

Chapter 1

From TPP to the “America First” Trade Policy

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Abstract: Trump’s US government decided to withdraw from the TPP, and instead, pursue bilateral negotiations wherever possible. What consequences will be brought about by Trump’s “America First” trade policy? This paper defines TPP’s plurilateral approach as “Going hand in hand together,” and predicts that the Trump’s “America First” trade policy would create an American hub and the others spoke structure. If one country starts bilateral trade negotiations, due to the domino effect, the American hub and the others spoke structure will soon follow. This study compares the legal provisions of TPP and the AEC, and suggests that the other 11 members should establish TPP11, and at the same time, the AEC and RCEP should incorporate elements of the TPP.

Keywords: *FTA, plurilateral FTA, bilateral FTA, TPP, RCEP*

JEL Classification: *F13; F15; F53*

1. The US withdrawal from TPP

The global standard was surely going toward a more open and free world when on 4th February 2016, in Auckland, New Zealand, the Trans-Pacific Partnership (TPP) Agreement was signed by 12 countries including Brunei, Malaysia, Singapore, and Vietnam, and the two-year ratification period before entry into force started. The TPP obliges the parties (member countries) to implement high quality trade and investment

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rules to force the member countries to conduct liberalisation of the domestic markets as well as regulatory reform. The participation by Vietnam in TPP, in particular, would hurt the exports of Indonesia, the Philippines and Thailand. Finally, due to the “domino effect,” TPP is expected to involve these countries. Indeed, the three countries expressed their wish to join the TPP.

The situation changed drastically when Mr. Donald Trump was elected US President. On November 21, 2016, the US President-elect Donald Trump sent a video message that he intended to withdraw from the TPP on the first day of work as the President of the United States. Since then, the policy makers in southeast Asia lost their interest in TPP as if TPP had collapsed.

On January 20, 2017, just one day after the inauguration of the President of the United States, the White House released its six top issues, of which, “Trade Deals Working For All Americans” stated as follows:

This (American workers and businesses first) strategy starts by withdrawing from the Trans-Pacific Partnership and making certain that any new trade deals are in the interest of American workers. President Trump is committed to renegotiating NAFTA. If our partners refuse a renegotiation that gives American workers a fair deal, then the President will give notice of the United States’ intention to withdraw from NAFTA (White House, 2017a).

On January 23, 2017, President Trump signed the Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement confirming that the United States will permanently withdraw from TPP negotiations, and begin pursuing, wherever possible, bilateral trade negotiations to promote American industry, protect American workers, and raise American wages (White House, 2017b).

On January 30, 2017, the USTR sent a letter to the TPP Depositary in New Zealand informing that the United States does not intend to become a party to the TPP, and has no legal obligations arising from its signature on February 4, 2016, and requests that New Zealand notify the other signatories accordingly (USTR 2017).

2. The Collapse of the Plurilateral Hand in Hand Approach

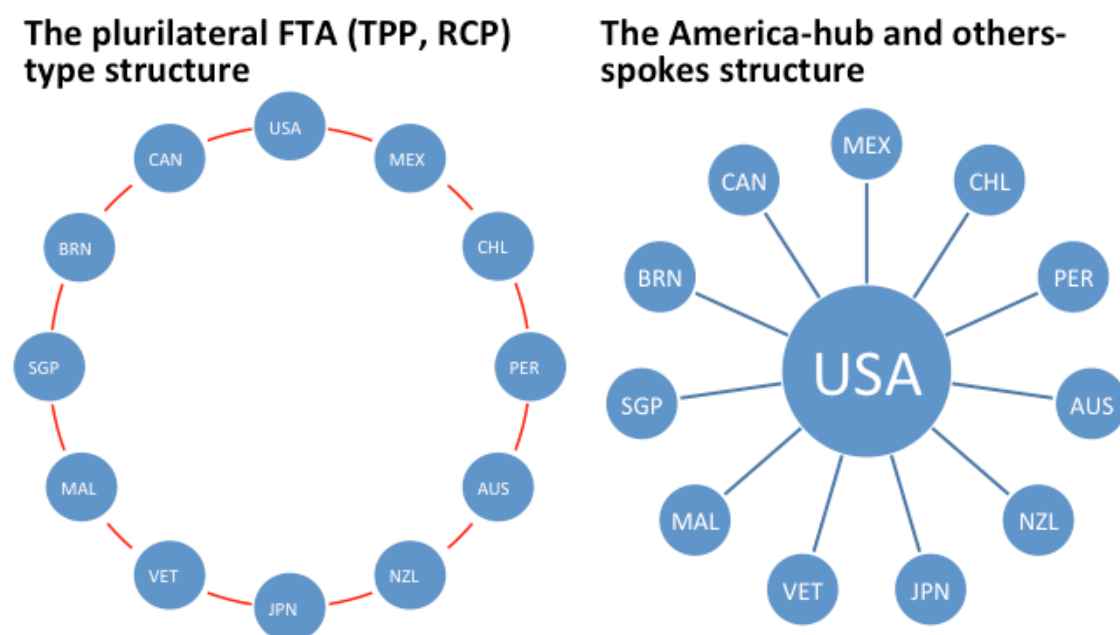
The “America First” policy on trade has three pillars. The first pillar is the “Border tax,” targeting a specific country and a specific product, which does not meet the WTO rules.

President Donald Trump criticised the automobile companies, Ford, GM, and Toyota for building factories in Mexico to supply the American market, and he tweeted that “Build plants in the U.S. or pay a big border tax”.

The second pillar of Trump’s “America First” policy is to reduce barriers to business in America. It includes the reduction of corporate tax and deregulation of the financial sector to provide loans to SMEs.

The third pillar, and perhaps most importantly of concern to Asia, is withdrawal from plurilateral FTAs, such as TPP and NAFTA, and pursuing bilateral FTAs wherever possible.

Figure 1. The plurilateral FTA structure and the American hub and the others spoke structure

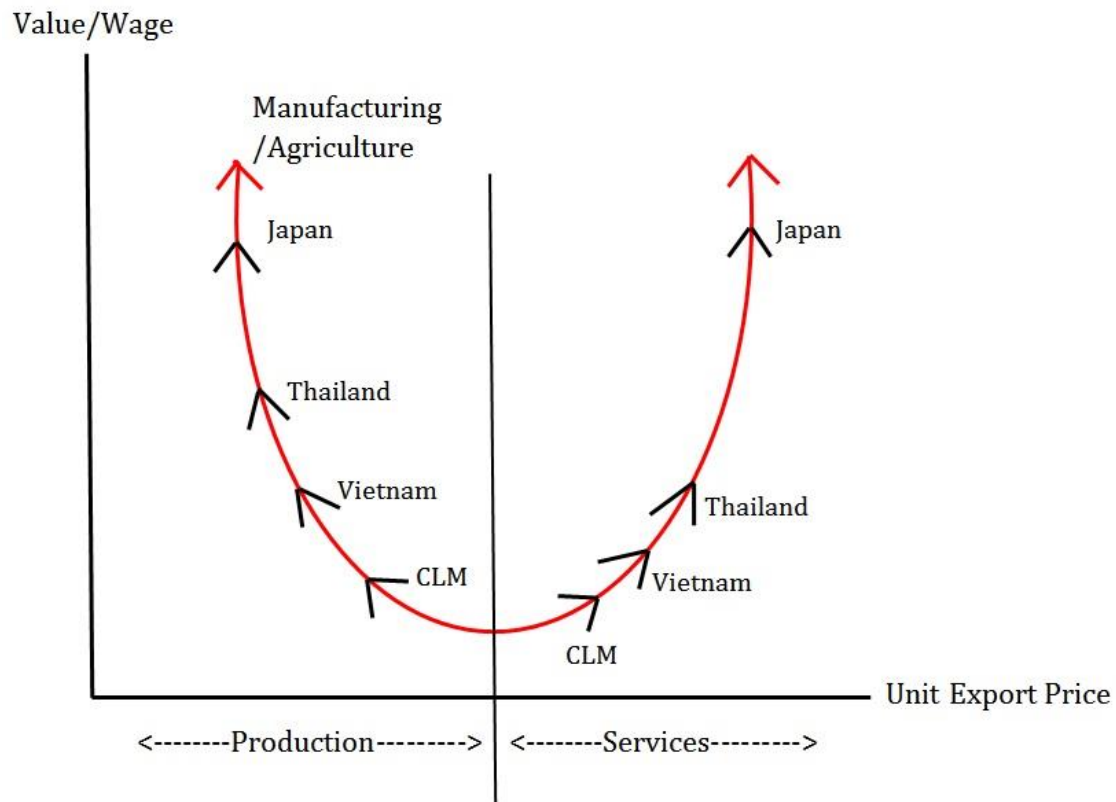


Source: Author

It is noteworthy that plurilateral FTAs, such as AEC and TPP, follow the going hand-in-hand together approach (Figure 1). The TPP’s hand-in-hand together approach implements single trade and investment rules and principles, such as rules of origin, investor state dispute settlement, intellectual property, labour, cooperation by SMEs, etc., which will encourage regional production and service supply chains. The plurilateral FTAs, if services are liberalised and transparent, will establish a predictable

business environment that will make it possible for each member to participate in the value chains and access higher value chains (Figure 2). It also will encourage “servicification,” the digital economy, and “Industry 4.0,” where production bases and various service suppliers are connected through the Internet.

Figure 2. Production and services smile curve



Source: Author’s compilation

3. The American hub and the others spoke structure and the Domino Effect

More importantly for Asia is that the “America First” trade policy includes pursuing bilateral FTAs wherever possible, because pursuing bilateral FTAs by America will make the so-called hub and spoke structure (Kowalczyk and Wonnacott, 1992; Baldwin 1994 and 2003); the American hub and the others spoke structure (Figure 1).

The American hub and the others spoke structure is problematic for Asia, and in

particular ASEAN. Firstly, the hub and spoke structure will not generate interaction by manufactures and service suppliers between the spoke countries.

Secondly, the long geographical distance between the suppliers in Asia and the markets in America is problematic. Most Asian exporters, in particular the SMEs, do not know the American market well as it is far from Asia. Only large-scale exporters can access the American market. Thus, the American hub and the others spoke structure may go backward concerning inclusive growth.

If one country begins bilateral trade negotiations with a big country, non-member country exporters want to avoid damage as well as gain new commercial opportunities, and will press their government to start negotiations in the first round. In the second round, other non-member country exporters will follow in a similar way, driving the “Domino effect” (Baldwin, 1993).

This domino effect works intensively within a region because the neighbouring non-member country exporters want to avoid any disadvantage of being a non-member.

This domino effect theory indicates that, if one country starts bilateral trade negotiations with America, the domino effect will force one country with another country to start bilateral trade negotiations with America. In other words, it is a matter of time before emergence of the American hub and the others spoke structure.

4. Trade-Investment-Service-Intellectual Property Nexus

The ASEAN countries are trying to climb up the value chains, and some, including Malaysia and Thailand, are trying to overcome the middle-income trap. Therefore, establishment of the trade-investment-services-intellectual property (T-I-S-IP) nexus is essential.

It is very important that the T-I-S-IP nexus can accommodate not only the low- and middle- value chains of manufacturing and services, but also the high-value chains for “Headquarters’ services”. In the 21st century, the “Headquarters services” in a firm will not concentrate in one home country but disperse to countries where a favourable T-I-S-IP nexus exists.

Baldwin (2013) argued that the T-I-S-IP nexus demands two disciplines: (1) Doing business abroad or doing business by foreign investment, which is the investment and intellectual property part; and (2) The two-way cross-border flow of goods, services, people, capital, and training, which is the trade, investment, and services part. The study

suggests that in order to establish the T-I-S-IP nexus, it is necessary to implement a suitable legal framework, promote the flow of trade-investment-services, and protect intellectual property.

5. The Main Features of TPP

TPP provides such a legal framework for the T-I-S-IP nexus. It is a landmark of the 21st century's regional trade agreement that enhances regional competitiveness in global supply chains, and digital economy through the reduction of barriers to telecommunication and electronic commerce. Also, TPP not only establishes a level playing field thorough liberalisation of trade and investment in a comprehensive manner but it also establishes a transparent and predictable business environment by coordinating the laws and regulations related to trade and investment, including government procurement, intellectual property, state-owned enterprises, labour rights, the environment, etc.

The TPP Agreement is composed of the Introduction, 30 Chapters, and Annexes. TPP takes the single-undertaking approach that asks each member to accept all 30 Chapters, and the Annexes, Appendices, and Footnotes to the Agreement.

The 30 Chapters can be classified into six categories as summarised in Table 1. They are (1) Market access for goods' liberalisation including single rules of origin and technical barriers to trade; (2) Liberalisation of services and investment, including reduction of the barriers to telecommunications and electronic commerce; (3) Business environments including government procurement, state-owned enterprises, labour, the environment, and intellectual property; (4) Good governance comprising regulatory coherence, transparency, and anti-corruption measures; (5) Cooperation in capacity building, development, SMEs ; and (6) General provisions.

6. Legal Framework of TPP and the AEC or ASEAN+1 FTAs

What is different between the TPP and the ASEAN Economic Community (AEC), and ASEAN+1 FTAs? The AEC comprises (1) The ASEAN Trade in Goods Agreement (ATIGA) for the free-flow of goods; (2) The ASEAN Framework Agreement on Services (AFAS) for the free-flow of services, (3) The ASEAN Comprehensive Investment Agreement (ACIA) for the free flow of investment, and the ASEAN Agreement on the Movement of Natural Persons (AAMNP) facilitating the movement

of natural persons, and the Mutual Recognition Arrangements (MRAs) facilitating the mobility of professional/ skilled labour within ASEAN.

Firstly, TPP incorporates the pro-supply chain rules of origin and origin procedure. TPP adopts the single rule of origin which applies to all 12 members. ASEAN enforced the “ASEAN+1 FTAs” with China in 2005, Japan in 2008, Korea in 2007, Australia and New Zealand in 2010, and India in 2010. Each FTA has different rules of origin, operational certificate procedures (OCPs) of origin, and different forms of certificate of origin (CO). The requirements and procedure for obtaining COs differ according to each FTA.

Also, TPP adopts the full-accumulation account of origin by the TPP members. Article 3.10: Accumulation, Chapter 3 on the Rules of Origin, and Origin Procedures, provides the rules of origin in three cases: Case 1) A good is originating if the good is produced in the territory of one or more of the parties by one or more producers; Case 2) An originating good or material of one or more of the parties that is used in the production of another good in the territory of another Party; Case 3) Production undertaken of a non-originating material in the territory of one or more of the parties by one or more producers may contribute toward the originating content of a good for the purpose of determining its origin, regardless of whether that production was sufficient to confer the originating status to the material itself.

On the other hand, the ATIGA adopts the partial accumulation rule, by which the value of the originating parts can be accumulated, provided that the value added content ratio is more than 20%. The ASEAN+1 FTAs adopt the non-full accumulation rule.

TPP adopts the self-certificate system, which provide that an importer may claim preferential tariff treatment, based on the certification of origin completed by the exporter, producer, or importer. This self-certificate system enables exporters and importers to speed up the export and import procedures to comply with the just-in-time production schedules. The ASEAN+1 FTAs adopt the third-party certification system, by which third-party organisations issue the certificate of origin if the product complies with the request by an exporter or producer. The self-certification system under ATIGA adopts the third-party certificate system, and will introduce the self-certificate system in 2017.

Secondly, TPP adopts the negative list approach to liberalise services and investment. The AFAS employs the positive list approach, by which lists the liberalised

services and investments.

Thirdly, the TPP aims to reduce the barriers to investment, which are the “ACIA plus” provisions. The prohibition of performance requirements by the ACIA adopts the provisions of the Agreement on Trade-Related Investment Measures (TRIMs).. The TPP’s performance requirements describe the details of performance that each Party prohibits. The TPP does not allow the parties to restrict transfers even in exceptional circumstances, while the ACIA provides that a Member State may impose restrictions on any capital transactions where, in exceptional circumstances, movements of capital may cause, or threaten to cause, serious economic or financial disturbance in the Member State concerned.

Fourthly, the ACIA has articles related to the ISDS. The TPP’s ISDS is the ACIA plus in (1) Third party involvement (the ACIA allows involvement solely for taxation disputes); (2) Transparency of arbitrary proceedings (documents of arbitrary proceedings and hearings shall be made public, and awards/decisions may be made public under ACIA);

Fifthly, the TPP’s intellectual property chapter, which is the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) plus the following provisions: (1) Trademark terms of protection of not less than 10 years (TRIPS requirement is 7 years); (2) Minimum copyright term of protection of at least 70 years (TRIPS is 50 years); (3) Requirement for enforceable legal means to protect trade secrets (None in TRIPS); (4) Protection of undisclosed test data submitted for marketing approvals at least 10 years in the case of agricultural chemicals and five to eight years in the case of pharmaceuticals (no requirement in TRIPS); (5) Explicit protection for new pharmaceutical products that are or contain a biological element (no requirement in TRIPS); and (6) Adjustment for Patent Office delays in granting patents that will promote harmonisation of the patent granting practice among TPP parties (none in TRIPS). The TPP’s intellectual property chapter adopts a high standard, and then allows each TPP member to set the transition period of its obligations (Article 18.83: Final Provisions). Table 2 summarises the transition period for Brunei, Malaysia, Mexico, Peru, and Vietnam set its transition period (Article 18.83.4).

Sixthly, TPP has a chapter on government procurement (Chapter 15). The TPP’s government procurement chapter covers goods, services, and any combination by any contract including rental or leasing. The Government Procurement Chapter shall apply

to any measure regarding procurement covered by central government, local government, and other entities (governmental organisations) with the applicable thresholds of contract value whose procurement is covered (Table 3). GATT Article III for the *National Treatment on Internal Taxation and Regulation* does not cover government procurement. Instead, the *Government Procurement Agreement (GPA)* is prepared as an international agreement, but it is just a plurilateral agreement with only 19 WTO members participating. Among the TPP members, the GPA members are only Canada, Japan, New Zealand, Singapore, and the United States.

Chapter 26, transparency and anti-corruption would contribute to establish transparent and predictable business environments not provided by the AEC and the WTO.

Seventhly, state-owned enterprises, labour, and the environment are new provisions that are not treated by the WTO. One of the objectives of TPP is to create a level playing field where each player can compete with another in a fair manner. Therefore, the SOE Chapter aims to ensure that SOEs or foreign SOEs compete on the basis of quality and price, not on the base of discriminatory regulations and subsidies.

TPP prohibits to waive, derogate from, or offer to waive or derogate from, the statutes or regulations implementing Article 19.3 (Labour Rights).

Eighthly, TPP has several chapters related to cooperation concerning capacity building, competitiveness of business facilitation, development, and SMEs, which are consistent with the AEC's third pillar of "Equitable development."

7. A way forward

The US withdrawal from TPP has forced other members to cope with this unexpected situation. What strategy should the other member take?

TPP provides all the necessary elements to establish the T-I-S-IP nexus. If the other member countries can enforce the TPP Agreement, this would contribute to enhance the regional supply chains, as well as establish a level playing field and a transparent and predictable business environment. Therefore, TPP11 without the United States would be the second-best scenario. Is TPP11 a potential scenario?

Chapter 30, the final provision of the TPP Agreement text, describes entry into force of the Agreement (Article 30.5: Entry into Force) in three ways.

Firstly, the Agreement will enter into force 60 days after all the signatories have

notified the Depositary (New Zealand) in writing of completion of their applicable legal procedures.

Secondly, the Agreement will enter into force 60 days after expiry of the period of two years from the date of signing the Agreement, if at least six of the original signatories, which together account for at least 85 per cent of the combined GDP of the original signatories in 2013, have notified the Depositary in writing about completion of their applicable legal procedures within this period.

Thirdly, the Agreement will 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 GDP of the original signatories in 2013, have notified the Depositary in writing of completion of their applicable legal procedures.

Therefore, entry into force of the TPP requires at least six of the original signatories, whose combined GDP accounts for at least 85 per cent of the original signatories. The US GDP occupies about 60 per cent of total combined TPP countries. Therefore, the US's withdrawal from TPP substantially legally means the collapse of TPP.

What are some possible solutions? The first way is to amend the provisions of Article 30.5 concerning entry into force by deleting the requirement for 85 per cent GDP requirement by the original signatories. Another way is TPP11 that all the signatories, except the United States, sign a new TPP Agreement comprising the 11 countries, and wait until the US joins.

In March 2017, the TPP's trade ministers will meet in Chile, in order to find a better solution. The United States will not oppose any decisions, including TPP11, since the country hopes the Asia-Pacific region will establish a level playing field with a transparent and predictable business environment.

On the other hand, the AEC and Regional Comprehensive Economic Partnership (RCEP) should incorporate the elements of TPP mentioned in the previous session, as far as possible. In particular, the pro-supply chain rules of origin and origin procedure, the negative list service, investment liberalisation, the ISDS with third party involvement, transparency of arbitrary proceedings, intellectual property rules to protect patents and encourage innovation, and cooperation including SMEs would be necessary elements for high level regional integration.

Table 1. Summary and Classification of the TPP Agreement Chapter

<p>1. Market access of goods</p> <ul style="list-style-type: none"> • Chapter 2 National Treatment and Market Access For Goods • Chapter 3 Rules of Origin and Origin Procedures • Chapter 4 Textile and Apparel Goods • Chapter 5 Customs Administration and Trade Facilitation • Chapter 6 Trade Remedies • Chapter 7 Sanitary And Phytosanitary Measures • Chapter 8 Technical Barriers to Trade
<p>2. Liberalisation of services including investment</p> <ul style="list-style-type: none"> • Chapter 9 Investment • Chapter 10 Cross-Border Trade in Services • Chapter 11 Financial Services • Chapter 12 Temporary Entry for Business Persons • Chapter 13 Telecommunications • Chapter 14 Electronic Commerce
<p>3. Business environments</p> <ul style="list-style-type: none"> • Chapter 15 Government Procurement • Chapter 16 Competition Policy • Chapter 17 *State-Owned Enterprises and Designated Monopolies • Chapter 18 Intellectual Property • Chapter 19 *Labour • Chapter 20 *Environment
<p>4. Good governance</p> <ul style="list-style-type: none"> • Chapter 25 *Regulatory Coherence • Chapter 26 *Transparency and Anti-Corruption
<p>5. Cooperation</p> <ul style="list-style-type: none"> • Chapter 21 Cooperation and Capacity Building • Chapter 22 Competitiveness and Business Facilitation • Chapter 23 *Development • Chapter 24 *Small and Medium-Sized Enterprise
<p>6. General provisions</p> <ul style="list-style-type: none"> • Chapter 1 Initial Provisions and General Definitions • Chapter 27 Administrative and Institutional Provisions • Chapter 28 Dispute Settlement • Chapter 29 Exceptions and General Provisions • Chapter 30 Final Provisions

Note: * shows new provisions, and the rest are classified into fundamental provisions, except for the legal provisions.

Table 2. Transition Period of its obligations under the provisions of the IPR Chapter

	Brunei	Malaysia	Mexico	Peru	Vietnam
1. Article 18.7.2(a) (International Agreements), Madrid Protocol, four years;		4 years			
2. Article 18.7.2(b) (International Agreements), Budapest Treaty		4 years			2 years
3. Article 18.7.2(c) (International Agreements), Singapore Treaty,		4 years			
4. Article 18.7.2(d) (International Agreements), UPOV 1991	3 years	4 years	4 years		
5. Article 18.7.2(e) (International Agreements), WCT					3 years
6. Article 18.7.2(f) (International Agreements), WPPT,					3 years
7. Article 18.18 (Types of Signs Registrable as Trademarks), with respect to sound marks	3 years	3 years			3 years
8. Article 18.46.3 and Article 18.46.4 (Patent Term Adjustment for Unreasonable Granting Authority Delays), with respect to patents claiming pharmaceutical products					5 years
9. Article 18.46.3 and Article 18.46.4 (Patent Term Adjustment for Unreasonable Granting Authority Delays), with respect to patents claiming agricultural chemical products					5 years
10. Article 18.46.3 and Article 18.46.4 (Patent Term Adjustment for Unreasonable Granting Authority Delays)					3 years
11. Article 18.47 (Protection of Undisclosed Test or Other Data for Agricultural Chemical Products)	18 months		5 years		5 years
12. Article 18.48.2 (Patent Term Adjustment for Unreasonable Curtailment)		4.5 years	4.5 years		5 years
13. Article 18.50 (Protection of Undisclosed Test or Other Data)	4 years ++				10 years;*/++
14. Article 18.50.2 (Protection of Undisclosed Test or Other Data)				5 years	
15. Article 18.51 (Biologics)	4 years ++	5 years	5 years++	10 years	10 years;*/++
16. Article 18.53 (Measures Relating to the Marketing of Certain Pharmaceutical Products)	2 years	4.5 years			3 years
17. Article 18.63(a) (Term of Protection for Copyright and Related Rights), with respect to life-based works		2 years			5 years
18. Article 18.68 (Technological Protection Measures: TPMs)					3 years
19. Article 18.69 (Rights Management Information: RMI)					3 years
20. Article 18.76 (Special Requirements Related to Border Measures), with respect to applications to suspend the release of, or to detain, 'confusingly similar' trademark goods		4 years			
21. Article 18.76.5(b) (Special Requirements Related to Border Measures), with respect to ex officio border measures for export		4 years			3 years
22. Article 18.76.5(c) (Special Requirements Related to Border Measures), with respect to ex officio border measures for in transit					2 years
23. Article 18.77.1(b) (Criminal Procedures and Penalties;					3 years
24. Article 18.77.2 (Criminal Procedures and Penalties), with respect to importation of pirated copyright goods					3 years
25. Article 18.77.2 (Criminal Procedures and Penalties), with respect to exportation					3 years
26. Article 18.77.4 (Criminal Procedures and Penalties), with respect to camcording					3 years
27. Article 18.77.6(g) (Criminal Procedures and Penalties), with respect to enforcement without the right holder's request for rights other than copyright					3 years
28. Article 18.78.2 and Article 18.78.3 (Trade Secrets)					3 years
29. Article 18.79.1 (Protection of Encrypted Program-Carrying Satellite and Cable Signals), with respect to criminal remedies					3 years
30. Article 18.79.2 (Protection of Encrypted Program-Carrying Satellite and Cable Signals),		4 years			
31. Article 18.79.3 (Protection of Encrypted Program-Carrying Satellite and Cable Signals), with respect to cable signals					3 years
32. Section J (Internet Service Providers)	3 years		3 years		3 years

Source: Author's compilation

Table 3. Obligation of Government Procurement by Party

	SECTION A: Central Government Entities Thresholds for Procurement		SECTION B: Sub-Central Government Entities Entities Thresholds for Procuremen		SECTION C: Other Entities Thresholds for Procurement	
	goods and services (SDRs)	construction services (SDRs)	goods and services (SDRs)	construction services (SDRs)	goods and services (SDRs)	construction services (SDRs)
Australia	130,000	5,000,000	355,000	5,000,000	400,000	5,000,000
Brunei	1-2 year: 250000 3-4 year: 190000 130,000	5,000,000			1-2 year: 500000 3-4 year: 315000 130,000	5,000,000
Canada	130,000	5,000,000	355,000	5,000,000	355,000	5,000,000
Chili	95,000	5,000,000	200,000	5,000,000	220,000	5,000,000
Japan	100,000	4,500,000	200,000	15,000,000	130,000	4,500,000 15,000,000
Malaysia	1-4 year: 1500000 5-7 year: 800000 130,000	1-5 year: 63000000 6-10 year: 50000000 11-15 year: 40000000 16-20 year: 30000000 14,000,000			1-4 year: 2000000 5-7 year: 150000 150,000	1-5 year: 63000000 6-10 year: 50000000 11-15 year: 40000000 16-20 year: 30000000 14,000,000
Mexico	US\$: 79507	US\$: 10335931			US\$: 397535	US\$: 12721740
New Zealand	130,000	5,000,000			400,000	5,000,000
Peru	95,000	5,000,000	200,000	5,000,000	160,000	5,000,000
Singapore	130,000	5,000,000			400,000	5,000,000
United States	130,000	5,000,000			250,000	5,000,000
Viet Nam	1-5 year: 2,000,000 6-10 year: 1,500,000 11-15 year: 1,000,000 16-20 year: 260,000 21-25 year: 190,000 130,000	1-5 year: 65,200,000 6-10 year: 32,600,000 16,300,000 8,500,000			1-5 year: 3000000 2,000,000	1-5 year: 65,200,000 6-10 year: 55,000,000 40,000,000 25,000,000 15,000,000

Source: Author's compilation

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