories of the TPP were “obliged to ‘endeavor to encourage’ the adoption of corporate social responsibility initiatives and to *discourage*, through initiatives it considers appropriate the importation of goods produced in whole or in part by forced or compulsory labour” (emphasis added).<sup>108</sup> Though socially responsible investors possibly stood to acquire some muscle through their access to ISDS, the states themselves, in signing the TPP, were agreeing to very little in ratifying the language on CSR. It is nearly unimaginable that a signatory would find itself before a dispute-resolution panel for not “endeavoring” enough, or being encouraging enough of its domestic businesses to adopt CSR platforms. Furthermore, just like the soft obligation of states deciding for themselves which labor protection statutes were appropriate to adopt, the requirement that states adopt “initiatives it considers appropriate” to discourage the importation of goods produced by forced labor is highly subjective. Because of the leeway this grants member states, this obligation imposed by the TPP is also quite soft.

Another strike against the TPP’s labor chapter actually being adhered to is its lack of pre-ratification mechanisms. While its trifold post-ratification mechanisms were discussed above, the agreement was notable for its lack of frontend requirements. However, one of the more efficacious developments surrounding the TPP’s labor chapter was the three pre-ratification bilateral agreements the U.S. forged with Brunei, Malaysia, and Vietnam.<sup>109</sup> Notably, these agreements, deemed “Labour Consistency Plans,” appeared to have teeth. For the three countries, these agreements instilled “detailed and significant changes of their labour laws prior to the TPP entering into force and subject[ed] these commitments to the dispute-settlement mechanisms under the TPP.”<sup>110</sup> These agreements, alone, are all also almost as long as the

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<sup>106</sup> Tham & Ewing, *supra* note 44, at 386.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 386-87.

TPP's labor chapter itself, with Malaysia's, for example, being eleven pages long.<sup>111</sup> These "Labour Consistency Plans" are also more substantive in what they require of their signatories, in contrast to the TPP's labor chapter.<sup>112</sup> And in contrast with the "voluntariness" of the labor chapter's requirements, Professor Ronald Brown of the University of Hawaii Law School asserts that "*by far, the most dramatic break-through on labor protections is found in the side agreements of the TPP that the U.S. has with Vietnam, Malaysia, and Brunei, i.e., those countries with the poorest record of ratification of ILO labor standard conventions [sic].*"<sup>113</sup> Professor Brown continues:

By express terms their labor laws must be newly established, changed and improved to allow independent labor unions, strikes, proper treatment of immigrants, anti-discrimination provisions, labor inspections, and the basic labor standards affecting working conditions, *before* they are allowed to export goods duty-free to the United States and otherwise use the provisions of the TPP. The side agreements are very detailed in their obligations.<sup>114</sup>

In essence, the U.S. was grooming Malaysia, Vietnam, and Brunei for ascension to the TPP. By dangling the carrot of liberalized trade before the three most habitual violators of international labor norms, the U.S. was exercising its economic power in a way it failed to do elsewhere in the TPP. While the other obligations imposed by the TPP were exceptionally soft, the obligations imposed by the U.S. bilaterally on Malaysia, Brunei, and Vietnam were consequential, as these three states stood to lose everything by not reforming their labor standards, and gain extraordinarily by free trade with the U.S. and the rest of the Pacific Rim. These three side agreements were inarguably a positive outcome for international labor if the remainder of the TPP was ultimately marred by its shortcomings. Furthermore, if no other signatories were incentivized to adhere to the TPP's soft labor obligations, Malaysia, Brunei, and Vietnam, the three least labor-friendly hopefuls to the TPP, were likely to adhere to the TPP's requirements on account of being singled out by the agreement's primary patron, the United States.

Lastly, a brief sampling of the attitude of the signatories themselves towards the TPP shows how the agreement ultimately failed. The U.S.'s withdrawal from the TPP ultimately scuttled the deal, so the shift in the U.S.'s attitude towards the agreement tracks with the rise and fall of the TPP, but

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<sup>111</sup> *Id.* at 387.

<sup>112</sup> *Id.*

<sup>113</sup> Brown, *supra* note 45, at 10.

<sup>114</sup> *Id.*

many of the TPP's other signatories soured on the deal as well. President Obama had, perhaps, the most reasonable outlook on the TPP—that the U.S. writing the trade rules for Asia would mean a better outcome for labor than China taking the reins:

He warned that 'trying to pull up a draw bridge on trade' would hurt the U.S. economy and American workers, and said that 'if we don't establish rules—norms—for how trade and commerce are conducted in the Asia-Pacific region, then China will...They're sure not worried about labor standards, or environmental standards, or human trafficking or anti-corruption measures.'<sup>115</sup>

However, the would-be incoming administrations of 2016 took an entirely opposite approach, focusing less on the relative advantages for labor with an involved, participatory, liberal U.S., and more on the agreement's shortcomings. Hillary Clinton said the agreement "didn't meet [her] standards."<sup>116</sup> Senator Sanders claimed the TPP "threatens our democracy."<sup>117</sup> And most crudely and thoughtlessly, President Trump grouched that the TPP "is another disaster done and pushed by special interests who want to rape our country, just a continuing rape of our country . . . [t]hat's what it is too. It's a harsh word: It's a rape of our country."<sup>118</sup> Elsewhere, for instance, the TPP was vehemently opposed on labor grounds by New Zealand's Labour Party. In New Zealand, despite the state's "major long-standing trade policy goals of an FTA with the United States," Labour, in contrast to the governing National Party, eventually grew skeptical of the "potential risks it posed to New Zealand's regulatory autonomy in respect of sensitive issues."<sup>119</sup> Similarly to how the free trade consensus collapsed in the U.S., "for years there has been strong bipartisan support between National and Labour for promoting New Zealand's economic interests through FTAs."<sup>120</sup> This consensus collapsed, however, in New Zealand when Labour opted to "represent the more sceptical public attitudes that were developing in relation

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<sup>115</sup> Paul Blake, *In Pushing TPP, President Obama Says He Has 'Better Argument' Than Trump or Clinton*, ABC NEWS (Aug. 2, 2016), <http://abcnews.go.com/Business/pushing-tpp-president-obama-argument-trump-clinton/story?id=41074632>.

<sup>116</sup> Cristiano Lima, *Trump Calls Trade Deal 'a Rape of Our Country'*, POLITICO (June 28, 2016), <https://www.politico.com/story/2016/06/donald-trump-trans-pacific-partnership-224916>.

<sup>117</sup> Arnie Seipel, *Sanders Centers Platform Fight On Trans-Pacific Trade Deal*, NPR (July 3, 2016), <http://www.npr.org/2016/07/03/484574128/sanders-centers-platform-fight-on-trans-pacific-trade-deal>.

<sup>118</sup> Lima, *supra* note 116.

<sup>119</sup> Amokura Kawharu, *Process, Politics, and the Politics of Process: The Trans-Pacific Partnership in New Zealand*, 17 MELB. J. INT'L L. 286, 293 (2016).

<sup>120</sup> *Id.* at 295.

to the agreement” and amplify the numerous concerns New Zealand’s indigenous Maori harbored regarding the TPP.<sup>121</sup> Similarly, Australian attitudes towards FTAs soured with a shift away from free trade deals in the trade policy changes adopted by Julia Gillard’s Labor government in 2011.<sup>122</sup> In summary, while it was growing American skepticism towards the TPP, and free trade in general, that ultimately led to the pared back CPTPP in existence today, distrust of free trade, and specifically the most ambitious free trade agreement in the TPP, was simmering across the Pacific independently of political developments in the U.S.. With the collapse of an American-led TPP and an uncertain U.S. role in establishing free trade regimes going forward, various other agreements have been granted new life. Next, this Note will examine CETA under the same rubric as the TPP, comparing the new Canadian-EU agreement to the TPP throughout.

### B. CETA

CETA, like the TPP, features its fair share of new and ambitious labor innovations. Canadian and European proponents of the deal, in fact, tout it as the most progressive free trade agreement of our time. The significance of CETA is not to be undermined:

On the 30<sup>th</sup> October 2016, the Comprehensive Economic and Trade Agreement (CETA) was signed between Canada and the EU—a deal considered to be ‘the most significant and ambitious’ it has ever signed—one which removes 99% of tariffs between the EU and Canada. The Agreement took seven years to negotiate and was not without its challenges.<sup>123</sup>

CETA’s labor innovations include: the first sustainable development chapter Canada has ever signed onto, encouraging business to promote economic objectives, an agreement to implement the ILO conventions, a non-derogation clause, civil society advisory groups, and dispute-settlement provisions.<sup>124</sup> This sustainable development chapter in CETA, Canada’s first, “ensures that any increased economic activity as a result of the FTA does not

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<sup>121</sup> *Id.* at 293.

<sup>122</sup> *Id.* at 295.

<sup>123</sup> Marianne Ojo, *More of a Competitor than a Trade Partner?: The Trans Pacific Partnership and Its Implications for Trade Relations*, SPRINGER (forthcoming Nov. 10, 2016).

<sup>124</sup> *Opening New Markets in Europe: Creating Jobs and Opportunities for Canadians – Technical Summary of Final Negotiated Outcomes*, GLOB. AFFAIRS CANADA 1, 26 (2013), <https://international.gc.ca/trade-commerce/assets/pdfs/ceta-technicalsummary.pdf>.

occur at the expense of environmental and labour protection.”<sup>125</sup> Resolving the issue of Canadian federalism with respect to FTAs, CETA negotiations concluded with each of Canada’s ten provinces and three territories agreeing to be bound by CETA’s sustainable development provisions.<sup>126</sup> Though dissent within the EU appeared to be the primary holdup for CETA, Canadian trade officials prevented many of the political issues that ensued with the TPP in the US by securing the ratification of the sustainable development chapter by all Canadian provinces at the onset. CETA’s language on CSR mirrors the TPP’s in that its primary mechanism is “encouraging businesses to adopt practices that promote economic, social and environmental objectives.”<sup>127</sup> However, CETA appears to go one step further in its agreement to monitor the impact of CSR and the agreement’s sustainable development provisions, with “a committee of high-level representatives to oversee [its] implementation.”<sup>128</sup> While Prime Minister Trudeau advanced similar aspirations to President Obama in claiming to be “setting international standards for others to follow,” the CSR provision in CETA, and its corresponding monitoring requirement, is perhaps more “significant” than its TPP counterpart in that it has been employed as a counterargument to European protestors who claim CETA is a boon only for multinational corporations.<sup>129</sup> Also, similarly to the TPP, CETA “includes a commitment to effectively implement the fundamental International Labour Organization (ILO) conventions that each party has ratified respectively.”<sup>130</sup> However, this is more meaningful in the context of CETA because while the U.S. has only ratified two of the eight ILO fundamental conventions, Canada has ratified all eight.<sup>131</sup> The European Union, for its part, does not ratify ILO conventions, but its member states appear to have all ratified each fundamental convention. The power players within the EU—France, Germany, Italy, Spain, and the Netherlands—at least all have.<sup>132</sup> Therefore, while CETA and the TPP’s adherence to the ILO appears substantively the same, CETA’s conformity to the ILO is more meaningful given that it encompasses all eight fundamental conventions. The U.S., the muscle and driving force behind the TPP, has still only ratified two fundamental conventions. Lastly, regarding the ILO, CETA

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<sup>125</sup> *Id.*, at 25.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Ojo, *supra* note 123, at 3-4.

<sup>130</sup> GLOB. AFFAIRS CANADA, *supra* note 124.

<sup>131</sup> *Ratifications for Canada*, INT’L LABOUR ORG., [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102582](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102582) (last visited Feb. 21, 2019).

<sup>132</sup> *Ratifications of Fundamental Conventions By Country*, INT’L LABOUR ORG., [https://www.ilo.org/dyn/normlex/en/f?p=1000:10011::NO:10011:P10011\\_DISPLAY\\_BY,Y,P10011\\_CONVENTION\\_TYPE\\_CODE:1,F](https://www.ilo.org/dyn/normlex/en/f?p=1000:10011::NO:10011:P10011_DISPLAY_BY,Y,P10011_CONVENTION_TYPE_CODE:1,F) (last visited Feb. 21, 2019).

“includes commitments to ensure that national labour laws and policies in Canada and the EU respect the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work.”<sup>133</sup> CETA’s anti-derogation clause also appears similar in substance and effect to its TPP counterpart. CETA’s clause “prevents either party from weakening its labour laws and lowering its labour standards in order to facilitate trade or encourage investment.”<sup>134</sup> Notably absent from CETA’s anti-derogation clause, however, is something along the lines of the TPP’s caveat that labor cannot be used as a justification for trade protectionism. Still, the anti-derogation clause was a novel, pro-labor innovation in the TPP that CETA by and large imitates. CETA’s version of an anti-derogation clause is just, arguably, purer. CETA, like the TPP, also carves out a role for civil society. These civil society advisory groups are “institutional structures set up to implement and monitor compliance with the established commitments,” tasked with the duty “to provide views and advice regarding labour issues...creat[ing] a mechanism through which the public can raise concerns about labour issues related to the chapter.”<sup>135</sup> Though these civil society groups function as a possible valuable line of dialogue between labor and trade officials, CETA’s civil society groups are essentially akin to the TPP’s national labor consultative bodies. These bodies are a formalized channel through which activists and interest groups can express themselves with no guarantee of repercussions for their efforts. Regardless, CETA’s civil society mechanism creates “incentives to raise public debate and awareness” on labor issues and “take[s] into account ‘submissions from the public.’”<sup>136</sup> Still, and again similar to the TPP’s counterpart provisions, these civil society components can be “beneficial” and are indeed “interesting and innovative,” but “they remain sectoral, aspirational or optional.”<sup>137</sup> Furthermore, one scholar points out that business is more likely to take advantage of these mechanisms than the public or labor advocates, “thus although the intention to incorporate specific tools for stakeholders to be associated with the CETA’s regulatory cooperation framework is noteworthy, in practice it fails to redraw a fair representation of interest at the bilateral level and civil society’s voice may be diluted...”<sup>138</sup> Lastly, CETA’s labor innovations include its own unique dispute-settlement provisions. CETA’s dispute-settlement mechanism

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<sup>133</sup> GLOB. AFFAIRS CANADA, *supra* note 124.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Angéline Couvreur, *New Generation Regional Trade Agreements and the Precautionary Principle: Focus on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union*, 15 *ASPER REV. INT’L. BUS. & TRADE L.* 265, 290 (2015).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 291.



includes “a review panel, which can issue recommendations.”<sup>139</sup> Still, it remains to be seen how CETA’s dispute-settlement mechanism will function in practice. One scholar, as such, is reserving judgment until “recourse to the dispute settlement mechanisms” occurs.<sup>140</sup>

Though the effectiveness of CETA has yet to be seen, just like a premature evaluation of the TPP’s merits was warranted, CETA’s innovations can still be judged before their implications are fully apparent, especially with the TPP as a point of comparison. Just like the TPP, CETA is highly aspirational, and seeks, in lofty terms, to elevate labor standards through the platform of an FTA. However, a few of the TPP’s shortcomings demonstrate that florid language does not always equate to tangible results for workers in the affected countries.

The clear concern of CETA is to place trade and commercial relations in a broader context insofar as labor is concerned.<sup>141</sup> However, CETA has long aspired to be as ambitious as the TPP. Indeed, it covers 99% of tariffs between the EU and Canada and breaks similar ground for international laborers as the TPP. As we saw with the TPP’s innovations, however, closer scrutiny reveals that for all the TPP’s bluster, its accomplishments were much more impactful on the tariff-reduction front than in the realm of labor protections. In reality, the TPP’s biggest breakthroughs in raising labor standards occurred with its side-deals with Brunei, Malaysia, and Vietnam. However, CETA might even espouse more pride in Western labor values than the TPP. CETA provides even more public participation than the U.S.-led approach as exemplified by the TPP.<sup>142</sup> The TPP’s nobler aspirations are framed as raising standards for workers across the Pacific Rim and in the United States.<sup>143</sup> CETA, on the other hand, speaks of striving to export the shared values of the EU and Canada through increased trade in a manner that includes public participation in the development of labor laws.<sup>144</sup> With the withdrawal of the U.S. from international trade cooperation and the abandonment of its long-held liberal trade and foreign policy consensus, Canada and the EU appear especially eager to assume the leadership role for the West in setting the trade agenda, and international labor policy. In light of the Chinese threat to these progressive labor values, these leadership goals appear especially noble. Just as with the TPP, dollars and cents benefits promise to accrue for the parties involved. This is especially true for Canada—with FTAs facing “headwinds” globally, the country stands to gain preference for its exports in relation to

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<sup>139</sup> GLOB. AFFAIRS CANADA, *supra* note 124.

<sup>140</sup> Couvreur, *supra* note 136, at 292.

<sup>141</sup> Timothy Lyons, *Brexit: Negotiating to Resist the Export of EU Tax Law and Policy*, 4 B.T.R. 379, 382 (2016).

<sup>142</sup> Tham & Ewing, *supra* note 44, at 384.

<sup>143</sup> *TPP: Made in America*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf>.

<sup>144</sup> Tham & Ewing, *supra* note 44, at 384.

other states.<sup>145</sup> In fact, after analyzing the opportunity costs to Canada of not ratifying CETA, one Canadian trade scholar implored his government: “[S]eal the deal on CETA. This is important both for the direct benefits of the deal but also in positioning Canada for a future TTIP of whatever level of ambition.”<sup>146</sup>

One major source of skepticism that arose with the TPP regarded how properly its labor chapter could be administered. Given the fragmented nature of the EU and the autonomy of Canada’s provinces, CETA has inspired similar skepticism regarding how well the parties can actually administer it. CETA seeks to remedy these concerns with institutional compliance monitoring.<sup>147</sup> Indeed, CETA’s institutional compliance monitoring does appear to cover many of the TPP’s compliance blind spots.

Still, doubts surrounding whether CETA has teeth arise from how the EU and Canada’s respective governments are structured. A German advisory opinion on CETA warned that only EU member states, not the EU, can ensure compliance with CETA since the EU does not have exclusive competence over its member states’ compliance with the ILO.<sup>148</sup> German skepticism, as the EU’s largest benefactor, casts doubts on the agreement’s effectiveness in the labor domain. Furthermore, though Canada is itself as compliant with the ILO as Europe, it has its own decentralization complications to address. In Canada, labor law is a matter of provincial jurisdiction.<sup>149</sup> Though Prime Minister Trudeau was successful at the onset in securing each province’s ratification of CETA’s labor requirements, the provinces themselves possess the prerogative to disobey CETA’s labor provisions, or withdraw their participation. It is foreseeable, therefore, that a future populist government in one of Canada’s provinces could renege on the agreement. Indeed, not all of Canada shares Prime Minister Trudeau’s globalist outlook, and the concerns of Ottawa naturally do not always line up with the concerns of Alberta, Saskatchewan, or Manitoba. Scholars have already expressed concern that “provincial ‘grievances’ could pose [a] roadblock for CETA.”<sup>150</sup>

Just as with the TPP, and really with any FTA, concerns about inequalities in CETA also threatened to scuttle the deal. The largest controversy took place

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<sup>145</sup> Dan Ciuriak, *Canada’s Trade Agenda: Facing Headwinds*, 4 POL’Y: CAN. POL. & PUB. POL’Y 16, 18 (2016).

<sup>146</sup> *Id.* at 19.

<sup>147</sup> GLOB. AFFAIRS CANADA, *supra* note 124, at 50.

<sup>148</sup> Tobias Dolle & Bruno G. Simoes, *Mixed Feelings about “Mixed Agreements” and CETA’s Provisional Application*, 7 EUR. J. RISK REG. 617, 618-19 (2016).

<sup>149</sup> BRIAN W. BURKETT, JOHN D.R. CRAIG & CHRISTOPHER D. PIGOTT, EMPLOYMENT AND EMPLOYEE BENEFITS IN CANADA: OVERVIEW § 1 (2016), Westlaw 6-503-1258.

<sup>150</sup> Jeff Lagerquist, *Provincial ‘Grievances’ Could Pose Roadblock for CETA*, *Says Expert*, CTV NEWS (Oct. 30, 2016), <http://www.ctvnews.ca/business/provincial-grievances-could-pose-roadblock-for-ceta-says-expert-1.3138408>.

within Belgium, in the assembly of the French-speaking community of Wallonia.<sup>151</sup> There, specifically in response to populist concerns over CETA's impact on labor, the deal was held up on behalf of the entire EU for a protracted amount of time.<sup>152</sup> Wallonia, specifically, was "nervous about exposing its agricultural sector to competition from Canadian farmers."<sup>153</sup> Ultimately, Belgian Prime Minister Charles Michel forged a compromise with the Walloon Assembly, but concerns about inequality from European civil society, inspired by Wallonia's successes, persisted.<sup>154</sup> One activist lamented that "[t]he use of investment tribunals allows companies to sue governments for lost profits if they introduce laws to protect people or the environment," and in Brussels, a "rowdy" protest of CETA followed the announcement of the Belgian compromise.<sup>155</sup>

Therefore, in deciding whether CETA's labor provisions will ultimately be adhered to, or if they are just pretty words without teeth, the crisis in the Walloon Assembly is as telling as the provincial jurisdiction issue in Canada. Thus far, CETA has been a relative success in a world growing increasingly averse to free trade agreements. Still, time will tell and controversies have already arisen in Germany and Austria since CETA was effected.<sup>156</sup> As previously mentioned, Canada must also reckon with its own provincial jurisdiction issue, and "[b]ecause CETA crosses into provincial jurisdictions ... provincial legislation needs to pass too."<sup>157</sup> Although CETA was spared a "Wallonia-like standoff"<sup>158</sup> from the Canadian provinces, Canada's unique federalist system, lovingly referred to by the *Economist* in the trade context as "the great provincial obstacle course," still poses potential threats to the agreement.<sup>159</sup> Although Canada is arguably moving towards a more centralized system insofar as trade is concerned, still, "[g]iven that the federal government has sole jurisdiction over international treaties within the Canadian federal system, the provinces are in fact at liberty to ignore CETA, in parts or in its entirety, without facing any of the sanctions included in the

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<sup>151</sup> Sweet & Maxwell, *Public Disquiet and Treaty-Making*, 42 E.L. REV. 1 (2017).

<sup>152</sup> *Id.*

<sup>153</sup> Jennifer Rankin, *Belgian politicians drop opposition to EU-Canada Trade Deal*, THE GUARDIAN (Oct. 27, 2016), <https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Sweet & Maxwell, *supra* note 151, at 1.

<sup>157</sup> Brent Patterson, *Five Major Obstacles to the Ratification & Implementation of CETA*, THE COUNCIL OF CANADIANS (Oct. 31, 2016), <https://canadians.org/blog/five-major-obstacles-ratification-implementation-ceta>.

<sup>158</sup> *Id.*

<sup>159</sup> *The Great Provincial Obstacle Course*, THE ECONOMIST (July 23, 2016), <https://www.economist.com/the-americas/2016/07/23/the-great-provincial-obstacle-course>.

agreement ....”<sup>160</sup> Therefore, the very structure of Canada’s government threatens the possibility of CETA not being adhered to in the future. Though Prime Minister Trudeau’s immense legwork secured CETA at the provincial level for the time being, “future political pressures or the arrival of a new government in power with different political interests could lead to parts of CETA not being implemented by the provinces.”<sup>161</sup> However, as Canada opens its borders to liberalized trade, chinks in its federalist system have begun to emerge. CETA, especially, has exposed Canada’s “patchwork” system as “a bit ridiculous,” according to a former premier of Newfoundland and Labrador.<sup>162</sup> Therefore, though Canada’s federalist system potentially poses a future existential threat to CETA, the deal also has the potential to reshape internal Canadian politics, perhaps making the agreement more likely to be adhered to than the TPP was, with its bevy of soft requirements.

Lastly, the attitude of signatories to CETA, though never rising to the level of shaping an election as important as the U.S. presidential race in 2016, has been a perpetual thorn in the side of the deal’s proponents. In addition to the controversy in the Walloon Assembly, opposition has flared up elsewhere in the EU too. “Public disquiet” surrounding CETA raised “considerable political and legal problems for both the European Union and national capitals...[and the signing of CETA] was by no means a foregone conclusion in Germany and Austria ....”<sup>163</sup> Just as in the U.S. in 2016, Europe was undergoing its own populist moment. Concerns about national autonomy, swirling populist rhetoric, and “fundamental questions about the coexistence of the [E.U.] and the Member States and the extent to which the latter may participate in what the former does in the world” did not end up stymying the deal, but “the public disquiet...about the EU’s trade deals is unlikely to be sated by legal ingenuity.”<sup>164</sup> Still, tellingly, although Brexit perhaps represented the pinnacle of European populism, CETA itself has remained popular with Prime Minister Theresa May and the UK’s “hard Brexiteers.”<sup>165</sup> As the UK renegotiates trade deals from outside the EU, the Tories are “convinced that Ceta represents a perfect model of corporate-led trade which,

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<sup>160</sup> Patrick Fafard & Patrick Leblond, *Canadian Federalism and International Trade: A Small Step While Waiting for the Giant Leap*, in CANADA: THE STATE OF THE FEDERATION, 2011: THE CHANGING FEDERAL ENVIRONMENT: REBALANCING ROLES? 153, 163 (Nadia Verrelli ed., 2014).

<sup>161</sup> *Id.*

<sup>162</sup> Fafard & Leblond, *supra* note 160.

<sup>163</sup> Sweet & Maxwell, *supra* note 151, at 1.

<sup>164</sup> *Id.* at 2.

<sup>165</sup> Nick Dearden, *Theresa May’s Celebration of Ceta is Telling of the Type of Brexit We are Heading Toward*, INDEPENDENT (Sept. 20, 2017), <http://www.independent.co.uk/voices/ceta-uk-canada-trade-deal-theresa-may-environment-food-safety-worker-rights-justin-trudeau-a7957696.html>.

without the shackles of the EU and with not even a whiff of democratic control over trade policy, can replace Britain's relationship with the EU post-Brexit."<sup>166</sup> The EU's chief negotiator for Brexit, Michel Barnier, has confirmed, in line with British wishes, that a "future UK-EU trade relationship will be modelled on the CETA agreement."<sup>167</sup> So, while CETA, par for the course with the FTAs in recent times, engendered its fair share of opposition, unlike with the TPP, leadership in the member states endeavored for its passage, even if "legal ingenuity" was required. Ultimately, the TPP, though fiercely championed by President Obama, could not survive the 2016 presidential election. CETA, on the other hand, propelled by European and Canadian leaders, was able to withstand "public disquiet." Prime Minister Michel in Belgium, for example, struck a compromise with Wallonia to rescue CETA, just as Prime Minister Trudeau secured the assent of the Canadian provinces before embarking for Europe to sign the deal. When the Obama Administration came to an end, the TPP was left without such an advocate, at least in the United States.

### C. RCEP

RCEP, given its Chinese leadership, stands in stark contrast to the TPP as a Pacific Rim trade deal, and as a counterexample to CETA of how FTAs approach labor. RCEP negotiations have been less transparent than even the TPP, and no deal has been inked yet, so much of the detail available on RCEP is educated conjecture from those knowledgeable of China's approach to trade and international relations. This approach, still, is ripe for contrast with the TPP and CETA and highly relevant in order to draw conclusions on how global trade regimes less dominated by the West will impact laborers across the globe. RCEP, in fact, has always been contextualized by the TPP. It was the TPP that initially "spurred China to push more actively for its own multiparty grouping,"<sup>168</sup> and it was the decline of the TPP and the subsequent void created in the Pacific Rim that breathed new life into RCEP.

RCEP's labor innovations offer more grounds for contrast with the TPP and CETA than the latter two agreements allowed for with each other. For starters, ASEAN agreements tend to be more "shallow" than Western ones.<sup>169</sup> Neither China nor the other RCEP participants are "likely to push for ... making binding any significant ... labour commitments."<sup>170</sup> Though RCEP's participants have touted the deal as a "modern, comprehensive, high-quality

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<sup>166</sup> *Id.*

<sup>167</sup> Greg Heffer, *Brexit: What is a Canada-style trade deal?*, SKY NEWS (Oct. 24, 2017), <https://news.sky.com/story/brexit-what-is-a-canada-style-trade-deal-11096397>.

<sup>168</sup> Lewis, *supra* note 100, at 362.

<sup>169</sup> *Id.* at 368.

<sup>170</sup> *Id.*

and mutually beneficial economic partnership agreement establishing an open trade and investment environment in the region,” China’s priorities merely have never appeared to encompass labor protections.<sup>171</sup> Though the actual benefits of the TPP and CETA for labor are disputed, those deals, unlike RCEP, at least pay heavy lip service to the concerns of labor. RCEP’s paramount purpose, perhaps more transparent in a sense than the TPP and CETA which shrouded their deals in high-minded language about labor and environmental protections, is to lower tariffs and non-tariff barriers (NTBs) among its signatories.<sup>172</sup> In accomplishing this aim, unlike the TPP or CETA, “the RCEP wouldn’t require its members to take steps to liberalize their economies, protect labor rights and environmental standards and protect intellectual property.”<sup>173</sup> One novel focus of RCEP is its treatment of liberalization of services. The RCEP’s Guiding Principles and Objectives for Negotiating the RCEP states, “The RCEP will be comprehensive, of high quality and substantially eliminate restrictions and/or discriminatory measures with respect to trade in services between the RCEP participating countries.”<sup>174</sup>

Concerning labor protections, RCEP is inarguably a less beneficial agreement than either the TPP or CETA. However, the very absence of labor protections in RCEP, and its strict, and still similarly ambitious, focus on liberalizing trade, holds some appeal for many signatories. One scholar believes that “the RCEP’s lower level of ambition may be more appealing to developing countries that do not wish to commit to . . . binding environmental and labour standards, and other features of the TPP.”<sup>175</sup> Furthermore, in terms of membership alone, RCEP offers access to East Asia to an extent the TPP did not, with Japan being the only signatory to the agreement among the three largest economies in the region.<sup>176</sup> Therefore, though the merits of RCEP’s innovations on labor can hardly be compared to the expansive labor chapters of both the TPP and CETA, because RCEP virtually leaves the issue unaddressed, it can be concluded that RCEP’s very lack of binding labor standards might be viewed as an asset by potential member states. However, with the U.S. now missing from the TPP, RCEP is the most ambitious multilateral FTA pending in the Pacific. Countries seeking access to the region no longer have to choose between joining the TPP or RCEP. The

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<sup>171</sup> *Id.*

<sup>172</sup> Enda Curran & Laurence Arnold, *China’s Free-Trade Opening in a World Without TPP: Quick Take Q&A*, BLOOMBERG (Nov. 22, 2016), <https://www.bloomberg.com/news/articles/2016-11-22/china-s-free-trade-opening-in-a-world-without-tpp-quicktake-q-a>.

<sup>173</sup> *Id.*

<sup>174</sup> R.V. Anuradha, *Liberalization of Trade in Services under RCEP: Mapping the Key Issues*, 8 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 401, 406 (2013).

<sup>175</sup> Lewis, *supra* note 100, at 369.

<sup>176</sup> *Id.*

Chinese approach to labor in FTAs is now the dominant approach in the Asia Pacific, comparable possibly only to the CPTPP.

How properly RCEP can be administered hinges on China's effectiveness in administering the deal. For starters, RCEP's virtual dearth of labor commitments leaves little to enforce on that front, whereas the TPP and CETA both feature ambitious labor protections that naturally create doubts about how effectively they can be administered. Otherwise, unlike the TPP, RCEP will have to proceed without U.S.-led enforcement, a feature of most large, multilateral trade deals since the GATT. Despite vast differences in the memberships of the TPP and RCEP, "their membership differ[ed] importantly with respect to the presence of China in the RCEP but not the TPP, and the U.S. in the TPP but not the RCEP."<sup>177</sup> How effectively China can occupy the U.S.'s traditional enforcement role remains to be seen.

Though uncertainty and speculated inequalities still dogged the TPP, and have at times threatened CETA, RCEP is an FTA without any semblance of labor standards binding its signatories. Both the TPP and CETA were frequent targets of labor and environmentalist groups in North America and Europe, but both agreements at least featured extensive labor clauses, many of which were new additions to the typical language of labor clauses under the U.S.-led approach. In the twentieth century, the U.S., Canada, and Europe saw immense progress in the realm of labor rights, which is now codified in FTAs dominated by the U.S. or Europe. As discussed previously, China has yet to achieve many of these same advances, and RCEP, with regard to labor, is a reflection of domestic affairs in China. Surely, workers are better off when the U.S. is authoring the labor rules that countries must abide by in order to access the free trade benefits of a new FTA. This might not be of concern to the isolationist populists that swept President Trump into office, but it is worth wondering whether the newfound importance of RCEP was an unintended consequence of the backlash to the TPP that was initiated by American populists that were supportive of Senator Sanders's positions on trade.

Prior to the downfall of the American-led TPP, the biggest concern for RCEP was its overlap with the TPP. Such was the state of affairs in 2013, when the TPP had more momentum than a newly-conceived RCEP:

Of course there is nothing to stop countries from seeking to join both the TPP and RCEP, and several countries in ASEAN seem inclined to do so by seeking to join the TPP. But particularly for countries with limited human and financial resources for negotiations and those outside the Asia-Pacific,

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<sup>177</sup> *Id.* at 375.

it will probably be the case that countries will seek to join one or the other rather than both.<sup>178</sup>

For RCEP, now, this problem of interregional competition no longer exists. The CPTPP exists, but without the United States, it is still important but smaller in size. Henceforth, RCEP's negotiators do not have to worry that a prospective member will depart for the TPP. In negotiating FTAs, trade ministers must worry about whether the deal will be adhered to by its signatories, but another issue is the deal's potential for "socializing" all countries that participate in the region. In that sense, both the TPP and RCEP can be viewed "as a dominant state's attempt to create its own regional framework where it can exercise some exclusive influence."<sup>179</sup> One scholar theorizes that when evaluating an FTA for its ability to socialize other countries, "what is politically more important in understanding group formation is exclusion ... because the exclusion of rival states is necessary for countries seeking to assume leadership."<sup>180</sup> RCEP, notably, excludes the United States, while the TPP, notably, excluded China. If China were to have joined a dominant TPP, or if, in the future, the U.S. is enticed into joining RCEP, both parties would be considered latecomers to the respective agreements. Latecomers are disadvantaged by "accession conditionality," which means they either must "accept the agenda and rules set by incumbents," "satisfy additional requirements that were not required to incumbents," or both.<sup>181</sup> A prime motivation of the Obama Administration in forging ahead with the TPP was to preempt China in the region, in part, ensuring that trade agreements in Asia included protections for labor. As a matter of strategy, therefore, the "'TPP [was] a club for anyone but China ... China [would have been] obliged to mend its errant' behavior if it want[ed] to become a member."<sup>182</sup> Now, with the U.S.'s TPP gambit foiled by domestic politics, China faces a similar opportunity to the one the U.S. once had. From its inception, China's strategy was "to establish a regional framework that does not include the US so it can hold a dominant position ... an attempt to establish an alternative trade forum to TPP, one that emphasizes flexibility for developing countries and that is less ambitious than TPP."<sup>183</sup> Instead of the U.S. socializing China, as was the ultimate aim of the Obama Administration, it may now be China socializing the U.S. by establishing the trade rules, or lack thereof, in Asia with regard to labor, with the U.S. and the former TPP

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<sup>178</sup> *Id.* at 369.

<sup>179</sup> Shintaro Hamanaka, *TPP Versus RCEP: Control of Membership and Agenda Setting*, 18 J. OF EAST ASIAN ECON. INTEGRATION 163, 164 (2014).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 168.

<sup>182</sup> *Id.* at 178.

<sup>183</sup> *Id.*



countries arriving at the RCEP negotiating table as latecomers, if at all. Furthermore, with the failure of the WTO's Doha Round, the TPP and RCEP became the "mega-trade agreements" that were likely to set trade standards for the foreseeable future.<sup>184</sup> With the collapse of the Doha Round and the TPP downgraded in scope and importance, the burden of setting global trade standards falls to RCEP as the remaining "mega-trade agreement."

Lastly, the attitudes of signatories to RCEP has made for a less newsworthy item, at least, than the attitudes of the countries involved in the TPP and CETA. We know that many countries, such as India, were drawn to RCEP's lower level of ambition.<sup>185</sup> Furthermore, with the TPP no longer the "mega-trade agreement" it once was, countries hungry for liberalized market access in the Pacific Rim have nowhere else to turn but RCEP, and beggars cannot be choosers. South Korea, as an example, was tasked at one point with choosing whether to join the TPP, RCEP, or both. In 2013, Korea, "[a]s one of the world's most open and agile economies" and potentially reaping the rewards of "a catalytic role in shaping outcomes ... as a first mover and valued partner in regional agreements," dutifully explored its options as a prospective influencer in both agreements.<sup>186</sup> One scholar in Asia-Pacific studies at Brandeis University advocated for Korea joining both RCEP and the TPP, "helping to shape both tracks in complementary ways."<sup>187</sup> This same scholar viewed Korea as having an eventually significant role in the consolidation of the TPP and RCEP, after tensions between Washington and Beijing died down a bit.<sup>188</sup> Now, this convergence is impossible, and Korea remains a member of RCEP, reaping the benefits of a Chinese-led FTA in the Asia-Pacific. Regardless, RCEP has still yet to succeed and it still might not take advantage of the TPP's decline on account of infighting, particularly stemming from India.<sup>189</sup> The Indian government's exceptions to RCEP stem from its longstanding trade-protectionism: "Just like in the World Trade Organization (WTO), India has been very recalcitrant on market access opening ... India is very loathe [sic] to open its markets to anyone, even its friends and allies."<sup>190</sup> Civil society objections to RCEP, however, have also emerged out of India. With a similar litany of complaints levied against most FTAs, activists in Hyderabad recently rallied forcefully in the streets against RCEP, releasing a

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<sup>184</sup> David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L. & COMP. L. 57, 58 (2016).

<sup>185</sup> *Id.* at 64.

<sup>186</sup> Peter A. Petri, *The New Landscape of Trade Policy and Korea's Choices*, 17 J. EAST ASIAN ECON. INTEGRATION 333, 334 (2013).

<sup>187</sup> *Id.* at 337.

<sup>188</sup> *Id.* at 354.

<sup>189</sup> Nyshka Chandran, *China-Backed Trade Deal May Not Gain from TPP's Loss. Blame India*, CNBC (Jan. 12, 2017, 8:14 PM), <https://www.cnbc.com/2017/01/12/trumps-wins-puts-tpp-in-danger-but-china-backed-trade-deal-may-not-gain-because-of-india.html>.

<sup>190</sup> *Id.*

statement branding it “a reinforcement of the destructive development model that the existing free trade agreements and the policies of liberalisation, privatisation and globalisation have inflicted upon the world’s poor.”<sup>191</sup> Therefore, while RCEP appeals to countries like India, in contrast to agreements like the TPP, because of its low ambition, New Delhi has still managed to hold up the completion of the deal. Likewise, though not as notorious as the TPP, RCEP has, like any other FTA, still managed to stoke the ire of labor activists.

#### IV. CONCLUSION

When President Trump withdrew the U.S. from the TPP, he promised that his decision was “a great thing for the American worker.”<sup>192</sup> But was that actually the case then, or has it proven to be the case since? And what about the non-American worker? Labor groups in the U.S. alleged that jobs would shift overseas as a result of the TPP, but the companies laborers work for also stood to gain in many ways from the agreement. Now they stand to potentially lose their competitive advantage, and tangibly they lose access to new markets and slashed tariffs. Naturally, this should have an impact on the workers they employ stateside. The most bitter irony here is likely the damage inflicted on the Heartland, the agricultural breadbasket that swept President Trump into power, the atrophying feedlots and grain mills serving as a brutal reminder to a populace hoodwinked out of their own economic prosperity. For global laborers, with the TPP reduced to the CPTPP, the less protective RCEP has an opportunity to rewrite global trade rules. Though the CPTPP is still significant, representing thirteen percent of global trade, rather than forty percent of the world’s economic output like the TPP, its diminished scale likely lacks the stature to preempt RCEP. RCEP, on the heels of its sixth ministerial meeting, is likely to be inked by the end of 2018 and will encompass more than twice the economic output of the CPTPP. The U.S. was two-thirds of the TPP<sup>193</sup>, and Prime Minister Shinzo Abe of Japan, a key player in the resurgent CPTPP, has said a “TPP without the US – and its

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<sup>191</sup> *Activists Protest in Hyderabad Against Impact of RCEP on Women*, THE HINDU BUSINESS LINE (July 24, 2017), <http://www.thehindubusinessline.com/news/national/activists-protest-in-hyderabad-against-impact-of-rcep-on-women/article9786732.ece>.

<sup>192</sup> Nicholas Loffredo, *Trump Says Withdrawal from TPP a ‘Great Thing for the American Worker’*, NEWSWEEK (Jan. 23, 2017), <http://www.newsweek.com/trump-withdrawal-tpp-great-thing-american-worker-547109>.

<sup>193</sup> Motoko Rich, *TPP, the Trade Deal Trump Killed, Is Back in Talks Without U.S.*, N.Y. TIMES (Jul. 14, 2017), <https://www.nytimes.com/2017/07/14/business/trans-pacific-partnership-trade-japan-china-globalization.html>.

market of 250 million consumers – would be ‘meaningless.’”<sup>194</sup> In a parallel universe, China would have eventually had to join the TPP to reap its benefits, and President Obama’s ultimate mission would have been fulfilled. China can now dictate the terms of trade in the Asia-Pacific, whereas once the TPP was the crown jewel of President Obama’s Asia pivot, the mechanism that would force China to “play by the rules that America and our partners set, and not the other way around.”<sup>195</sup> For labor, this meant at least the familiar standard from U.S.-led FTAs, with perhaps even some newer innovations. Now, with RCEP, the biggest deal among potential FTAs features no binding labor protections and a benefactor in China with insufficient labor protections even within their own borders. RCEP, accordingly, focuses exclusively on tariff reduction, with no built-in binding labor standards. China is the likely successor to the void left by the U.S., with President Xi Jinping announcing recently “\$2 trillion of outbound investment ... sound[ing] like a twenty-first century Chinese version of a twentieth-century American president ....”<sup>196</sup> While the West remains ambitious on the labor front, not much is at stake for global labor in a deal inked between Canada and the EU, both entities entirely compliant with the ILO. The U.S. might also come crawling back to the CPTPP<sup>197</sup>, but this time as a latecomer having abdicated its leadership role on international trade. The true successor to the TPP is neither the CPTPP nor CETA but RCEP, entirely unambitious in its labor innovations by design, but exceedingly ambitious in its geopolitical designs.

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<sup>194</sup> *TPP: What is it and Why Does it Matter?*, BBC (Jan. 23, 2017), <http://www.bbc.com/news/business-32498715>.

<sup>195</sup> Barack Obama, Opinion, *President Obama: The TPP Would let America, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), [https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d\\_story.html?utm\\_term=.5778f617e558](https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.5778f617e558).

<sup>196</sup> Alfred W. McCoy, *Beijing’s Bid for Global Power in the Age of Trump*, LE MONDE DIPLOMATIQUE (Aug. 21, 2018), <https://mondediplo.com/openpage/america-first-four-continent>.

<sup>197</sup> Fathin Ungku & Charlotte Greenfield, *Trump Says U.S. Could Rejoin TPP if Deal Improved. How Hard Would It Be?*, REUTERS (Apr. 16, 2018), <https://www.reuters.com/article/us-usa-trade-china-tpp-explainer/trump-says-us-could-rejoin-tpp-if-deal-improved-how-hard-would-it-be-idUSKBN1HN0TW>.