

# Trade and Labour Standards

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# Trade and Labour Standards:

*New Trends and Challenges*

Series Editors

Tayo Fashoyin and Michele Tiraboschi

Issue Editor

José Luis Gil y Gil

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## PREFACE

JOSÉ LUIS GIL Y GIL

The failure of the Doha Round – along with the impossibility of establishing a multilateral agreement on free trade in the context of the World Trade Organisation (WTO) – have prompted the adoption of mega-regional trade agreements. Mega-regional trade agreements feature four main aspects. Firstly, they are concluded between a group of countries from different regions, e.g. the EU and the U.S. They can be bilateral agreements, such as the Comprehensive Economic and Trade Agreement (CETA), the EU-Japan Economic Partnership Agreement (EPA) or the Transatlantic Trade and Investment Partnership (TTIP), or multilateral agreements, e.g. Trans-Pacific Partnership (TPP). Secondly, they have broad contents. Besides traditional provisions concerning the reduction of customs duties and non-tariff barriers affecting the trade of goods and services, they regulate other aspects, which are deemed to be relevant to or even fundamental for trade. Examples of these are the protection of intellectual and industrial property, investments, public procurement, competition and sustainable development. Thirdly, they have significant combined economic weight. This way, the EU and the U.S. are one another's largest economic partner. TTIP was intended to facilitate exchanges among two areas that account for half of global GDP, one third of global trade, and a combined market of 800 million consumers. Fourthly, they have a systemic or global impact. They are sufficiently comprehensive and ambitious to influence trade rules and trade flows beyond their scope of application. In this sense, and although its conclusion appears to be unlikely for the time being, TTIP could set a model for future free trade agreements. TTIP might redefine the global economy of the XXI century, either due to the economic and geopolitical challenges with which it would deal or to the complex, ambitious, and innovative character of its terms. In short, mega-regional trade agreements bear much relevance in both economic and geopolitical terms. They are an attempt on the part of major trading powers to exert power through trade. Thus, TTIP aimed to reinforce the traditional links between the U.S. and the European countries, reasserting the prominence of the two “blocks” in

the regulation of global trade, and restoring their key role in commercial relations with the Pacific regions, especially considering that China and India are threatening their hegemony. Mega-regional trade agreements raise a number of issues with respect to their potential effects on the current system of international trade and investment law, among others the consequences on the most-favored nation (MFN) principle, their relation to the multilateral system of the WTO, their democratic legitimacy and their links with existing bilateral investment treaties (BITs).

Mega-regional agreements have stirred controversy. Their conclusion has produced a clash between the founding principles of liberalisation and protectionism, giving rise to competence issues between the European Union and its Member States. Significantly, while TTIP has attracted much criticism, other agreements – i.e. Japan's EPA – were negotiated and concluded almost smoothly. The debate is characterised by ideological and political leanings, as well as by the contradictory character of economic analyses. Opponents object the lack of transparency in negotiations and some controversial aspects in terms of contents, among others regulatory cooperation or the Investor-State Dispute Settlement (ISDS) mechanism. They consider that the agreements constitute a threat to democracy, jeopardize the environment, reduce consumers' protection standards, affect workers and belittle the authority of national governments towards multinationals. Opponents argue in favour of measures such as trade protectionism and the restoration of a type of sovereignty that does not exist. For this reason, they mingle with radical leftists or extreme-right groups, fearing and rejecting globalisation. Resistance to mega-regional trade agreements is mostly fuelled by anti-establishment movements that oppose globalisation and ride the wave of malcontent of those who were negatively affected by globalisation and the economic crisis. They leverage the political power of evoking fear and put forward chimerical and inadequate measures – e.g. protectionism – as a response to real problems: a Darwinist and immoral form of capitalism which accumulates profits and shares losses, and unjust and unbalanced globalisation, which is effective in economic and financial terms but it leaves much to be desired on tax and social issues, as it does not safeguard the weak and excluded persons. At times, research is marked by rhetoric and foresees apocalyptic scenarios. In other words, research in this area is rarely unbiased, as it is tainted with prejudice and influenced by individual feelings and convictions. Analyses are fraught with ideological preconceptions, and fuelled by propaganda, post-truth assertions and “pre-understanding,” to use hermeneutical terminology. Importantly – and depending on the methodology implemented – economic research has led

to different outcomes in relation to the negative and positive impact of trade liberalisation. So, the impression is that proponents and detractors of these agreements exaggerate its pros and cons, to such an extent that forming an unprejudiced, fact-based idea turns out to be complicated.

Both the EU and the U.S. started to include labour provisions in their free trade agreements in the mid-1990s. Mega-regional trade agreements give increasing attention to social aspects and contain labour provisions organised in specific chapters or dealt with together with other issues, for example development and the environment. Although scholarly work has focused for years on the controversial “social clause”, it might be worth carrying out a detailed, legal analysis of the labour standards contained in the mega-regional trade agreements adopted and negotiated by the EU and the U.S. The topic bears relevance and brings about much controversy, in that it is influenced by political convictions and election results. For this reason, it poses one of the most significant challenges to international labour law. The inclusion of labour provisions in free trade agreements can prevent unfair competition and a race to the bottom. The move to take the 1998 ILO Declaration as a model raises a number of questions. Nevertheless, it also plays a significant role in the fragmentation of international law, as it contributes to harmonising trade and social legal systems in place at the international level. There is no doubt that mega-regional trade agreements come with some controversial aspects. But this does not mean that all chapters contain detrimental provisions which might increase unemployment rates and reduce protection standards in relation to employment and the environment. While permeated by the neoliberal ideas that marked the last decades, mega-regional trade agreements can also be viewed as ambitious and well-balanced agreements that might strengthen economic relations, reassert the social model based on a free-market economy and promote social justice and sustainable development. Despite the foreboding scenario depicted by many opposing free trade agreements, free trade can benefit workers. Although mega-regional trade agreements (e.g. TTIP) might be improved as far as drafting and contents are concerned, it is a much better alternative than the initiatives put forward by its detractors, which are frequently based on protectionism and demagoguery. For this reason, it is important to escape prejudice when assessing the positive and negative effects of the labour and sustainable development issues.

The present volume, which I have the honour to present, examines the social dimension of three of the most relevant mega-regional trade agreements. Tatsiana Ushakova looks at TTP, Vincenzo Ferrante deals with CETA, while Philippe Auvergnon and I examine TTIP. In their

research, the contributors point out that, although important, trade liberalisation should be accompanied by progress in the social and labour field. Trade liberalisation is a means, but not an end in itself. In this sense, and according to the agreement establishing the WTO, the goal of global trade is to increase the quality of life of people and not to maximise trade in itself. In an increasingly globalized world, trade should be compatible with sustainable development and ensure a modicum of social justice. Globalisation is clearly unstoppable. As a Spanish proverb says, “countryside cannot be closed off behind doors”. It is not possible to build walls that limit the flows of capital, investments, ideas and business on the Internet. Today, both the national and the international market has a global character. Globalisation could help us pursue a utopian world without barriers, not only in relation to capital but also to businesses, services, consumers and workers. If we allow that globalisation cannot be reversed but represents an opportunity to achieve universal solidarity, the debate should be focused on how to correct the course – which at times has moved in the wrong direction – in such a way that globalisation, sustainable development and the protection of workers’ rights can co-exist. Fair governance and legal regulation are needed so that globalisation can contribute to sustainable development and be provided with a social dimension. Globalisation and the respect for human rights at work should go hand in hand; this is required of national governments and multinationals alike, the latter being the leading players in the global market. To sum up, it is necessary to govern, and to create a new deal for, globalisation. In the last section, Jo Carby-Hall analyses a relevant topic, the practical effects of which might be unforeseeable, viz. Brexit. While discussing this process, feelings and short-sighted political evaluations often prevail over reasoning and law. Against the background of populist movements and economic protectionism, Brexit can be seen as a further manifestation of the clash between the economic priorities of a liberal society, the social needs of the most vulnerable groups and the resentment of those who feel they have been penalized by unstoppable globalization. Yet Brexit questions the EU foundations and provides a one-time opportunity to achieve fairer and more inclusive social inclusion. The volume collects the papers presented at the international workshop *La dimensión social de los acuerdos comerciales de nueva generación* (The social dimension of new-generation trade agreements in English) which took place on 16 December 2016 at the Law Faculty of the University of Alcalá (Spain). The event is part of the research project no. DER2013-47698-R titled *Comercio y justicia social en un mundo globalizado, con especial referencia a los intereses de España* (Trade and Social Justice in

a globalised world, with a focus on Spain's interests in English) – of which I am the main researcher – that received funding by Spain's Ministry of Economy and Competitiveness from 1 January 2014 through 31 December 2016. I wish to thank the authors for their participation in the workshop and for having contributed this volume with high-quality scientific papers. I also want to express my gratitude to the Association for International and Comparative Studies in the field of Labour Law and Industrial Relations (ADAPT) – especially Michele Tiraboschi, Lavinia Serrani and Pietro Manzella – and to Cambridge Scholars Publishing, for including this work in the renowned *ADAPT Labour Studies Book-Series*.



# THE TRANS-PACIFIC PARTNERSHIP LABOUR CHAPTER: A NEW PARADIGM OF THE SOCIAL CLAUSE?

TATSIANA USHAKOVA<sup>1</sup>

## **Introductory Remarks: TPP as a New-generation Commercial Agreement**

A growing debate on “megaregional” agreements has been marking the last ten years. Indeed, the negotiation processes characterising the conclusion of these agreements have been widely discussed both in the press and in academic literature, particularly in relation to their lack of transparency.<sup>2</sup>

It seems that the confidentiality accompanying the negotiation of the Trans-Pacific Partnership (hereafter: TPP) and the absence of open dialogue have played a key role in the failure of the Obama Administration to ratify this agreement. However, it is certainly true that in this sort of processes the last say lies on an economic argument coming at a politically critical time. Due to this unsuccessful result, the analysis of the TPP Chapter on Labour acquires both a theoretical character, as it is not yet possible to appreciate its practical impact on State Parties, and a contextual character, if its “megaregional” dimension is considered.

One way to examine these processes entails making reference to the annual reports on investment issued by the United Nations Conference on Trade and Development (UNCTAD).<sup>3</sup> *Inter alia*, these reports provide

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<sup>1</sup> Translation from Spanish by Pietro Manzella (pietro.manzella@adapt.it)

<sup>2</sup> Among others, see BBC News, *TPP: What is it and why does it matter?* 22 November 2016, <http://www.bbc.com/news/business-32498715> (accessed on 26 November 2016).

<sup>3</sup> UNCTAD, *World Investment Report 2014* (hereafter: *WIR 2014*). On this topic, see Ushakova, T., “La dimensión social de los acuerdos de inversiones”, *Nueva Revista Española de Derecho del Trabajo*, Vol. 173 (2015), pp. 81-115, and “La protección de los derechos laborales en los ALC de última generación: modelo de

useful information about how emerging economies have fared during the economic crises that have fostered the creation of “megaregional” groups, such as the Transatlantic Trade and Investment Partnership (hereafter: TTIP), TPP, and the Regional Comprehensive Economic Partnership (hereafter: RCEP).<sup>4</sup> The mentioned groupings have become increasingly prominent in the political debate, although they have received more criticisms than praises, mainly in relation to their implications on State Parties’ national laws and sustainable development.<sup>5</sup> UNCTAD defines megaregional agreements as “broad economic agreements among a group of countries that have a significant combined economic weight”.<sup>6</sup> This definition needs to be complemented by two distinctive traits of these arrangements, namely the participation of countries from different regions and the fact that they cover a large number of topics. For this latter reason, “megaregional agreements” are also referred to as “new-generation agreements.”<sup>7</sup>

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EE.UU. vs. modelo de la UE”, *Revista Internacional CONSINTER de Direito*, año III, nº IV (2017), available at:

<http://editorialjuria.com/revistaconsinter/es/revistas/ano-iii-numero-iv/>.

<sup>4</sup> The 2014 report points out that “[t]he three megaregional integration initiatives currently under negotiation – TTIP, TPP and RCEP – show diverging FDI trends. The United States and the EU, which are negotiating the formation of TTIP, saw their combined share of global FDI inflows cut nearly in half, from 56 per cent pre-crisis to 30 per cent in 2013. In TPP, the declining share of the United States is offset by the expansion of emerging economies in the grouping, helping the aggregate share increase from 24 per cent before 2008 to 32 per cent in 2013. The Regional Comprehensive Economic Partnership (RCEP), which is being negotiated between the 10 ASEAN member States and their 6 free trade agreement (FTA) partners, accounted for more than 20 per cent of global FDI flows in recent years, nearly twice as much as the pre-crisis level”. UNCTAD, *WIR 2014*, p. xvi.

<sup>5</sup> UNCTAD, *WIR 2014*, p. xxiii.

<sup>6</sup> *Ibid.*

<sup>7</sup> Guamán examines some of these processes and gives the notion of “new-generation agreements” a wider meaning which comprises three main aspects: market access, regulatory issues and the production of mandatory rules, which include investor-state dispute settlement mechanisms. See Guamán Hernández, A., *La política comercial de la UE y su impacto en los derechos laborales: una aproximación a los posibles efectos de la firma del TTIP y del CETA*, *Lex Social*, Vol. 6, nº 2, 2016, p. 125. See also *TTIP, el asalto de las multinacionales a la democracia*, Akal, Madrid, 2015, and “Cláusulas laborales en los acuerdos de libre comercio de nueva generación: una especial referencia al contenido laboral del TPP, CETA y TTIP”, *Estudios Financieros, Revista de Trabajo y Seguridad Social*, nº 398 (2016), pp. 83-112.

The opportunity to conclude agreements of this kind has undoubtedly constituted a growing trend in recent years, particularly as an alternative to the international trade system managed by the World Trade Organisation (hereafter: WTO) and following the Doha Development Round, which has caused gridlock and unsatisfactory results. Yet one might note that the increasing number of bilateral free trade agreements has contributed to legal uncertainty, giving more sway to countries with higher economic power and with well-defined business models. Furthermore, the integration systems operating at the regional level are not sufficient enough to carry out their functions and appear to need external openness in the multilateral context. Consequently, the seven megaregional agreements, including the one analysed in this paper, involve a total of 88 countries, either developed or developing ones.<sup>8</sup> If successful, they would make a decisive impact on global trade.

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<sup>8</sup> Among the mega-regional agreements that were discussed in 2014, mention should be made of the Comprehensive Economic and Trade Agreement (CETA), which was concluded between the European Union and Canada, involving 29 countries; the COMESA-EAC-SADC Tripartite Free Trade Agreement, involving 26 countries; the Free Trade Agreement, signed by the European Union and Japan, that affects 29 countries; the Pacific Agreement on Closer Economic Relations (PACER Plus) between Australia, New Zealand and some Pacific islands, that concerns 16 countries; the Trans-Pacific Partnership, involving 12 countries and the Transatlantic Trade and Investment Partnership, between the European Union the US, involving 29 countries. See *WIR 2014*, pp. 118-119, and Ushakova, *Loc. cit.*, op., pp. 110-111.

TPP was concluded after seven years of negotiations and signed in February 2016. See *WIR 2016*, p. 101. However, On January 23, 2017, President Donald Trump took action to permanently withdraw the United States from the Trans-Pacific Partnership, a multinational trade agreement. The President's memorandum regarding withdrawal of the United States from the Trans-Pacific Partnership negotiations and agreement stated: "It is the policy of my Administration to represent the American people and their financial well-being in all negotiations, particularly the American worker, and to create fair and economically beneficial trade deals that serve their interests. Additionally, in order to ensure these outcomes, it is the intention of my Administration to deal directly with individual countries on a one-on-one (or bilateral) basis in negotiating future trade deals. Trade with other nations is, and always will be, of paramount importance to my Administration and to me, as President of the United States. Based on these principles, and by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct you to withdraw the United States as a signatory to the Trans-Pacific Partnership (TPP), to permanently withdraw the United States from TPP negotiations, and to begin pursuing,

## 1. The Peculiarities of TPP

### 1.1. States Parties and Prospective Members

TPP (now it should be referred to as CPTTP<sup>9</sup>) is a free trade agreement (hereafter: FTA) concluded by twelve countries from the Pacific area.<sup>10</sup>

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wherever possible, bilateral trade negotiations to promote American industry, protect American workers, and raise American wages.”

<https://blogs.state.gov/stories/2017/01/23/en/withdrawal-united-states-trans-pacific-partnership-negotiations-and-agreement> (accessed on 27 February 2017). Nevertheless, the eleven State Parties in TPP decided to go on with the process. On 9-10 November 2017 in Da Nang, Viet Nam, Trade Ministers from eleven countries agreed the legal instrument for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

See Ministerial Statement on 11 November at:

<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/trans-pacific-partnership-agreement-tpp/> (accessed on 31 January 2018).

In July 2016, the European Commission put forward a proposal concerning the signature of CETA, which was approved by the European Parliament on 15 February 2017. See:

<http://www.europarl.europa.eu/news/es/news-room/20170209IPR61728/ceta-el-parlamento-europeo-respalda-el-acuerdo-comercial-con-canad%C3%A1> (accessed on 27 February 2017). CETA entered into force provisionally on 21 September 2017. National parliaments in EU countries have still to approve it can take full effect. See: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/> (accessed on 20 October 2017).

The negotiations between the EU and Japan on the Economic Partnership Agreement (the EPA) have been finalized as well. See more information at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684> (accessed on 9 February 2018).

Finally, Negotiations on PACER Plus were concluded in Brisbane on 20 April 2017, and the Agreement was signed in Nuku’alofa in Tonga on 14 June 2017 by Australia, New Zealand and eight Pacific island countries – Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga and Tuvalu. Vanuatu signed in Apia in Samoa on 7 September 2017. See more information at:

<http://dfat.gov.au/trade/agreements/pacer/Pages/pacific-agreement-on-closer-economic-relations-pacer-plus.aspx> (accessed on 10 March 2018).

<sup>9</sup> CPTPP incorporates the original TPP agreement, with the exception of a few technical provisions. These provisions deal with legal issues, such as when the agreement becomes legally binding and how new countries can join it. The Ministers also agreed to cancel the “List of Suspended Provisions” contained in original TPP. In addition, the Ministers agreed to provide a list of four specific aspects contained in the “Items to be finalized by the Date of Signature”. On 23

Although the United States Trade Representative (USTR) website points out that the TPP is a completely new initiative, this is not entirely accurate.<sup>11</sup>

Historically, this arrangement follows on the commitment to extend the Trans-Pacific Strategic Economic Partnership of 3 June 2005, also known as the Trans-Pacific SEP, the P-4 Agreement (or just the P-4), and comprises Brunei, Chile, New Zealand and Singapore.<sup>12</sup> The P-4, in turn, began with negotiations launched by Chile, New Zealand and Singapore at the Asian-Pacific Economic Cooperation (APEC) summit in 2002. This initial agreement was known as the Pacific Three Closer Economic Partnership or P-3 CEP, as Brunei became a member of the Partnership afterwards. Indeed, the goal of TPP four founding members was not that of promoting economic integration but of establishing a standard agreement that for the first time could attract other Pacific countries and could be converted to a free-trade agreement at a later stage.<sup>13</sup> In this light,

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January 2018, the remaining issues were resolved and negotiations for the CPTPP were concluded in Tokyo. The agreement was subsequently signed on 8 March 2018. CPTPP is available at:

<https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf> (accessed on 12 March 2018).

<sup>10</sup> The following countries are members of TPP: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam. Among the books on TPP, see: Lim, C.L. et al. (Eds.), *The Trans-Pacific Partnership. A Quest for a Twenty-first Century Trade Agreement*, Cambridge University Press, Cambridge, 2012; Voon, T. (Ed.), *Trade liberalization and international cooperation: a legal analysis of the Trans-Pacific Partnership Agreement*, Edward Elgar, 2013; Palit, A. (Ed.), *The Trans-Pacific Partnership, China and India: economic and political implications*, Routledge, Taylor & Francis Group, 2014; Bhala, R., *TPP Objectively: Law, Economics, and National Security of History's Largest, Longest Free Trade Agreement*, Carolina Academic Press, 2016, and Singh, H. V. (Ed.), *TPP and India: Implications of Mega-regionals for Developing Economies*, Wisdom Tree, 2016.

<sup>11</sup> Kolsky Lewis, M., "The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?", *Boston College International and Comparative Law Review*, Vol. 34 (2011), pp. 30 ff.

<sup>12</sup> In each signatory country, the P-4 agreement come into force at different times during 2006, and in the same year Brunei enforced the agreement on an experimental basis. See, "The past: origins of the TPP Agreement", in Lim, C. L. et al. (Eds.), *op. cit.*, pp. 19 ff. where certain historical aspects and negotiation processes concerning TPP are discussed.

<sup>13</sup> Kolsky Lewis, *Loc. cit.*, p. 29.

the TPP does play a significant role in that it was the first arrangement entered into by Asian, Pacific and Latin-American countries.

The interest of the U.S. in entering this partnership speeded up negotiations, and from that moment on the agreement was entitled “TPP”.<sup>14</sup> In March 2008, discussions started concerning investments and financial services. In September 2008, the former US President George Bush informed the Congress about his decision to negotiate with the signatories of the P-4 Agreement and with Australia, Peru and Vietnam.<sup>15</sup>

Bush’s successor, Barack Obama, carried forward this plan and considered talks with these governments as a priority during his second presidential term. In 2010, Malaysia was allowed to join negotiations and so were Canada, Japan and Mexico in the following years, thus establishing the current composition of the Partnership.

Prior to signing TPP, other countries made known their interest in joining the project.<sup>16</sup> At first, it was South Korea and Colombia (2014), and then other countries followed, like Costa Rica, Argentina, Bangladesh, Philippines, India, Indonesia, Laos, Taiwan, China<sup>17</sup> and even Russia.<sup>18</sup>

Despite the expression of interest, no other country entered the Partnership.

Unlike most integration processes taking place on the regional level, the one marking TPP does not provide formal requirements as regards adhesion, except for countries that do not agree on its liberalisation

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<sup>14</sup> Kolsky Lewis, *Loc. cit.*, p. 31.

<sup>15</sup> Fergusson, I. F. (Coord.), *Trans-Pacific Partnership (TPP). Negotiations and Issues for Congress*, Congressional Research Service, March 20, 2015, p. 1, available at: <http://www.fas.org/sgp/crs/row/R42694.pdf>.

<sup>16</sup> Fergusson (2015), *op. cit.*, p. 3.

<sup>17</sup> “The conclusion of a TPP agreement in early October has sparked a lively debate in Beijing, with the weight of elite opinion seeming to tilt toward eventual membership; for example, the head of the Chinese-sponsored Asian Infrastructure Investment Bank (AIIB), Jin Liqun, announced his support during a speech in Washington shortly after the TPP deal was announced”. Jin Liqun, “Building Asia’s New Bank,” presentation at The Brookings Institution, Washington, DC, October 21, 2015, in: [http://www.brookings.edu/~media/events/2015/10/21-aiib-jin-liqun/20151021\\_asia\\_infrastructure\\_bank\\_transcript.pdf](http://www.brookings.edu/~media/events/2015/10/21-aiib-jin-liqun/20151021_asia_infrastructure_bank_transcript.pdf). Quoted in: Green, M. J., and Goodman, M. P., “After TPP: the Geopolitics of Asia and the Pacific”, *The Washington Quarterly*, Vol. 38, n° 4 (2016), p. 23.

<sup>18</sup> Krist, W., *Negotiation for a Trans-Pacific Partnership Agreement*, Wilson Center, Pennsylvania, 2012, p. 20.

leanings. The Partnership was envisioned as a living and opened agreement.<sup>19</sup>

However, as all TPP members are also part of APEC, negotiations have particularly concerned these countries, an aspect that has somehow conditioned the involvement of other participants.<sup>20</sup> As pointed out in the preamble, this partnership intends to contribute to the harmonious development and expansion of world trade and provides a catalyst to broader regional and international cooperation and to expand partnerships by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration and laying the foundations for a Free Trade Area of the Asia-Pacific (FTAAP). CPTTP reasserts the aims of the preamble to the Trans-Pacific Partnership.

## 1.2. Objectives

According to the first sentences of the text, TPP's ambitious objectives comprise the implementation of an innovative form of partnership that promotes economic integration, liberalises trade and investment, brings economic growth and social benefits, creates new opportunities for workers and businesses, contributes to raising living standards, benefits consumers, reduces poverty and promotes sustainable growth. In quantitative terms, the twelve TPP countries make up 37.6 per cent of global GDP, 26 per cent of global trade and 11.3 per cent of the global population, that is as much as twice the share of people living in the European Union.<sup>21</sup>

As has been mentioned before, CPTTP fully reasserts the TPP objectives and, in particular, the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving the right to regulate the public interest. CPTTP's

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<sup>19</sup> Fergusson, I. F., McMinimy, M. A., Williams, B. R., *The Trans-Pacific Partnership (TPP): In Brief*, Congressional Research Service, March 19, 2016, Summary.

<sup>20</sup> CPTTP lays down the new Article 5 on accession: "After the date of entry into force of this Agreement, any State or separate customs territory may accede to this Agreement, subject to such terms and conditions as may be agreed between the Parties and that State or separate customs territory".

<sup>21</sup> These statistics are available at Australia's official webpage concerning the TPP agreement, <http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx> (accessed on 15 December 2016). See also: <http://www.bbc.com/news/business-32498715> (accessed on 29 November 2016).

eleven States represent 13.5 per cent of global GDP and 15.2 per cent of global trade, much lower than TPP's share (due to the significant push on the part of the U.S.).<sup>22</sup>

The TPP agreement deals with practically all products and services that are traded between Member States. However, rates differ from one country to the other, so for example those on imports will be abolished at once, while measures promoting liberalisation might take more time than others to establish. Generally speaking, some 18,000 rates will be affected by TPP.<sup>23</sup> For instance, TPP countries voiced the need to eliminate or reduce rates and other restrictions on agricultural and manufacturing products. As stressed by the U.S. Advisory Committee for Trade Policy and Negotiations, the 30 chapters constituting the TPP agreement are not sufficient to take into consideration the interests of all Parties.<sup>24</sup> Despite this, it contains universal values, among others those concerning the protection of working conditions and the environment, that the U.S. has been defending in compliance with its mandate for trade policy and negotiation, as agreed upon in the 2015 *Bipartisan Trade Priority and Accountability Act*.<sup>25</sup>

The TPP moves beyond some of the aspects set down within the context of the World Trade Organisation (WTO) and hopefully might represent the starting point to deal with the obstacles characterising the Doha Development Round, particularly progress with social and environmental clauses. In a similar vein, TPP might positively affect the obligations that the North American Free Trade Agreement's (NAFTA) - also the new one's<sup>26</sup> - members are required to fulfil, since Canada and Mexico are signatory of both agreements.

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<sup>22</sup> Huong, N., "Key differences between TPP and CPTPP", *Vietnam Investment Review*, 7 March 2018, available at: <http://www.vir.com.vn/key-differences-between-cptpp-and-tpp-56904.html> (accessed on 20 March 2018).

<sup>23</sup> See the opening paragraph of the TPP agreement, in *The Trans-Pacific Partnership. Made in America*. <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (accessed on 30 November 2016).

<sup>24</sup> *The Trans-Pacific Partnership Agreement (TPP)*, Report of the Advisory Committee for Trade Policy and Negotiations (ACTPN) to the President, the Congress, and the United States Trade Representative on the TRANS-PACIFIC PARTNERSHIP (TPP), December 3, 2015, p. 4.

<sup>25</sup> 19 USC Ch 27, Sec. 4201, y *The Trans-Pacific Partnership Agreement (TPP)*, Report of the Advisory Committee for Trade Policy and Negotiations (ACTPN) to the President.

<sup>26</sup> On 29 October 2018, Canada agreed to sign on to a trade deal between the United States and Mexico, reviving the three-country North American Free Trade Agreement after more than a year of tortuous negotiations.

After the adoption of the North American Agreement on Labour Cooperation (NAALC), which supplemented NAFTA, though coming into force in 1994, the number of trade agreements containing labour clauses has increased from 4 to 21 in 2005 and to 60 in 2013.<sup>27</sup> In August 2016, this figure rose to 77 and involved 136 countries.<sup>28</sup> Thus the last twenty years<sup>29</sup> have witnessed a growing trend to include labour provisions in trade agreements. Although many of these provisions form part of North-South trade agreements, there is a modest but increasing trend to integrate them into trade agreements among developing and emerging countries (South-South trade agreements).

The U.S. government's efforts to promote its own trade model around the world are met with resistance by other countries and its civil societies, and U.S. civil society organisations. Opponents would counter their stance with three main reasons concerning the global trade order.<sup>30</sup>

Firstly, the entry into force of the TPP agreement and of other bilateral or regional FTAs might somehow divert attention from the main objective, that is that of reaching a global commitment in the framework of the WTO. Secondly, the intensification of trade relations among TPP members would weaken existing regional systems rather than creating a new one. Thirdly, the increasing number of FTAs might paradoxically pose new challenges to international trade, forcing companies to "navigate varying rules and standards associated with different agreements."<sup>31</sup>

Clearly, an awareness of consistency of TPP with other trade agreements exists. In this sense, Chapter I of TPP deals with initial provisions and

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<https://edition.cnn.com/2018/09/30/politics/trump-nafta-canada/index.html>  
(accessed on 15 October 2018).

<sup>27</sup> ILO, *Social Dimensions of Free Trade Agreements*, International Institute for Labour Studies, Geneva, 2013, p. 1, and Agustí-Panareda, J., Ebert, F.Ch., and LeClercq, D., *Social Dimensions of Free Trade Agreements. Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System*, International Labour Office, Geneva, 2014, p. 7.

<sup>28</sup> OIT, *Cláusulas laborales en los acuerdos comerciales: tendencias recientes y pertinencia para la OIT*, Oficina Internacional del Trabajo, Ginebra, 2016, párr. 4. In this document, a summary is provided of the ILO's most recent research on the increase of trade agreements including labour regulations. See also ILO, *Assessment of labour provisions in trade and investment arrangements*, International Labour Office, Geneva, 2016, p. 1.

<sup>29</sup> ILS estimates based on the WTO Regional Trade Agreements Information System and information from national governments and treaty bodies. ILO, *Social Dimensions of Free Trade Agreements*, p. 19.

<sup>30</sup> Fergusson, *op. cit.*, p. 7.

<sup>31</sup> *Ibid.*

general definitions and also establishes links with some other treaties. In particular, the establishment of a free trade area shall be done in compliance with Article XXIV of the General Agreement on Tariffs and Trade (GATT)<sup>32</sup> of 1994 and Article V of the General Agreement on Trade in Services (GATS)<sup>33</sup> (Article 1.1 of TPP).

In this connection, Member States reassert their obligations under existing international agreements, as this is expressly specified in the case of WTO system [Article 1.2.1(a)]. However, the contracting parties are aware that inconsistencies might arise between different agreements. For this reason, one Party shall consult the other interested with a view to reaching a mutually satisfactory solution, without prejudice to a Party's rights and obligations under Chapter 28 regarding disputes settlement (Article 1.2.2).

As for those provisions laid down in the TPP Agreement that improve those contained in the NAFTA or other FTAs in relation to labour and environmental issues – e.g. those concluded by Australia, Canada, Mexico, Peru and Singapore – the Parties in the Trans-Pacific Partnership shall apply the highest standards contained in this Agreement.

As for the relationship between TPP and CPTPP, Article 1.3 of the latter states that, in the event of inconsistency, the latter shall prevail.

### 1.3. Prospects

At the beginning of this paper it has been mentioned that the conclusion of the TPP agreement drew interests particularly because of the willingness of the U.S. government to join the Partnership. One might note that after Donald Trump's victory in the presidential elections, the future of TPP has become uncertain. Unlike Barack Obama, who encouraged negotiations and the signature of the Partnership agreement, Donald

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<sup>32</sup> The Marrakech Agreement of 15 April 1994 establishing the WTO draws on the 1947 GATT system. By means of this agreement, which came into force on 1 January of 1995, GATT members decided to establish the WTO, which was tasked with ensuring the freedom of international exchanges. The agreement includes 1994 GATT as part of Annex 1 A, which builds on the original text, though the new version promotes a more open and competitive market. Among other things, the more recent version repeals the protection policies on certain "sensitive" issues. See Sierralta Ríos, A., *Teoría evolutiva del comercio internacional*, ESAN Ediciones, Lima, 2014, pp. 134-135.

<sup>33</sup> GATS, one of the main achievements of the Uruguay Round, integrated the Marrakech Agreement as part of Annex 1 B and came into force in January 1995.

Trump appears reluctant to promote its ratification and entry into force.<sup>34</sup> As initially designed, the TPP regulation itself places an obstacle to its implementation.<sup>35</sup> Without the participation of the United States, there is a

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<sup>34</sup> It seems fair to remember that neither of the two US candidates supported TPP. Hilary Clinton opposed Obama's views on this subject, Donald Trump expressed even more reservations. The two candidates' opinions on TPP can be examined in Lee, E.Y.J., "Trans-Pacific Partnership (TPP) as a US Strategic Alliance Initiative under the G2 System: Legal and Political Implications", *JEAIL*, Vol. VIII, 2 (2015), pp. 323-352. "Clinton said she does not support the TPP trade deal, putting her at odds with President Barack Obama and his administration. In an interview with PBS News Hour, she said that the deal would not do enough to create jobs, raise wages for Americans and advance national security". Lee, *Loc cit.*, p. 339. "Trump slammed the Obama administration over its Trans-Pacific Partnership trade deal, labeling it disastrous and warning that it will encourage US companies to slash domestic jobs". Lee, *Loc. cit.*, p. 340.

<sup>35</sup> "Article 30.5: Entry into Force 1. This Agreement shall enter into force 60 days after the date on which all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures. 2. In the event that not all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures within a period of two years of the date of signature of this Agreement, it shall enter into force 60 days after the expiry of this period if at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013 [For the purposes of this Article, gross domestic products shall be based on data of the International Monetary Fund using current prices (U.S. dollars)] have notified the Depositary in writing of the completion of their applicable legal procedures within this period. 3. In the event that this Agreement does not enter into force under paragraph 1 or 2, it shall enter into force 60 days after the date on which at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013, have notified the Depositary in writing of the completion of their applicable legal procedures. 4. After the date of entry into force of this Agreement under paragraph 2 or 3, an original signatory for which this Agreement has not entered into force shall notify the Parties of the completion of its applicable legal procedures and its intention to become a Party to this Agreement. The Commission shall determine within 30 days of the date of the notification by that original signatory whether this Agreement shall enter into force with respect to the notifying original signatory. 5. Unless the Commission and the notifying original signatory referred to in paragraph 4 agree otherwise, this Agreement shall enter into force for that notifying original signatory 30 days after the date on which the Commission makes an affirmative determination". <https://medium.com/the-trans-pacific-partnership/final-provisions-29a2af5df02f#.s6dhhj12o> (accessed on 20 January 2017).

remote possibility that the remaining countries can reach the required majority for its entry into force.

Now this provision has been replaced by a new one to adjust to CPTPP composition. Article 3 provides that the Agreement shall enter into force 60 days after the date on which at least six or at least 50 per cent of the number of signatories, whichever is smaller, have completed their legal procedures.

It is essential to bear in mind that the Trans-Pacific Partnership has been originally conceived as an “open” agreement to incorporate other countries. The U.S. has always looked at it as a key arrangement to achieve strategic objectives in Asian and Pacific taking into consideration concrete economic data.<sup>36</sup> Somehow the TPP would be seen as a tool to face the growing competition from China, as the latter has been expected to join the Partnership.

At the same time, TPP members are currently in the process of concluding a number of FTAs. For instance, the U.S. has concluded such agreements with six of eleven partners,<sup>37</sup> while four of them are also members of the Association of Southeast Asian Nations (ASEAN) members,<sup>38</sup> establishing free-trade areas among them and signing free-trade agreements with third countries.

Furthermore, all TPP members have been already participants in Asia-Pacific Economic Cooperation.<sup>39</sup> However, APEC is not directly involved in negotiations for FTAs, it offers a platform to dialogue and adoption of

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<sup>36</sup> Fergusson points out that “[t]he TPP has potential implications beyond U.S. economic interests in the Asia-Pacific. The region is increasingly seen as being of vital strategic importance to the United States. Throughout the post-World War II period, the region has served as an anchor of U.S. strategic relationships, first in the containment of communism and more recently as a counterweight to the rise of China. This trend has recently been accentuated by the Obama Administration’s “pivot to Asia,” along with the perception that the center of gravity of U.S. foreign, economic, and military policy is shifting to the Asia-Pacific region. The TPP is viewed as an important element in the U.S. “rebalancing” toward Asia”. Fergusson, *op. cit.*, p. 5 and ff.

<sup>37</sup> Australia, Canada, Chile, Mexico, Peru and Singapore.

<sup>38</sup> Brunei, Malaysia, Singapore and Vietnam are both TPP and ASEAN members, along with Myanmar, Cambodia, Philippines, Indonesia, Laos and Thailand.

<sup>39</sup> APEC comprises 21 members: Australia, Brunei, Canada, Chile, People’s Republic of China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, New Guinea, Peru, Philippines, Russian Federation, Singapore, Taiwan, Thailand, United States and Vietnam.

guidelines on free trade and investment in the region.<sup>40</sup> Thus, in 2010, APEC decided to encourage the creation of Free Trade Area of the Asia-Pacific (FTAAP) viewing the TPP Agreements as some of the “ongoing regional undertakings” to achieve this objective.<sup>41</sup>

At least from the U.S. perspective, it is difficult to evaluate the relationship between the Trans-Pacific Partnership and the other “megaregional” initiatives, i.e. the Regional Comprehensive Economic Partnership (RCEP) which has been touched upon before<sup>42</sup>. If successful, this last mentioned would comprise ASEAN countries together with other six countries that have already concluded FTAs,<sup>43</sup> giving rise to a single free-trade area. Obviously, this project would entail an alternative, but not necessarily contradictorily with TPP, to fulfil the goals set down by APEC. At any rate, many countries have engaged in negotiations to conclude both agreements – namely the TPP and the RCEP – regarding these two processes as complementary.<sup>44</sup> In numerical terms, the 16 countries involved in the RCEP account for 30 per cent of global GDP (compared to 37.6 per cent totalled by TPP countries), though they are expected to double this figure by 2030, reaching 25 per cent of global trade (that is similar to TPP countries), and 45 per cent of the world’s population, that is four times the number of inhabitants of the TPP countries.<sup>45</sup>

The U.S. refers to China as a potential TPP member, though the latter seems to have different views on this point. From the Chinese perspective, the Trans-Pacific Partnership was conceived as an important driving force

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<sup>40</sup> In order to meet APEC’s Bogor Goals for free and open trade and investment in Asia-Pacific, APEC member economies follow the strategic roadmap as agreed by APEC Economic Leaders in Osaka, Japan in 1995. This roadmap is known as the Osaka Action Agenda. APEC member economies report progress towards achieving free and open trade and investment goals through Individual Action Plans (IAPs) and Collective Action Plans (CAPs), submitted to APEC on an annual basis. More information is available at: <http://www.apec.org> (accessed on 2 December 2016).

<sup>41</sup> Quoted by Fergusson, *op. cit.*, p. 7. More information is available on: [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2010/2010\\_aelm.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2010/2010_aelm.aspx) (Accessed on 2 November 2016).

<sup>42</sup> Fergusson, *op. cit.*, p. 7.

<sup>43</sup> Australia, China, India, Japan, New Zealand, and South Korea.

<sup>44</sup> Australia, Brunei, Japan, Malaysia, New Zealand, Singapore and Vietnam. Fergusson, *op. cit.*, p. 7.

<sup>45</sup> Data available on the official webpage of Australia, one of the countries involved in negotiations <http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx> (accessed on 15 December 2016).

of U.S. “Pivot to Asia” strategy to reduce China’s influence in the region.<sup>46</sup> The Chinese legal doctrine describes four countermeasures to tackle TPP. Primarily, there is the “One Belt, One Road” initiative that contains plans to establish “the Silk Road Economic Belt” and the “21<sup>st</sup> Century Maritime Silk Road”. Both routes connecting China with Europe – the land route through Central Asian and Russia and the sea path through the Malacca strait to India, the Middle East, and East Africa – are intended to promote business opportunities, favour investment in infrastructure, transportation, ports, oil pipelines, and environmental projects, and encourage the exploitation of natural resources and energy.<sup>47</sup> Secondly, China’s proposal of an Asian Infrastructure Investment Bank (AIIB) can be seen as a response to the U.S. influence in the context of the World Bank, or that of Japan in the Asian Development Bank<sup>48</sup>. Thirdly, China has taken the leading role in the promotion of ZLCAP with the support of APEC countries.<sup>49</sup> And, finally, the RCEP is also deemed to be the Asian superpower’s instrument to take the economic control over the “megaregion”.<sup>50</sup>

The same as the TPP, the RCEP deals with numerous aspects, i.e. trade of products and services, investment, economic and technical cooperation, expertise, intellectual property and so forth. Meanwhile, TPP could generate benefits to current and prospect members by opening up new opportunities in the huge U.S. market, and the same seems to be happening with the RCEP, which provides its Member States with access to China.

However, turning back to the analysis of the TPP Agreement, the promotion of global values, especially those related to labour standards should be stressed. In American experts’ opinion, TPP offers much higher commitments both in respect of trade liberalization and environment and labour.<sup>51</sup>

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<sup>46</sup> Lee, *Loc. cit.*, pp. 337 and 342.

<sup>47</sup> Quoted by Lee, *Loc. cit.*, pp. 341-343.

<sup>48</sup> Lee, *Loc. cit.*, p. 343. More information is available here: <http://www.aiib.org/>.

<sup>49</sup> Lee, *Loc. cit.*, pp. 343-344.

<sup>50</sup> Lee, *Loc. cit.*, pp. 344-345.

<sup>51</sup> Fergusson, *op. cit.*, p. 8.

## 2. TPP's Labour Chapter

### 2.1. Covered Aspects

The Trans-Pacific Partnership (and now the CPTTP) includes a substantive Chapter 19 which is titled “Labour” (or “Labor” in American spelling) and consists of 15 articles (from 19.1 to 19.5).<sup>52</sup> One year before the signature and publication of the agreement, the only summary of the Labour Chapter was available at the U.S. government official website.<sup>53</sup> As stated in the Report for the U.S. Congress, it was the United States that encouraged other TPP Partners to include a specific section covering labour issues.<sup>54</sup> In this way, the motto of the seal “TPP: Made in America”, appearing on the full version of the agreement, attests to the willingness of the U.S. government to operate in different fields, including labour, in compliance with internal rules: at the very beginning, the 2007 *Bipartisan Trade Deal* and then, the 2015 *Trade Priority Accountability Act* already referred to.

In the last twenty years, the labour content of the free-trade agreements concluded by the U.S. has experienced considerable development as a result of national trade policy. Chronologically, four models of North-

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<sup>52</sup> On the labour aspects of TPP, see, among others, Brown, R. C., “Labor Implications of TPP: A Game Changer?”, Working Paper, East-West Centre Workshop on Mega-regionalism - New Challenges for Trade and Innovation, 21 February 2016, 22 pp.; Cimino-Isaacs, C., “Labour standards in the TPP”, in Schott, J. J. and Cimino-Isaacs, C. (Eds.), *Assessing the Trans-Pacific Partnership*, Vol. II: “Innovations in trading rules”, Peterson Institute for International Economics, March 2016, pp. 41-65; Elliott, K. A., “Labour standards and the TPP” in Lim, C. L. et als. (Eds.), *The Trans-Pacific Partnership. A Quest for a Twenty-first Century Trade Agreement*, Cambridge University Press, Cambridge, 2012, pp. 200-210; Guamán Hernández, A., “Cláusulas laborales en los acuerdos de libre comercio de nueva generación: una especial referencia al contenido laboral del TPP, CETA y TTIP”, *Estudios Financieros, Revista de Trabajo y Seguridad Social*, n° 398, 2016, pp. 99-102, and Tham, J.-Ch., Ewing, K.D., “Labour clauses in the TPP and TTIP: A comparison without a difference?”, *Melbourne Journal of International Law*, Vol. 17 (2016), pp. 1-35.

<sup>53</sup> In December 2015, the USA published the full text of the TPP agreement that can be accessed at: <https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf> (accessed on 20 December 2015). New Zealand also published the full version of the document: <http://www.globalresearch.ca/the-full-text-of-the-trans-pacific-partnership-tpp/5486887> (accessed on 20 December 2015). Nowadays is recommendable to follow the latest information at the webpage of the Depository of the TPP: <http://www.tpp.mfat.govt.nz/> (accessed on 20 October 2017).

<sup>54</sup> Fergusson, *op. cit.*, pp. 38-40.

American social clauses could be drawn.<sup>55</sup> The first model corresponds to the NAALC and includes the commitment of its three Member States (Canada, Mexico and United States) to improve domestic labour regulation in accordance with the eleven labour principles set out in Section 1(b).<sup>56</sup> In compliance with this agreement, they ensure that its administrative, quasi-judicial, judicial and labour tribunal proceedings for the enforcement of its labour law are fair, equitable and transparent. Article 45 also provides for the opportunity to cooperate with the ILO.<sup>57</sup>

The agreement between the United States and Jordan<sup>58</sup> represents the only example of the second model. It was concluded two years after the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.<sup>59</sup> Starting from the ILO Declaration, the USA practice

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<sup>55</sup> See Bolle, M. J., *Overview of Labor Enforcement Issues in Free Trade Agreements*, Congressional Research Service, February 22, 2016, pp. 2-4, available at: [www.crs.gov](http://www.crs.gov), and ILO, *Studies on Growth with Equity. Assessment of Labour Provisions in Trade and Investment Arrangements*, International Labour Office, Geneva, 2016, pp. 42-44.

<sup>56</sup> Annex 1 contains the following labour principles: 1. Freedom of association and protection of the right to organize; 2. The right to bargain collectively; 3. The right to strike; 4. Prohibition of forced labour; 5. Labour protections for children and young persons; 6. Minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; 7. Elimination of employment discrimination on the basis of grounds such as race; 8. Equal pay for men and women; 9. Prevention of occupational injuries and illnesses; 10. Compensation in cases of occupational injuries and illnesses; 11 protection of migrant workers. Quoted from [http://www.economia.gob.mx/files/comunidad\\_negocios/comercio\\_exterior/reglas\\_comercio\\_internacional/ACLAN.pdf](http://www.economia.gob.mx/files/comunidad_negocios/comercio_exterior/reglas_comercio_internacional/ACLAN.pdf) (accessed on 15 January 2017).

<sup>57</sup> Article 45 “Cooperation with the ILO”: “The Parties shall seek to establish cooperative arrangements with the ILO to enable the Council and Parties to draw on the expertise and experience of the ILO for the purposes of implementing Article 24(1).”

<sup>58</sup> The text is available at: <https://ustr.gov/sites/default/files/Jordan%20FTA.pdf> (accessed on 15 December 2017).

<sup>59</sup> The ILO Declaration on fundamental principles and rights at work – which was adopted in 1998 – reaffirms all those rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia, which have been set forth in those conventions regarded as fundamental. Furthermore, the Declaration insists that all ILO members, even though they have not ratified the fundamental conventions, have an obligation, arising from the very fact of being a member to the Organization, to respect, to promote and to realize the fundamental rights and principles at work. On the 1998 ILO Declaration see Gil y Gil, J. L. and Ushakova, T., “La Declaración de la OIT relativa a los principios y derechos fundamentales

was characterized by the reference to this instrument in the further free-trade agreements. In this sense, the terms of national laws are defined taking into account “internationally recognised labour rights” and not “workers’ basic rights”, which were the focus of NAALC. Pursuant to Article 6.6 of US-Jordan FTA, “internationally recognised labour rights” include: acceptable conditions of work (with respect to minimum wages, hours of work, and occupational safety and health) and three of the four fundamental labour rights set out in the 1998 ILO Declaration, except for the principle of non-discrimination,<sup>60</sup> as it was already regulated by the U.S. Generalised System of Preference (GSP).<sup>61</sup> By virtue of this agreement, each party committed not to derogate to national laws issues concerning the promotion of trade and to safeguard in its national legislation the labour provisions set out in the agreement.

The third generation of USA FTAs includes the seven agreements signed between 2003 and 2006,<sup>62</sup> the provisions of which referred to the objectives set down in the 2002 *Bipartisan Trade Promotional Authority Act*, particularly to the elimination of the worst forms of child labour, an aspect that was also emphasized in the 1999 ILO Convention No. 182. Although the 2002 *Act* aimed at promoting respect for workers’ and children’s rights consistent with the core labour standards of the ILO and at emphasizing the relationship between trade and worker rights,<sup>63</sup> the

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en el trabajo”, *Documentación Laboral*, nº 59, 1999, pp. 99-112; Ushakova, T., “Hacia la justicia social: vías de intervención de la OMC”, *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, Vol. 4 (2016), nº 2, p. 159.

<sup>60</sup> According to Article 6.6: “For purposes of this Article, “labor laws” means statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”.

<sup>61</sup> See Kaufmann, Ch., *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*, Hart Publishing, Oxford and Portland, Oregon, 2007, p. 174.

<sup>62</sup> They comprise the agreements concluded between United States and Australia, Bahrain, Chile, the Dominican Republic and other Central American Countries (known as the CAFTA-DR), Morocco, Oman and Singapore.

<sup>63</sup> Sec. 2102(6) of *Trade Act* establishes the following: “to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO (as defined in Section 2113(6)) and an understanding of the relationship between trade and worker rights”. In turn, Sec. 2113(6) defines the following as

fundamental standards detailed in Section 2113(6) of the *Act* are different from those laid down in the 1998 Declaration and from those specified in the eight ILO core conventions.<sup>64</sup> Thus, this is the same picture as the one observed in the USA-Jordan FTA, which does not include workplace discrimination, though other aspects are covered (e.g. minimum wage, working day, occupational health and safety).

The 2007 *Bipartisan Trade Deal* included provisions compelling members to harmonise national labour laws with the ILO fundamental labour rights, e.g. the 1998 Declaration, and to ensure implementation of labour rules containing these standards.<sup>65</sup> Indeed, the U.S. FTAs concluded after 2007, including TPP, are consistent with the standards referred to in the Declaration. In particular, and according to Article 19.2.2 of TPP, the Parties reaffirm the statement of Paragraph 5 of the Declaration: “labour standards should not be used for protectionist trade purposes”.

Workers’ protection is at the heart of the TPP Labour Chapter and is guaranteed in accordance with some commitments: on the one hand, through compliance with fundamental principles and rights at work set out in the 1998 ILO Declaration [i.e. freedom of association and the effective recognition of the right to collective bargaining; the elimination of all

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“core labor standards”: (A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”. Available at:

<https://www.gpo.gov/fdsys/pkg/BILLS-107hr3009enr/pdf/BILLS-107hr3009enr.pdf> (accessed on 10 September 2017).

<sup>64</sup> The eight fundamental ILO Conventions are as follows: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111). See, Gil y Gil and Ushakova, *Loc. cit.*, p. 107.

<sup>65</sup> See: [http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS\\_116960/lang--es/index.htm](http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_116960/lang--es/index.htm) (accessed on 15 September 2017). The Bipartisan Trade Deal is available at [https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf) (accessed on 20 September 2017). On this agreement, see Gantz, D. A., “The ‘Bipartisan Trade Deal’”, *Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, *Saint Luis University Public Law Review*, Vol. XXVIII (2008), pp. 138 and ff.