

CHAPTER FOUR

FINDING AND ANALYSIS

A. An Overview of the Trans-Pacific Partnership

1. The Trans-Pacific Partnership in Brief

The development of modern era absolutely encourages the countries to enhance their ability in every good thing in order to make the country gets the place in the eye of the world. The globalization definitely offers an idea for a country to open its mind to the situation surroundings. Such thing makes a country has to socialize and communicate with others to create an opportunity for a better life. Thus, the international agreement or cooperation will be the very wonderful option to reach the dream. The Trans-Pacific Partnership (TPP) is one great solution that might be taken by a country to connect and to make relationship with other countries.

The Trans-Pacific Partnership (TPP) is by far the most comprehensive trade and investment pact since the creation of the World Trade Organization (WTO) for more than 20 years. It eliminates a broad array of barriers to trade and investment, some of which have been untouchable in previous trade pacts, and establishes state-of-the-art rules on domestic policies that can distort trade and investment flows.¹

The origins of the TPP date back to 2004, immediately following the Cancun ministerial meeting of the World Trade Organization (WTO)

¹ Jeffrey J. Schott, 2016, *Understanding the Trans-Pacific Partnership: An Overview*, Washington, Peterson Institute for International Economics, p. 1.

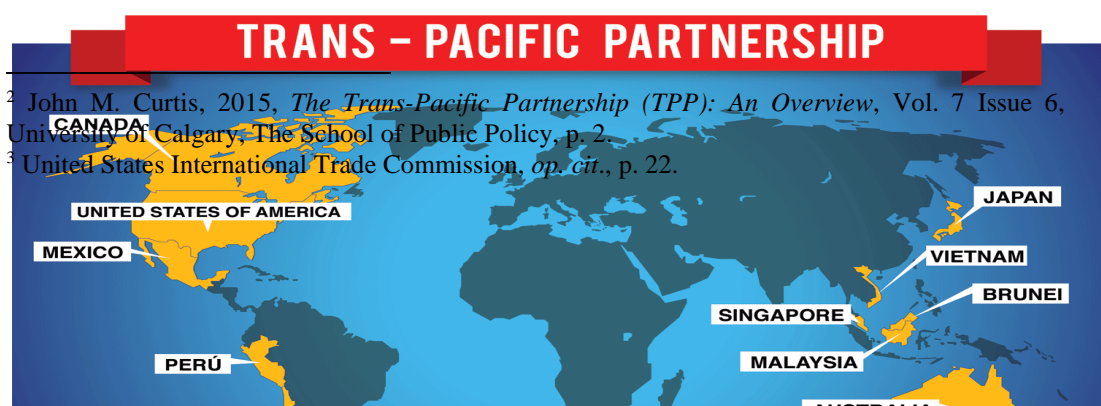
in December 2003. Four relatively small, open economies, one from the Eastern Pacific (Chile), and three from the Western Pacific (New Zealand, Brunei Darussalam and Singapore), agreed to launch negotiations to open trade more quickly and more deeply than what appeared would likely be the case in the foreseeable future for the world as a whole. These negotiations were joined five years later by the United States, as part of the Obama administration’s “pivot” towards Asia, which changed both the significance and the objectives of the ongoing TPP negotiations.²

The TPP Agreement would affect the trade and investment relationship between the United States and the region in many areas. In addition to the United States, the parties to the Agreement are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam (data in 2016).³

Through the TPP, the participating countries seek to liberalize trade and investment and establish new rules and disciplines in the region beyond those that already exist in the World Trade Organization (WTO). The FTA is envisioned as a living agreement open to future members and new issues and may become a vehicle to advance a wider Asia-Pacific free trade area.

Figure 1.

Trans-Pacific Partnership Members



² John M. Curtis, 2015, *The Trans-Pacific Partnership (TPP): An Overview*, Vol. 7 Issue 6, University of Calgary, The School of Public Policy, p. 2.

³ United States International Trade Commission, *op. cit.*, p. 22.

Source: <https://tax.thomsonreuters.com/blog/onesource/tpp-trans-pacific-partnership-overview/> (March 9th, 2017, at 9.35 p.m.)

Indonesia, the Philippines, and South Korea have recently indicated their interest in joining the TPP. It is also a U.S. policy that response to the rapidly increasing economic and strategic linkages among Asian-Pacific nations and has become the economic centerpiece of the Administration's "rebalance" toward the region.⁴

The first round of negotiations in the TPP was held in Melbourne in March 2010 attended by seven members, namely Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and the United States. Viet Nam participated as an observer.⁵ The first meeting, as might be expected, made limited progress towards imagining a new approach to negotiations. It probably did not help that most of the mid-level officials in the room had previous experience in negotiating 'traditional' Preferential Trade Arrangements (PTAs).

⁴ Ian F. Fergusson, Mark A. McMinimy and Brock R. Williams, 2016, *The Trans-Pacific Partnership (TPP): In Brief*, Congressional Research Service Report, February 9th, 2016, p. 1.

⁵ Viet Nam joined as a full member prior to the October 2010 meeting in Brunei Darussalam.

Figure 2.

TPP Negotiators



Source: https://en.wikipedia.org/wiki/Trans-Pacific_Partnership (March 9th, 2017, at 9.46 p.m.)

Once you have experience at one or more of these agreements, it is hard to reorient thinking to new approaches. Since many of the biggest decisions were still pending (like membership, scale and scope of negotiations), progress was limited in Melbourne. As negotiations continued, they grew larger and longer.⁶

The TPP actually focuses on harvesting the gains that can come from greater international economic integration. Added competition can force companies and countries to allocate their time and resources more efficiently. The TPP is also an attempt to extend the rule-based system of international trade to respond to a series of new challenges.⁷ According to

⁶ Deborah Elms and C.L. Lim, 2012, *The Trans-Pacific Partnership Agreement (TPP) Negotiations: Overview and Prospects*, Singapore, RSIS Working Paper, p. 8.

⁷ William Krist and Kent Hughes, *loc. cit.*

its proponents, the TPP will generate higher economic growth throughout the area by eliminating tariffs and other obstacles to international trade and investment.⁸

In addition, the TPP Agreement (TPPA) stands out from other regional trade agreements in terms of its nature and scope. It goes much beyond the existing trade agreements in the Asia-Pacific region and includes 30 Chapters on traditional as well as new issues, which include investments, services, financial services, competition, government procurement, labor, intellectual property, environment etc. Further, all TPPA negotiating partners have entered into a confidentiality arrangement which makes any analysis of the implications of TPPA on member countries extremely challenging until they release the text.⁹

In the Preamble, it is clearly stated that the parties to this Agreement are resolving to:¹⁰

- a. establish a comprehensive regional agreement that promotes economic integration to liberalize trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth;

⁸ Jeronim Capaldo, Alex Izurieta and Jomo Kwame Sundaram, 2016, *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement*, Working Paper No. 16-01, U.S.A, Global Development And Environment Institute, p. 1.

⁹ Rashmi Banga, 2015, *Trans-Pacific Partnership Agreement (TPPA): Implications for Malaysia's Domestic Value-Added Trade*, Background Paper No. RVC-12, UNCTAD, p. 4.

¹⁰ The Preamble of the Trans-Pacific Partnership Agreement.

- b. strengthen the bonds of friendship and cooperation between them and their peoples;
- c. build on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization;
- d. recognize the differences in their levels of development and diversity of economies;
- e. strengthen the competitiveness of their businesses in global markets and enhance the competitiveness of their economies by promoting opportunities for businesses, including promoting the development and strengthening of regional supply chains;
- f. support the growth and development of micro, small and medium-sized enterprises by enhancing their ability to participate in and benefit from the opportunities created by this Agreement;
- g. establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules;
- h. facilitate regional trade by promoting efficient and transparent customs procedures that reduce costs and ensure predictability for their importers and exporters;
- i. recognize their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the

- conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals;
- j. recognize further their inherent right to adopt, maintain or modify health care systems;
 - k. affirm that state-owned enterprises can play a legitimate role in the diverse economies of the Parties, while recognizing that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment, and resolve to establish rules for state-owned enterprises that promote a level playing field with privately owned businesses, transparency and sound business practices;
 - l. promote high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices;
 - m. protect and enforce labor rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labor issues;
 - n. promote transparency, good governance and the rule of law, and eliminate bribery and corruption in trade and investment;
 - o. recognize the important work that their relevant authorities are doing to strengthen macroeconomic cooperation, including on exchange rate issues, in appropriate fora;

- p. recognize the importance of cultural identity and diversity among and within the Parties, and that trade and investment can expand opportunities to enrich cultural identity and diversity at home and abroad;
- q. contribute to the harmonious development and expansion of world trade and provide a catalyst to broader regional and international cooperation;
- r. establish an Agreement to address future trade and investment challenges and opportunities, and contribute to advancing their respective priorities over time; and
- s. expand their partnership by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration and create the foundation of a Free Trade Area of the Asia-Pacific.

Those are the guidelines for the members in running the Agreement. Absolutely, the TPP has the potential to be a model for 21st century free trade agreement, it will only become so if it both includes and holds the nations that sign it to the very highest standards, including those regarding Intellectual Property Rights (IPR) protection; liberalized trade in services; transparency and openness in government procurement practices; restrictions on preferential treatment toward State-Owned Enterprises (SOEs); elimination of a host of Non-Tariff Barriers (NTBs),

including barriers to Foreign Direct Investment (FDI); and at least equal, if not greater, emphasis on enforcement as on market access.¹¹

The TPP could have significant implications beyond its direct economic impact. Obama Administration officials and other TPP proponents argue that these implications would be positive and felt in several ways, both geo-economic and geo-political matters. Though such implications are hard to define precisely, proponents of the TPP's strategic importance suggest that the United States could use the agreement as a tool to exert influence in the region and beyond, in not only economic, but also broader political and security spheres.¹²

Table 1.
Major U.S. Exports by TPP Members

Country	Products
Australia	Machines, vehicles, aircraft
Brunei Darussalam	Aircraft, machinery, medical equipment
Canada	Vehicles, machines, oil
Chile	Oil, machinery, vehicles
Japan	Medical equipment, aircraft, machines
Malaysia	Machinery, aircraft, medical equipment
Mexico	Machines, electronic equipment, oil
New Zealand	Aircraft, machinery, vehicles
Peru	Oil, machinery, vehicles

¹¹ Stephen J. Ezell, 2012, *Ensuring the Trans-Pacific Partnership becomes a Gold Standard Trade Agreement*, Washington, the Information Technology & Innovation Foundation, p. 1.

¹² Ian F. Fergusson and Brock R. Williams, op. cit., p. 4.

Singapore	Machines, electronic equipment, oil
Viet Nam	Machinery, soybeans, cotton

Source: Office of the U.S. Trade Representatives

The potential economic impact of the TPP agreement will depend on a number of factors, including the extent of trade liberalization achieved in the agreement, as well as the current level and potential growth of trade and investment among TPP members. On both measures, the TPP appears significant given that it would be the largest U.S. FTA by trade flows (\$905 billion in U.S. goods and services exports and \$980 billion in imports in 2014), and would eventually eliminate all tariffs on manufactured products and most agricultural goods. From the U.S. perspective, a significant share of this liberalization has already occurred due to the existing U.S. FTAs with 6 of the 11 TPP partners.

The TPP is a fast-growing region, home to 40% of the world GDP and 800 million people living inside; it could simply be seen through the picture below.

Figure 3.

TPP's Percentage in Global GDP

THE TRANS-PACIFIC PARTNERSHIP

A fast-growing region, home to 40% of global GDP and 800 million consumers



*Source: International Trade Administration, December 2015,
U.S. Department of Commerce*

Japan's entry into the negotiations increased the potential economic significance of the agreement. Among U.S. negotiating partners in the TPP, Japan is the largest economy and trading partner without an existing U.S. FTA (thus having greater scope for trade liberalization with the United States). Moreover in 2014, Japan was the United States' fourth-largest goods export (\$67 billion) and import (\$134 billion) market. As high-income countries, U.S.-Japan trade differs considerably from U.S. trade with most other TPP partners without U.S. FTAs, which generally are not high-income nations. As a result, many U.S. industries are actively interested in Japan's participation in the TPP.

Besides Japan, Malaysia and Viet Nam also stand out among the TPP countries without existing U.S. FTAs, given the rapid growth in U.S. trade with the two nations over the past three decades, and the potential for future growth. Both economies have grown steadily and rapidly since the 1980s. Moreover, Malaysia's and Viet Nam's average applied tariffs on imports are 6.1% and 9.5%, respectively, two of the highest levels among

TPP members.¹³ Both nations also have a substantial presence of SOEs in their economies, which may be affected by TPP outcomes among other trade barriers of potential interest to the United States.¹⁴

At the end, Indonesia should learn from the members to the Agreement since the TPP seems beneficial to the members so that Indonesia may take advantages. Despite the opportunities of joining the TPP as the FTA for Indonesia, it would be great knowing the challenges of it as well. Then, the national legal system's perspective to the TTPA is also important to be discussed.

2. The Trans-Pacific Partnership Agreement as the Constitution of International Organization

The issue of the TPP is certainly discussing one of the subjects of International Law, namely International Organization. As a multilateral FTA, it created International Organization which focuses on economic and political matters.

International Organizations (IOs), otherwise known as Intergovernmental Organizations (IGOs), are formed between two or more state governments. Some IOs operate by making decisions on the basis of one vote for each member-state, some make decisions on a consensus or

¹³ Tariff data from WTO Tariff Profiles 2015.

¹⁴ Ian F. Fergusson, Mark A. McMinimy and Brock R. Williams, 2016, op. cit., p. 2.

unanimity basis, while others still have weighted voting structures based on security interests or monetary donations.¹⁵ Thus, surely IOs are a part of International Law which is simply containing the set of rules that countries follow in dealing with each other and it is absolutely the concern of the researcher to discuss.

Consequently, in establishing the International Organization, a Treaty or Agreement needs to be formulated so that later, in running the Treaty or Agreement, the members have a guideline to follow. Thus, they will operate the IO or conduct everything in its portion.

According to 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, it is stated that Treaty itself is an international agreement governed by International Law and concluded in written form either between one or more states and one or more international organizations; or between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.¹⁶ These various instruments of International Agreement are Treaty, Convention, Agreement, Arrangement, Charter, Covenant, Statute, Accord, Code, Compact,

¹⁵ Globalization101, 2017, "International Law and Organizations", A Project of Suny Levin Institute, p. 9, taken from <http://www.globalization101.org/uploads/File/Inter/interall.pdf>, downloaded on Wednesday, April 19th, 2017, at 2.13 p.m.

¹⁶ Article 2 (a) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Contract, Regulation, Concordat, Constitution, Pact, Protocol, Declaration, Final Act, and General Act.¹⁷

In relation to the TPP, the Treaty or Agreement of establishing the TPP is exactly what so-called Trans-Pacific Partnership Agreement (TPPA). As the Treaty or Agreement, it is right to say that the TPPA is the Constitution of the TPP as International Organization which operates the TPP itself and becomes the guideline for the members in conducting any activity.

Philippe Sands and Pierre Klein said in their book that the law of IOs inscribes itself as part of general Public International Law, from which it both draws inspiration and makes its own contribution. Within the global framework of International Law, each organization of course has its own governing law deriving from its constituent instrument and decisions and resolutions it adopts, as well as its established practice.¹⁸ The statement actually implies that the Treaty or Agreement as the law deriving from IO instrument acts as Constitution governing the things related to the members and the future of the organization. Therefore, the researcher could see that the TPPA is the Constitution of the TPP.

Aside of that, it is already clearly mentioned at the beginning that the TPP is an IO which focuses on economic and political issues; thus, the

¹⁷ Gerhard von Glahn and James Larry Taulbee, 2016, *Law among Nations, An Introduction to Public International Law*, New York, Routledge, pp. 72 – 73.

¹⁸ Philippe Sands Q.C. and Pierre Klein, 2009, *Bowett's Law of International Institutions*, London, Thomson Reuters (Legal) Ltd, p. 16.

Agreement is actually one of the FTAs. Accordingly, the researcher in the study discusses the opportunities as well as the challenges of the FTAs.

B. The Opportunities and Challenges of the Free Trade Agreement

1. The Opportunities of the Free Trade Agreement

One of the prospects for a country to enhance their income is by joining any Free Trade Agreement (FTA) that aims to bring many countries to engage into one vision. Surely, developing countries are expecting to be developed countries in the coming years. FTA is a major attempt for them to interact directly with developed countries, since they have to learn how to dominate the business world.

For Asian countries, the recent advent of Free Trade Agreements (FTAs) will likely have a marked impact on Asia's trade policy and its cherished status as the global factory. It began in the 1960s, when developing Asian economies lacked of natural resources and had high levels of poverty. Moreover, a booming world economy was hungry for labor-intensive imports from Asia, falling tariffs in developed country markets, inflows of trade-related Foreign Direct Investment (FDI), and generous foreign aid flows also favored outward-oriented growth in Asia.¹⁹ Then, Asia began emphasizing FTAs as a trade policy instrument

¹⁹ Masahiro Kawai and Ganeshan Wignaraja, 2009, "Asian FTAs: Trends and Challenges", *ADBI Working Paper Series*, No. 144, August 2009, Asian Development Bank Institute, pp. 5 – 6.

in the late 1990s and the region is today at the forefront of world FTA activity.²⁰

Four main factors underlying the recent spread of FTA initiatives in Asia are: (i) deepening market-driven economic integration in Asia, (ii) European and North American economic integration, (iii) the 1997–1998 Asian financial crisis, and (iv) slow progress in the WTO Doha negotiations.

First, among these is market-driven economic integration through trade, FDI, and the formation of East Asian production networks and supply chains. Market-driven economic integration has begun further liberalization and harmonization of policies, rules, and standards governing trade and FDI. East Asia's policymakers views that if FTAs given wide scope, can support expanding trade and FDI activities through further elimination of cross-border impediments, facilitation of trade and FDI, and other such harmonization efforts. Thus, FTAs can be regarded as part of a supporting policy framework for deepening production networks and supply chains formed by global Multinational Corporations (MNCs) and also emerging Asian firms.

Second, European and North American economic regionalism, including European Union (EU) development into central and Eastern Europe, a monetary union in the Eurozone, the success of the North

²⁰ Roberto V. Fiorentino, Jo-Ann Crawford, and C. Toqueboeuf, 2009, *The Landscape of Regional Trade Agreements and WTO Surveillance*, Cambridge, Cambridge University Press, p. 7.

American Free Trade Agreement (NAFTA), and emerging moves toward a Free Trade Area of the Americas (FTAA), has motivated East Asian FTAs. Governments fear that the two giant trading blocs of Europe and North America might dominate rule-setting in the global trading system, thereby marginalizing Asia.

Increasingly, policymakers have realized the need for stepping up the pace of integration to develop international competitiveness by exploiting economies of scale and strengthening their bargaining power through a collective voice on global trade issues. FTAs can support protection against the periodic difficulties of multilateral trade liberalization, such as the recent slow progress in the WTO Doha negotiations and a perceived loss of steam in the APEC process.

Third, the 1997–1998 Asian financial crisis made it clear that East Asian economies needed to work together in the area of trade and investment in order to sustain growth and stability by addressing common challenges. This need has not yet been fully met by either regional initiatives to strengthen the international economic system or by national efforts to strengthen individual economies' basics, both will take time to bear fruit. With the propagation of FTA initiatives in the region, a number of countries have begun to jump on the movement of these initiatives out of fear of exclusion.

Fourth, slow progress in the WTO Doha negotiations encouraged countries to consider FTAs as an alternative. Hailed as a development

round to promote trade-led growth in poor countries, the WTO Doha Development Round began in November 2001. The talks have largely focused on liberalization in two key areas: agriculture and non-agricultural market access.

In essence, developed countries were being asked to accelerate the pace and scope of reductions in agricultural tariffs and subsidies, and developing countries were being asked to do the same with regard to tariffs for industrial goods. Seven years of formal negotiations eventually stalled in mid-2008 over concerns in developing countries about safeguard measures to protect poor farmers from rising food and oil prices. However, discussions have continued behind the scenes.²¹

The FTA extremely offers a platform for its members to get the easiest way to communicate each other, besides there are more provisions in the Agreement/Treaty that contribute to improve trade and investment conditions. There are rules, e. g., on subsidies and competition policies. Moreover, the Agreement/Treaty might provide for protection of intellectual property rights in areas such as patents, copyright, undisclosed information, industrial designs and geographical indications.²² In addition,

²¹ Masahiro Kawai and Ganeshan Wignaraja, *op. cit.*, pp. 7 – 8.

²² Christian Etter, 2007, “Egypt-EFTA Free Trade Agreement: Benefits and Opportunities for Companies from Egypt and the EFTA States”, Speech held at the launching event for the Egypt-EFTA Free Trade Agreement, September 10th, 2007, Cairo, p. 11.

The FTA is also expected to create a “win win” situation as the main aim in the trading issue among the members.²³

The strength of FTA does not actually belong to the state itself; the citizens may also enjoy the FTA. For example the Small and Medium-sized Enterprises (SMEs) will get the benefits from the FTA. The FTA benefits for SMEs, such as preferential tariffs for final and intermediate goods, access to new markets, elimination of non-tariff barriers, and also new business opportunities.²⁴

Discussing the FTA for our country, Indonesia, could be seen from the closest one since Indonesia is the member of ASEAN. Thus, Indonesia is familiar with the AFTA (ASEAN Free Trade Area). AFTA was signed in 1992. Its original members were six ASEAN countries – namely, Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand – and four newer members – namely, Viet Nam, Lao PDR, Myanmar, and Cambodia which joined in 1995, 1997, 1997 and 1999, respectively. The key objective of AFTA is trade liberalization under the Common Effective Preferential Tariff (CEPT) scheme to eliminate tariffs on intra-ASEAN trade which have been in effect since January 1993.

²³ Saman Kelegama, 2014, “China-Sri Lanka FTA: Opportunities and Challenges”, Seminar organized by the National Chamber of Exporters Association, July 15th, 2014, Institute of Policy Studies of Sri Lanka, p. 10.

²⁴ Samuel Scoles, 2012, “FTA Benefits & Challenges for SMEs”, APEC Workshop on Increasing FTA Utilization by SMEs, August 7th, 2012, International Trade Advisory Services, p. 3.

AFTA was actually planned to reduce tariff rates on products in the Inclusion List to a level between zero to five percent by 2008 in the beginning; then the target date was moved to 2002. Moreover, the ASEAN–CEPT agreement was revised significantly by the ASEAN Trade in Goods Agreement in 2008. The tariff rates of the products in the Inclusion List were planned to eliminate to zero percent by the year 2010 for the six ASEAN countries and by 2015 for the remaining four countries.²⁵

Beside of AFTA, Indonesia is joining another FTA which is bigger than it in term of size, namely APEC (Asia-Pacific Economic Cooperation). APEC is a regional forum within the Asia Pacific region focusing on promoting free trade and investment. According to economic forecasts and trends, APEC is slated to be a significant player in shaping and promoting trade liberalization in the region by 2013. Indonesia as host and leader of APEC 2013 seeks to address three key priorities namely: 1) Attaining the Bogor goals 1994; 2) Achieving Sustainable Growth with Equity; and 3) Promoting Connectivity by focusing on the enhancement of physical interconnectedness through investment in infrastructure, the blue water economy, institutions, and people.²⁶

²⁵ Misa Okabe, 2015, *Impact of Free Trade Agreements on Trade in East Asia*, ERIA Discussion Paper Series, January 2015, pp. 6 – 7.

²⁶ RSIS Policy Report, 2017, “Indonesia’s APEC Chairmanship of 2013: Key Priorities and Future Agenda”, Executive Summary, pp. 2 – 6, taken from https://www.rsis.edu.sg/wp-content/uploads/2014/07/PR130401_Indonesia_APEC_Chairmanship_2013.pdf, downloaded on Tuesday, February 28th, 2017 at 11.10 p.m.

Those examples could be the reference that Indonesia really needs to participate in FTA. Especially since Indonesia is huge in term of population and territory, so it is necessary to manage it and make it beneficial for Indonesia because the more population and territory lead to the more benefits. On the other hand, it is difficult for Indonesia to reject the free trade agreement. Denial will only make Indonesia isolated from the stage of regional trade.²⁷

Indonesia has to take the FTA seriously, so that the FTA benefits might be reached by Indonesia. Here we could see how beneficial the FTA for Indonesia, that is between 2005 and 2011, Indonesia maintained an annual growth rate of around 5.0%, and by the end of 2011 its GDP reached US\$1,124 billion. As the largest economy in the Southeast and in ASEAN, Indonesia will be able to support regional integration via its participation in the ASEAN Economic Community (AEC), especially in the single market and production base while vice versa; Indonesia's large population will also contribute to AEC's market.²⁸

By lowering barriers to trade and investment, an FTA generates opportunities for its members to increase the levels of bilateral trade and investment above the levels that they can attain otherwise.²⁹ This is

²⁷ Fatimah Riswati and Indro Warsito, 2010, "Challenge for ASEAN-China Free Trade Agreement on Indonesia Employment", *Economic Journal of Emerging Markets*, Vol 2 Issue 1, April 2010, p. 91.

²⁸ Listiana Operananta, 2017, "Free Trade Agreement for Indonesia: A Love and Hate Reality", <https://www.linkedin.com/pulse/free-trade-agreement-indonesia-love-hate-reality-listiana-operananta?forceNoSplash=true>, accessed on Friday, March 3rd, 2017, at 8.04 p.m.

²⁹ Raymond Atje, 2017, "Current Status of FTAs in East Asia and Ripple Effect on Indonesian Economy", taken from https://www.jetro.go.jp/ext_images/jetro/topics/pdf/1303_topics3_annexion5.pdf, downloaded on Friday, March 3rd, 2017, at 8.29 p.m.

actually a good attempt for Indonesia to enhance its capacity in entering into relationship with other countries, as Indonesia seeks a platform to spread its wings in the field of business, technology, finance, and trade.

Disregarding that the FTA can reduce most tariffs of goods and services among Indonesia and the members to the Agreement, the FTA will basically encourage Indonesia to be more competent. The innovation should exist since triggering competition between companies will produce innovative products and solutions to seize the interest to the market. The FTA might also promote education, such as sending scientists to train people in Indonesia, or Indonesia can also send its agricultural experts to other countries to train farmers in increasing yields.

From the economic aspect, the FTAs would open up the market widely. This is an opportunity for Indonesian entrepreneurs and the Indonesian people in general to deliver good quality products, creative products, and it is needed by the market world that is increasingly growing. This can be done with a note of such products can compete with foreign markets. If creativity and initiatives of people are developed, there will be a healthy competition among producers to produce high-quality and innovative goods and services.

Thus, the FTAs will amazingly add employment opportunities. The reason for the existence of the FTAs makes market in goods and services of a country become more widespread. Marketing of the production is no longer simply relying on the domestic market alone, but

can also rely on the international market that the market is very broad. Therefore, the amount of goods and services produced can be multiplied and consequently the demands for labor also increase.

By joining any trade agreement, it is going to make the creation of efficient allocation of resources and specialization. In the end, because of the presence of free trade, Indonesia will only produce certain goods and services which are considered to be the most efficient if these goods and services are produced in Indonesia than if they are produced in another country. Thus, eventually all countries will specialize in a particular product, the result is that it would be efficient in the use of resources.

In addition, free trade can accelerate the progress in the science and the technology. Trading is basically competition of price and quality, so in order for Indonesia to exist in the free trade, the goods and the services offered must be superior in quality and cheap in price, this can only be achieved by continuing to develop the science and the technology.

Indonesia is actually one country that has been quite active in concluding FTAs. By July 2012, Indonesia had eight FTAs in effect, six regional and two bilateral (specifically, the ASEAN free trade area, AFTA; ASEAN-Australia and New Zealand, ASEAN-China, ASEAN-India, ASEAN-Japan and ASEAN-Korea FTAs, Indonesia-Japan EPA and Indonesia-Pakistan FTA). These agreements mean that Indonesia has FTAs with trading partners that account for of 67% of its total trade. For context, Chile, Peru, and Mexico have FTA coverage ratios of more than

80%, while Canada, Singapore and New Zealand are at more than 50%.³⁰

Right now, Indonesia is negotiating trade deals with some countries. It has also expressed an interest to join the Trans-Pacific Partnership (TPP).

2. The Challenges of the Free Trade Agreement

Many countries have pursued trade liberalization by forming bilateral or multilateral trade agreements to gain various economic benefits which come from trade creation and market expansion effect by elimination trade barriers and various dynamic effects such as capital accumulation and productivity improvement brought about by liberalization of FDI and technology transfer among member countries.³¹

As regards free trade agreements (FTAs) in East Asia, bilateral and regional FTAs have increased rapidly, such as in Indonesia, this country has entered into many bilateral and multilateral agreements. Initially, in 1997 Indonesia was hit by the economic crisis. It forced the government to turn to the International Monetary Fund (IMF) and to adopt an economic recovery and reform program, including in trade.³² Therefore, Indonesia seems close to FTAs and anything related to it.

Being the biggest market in ASEAN Economic Community (AEC) will not make Indonesia escapes from the challenges faced. Since

³⁰ Lili Yan Ing, 2017, "Free Trade Agreements for Indonesia?", taken from <http://thediplomat.com/2017/04/free-trade-agreements-for-indonesia/>, accessed on Saturday, March 4th, 2017, at 8.47 p.m.

³¹ Misa Okabe, *op. cit.*, p. 1.

³² Hadi Soesastro and M. Chatib Basri, 2005, *The Political Economy of Trade Policy in Indonesia*, CSIS Working Paper Series, Jakarta, p. 2.

AEC is a FTA, this offers opportunities and it absolutely has challenges, like the needs may change in line with times, challenges for movements, investment threats and people's resistance.³³ Thus, Indonesia has to think and consider well before it actually joins in any FTA.

The challenges inherent in the free trade system is how people can make the best use of every opportunity to develop the industry and produce products that can compete and absorbed in the international market, hence, creativity will be very great to be done. Besides that, the partner to the Agreement must also have equal ability, since the weight of both partners is really important for the products exchange,³⁴ so there will be stability in the Agreement.

As Indonesia has joined in many Asia-Pacific trade agreement, the Asia-Pacific itself has witnessed a surge in the FTAs since the 2010s, reflecting the region's greater economic integration. Despite its significant benefits, free trade agreements also bring challenges for countries and businesses:³⁵

- a. While domestic businesses benefit from a diversified export market, they also suffer from greater competition, due to the removal of trade

³³ Aziz Choudry, 2010, Fighting FTAs, "Educating for Action: The Challenges of Building Resistance to Bilateral Free Trade Agreements", *Journal of Alternative Perspectives in the Social Sciences*, Vol. 2 Issue 1, 2010, pp. 285 – 292.

³⁴ Bertrand de Largentaye, 2013, *Challenges and Prospects of a Transatlantic Free Trade Area*, Policy Paper, Notre Europe, p. 5.

³⁵ Euromonitor Research, 2017, "Challenges of Free Trade: Spotlight on Asia Pacific", taken from <http://blog.euromonitor.com/2016/07/challenges-of-free-trade-spotlight-on-asia-pacific.html>, accessed on Sunday, March 5th, 2017, at 6.08 p.m.

tariffs and inflows of cheap foreign goods. This may weigh on business profits and constrain business expansion.

- b. There is also concern that tougher competitive pressures will reduce the incentives in Asia-Pacific to implement proper labor standards and protect the environment. Asia-Pacific has been the world's largest polluter, as it accounted for 48.3% of the world's total carbon dioxide (CO₂) emissions in 2014, up from 42.1% in 2009.
- c. Free trade can contribute to higher income inequality, especially in high-wage countries, as it promotes cheaper goods from low-wage countries. Also, owners of intellectual property would receive more of the income gains, since FTAs often protect patents and copyrights. Income inequality has already been high in many Asia Pacific countries, such as China, the Philippines, Singapore, Thailand and Viet Nam.
- d. Growing trade flows will make it more difficult for some Asia-Pacific countries, such as China, South Korea and Japan, to rebalance their economies towards more consumption-driven models rather than export-led growth. In 2014, consumer expenditure made up 48.2% of Asia-Pacific's total GDP, significantly lower than 65.7% and 55.6% for North America and Western Europe in the same year respectively.

As developing country, Indonesia needs to pay attention to the challenges faced in the FTAs, because there is a set of problems

developing nations facing in world market when trading with industrialized countries, namely:

a. Non-diversified Economies

Many developing economies are highly dependent on the advanced nations as majority of their exports go to advanced nations and imports come from these advanced nations.

b. Unstable Export Markets

Another characteristic of many developing economies exports are based on primary products (agricultural products, raw materials and fuels) as shown table below. Therefore, when there is a poor harvest or decrease in demand for nation's specialized product, it can significantly reduce revenues from export and seriously disrupt domestic income and damage employment levels.³⁶

c. Worsening Terms of Trade

Developing nations complain that their commodity terms of trade has declined long time ago, meaning that prices of their exports relative to their imports have fallen.

d. Limited Market Access

Integration of developing countries as whole into world market has improved significantly. However, protectionism and trade barriers

³⁶ Carbaugh, 2004, *International Economics*, Ninth Edition, Thomson, New York.

imposed by many advanced nations have been hindrance to developing nation's market access. Specially, global protectionism in agriculture has been major problem for third world countries as agricultural commodities form their export. Many advanced nations use sizable subsidies to support their farmers. Consequently by doing that, they discourage agricultural imports.³⁷

For Indonesia, there are 3 (there) things that should be highlighted in facing FTAs, population growth, education, and economy. First, the population growth in Indonesia is large enough, then there are some things that need to be anticipated because the population growth that does not have the job skills will lead Indonesia into one of the major market for foreign products and the labor market for foreign workers. Then, education is an important part in deciding the fate of a nation. States should feel lucky if it has a large population, and its education is met.

Another thing, Indonesia must make its economy cycle better. The open unemployment rate stood at 5.7% or 7.15 million people. Unemployment will hamper the economy in Indonesia; the cause of unemployment is dangerously due to small work shortage, low skills and inadequate education.³⁸ If the economic system is bad, how can Indonesia enters into trade agreement?

³⁷ John Dudovskiy, 2017, "Problems Faced by Developing Nations in Free Trade", taken from <http://research-methodology.net/problems-faced-by-developing-nations-in-free-trade/>, accessed on Sunday, March 5th, 2017, at 8.16 p.m.

³⁸ Muhammad Saputra, 2017, "Menghadapi Tantangan Perdagangan Bebas ASEAN bersama Pekerja Sosial yang Berdaya Saing Global", Online Book, taken from http://www.academia.edu/9699981/MENGHADAPI_TANTANG

So far, the main export destination for Indonesia are the countries whose progress is very rapid, such as Japan, the US, European countries, and also the one that its progress is quite rapid, namely China. If Indonesian exporters continue to rely on the conventional market as it was then when those countries are experiencing a crisis, it would also disrupt the exports activities of Indonesia.

It seems that Indonesia should join FTA that is bigger in term of size and impacts to update the provisions on the international trade and investment. Given Indonesia's commitments to free trade and its accelerated dismantling of trade barriers, the reservations about AFTA in general and AFTA-BFTAs (Bilateral Free Trade Agreements) in particular seem paradoxical. Indonesia's cautious approach is due to its perceived lack of significant gains from regional FTAs compared to the gains from multilateral trade liberalization. This is particularly problematic at a time of high level of unemployment and when Indonesia's competitiveness is under threat from other labor abundant ASEAN countries.³⁹

C. The Opportunities and Challenges of the Trans-Pacific Partnership

1. The Opportunities of the Trans-Pacific Partnership

[AN PERDAGANGAN BEBAS ASEAN BERSAMA PEKERJA SOSIAL YANG BERDAYA A SAING GLOBAL](#), accessed on Monday, March 6th, 2017, at 11.03 p.m.

³⁹ Anis Chowdhury, 2007, "Indonesia's Hesitance with AFTA and AFTA plus: A Political Economy Explanation", Paper for FTA, Regional Integration, and Development Conference, December 18th – 19th, 2017, held in Pusan National University, Busan, South Korea, p. 3.

The idea of establishing the TTP negotiations initiated by countries in Asia-Pacific area to facilitate trade recovery and economic growth following the financial crisis in 2008 which affected world trade declined dramatically. International trade surely dominates and serves as an important contributing factor to the world economy's prosperity. Furthermore, trade has also promoted economic integration and cooperation among countries on both regional and global levels.

In relation with this issue, leaders from major trading countries in the Asia-Pacific region are concerned on the decline in merchandise and services trade. Although they have always been actively engaged in the Asia-Pacific Economic Cooperation (APEC) members, many Asian countries still suffer from the trade decline, such as Singapore, Malaysia and Viet Nam since they role as major exporters of merchandise and receivers of foreign direct investments. In addition, the Global Financial Crisis (GFC) revealed both the strengths and weaknesses of the global trading system under the WTO regime.

It is known that the global trade liberalization under the WTO is the best existing policy for the world as a whole. However, the current round of multilateral trade negotiations under the WTO, the Doha Development Agenda (DDA), has been deadlocked.⁴⁰ Therefore, the WTO, along with other regional trade organizations aim to facilitate trade

⁴⁰ Hoang Chi Cuong, 2013, *The Trans-Pacific Partnership (TPP): Opportunities and Challenges for Viet Nam*, Viet Nam, Khoa Hoc, p. 7.

resulting major Asia-Pacific countries seek to initiate a new FTA, which include the U.S. and other major trading partners among APEC members. In this case, the TPP has extremely offered a perfect opportunity to build trading foundation and boost rapid recovery in trade.⁴¹

The TPP project has garnered a lot of attention,⁴² since the TPPA definitely presents an opportunity to help countries recover from the trade decline while also offering new economic benefits based on the advantage of the Asia-Pacific region and unique features of the TPP framework. The TPP, especially with its potential expansion, is important largely because of the economic significance of the Asia-Pacific region for both the U.S. and the world.

According to IMF statistics, this region has some of the fastest growing economic and is home to more than 40% of the world population; it also is absolutely an important market for goods and services. Thus, the Asia-Pacific region represents an important source and destination for world trade and investment.

With this situation, developed countries like the U.S., Australia and New Zealand will be able to benefit from the TPP Agreement. They trade with quickly growing economies like Viet Nam, Peru and Chile. For

⁴¹ Lydia Yancan Li, 2017, "Trans-Pacific Partnership Agreement: An Analysis of Opportunities and Challenges", p. 1, taken from <https://www.cmc.edu/sites/default/files/keck/student/LiY%20Fellowship%20Paper.pdf>, downloaded on Sunday, January 29th, 2017, at 7.31 p.m.

⁴² Mireya Solís, 2013, *Endgame: Challenges for the United States in finalizing the TPP Negotiations*, The Japan Institute of International Affairs, Kokusai Mondai (International Affairs), p. 1.

instance, U.S. merchandise exports to Peru increased by more than double from \$2.3 billion in 2005 to \$4.9 billion in 2009.

Aside from that, in the seven years since the U.S. – Chile FTA went into effect, U.S. exports to Chile quadrupled, increasing from \$2.7 billion in 2003 to \$10.9 billion in 2010. It might be concluded from historical cases that the volume of trade between more developed countries and less developed, fast-growing economies will increase significantly with further trade liberalization under the TPP framework.⁴³

According to specialists, TPP impact must come from the adoption of common rules on production between countries. As a result, its influence on the business goes beyond the simple reduction of fees. By setting common legal rules between countries, businesses are provided with predictability for long-term business decisions, therefore facilitating investments. For example, a company may choose, as a strategy procuring from partner country regional chains, to export parts from one of the participating countries and final assembly being in one of the partner countries. The initial investment in this flow of goods should pay off in the long term as real savings.⁴⁴

As mentioned in the previous chapter, The TPP extremely covers all of the topics included in most modern FTAs, including trade in goods, services, technical barriers to trade, investment, government procurement,

⁴³ Lydia Yancan Li, *op. cit.*, p. 4.

⁴⁴ Marcos Piacitelli, 2017, “The TPP – The Trans Pacific Partnership – Overview”, taken from <https://tax.thomsonreuters.com/blog/onesource/tpp-trans-pacific-partnership-overview/>, accessed on Sunday, March 12th, 2017, at 12.43 p.m.

and intellectual property. In addition, the TPP also goes beyond these traditional areas, providing disciplines to new areas such as anti-corruption, electronic commerce, and cyber security.⁴⁵

Therefore, what is most interesting and significant in the TPP Agreement is the novel Chapters on items such as digital trade and electronic commerce, which is areas through which trade is increasingly being conducted. Such trade raises questions of local data-storage requirements, privacy and security, topics covered, as least to some degree, in the new agreement. As well, there are explicit Chapters dealing with development, particularly focused on capacity-building, that developing countries around the world have been advocating the past number of years.

Other than that, the TPP surely boosts exports and economic growth. This should create more jobs and prosperity for the 12 countries involved. It increases exports by \$305 billion per year by 2025. U.S. exports would increase by \$123.5 billion. It would benefit the machinery, auto, plastics and agriculture industries. It indeed increases exports by removing 18,000 tariffs placed on U.S. exports to the other countries. The United States has already withdrawn 80 percent of these tariffs on imports.⁴⁶ Here the TPP evens the playing field.

⁴⁵ Laura Dawson and Jeffrey Phillips, 2016, *Risks and Opportunities of the Trans-Pacific Partnership for Canada's Building Trades Unions*, Canada, Dawson Strategic, p. 4.

⁴⁶ Kimberly Amadeo, 2017, "Trans-Pacific Partnership: Pros, Cons, Obstacles", taken from <https://www.thebalance.com/what-is-the-trans-pacific-partnership-3305581>, accessed on Sunday, March 12th, 2017, at 2.35 p.m.

The TPP includes the first-ever provisions touching on State-Owned Enterprises (SOEs), with the requirement that such firms operate on a commercial and transparent basis as an important precedent. Provisions in the TPP on the environment and on labor are spelled out clearly and are an integral part of the agreement, rather than as side letters, as they were in the NAFTA and other more recent bilateral and regional trade agreements. Taken together, these new “innovative” elements in the TPP make this agreement a gold standard for future agreements. These elements could perhaps become, in due course, “path-breakers” for the World Trade Organization.⁴⁷

At the end, TPP is important for both developed and developing nations because of what it demonstrates globally in terms of the possibility of making progress on trade and investment liberalization and the capacity of the U.S. to lead such an effort. For one, the diversity of countries involved in lower-middle-income countries such as Viet Nam, upper-middle-income countries such as Malaysia and Mexico, and high-income countries such as Japan, Australia, Canada, and Chile sends an important message about the benefits to all countries of undertaking further trade and investment liberalization, committing to high standards and new regulations and rules on issues such as labor and the environment.⁴⁸

⁴⁷ John M. Curtis, *op. cit.*, p. 3.

⁴⁸ Joshua P. Meltzer, *loc. cit.*, accessed on Sunday, March 12th, 2017, at 2.00 p.m.

For the developing economic countries, through TPP, relations of trade, investment and cooperation in education, science and technology between developing members with other TPP members can improve and expand quickly. Accordingly, it creates more resources from outside to help them to develop and modernize the country in the new period.⁴⁹

These issues will of course become a great attempt for country in developing its economic, political and legal sectors. Moreover, for developing country like Indonesia that seeks bilateral or multilateral cooperation which will increase its income, TPP will be a wonderful option, since the developed countries joining the Agreement may help Indonesia in reaching its goal.

2. The Challenges of the Trans-Pacific Partnership

As the FTA under way for the United States established at a time of economic uncertainty in the aftermath of the Global Financial Crisis (GFC), the U.S. government definitely has aimed to accomplish very important goals with the TPP. *First*, TPP placed as a platform for the dissemination of high quality rules on trade and investment since actually the WTO has not updated these rules as part of a broad multilateral round since the conclusion of the Uruguay Round in 1994.

Second, marginalization from a process of Asian regional integration led by China is expected to be avoided, as there was concern

⁴⁹ Phan Quan Viet, *op. cit.*, p. 8.

with the modest progress in disseminating the American “gold standard” through bilateral trade agreements. Aside of that, the TPP aims to tap into the economic dynamism of Asia as part of a larger effort to find off-budget sources of growth through an export promotion strategy.⁵⁰

Even though U.S. has set a really great expectation in establishing the TPP, still many questions might arise since the TPP is not absolutely for U.S. itself, and furthermore, the time will always go on making such FTA is actually in line with time or not. What if the TPP is not doomed initiative – and what if it will actually make inroads into modern trade problems?

Yet since the start of the TPP negotiations, new countries have joined the TPP – adding more economic clout to the initiative. The scope of the negotiations has also changed somewhat, taking it into some novel fields of trade policy. Negotiations have advanced to a point where a conclusion is anticipated by involved countries in the near future.⁵¹

The TPP is perhaps best looked at as an experiment with a new model of trade agreement. An agreement on multilateral trade liberalization has been elusive, and bilateral trade agreements have perhaps reached the limits of their success. As a result, governments have pushed forward with an alternative model that is loosely tied to regions, but is perhaps more accurately described as a strategic trade alliance. This

⁵⁰ Mireya Solís, *loc. cit.*

⁵¹ Matthias Bauer, Fredrik Erixon, Martina Ferracane and Hosuk Lee-Makiyama, 2014, *Trans-Pacific Partnership: A challenge to Europe*, ECIPE Policy Brief, No. 9/2014, ISSN 1653-8994, p. 1.

model moves ahead with using trade agreements as global governance, tries to export U.S. values to trading partners, and expands trade relationships with some countries while excluding others.

But can it succeed in this way? As much as trade officials try to talk up the TPP as almost finished, describing the TPP as in the ‘end game’ late last year and early this year, if the TPP fails, on the other hand, then perhaps the trade community can begin to think more deeply about the best approach to economic integration.⁵²

Given its nature as an “evolving” Agreement will affect the members, since any constraints imposed will have a dynamic character and it is possible to expect that they will be modified over time (e.g: mechanisms aimed at harmonizing regulations and/or mutual recognition agreements). Then for the non-members, given the way in which the TPP proceeds to make the cooperative regulation of its members a reality (harmonization through recognition of equivalence exclusive to the Parties), excluded countries will suffer additional costs when competing with them for sure.⁵³

Another thing is that actually the TPP has a series of new chapters which reach even further into domestic law and policy. The Regulatory Coherence Chapter attempts to set regional limits on food and alcohol

⁵² Inu Barbee and Simon Lester, 2014, “The TPP and the Future of Trade Agreements”, *Latin American Journal of International Trade Law*, Vol. 2 Issue 1, 2014, p. 223 – 224.

⁵³ Extra-Regional Relations, 2016, *The Trans-Pacific Partnership Agreement (TPP): Challenges and Possibilities for Latin America and the Caribbean*, Venezuela, Latin American and Caribbean Economic System (SELA), p. 66.

labeling. These could prevent governments from introducing new forms of regulation, such as alcohol health warnings for pregnant women or better nutritional labeling of food.⁵⁴

Bernie Sanders⁵⁵ claimed that the Trans-Pacific Partnership is a disastrous trade agreement designed to protect the interests of the largest multi-national corporations at the expense of workers, consumers, the environment and the foundations of American democracy. It will also negatively impact some of the poorest people in the world. The TPP is a treaty that has been written behind closed doors by the corporate world. Incredibly, while Wall Street, the pharmaceutical industry and major media companies have full knowledge as to what is in this treaty, the American people and members of Congress do not. They have been locked out of the process. He further added,⁵⁶

“Let’s be clear, the TPP is much more than a “free trade” agreement. It is part of a global race to the bottom to boost the profits of large corporations and Wall Street by outsourcing jobs; undercutting worker rights; dismantling labor, environmental, health, food safety and financial laws; and allowing corporations to challenge our laws in international tribunals rather than our own court system. If TPP was such a good deal for America, the administration should have the courage to show the American people exactly what is in this deal, instead of keeping the content of the TPP a secret.”

⁵⁴ Pat Ranald, 2017, “Trans-Pacific Partnership Piles up Challenges for Democracy”, taken from <http://theconversation.com/trans-pacific-partnership-piles-up-challenges-for-democracy-32815>, accessed on Sunday, March 12th, 2017, at 8.09 p.m.

⁵⁵ Bernie Sanders is a U.S. Senator from the state of Vermont since 2007.

⁵⁶ Bernie Sanders, 2017, “Senator Bernie Sanders: The Trans-Pacific Trade (TPP) Agreement must be Defeated”, p. 1, taken from <https://www.sanders.senate.gov/download/the-trans-pacific-trade-tpp-agreement-must-be-defeated?inline=file>, downloaded on Sunday, March 12th, 2017, at 8.29 p.m.

In FTAs, countries generally benefit the most from liberalization of their own barriers to trade. While all TPP countries gain from the trade and investment reforms, not all firms and workers will be better off. Some firms will downsize or depart in the face of new competition; some workers will lose their jobs. The TPP does not cover employment policies or require retraining and retooling of workers and firms.⁵⁷ For instance when Indonesia joins the Agreement, will the Indonesian workers get a place to work? Or even it will be placed by foreign workers, since Indonesian workers might be left behind in term of knowledge. Thus, policymakers need to address these adjustment challenges as they advance strategies to take advantage of the new opportunities created by the TPP.

As mentioned in the literature review that as FTA, TPP absolutely has some challenges faced by members or those who wants to be member, namely Organizational Challenges, Public Policy Challenges, Economic Development Challenges, Overlapping Agreement Challenges, and Next Generation of the TPP Challenges.⁵⁸

Go straight to the Agreement, basically the number of TPP members makes complexity that will inhibit assessments of quality. The rationalization of national regulations and existing multilateral arrangements by itself is a daunting challenge, all the more so because the countries involved are at multiple stages of development. Ideal outcomes

⁵⁷ Jeffrey J. Schott, *op. cit.*, p. 4.

⁵⁸ Andrew Stoler, *loc. cit.*

are not feasible, particularly for a group that hopes to expand. The TPP should be judged on the number of clear steps forward, or backward.⁵⁹

In addition, the TPP would reward authoritarian regimes like Viet Nam that systematically violate human rights. This is due to the State Department, the U.S. Department of Labor, Human Rights Watch, and Amnesty International has all documented Viet Nam's widespread violations of basic international standards for human rights. Yet, the TPP would reward Viet Nam's bad behavior by giving it duty free access to the U.S. market.

Besides that, the TPP also has no expiration date, making it virtually impossible to repeal. Once TPP is agreed to, it has no sunset date and could only be altered by a consensus of all of the countries that agreed to it. Other countries, like China, could be allowed to join in the future. For example, Canada and Mexico joined TPP negotiations in 2012 and Japan joined last year.⁶⁰ This seriously makes any country that intends to enter into the Agreement feels free, just like whenever a country wants to enter and become a member, it is absolutely in the hand of the concerned country. And the expiration date that was not written in the Agreement will make the Agreement seem unclear.

Although, it absolutely has some challenges, the TPP is still a major attempt to be entered by both developing and developed nations. For

⁵⁹ Derek Scissors, 2017, "What a Good Trans-Pacific Partnership Looks Like", taken from <http://www.heritage.org/trade/report/what-good-trans-pacific-partnership-looks>, accessed on Sunday, March 12th, 2017, at 9.11 p.m.

⁶⁰ Bernie Sanders, *op. cit.*, p. 3.

Indonesia, it is not too late to participate in the one of the greatest trade and investment agreements in the area of Asia-Pacific in term of size and impact. Therefore, a very deep consideration has to be concluded by Indonesian government, such as measuring the advantages and disadvantages of TPP for the Republic of Indonesia, then the government may pay attention to the perspective of our national legal system towards the rules on the TPPA.

D. The Perspective of National Legal System towards the Rules on the Trans-Pacific Partnership

1. The Theory of Monism and Dualism

A country, in ratifying Treaties, knows a theory called monism or dualism. These monist and dualistic theory exist due to the relationship between International Law and National Law. It is used to divide which system applied in the country. Monism theory considers that the rule of national law is in the same sphere with international law, existing a report of supra/subordination, depending on the variant adopted. This theory considers that national law is derived from international law.

On the other hands, dualism theory says that international and national legal order are equal but completely independent and separate, which coexist in parallel, there was no relation of subordination between

the two systems.⁶¹ Further, to make an International Law becomes National Law, in Indonesia it needs an approval from the House of Representatives. In relation with this issue, it could be the matter to discuss whether Indonesia might apply monism or dualism system in ratifying the TPPA.

The TPPA is actually like the ASEAN Charter that is an agreement that has to be fully run by all members to the Agreement, since both are a cooperation agreement among the countries. Thus, the members have to take all the responsibilities and obligations aside from the rights. It can be simply understood that in the TPPA basically all Provisions and Policies in the Agreement shall be fully taken and be run by the members without filtering or eliminating some Provisions or Policies of the Agreement.

In connection with the Monism and Dualism theory, Indonesia is actually applying dualism theory. It absolutely can be seen in the 1945 Constitution of the Republic of Indonesia and Law No. 24 Year 2000 on International Treaties.

Article 9 paragraph (2) explained that the ratification of International Treaties shall be done by law or Presidential Decree.⁶² It means that the ratification requires an approval from the House of Representatives of the Republic of Indonesia. Then, the endorsement with

⁶¹ Emilian Ciongaru, 2012, "The Monistic and the Dualistic Theory in European Law", *Acta Universitatis George Bacovia. Juridica*, Vol. 1 Issue 1, 2012, Online ISSN 2285-1933 & Print ISSN 2285-0171, Romania, George Bacovia University Printing House, p. 218.

⁶² Article 9 paragraph (2) of the Law No. 24 Year 2000 on International Treaties.

a Presidential Decree further will be notified to the House of Representatives as well.

In addition, the 1945 Constitution also explained on the dualism system applying in Indonesia, Article 11 stated:⁶³

“(1) The President with the approval of the House of Representatives may declare war, make peace and conclude treaties with other countries. (2) The President in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or that will require an amendment to or the enactment of a law, shall obtain the approval of the House of Representatives.”

Hence, adopting International Law to become Domestic Law cannot be directly done; it is necessary to follow the guideline set out in the 1945 Constitution and also related laws; the President has to be one with the House of Representatives. Therefore, in ratifying the TPPA to be Indonesian Law, the President of the Republic of Indonesia needs an approval from the House of Representatives.

Accordingly, it can be concluded that normatively in signing the TPPA and making it as the Indonesian Law, there is an existence of dualism theory in which International Law and National Law are parts of the different legal system. Thus, they are absolutely separated.

⁶³ Article 11 of the 1945 Constitution of the Republic of Indonesia.

2. The Perspective of Indonesian Legal System towards the Rules on the Trans-Pacific Partnership

From the discussion above, the discussion may arise on how our national legal system sees the TPPA, since there are surely many provisions in the Agreement that needs to be examined deeply, like in the investment, do we really need to change a little bit about the rules on investment of ours? This will lead us to think on the domination of the TPP provisions to our legal system.

This will be quite difficult to examine the TPPA since the TPP itself was primarily negotiated in secret and hidden from not only the general populations of the 12 nations, but also from their elected representatives in their respective legislative branches. Leaders of the TPP member countries kept the full text of the agreement secret until the full package was ready to be released, supposedly fearful—according to proponents—of undercutting their own negotiators. In actuality, the TPP was kept a secret because of the fear that the public becoming aware of the details of the agreement would fuel massive opposition to it.⁶⁴

The Haas Institute for a Fair and Inclusive Society is committed to promoting an inclusive, just, and sustainable society and people do so through conducting engaged research and employing strategic communications to address issues faced by the most marginalized

⁶⁴ John A. Powell, Elsadig Elsheikh, and Hossein Ayazi, 2016, *The Trans-Pacific Partnership Corporations Before People and Democracy*, Berkeley, California, Haas Institute for a Fair and Inclusive Society, p. 12.

populations. The research and analysis of the TPP agreement raises serious concerns about the trade deal with respect to the following three principles:⁶⁵

a. Democratic Participation

The first among these principles is democratic participation—a response to the TPP’s secrecy from the general public and elected officials, and its relative non-secrecy to corporations and appointed, non-elected government bureaucrats. With regard to such agreements, democratic participation encompasses access to key decision-makers and decision-making processes, and the ability to make meaningful contributions to the decision-making process.

b. Transparency⁶⁶

The second among these principles is transparency, which is essential for democratic participation. Access to information motivates and empowers the general public to participate in an informed manner. This access to information is vital for holding government agencies and private corporations accountable for decisions that affect the public. Regarding the TPP in particular, transparency is crucial, as every part of society would be affected by this agreement including food safety, healthcare, the environment, migration, and the distribution of wealth, among others.

⁶⁵ *ibid.*, pp. 7 – 8.

⁶⁶ The TPP forbids release of the draft texts and negotiating notes and background papers for five years after it is implemented or abandoned.

c. Public Accountability

The third among these principles is public accountability. As part of the system of increasing privatization, which has taken shape since the early 1980s, the overall exercise of political power has been increasingly modeled on principles of the market-based economy. In this way, governments have become more responsive to corporate actors and interests and less to their own people. The case against the TPP must be one that holds democratic institutions and decision-makers accountable to the interests and wellbeing of the general public and not corporations.

Those three principles are actually in line with Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia which stated,⁶⁷ *“the organization of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.”* It means, the TPP principles stated by the Haas Institute reflects the idea of economy in Indonesia.

In addition, Indonesia aims to build a better life for its citizens by delegating its power in maximizing the natural resources for those who wants to establish SMEs or business. It could be seen through Article 33

⁶⁷ Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia.

paragraph (3) of the 1945 Constitution which states,⁶⁸ “*the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.*”

Exporting the products of natural resources will absolutely boost Indonesian’s economic; here the TPP is going to be a major attempt to reach it. Moreover, the TPP will significantly boost Indonesian’s economic relationships through the region: creating seamless preferential supply chains with the TPP Parties; bolstering relations with those with whom we already have existing FTAs (bilateral or regional).⁶⁹ As the result, it will economically beneficial for both Indonesia and its citizens.

By setting common international trade and investment standards between member countries, the TPP will make doing business across the region easier, reducing red tape⁷⁰ and business costs.⁷¹ By reducing the red tape, the decision-making process is expected to be faster. Therefore business activities among the members will run effectively.

The realities of global political economic developments, however, mean that a country must secure its future with the necessary institutional frameworks to be able to engage, advance and defend its interests. There will be some pillars that must be noted if Indonesia really

⁶⁸ Article 33 paragraph (5) of the 1945 Constitution of the Republic of Indonesia.

⁶⁹ ATNIF 2, 2016, *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Viet Nam and Associated Side Letters*, Auckland, National Interest Analysis [2016] ATNIA 4, p. 3.

⁷⁰ Red tape is an idiom that refers to excessive regulation or rigid conformity to formal rules that is considered redundant or bureaucratic and hinders or prevents action or decision-making, so that the decision-making process is too long.

⁷¹ ATNIF 2, *op. cit.*, p. 4.

wants to enter into the TPPA like Malaysia for example as one of the members, namely Security Pillar, Social Pillar and Economic Pillar.⁷²

In term of security, Indonesia's participation will result in the interaction to the security interest. It could be either good or bad. As mentioned previously that the TPP will remove some tariff-rate quotas (TRQs) and many non-tariff barriers to goods and services trade and investment between the parties to the Agreement. It will certainly attract foreign investors to come to Indonesia for business. When it deals with the enhancement of the foreign investors who comes to Indonesia, it may affect our national security by the explosion of them. This explosion of foreign investors could be a bad impact to the security sector.

On the other hand, if the Jokowi Administration can manage this issue well, this could lead to good thing as well. For instance, by entering into the TPPA, the government attempts to reinforce the security in order to protect the nation from the disruption of the foreign investors' explosion. Strengthening the security is a really brilliant idea to be implemented when Indonesia signs the Treaty, so the business activities run perfectly.

For the social matter, the standard of living and welfare of workers should improve over time and The TPP is expected to also bring about stronger standards and enforcement in environmental protection.

⁷² Firdaos Rosli, et. al., 2015, *National Interest Analysis of Malaysia's Participation in The Trans-Pacific Partnership*, Malaysia, Institute of Strategic and International Studies, pp. 9 – 10.

The positive effects on wealth and job creation resulting from the TPP should lead to greater social harmony.

However, the impact on income distribution is indeterminate, given the many factors that can determine this. For example in Malaysia as one of the members, there is an overall positive impact on the cost of living as a result of greater access to, and competition in, Malaysian markets. The prices of some goods and services, however, will not decline as they are still subject to domestic regulations and competitive supply conditions. There should not be a significant impact on timely access to affordable and essential medicines due to safeguards and the nature of Intellectual Property provisions.⁷³

Besides those matters, economically, as the TPP removes most tariff barriers, it will surely affect the provisions concerning the tax and both the export and import of products which hinder the entry and exit of goods/services. Thus, Indonesia should be ready to receive foreign investors and should open all economic sectors for them.

The TPP is also equipped with the Investor-State Dispute Settlement (ISDS) as a dispute resolution institution for investors. The ISDS provisions of the TPP Agreement allow an investor from a TPP member state to bring a binding arbitration proceeding against a host TPP

⁷³ *ibid.*, p. 10.

member state if the host country has breached any of these normative protections.⁷⁴

This is going to protect foreign investors absolutely, especially for the investors come from the developed nations. They may demand a petition to the ISDS if the investors judge that the relevant government policies discourage the investment of the TPP member countries. This is certainly not true and cannot be justified, since every country has their own rules and regulations on the investment, import, and also export. Moreover, basically there are three keys that have to be met in arbitration process, namely the existence of a dispute, deal to hand over to a third party, and the final and binding decision that will be dropped.⁷⁵ Accordingly, when the consent of one of the parties is absent, then the arbitration seems could not be run.

For the developing nations, TPP may represent several things which really need to be discussed carefully. There are at least nine major ways the agreement would stunt the national economic development of its developing country members:⁷⁶

a. The TPP Forces Equal Rules on Unequal Partners

⁷⁴ Ko-Yung Tung, 2015, "Investor-State Dispute Settlement under the Trans-Pacific Partnership", *The California International Law Journal*, Vol. 23 No. 1, 2015, p. 19.

⁷⁵ Yordan Gunawan, 2017, "Arbitration Award of ICSID on the Investment Disputes of Churchill Mining PLC v. Republic of Indonesia", *Hasanuddin Law Review*, Vol. 3 Issue 1, April 2017, ISSN 2442-9880 & e-ISSN 2442-9899, Halrev, Hasanuddin University, Makassar, p. 16.

⁷⁶ Rick Rowden, 2017, "9 Ways the TPP is bad for Developing Countries", taken from <http://foreignpolicy.com/2015/07/07/9-ways-the-tpp-is-bad-for-developing-countries/>, accessed on Friday, March 17th, 2017 at 3.49 p.m.

The TPP members that are already rich and industrialized (Canada, the United States, Japan, Australia, and New Zealand) are aggressively seeking uniform tax and financial policies and low level regulations around the world in order to reduce operating costs for their multinational corporations. That, indeed, feels unfair and could harm developing countries.

b. The TPP Forbids Using Trade Policy to Protect Domestic Industries

Going further than current World Trade Organization rules, the TPP seeks deep cuts in quotas, tariffs, and other protective trade policies, ensuring that nascent manufacturing industries in its developing members will face massive competition from far more competitive foreign firms. The TPP would also prohibit levying taxes on the export of raw materials.

Such policies encourage the domestic manufacturers to devise a way facing foreign industries which will be very great rival in getting the place in the heart of consumers. Surely, developing nations need extra effort in doing so since they compete with the developed nations that are more knowledgeable in term of economic field.

c. The TPP Bans Using Government Procurement to Assist Domestic Firms

The commitments in the Government Procurement chapter apply only to procurement that each country has agreed to cover. Eight

of the 11 TPP Parties have already agreed to ambitious coverage of their government procurement in the past trade agreements with the United States.⁷⁷ If Indonesia signs the Agreement, it will be definitely adopted by Indonesia.

The rich countries in the TPP negotiations are demanding that foreign corporations be allowed to compete with domestic companies for government procurement contracts. But historically, countries have used procurement as an explicit form of assistance for their domestic firms.

d. The TPP Limits Regulation of Foreign Investors Too Much

The TPP proposes that no special regulations are allowed to apply to foreign investors; it means that they must be treated equally/no differently from domestic companies. But this is actually another example of hypocrisy — most industrialized countries long used “local content” rules and other regulations to ensure that foreign investment transferred technology and purchased local goods and services to boost domestic sectors. However, according to a leaked draft of the TPP’s Investment Chapter, any policies that favor local ownership would be considered discriminatory and prohibited.

⁷⁷ USTR, 2017, “Summary of the TPP Chapter on Government Procurement”, p. 3, taken from <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Government-Procurement.pdf>, downloaded on Saturday, March 18th, 2017 at 3.38 p.m.

e. The TPP Undermines the Sovereignty of National Courts And Scares Countries from Adopting New Regulations

Enforcing the TPP's new deregulated standards also proposes to radically extend the traditional definition of "unfair expropriation or nationalization" of a foreign investment to include "the expectation of gain or profit." Thus, it allows a corporation to sue a signatory nation for enacting new regulations or laws, even those that address public-interest concerns like labor and environmental rights if it believes these would deprive it of "expected profits."⁷⁸

f. The TPP Makes Countries more Vulnerable to Financial Crises

The TPP's Investment Chapter⁷⁹ is only a part of a treaty whose "mega" ambitions are as vast as its economic scale.⁸⁰ However, the TPP goes against new thinking on best practices regarding capital controls; this is due to the restrictions on the ability of investors to bring in or take out vast amounts of capital from countries overnight. Even the IMF reversed its long-standing opposition to capital controls in 2012, finally agreeing with mounting research showing that capital controls may be useful in ensuring financial stability in a crisis by stemming sudden outflows or disruptive inflows. Yet, despite this new

⁷⁸ Rick Rowden, *loc. cit.*

⁷⁹ The TPP's Investment Chapter is over 50 pages long including 9 annexes and is only 1 Chapter of 30.

⁸⁰ José E. Alvarez, 2016, "Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?", *ILJ Working Paper 2016/3*, ISSN 1552-6275, March 27th, 2016, New York, Institute for International Law and Justice, p. 2.

conventional wisdom, the TPP would block developing countries from using capital controls.⁸¹

g. The TPP Undermines Public Health

The TPPA affirms that a Party may take measures to protect public health in accordance with the WTO Doha Declaration on the TRIPS⁸² Agreement and Public Health.⁸³ However, in implementing the Agreement there is something which needs to be evaluated, especially in the health sector.

Many health groups such as Doctors Without Borders have campaigned against the TPP because its rules on IPR would keep cheaper generic drugs out of reach for millions of poor people in developing countries. According to a leaked draft of the IPR Chapter, the TPP would greatly extend existing patents and copyrights on essential drugs and expand the scope of patents and copyrights beyond finished products to include coverage of many components of finished goods. If enacted, such rules would considerably undermine developing countries' ability to address public health needs; indeed it means that more people would die.

h. The TPP Blocks Companies from Acquiring Needed Technology

⁸¹ Rick Rowden, *loc. cit.*

⁸² TRIPS stands for Trade-Related Aspects of Intellectual Property Rights. It is an international legal agreement between all the member nations of the World Trade Organization (WTO).

⁸³ Ronald Labonté, Ashley Schram and Arne Ruckert, 2016, *The Trans-Pacific Partnership Agreement and Health: Few Gains, Some Losses, Many Risks*, Globalization and Health, BioMed Central, p. 2.

The IPR Chapter would also significantly stunt the development of manufacturing firms in developing countries because it would considerably raise the costs of and create new barriers to accessing needed manufacturing technologies, thereby hampering firms' ability to engage in reverse-engineering, it is a key step in the learning-by-doing process used by all developed economies when they were first developing.⁸⁴

i. The TPP Undermines State-Owned Companies

The text reveals that the Competition Chapter of the TPP aims to place stringent requirements and restrictions on TPP governments in how they use and finance state-owned enterprises, including where SOEs are used to provide vital public services, support local businesses or encourage social, cultural or economic development. SOEs would be obliged to act on commercial considerations only, and would be prohibited from discriminating in favor of local goods and services.⁸⁵ These Specific rules on SOEs are necessary and certain problems are created by a lack of adequate disciplines on the potentially trade and investment distorting effects of these SOEs.⁸⁶

⁸⁴ Rick Rowden, *loc. cit.*

⁸⁵ WikiLeaks, 2015, "Secret Trans-Pacific Partnership Agreement (TPP) Treaty: State-Owned Enterprises (SOE) Issues for Ministerial Guidance", Trans-Pacific Partnership Agreement Meeting of Ministers, Trans-Pacific Partnership Negotiators, p. 1.

⁸⁶ Ines Willekens, 2016, "Disciplines on State-Owned Enterprises in TPP: Have Expectations Been Met?", *Working Paper*, No. 168, January 2016, Belgium, Leuven Centre for Global Governance Studies, p. 4.

The TPP proposes breaking up SOEs, which have been cornerstones of East Asia's successful industrialization strategy for many decades. Not only would the proposed reforms significantly curtail state support for such firms, but they would also commercialize current SOEs in Malaysia, Viet Nam, and Singapore. These countries would be locked into such constraints going forward and would be prevented from offering state support to any new or future SOEs.⁸⁷

Those things are quite enough to define the TPPA and its consequences. However, for Indonesia as seeking brilliant opportunity to build up cooperation with others, the TPP with its members embodies great and promising attempt to run the economic cycle, and it will help Indonesia in facing globalization that is increasingly getting cruel time by time.

In addition, since the President of the U.S. is now Donald Trump, who used the campaign before the election to shout to the world that if he became the new President, his Administration would withdraw the U.S. from the TPP. Finally, he won the election, and was chosen as the new President of the U.S. Then, on January 23rd 2017, America formally withdrew from the TPP as Donald Trump signed the executive order to withdraw the U.S. from the 12-nation of TPP.

Figure 4.

President Trump Signing the U.S. Resignation Letter from TPP



⁸⁷ Rick Rowden, *loc. cit.*

Source: <https://www.thestar.com/news/world/2017/01/23/trump-signs-notice-to-withdraw-from-trans-pacific-partnership.html> (March 18th, 2017, at 11.13 p.m.

Professor of International Law, University of Indonesia (UI) Hikmahanto Juwana said that Indonesia does not get much benefit if it enters and becomes a member of the TPP. He further added that TPP is an agreement that is strongly colored by the interests of the U.S. where the TPP would favor the U.S. workers; this means the U.S. products will be able to compete with products from other TPP member countries because the cost of production will be the same.⁸⁸ By the discharge of the U.S., it will certainly benefit Indonesia, since both economic and strategic significance for the U.S. will be removed from the Agreement.

Figure 5.

U.S. Withdrew from TPP

⁸⁸ Phone Interview with Hikmahanto Juwana, an International Law Expert from University of Indonesia, interviewed on Tuesday, March 21st, 2017.



Source: <http://www.trbing.com/img-58863aea/turbine/ct-donald-trump-executive-orders-trade-tpp-20170123> (March 19th, 2017, at 0.33 a.m.)

Thus, although the U.S. is no longer the member of the TPPA, still, Indonesia has wonderful and excellent chance to participate in it. Without the direction from the U.S., the 11 members of the TPP might create new rules governing international trade which are in line with the members objectives instead of the U.S. objectives. Therefore, the TPP will become a FTA that is acceptable and profitable either for current or latecomer members to the Agreement.