

NILUPULI ARIYARATNE

**THE TRANS-PACIFIC PARTNERSHIP – A BANE OR
BOON TO CORPORATE SOCIAL RESPONSIBILITY?**

LLM RESEARCH PAPER

LAWS 582: MASTERS LEGAL WRITING

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



2016

Contents

I	INTRODUCTION	5
II	WHAT IS CSR?	7
	A The Development of the Concept of CSR	7
	B Justifying the Need for CSR	8
	C Measures and Instruments which Promote CSR	10
	D The Relationship between the TPP and CSR	13
III	HOW CAN THE TPP AFFECT CSR?	14
	A Champions CSR and Encourages Future Use	14
	B How Can States Promote CSR?.....	16
	C Interpretation of the TPP	18
	D National Treatment for Originating Goods.....	19
	E Investment.....	20
	F Dispute Settlement.....	21
	G Assistance for Small and Medium-Sized Enterprises.....	22
	H A Level Playing Field	23
	I Overall Effects of the TPP	24
IV	PROTECTION OF LABOUR RIGHTS	24
	A Current Labour Standards of the TPP Parties.....	24
	B Does the TPP Affect these Labour Standards?.....	26
	C Will the TPP Improve Labour-Related CSR Standards?.....	31
V	PROTECTION OF THE ENVIRONMENT	31
	A Can International Trade Affect Environmental CSR Practices?	32
	B Environmental Obligations Imposed by the TPP	33
	C The CSR Provision	35
	D Enforcement by Dispute Settlement Procedures	36
	E Cooperation and Assistance for Implementation.....	36
	F Public Submissions.....	37
	G Will the TPP Improve Environmental CSR Practices?	38
VI	CONCLUSION.....	38

BIBLIOGRAPHY40

Abstract

This paper examines the possible positive and negative effects that the Trans-Pacific Partnership (TPP) can have on Corporate Social Responsibility (CSR). Accordingly, the thesis will analyse these effects to determine whether the TPP could ultimately serve as a tool for improving or crippling the CSR practices of corporations within TPP States.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises 11991 words.

Subjects and Topics

The Trans-Pacific Partnership,
Corporate Social Responsibility, and
Corporate Law.

“Ethics is the new competitive environment.”¹

I Introduction

In recent years, transnational business has surged, owing to improved internet services, reliable distance payment methods, prompt transport of goods and a greater reach to consumers worldwide. This growth has been further fuelled by Free Trade Agreements (FTAs) which eliminate cross-border trade barriers such as customs duties and import and export taxes.

The latest FTA is the Trans-Pacific Partnership (TPP),² recently signed by 12 Pacific Rim countries: New Zealand, Australia, United States, Canada, Mexico, Japan, Malaysia, Singapore, Brunei, Vietnam, Peru and Chile. The Agreement was recently signed in Auckland but is yet to be ratified by the Parties. It aims to promote trade and investment, achieve economic growth and increase trade opportunities across the 12 Parties.³

The facilitation of international trade by the TPP is likely to increase transnational business activities through multinational companies and overseas subsidiaries, especially where investors from developed TPP countries (such as the United States) can secure better business deals in countries with lower production costs and minimum wages (such as Vietnam). This would increase the volume of business being conducted beyond their parent jurisdictions on a regular basis. Rules of international law act as a shield to prevent these businesses being regulated by the domestic laws applicable to their parent companies. This allows foreign subsidiaries and sub-contractors to exploit their legal immunity and violate laws outside their parent jurisdiction without holding the parent company accountable for their actions.

In recent times, this has led to the devastating abuse of employees and the environment as a result of parent companies turning a blind eye to the actions of subsidiaries or subcontractors. One such example was the suicide scandal at Foxconn Technology Group in China, a subcontractor which manufactured electronics for the US-based company, Apple Inc.⁴ Due to horrifying work conditions and human rights abuse at the factory, Foxconn employees committed suicide at the company premises, causing Foxconn to respond by merely installing “suicide nets” around the factory. Despite the

¹ Peter Robinson, CEO at Mountain Equipment Co-op; found at InterPraxis <www.interpraxis.com>.

² Trans-Pacific Partnership (opened for signature 4 February 2016); hereinafter referred to as “TPP”.

³ Trans-Pacific Partnership, preamble.

⁴ Rob Cooper “Inside Apple’s Chinese ‘sweatshop’ factory where workers are paid just £1.12 per hour to produce iPhones and iPads for the West” *Daily Mail* (online ed, United Kingdom, 25 January 2013).

alarming implications of these events, Apple faced no legal consequences whatsoever as they were under no obligation to account for the production of its goods in foreign jurisdictions through subcontractors. In this manner, international trade via multinational companies, subsidiaries and subcontractors gives (parent) companies an avenue to produce goods by violating labour and environmental protection laws, for lesser costs, with no requirement to be liable or accountable.

Increased trade and FTAs can also cause regulatory competition, whereby States ‘compete’ to offer the most attractive business environments for investors. This could result in a ‘race to the bottom’ when countries compete to provide the least costly business environment,⁵ by relaxing employee protection laws (such as those regulating minimum wage and work hours) and environment protection laws (such as providing for the disposal of hazardous waste). This could also pressure developed countries with stringent domestic laws to dilute their laws to level the playing field and compete with countries having lax regulations. This further facilitates the process by which parent companies can discount the actions of subsidiaries and subcontractors operating in other countries.

Under these circumstances, it is important that this accountability deficit is addressed by FTAs such as the TPP, which can bind a large population of traders. One possible method by which the TPP can oblige accountability is through the concept of Corporate Social Responsibility (CSR). The text of the TPP explicitly provides for CSR in a number of chapters, and additionally contains entire chapters dedicated to the protection of obligations related to CSR, such as labour rights and environmental protection. The TPP is regarded as the world’s largest trade deal which includes the world’s largest and third largest economies,⁶ and accordingly has far-reaching powers to implement these provisions on a more global scale. If the TPP is ratified, numerous economies and businesses could be subject to these CSR provisions of the TPP, thereby promoting and increasing accountability.

This paper aims to determine whether the TPP promotes or hinders CSR obligations of corporations which are not presently accountable under existing laws.⁷ Relevant provisions of the TPP will be examined in detail to determine the potential effects they

⁵ Aseem Prakash and Matthew Potoski “Racing to the Bottom? Trade, Environmental Governance and ISO 14001.” (2006) 50(2) *Am J Polit Sci* 350 at 359.

⁶ Tim Worstall “The TPP, World’s Largest Trade Pact, Finally Gets Signed” *Forbes* (online ed, United States 4 February 2016); Rebecca Howard “Trans-Pacific Partnership trade deal signed, but years of negotiations still to come” *Reuters* (online ed, Wellington, 4 February 2016).

⁷ P Blumberg “Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems” (2002) 50 *Am J Comp L* 493 at 494.

could have on labour and environmental law and whether corporations could be held accountable under such laws. If it is found that the TPP has positive effects on the implementation and enforcement of CSR, it could then be concluded that the TPP is an appropriate instrument to fill the regulatory gap in accountability through CSR practices.

II What is CSR?

CSR can be defined as the notion that companies are accountable for the consequences of their activities on their employees, the society and the environment.⁸ There are several aspects to CSR: promoting transparency, accountability, protection of human rights, protection of the environment, promoting ethical behaviour and exceeding legally binding norms.⁹ It encapsulates the economic, legal, ethical, and discretionary or philanthropic expectations that society has of organisations.¹⁰ CSR obligations often go beyond what is required by law, and are, as a result, voluntarily adopted by companies to promote their brand image and company reputation. The rationale behind imposing such extralegal obligations is that companies, as separate legal entities with enforceable legal rights, should have similar (albeit, non-legal) responsibilities. It also would be unreasonable to allow companies to enjoy the benefits of profit-making without the burden of responsibility and accountability towards the sources of the profits made.¹¹

A The Development of the Concept of CSR

The concept of CSR is not new. From the late 19th to early 20th centuries, legal and organisational transformations created large companies which were more widely owned by larger numbers of owners. Consequently, the traditional influence held by owners over managers and directors of the company dwindled.¹² This correlates with the decision in *Salomon v Salomon*,¹³ which established that companies are separate legal entities from their owners. This concept created a "corporate veil" which shielded

⁸ Alwyn Lim and Kiyoteru Tsutsui "The social regulation of the economy in the global context" in Kiyoteru Tsutsui and Alwyn Lim (ed) *Corporate Social Responsibility in Globalizing World* (Cambridge University Press, Cambridge, 2015) 1 at 1.

⁹ United Nations Environment Programme *Corporate Social Responsibility and Regional Trade and Investment Agreements* (DTI/1429/GE, 2011) at 17.

¹⁰ W Visser and others *The A to Z of Corporate Social Responsibility* (John Wiley & Sons, West Sussex, 2007) at 107.

¹¹ Cooper, above n 4.

¹² Stephen J Brammer and Stephen Pavelin "Corporate Governance and Corporate Social Responsibility" in Mike Wright and others (eds) *The Oxford Handbook of Corporate Governance* (Oxford University Press, Oxford, 2013) 719 at 719.

¹³ *Salomon v Salomon* [1897] AC 22 (HL).

owners from liability for the actions of their corporations, and could only be lifted in exceptional circumstances.¹⁴ Subsequent rulings such as that in *Adams v Cape Industries Plc* demonstrate that Courts generally upheld this concept of a separate legal personality created by the corporate veil, when it refused to lift the veil to hold a parent company responsible for the actions of its subsidiaries.¹⁵

This level of protection afforded to shareholders and parent companies meant that they would no longer be held accountable for effects the business may have on society and the environment. Over time, owners and parent companies began to increase the scale of risk-taking, protected by the corporate veil and the separate legal entity, with no threat of liability.¹⁶ These trends called for the formation new systems of accountability whereby companies could be held accountable to affected persons. The notion of corporate governance was subsequently introduced to ensure accountability to the owners of a company, but it did not create obligations to be accountable towards other stakeholders.¹⁷

The continued need to hold companies accountable to the wider society was accompanied by the belief that issues such as human and employee rights and environmental protection could accompany profit-maximisation goals, leading to what is now known as the "Triple Bottom Line" framework.¹⁸ Compliance with the Triple Bottom Line framework fulfilled business obligations towards people, the planet and profit-making purposes. This practice gradually developed into the present-day concept of CSR which promotes accountability towards employees, society and the environment.

B Justifying the Need for CSR

A plethora of material can be found which highlights the importance of CSR. Apart from its capacity to regulate human rights and environmental effects along supply chains and overseas jurisdictions, CSR also offers various economic benefits. Studies have shown CSR measures to increase profits and cut down costs in the long run, owing to resource efficiency and recycling.¹⁹ One study has found CSR to decrease production inefficiencies, reduce risks and simultaneously, increase sales, leading companies to

¹⁴ Where a company is established as a mere facade or is acting as an agent of the parent company, as established in *Adams v Cape Industries Plc* [1990] Ch 433 (CA).

¹⁵ *Adams v Cape Industries Plc* [1990] Ch 433 (CA).

¹⁶ Brammer and Pavelin, above n 12, at 719.

¹⁷ Brammer and Pavelin, above n 12, at 721.

¹⁸ A Gill "Corporate Governance as Corporate Social Responsibility: A Research Agency" (2008) 26(2) *Berk J Intl L* 452 at 461.

¹⁹ United Nations Environment Programme, above n 9, at 14.

become more profitable over time.²⁰ Implementing such measures can also enhance brand image and promote sustainable development,²¹ which may be more appealing to stakeholders and consumers. The practice of CSR can also contribute to reputational capital of a company and generate customer loyalty. For instance, when the New York plant Merck & Co Inc leaked toxic chemicals into a river, the company avoided severe backlash due to exemplary CSR practices in the past.²² Governments may also be inclined to encourage corporations to practice CSR to avoid political embarrassment and bad publicity when corporations within their jurisdiction act irresponsibly.

Nonetheless, the need for CSR is greatly debated, with most scholars siding with one of two theories for and against the concept of CSR. The first theory, which supports CSR considers that corporations, being separate legal persons in the eyes of the law, have their own moral personhood and therefore can be held morally responsible for their actions.²³ This view is supported by scholars such as Keith Davis, CC Walton and KR Andrews, who assert that corporations have considerable power which entails responsibility, and therefore, corporations have responsibilities beyond those that are economic and legal.²⁴ In contrast, the second theory, known as Fundamentalism, argues against CSR with the contention that the only social responsibility of businesses is to maximise its profits in compliance with the law.²⁵ This argument has been spearheaded by scholars such as Milton Friedman, who maintain that the imposition of social responsibilities would "undermine the very foundations of ... free society".²⁶

However, this perspective overlooks the collateral damage caused by businesses which neglect social responsibilities and focus purely on profit-making objectives. Business activities of certain corporations (for example, the production of textiles or the mining of natural resources) can cause pollution, spread disease and cause conflicts over land rights.²⁷ Such problems cannot be solved by corporations satisfying their profit-earning obligations towards shareholders. Moreover, the long-term costs incurred by liability

²⁰ Jose M Cruz and Tina Wakolbinger "Multiperiod effects of corporate social responsibility on supply chain networks, transaction costs, emissions, and risk" (2008) 116 Int J Production Economics 61 at 72.

²¹ Jennifer A Zerk *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, Cambridge, 2006) at 157.

²² Cruz and Wakolbinger, above n 20, at 62.

²³ Domènec Melé "Corporate Social Responsibility Theories" in Andrew Crane and others (eds) *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, New York, 2008) at 48.

²⁴ Andrew Crane and others (eds) *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, New York, 2008) at 56.

²⁵ Melé, above n 23, at 47-48.

²⁶ Milton Friedman and Rose Friedman *Capitalism and Freedom* (University of Chicago Press, Chicago, 1962) at 133.

²⁷ United Nations Environment Programme, above n 9, at 13.

for pollution, compliance with regulation, use of hazardous raw material, production of hazardous waste and health and safety issues are found to be higher than the short-term costs of implementing CSR,²⁸ thereby undermining the profit-making obligations in the long run.

The failure of the law to monitor and control the damaging actions of businesses highlights the pressing need for extra-legal regulation. These issues need to be addressed with regard to corporations' obligations towards other stakeholders. It could therefore be deemed that CSR could hold the answer to such problems, and accordingly, corporations should practice CSR over the course of business.

C Existing Measures Promoting CSR

1 International initiatives

CSR is encouraged by numerous international organisations which monitor CSR activities within companies. Various binding conventions as well as non-binding guidelines, standards and initiatives have also been introduced by the United Nations (UN),²⁹ International Labour Organization (ILO),³⁰ the Organisation for Economic Co-operation and Development (OECD),³¹ and the International Organization for Standardization (ISO).³²

The UN Commission on Human Rights attempted to implement a set of CSR norms which would bind multinational companies, but the proposal was unsuccessful, and other possible systems are currently being deliberated.³³ The European Commission has introduced a successful CSR policy,³⁴ but this can only be enforced within the European Union.

²⁸ Cruz and Wakolbinger, above n 20, at 72.

²⁹ For example, the United Nations Global Compact, found at <www.unglobalcompact.org>.

³⁰ For example, Abolition of Forced Labour Convention (ILO No 105) 320 UNTS 291 (opened for signature 25 June 1957, entered into force 17 January 1959), Freedom of Association and Protection of the Right to Organise Convention (ILO No 87) 68 UNTS 17 (opened for signature 9 July 1948, entered into force 4 July 1950) and Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182) 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000).

³¹ For example, OECD Guidelines for Multinational Enterprises 2011.

³² For example, ISO 26000:2010 Social Responsibility (2010).

³³ Joshua Waleson "Corporate Social Responsibility in EU Comprehensive Free Trade Agreement: Towards Sustainable Trade and Investment" (2015) 42(2) *Legal Issues of Economic Integration* 143 at 151.

³⁴ European Commission *A renewed EU strategy 2011-14 for Corporate Social Responsibility* (COM/2011/0681 FINAL, 25 October 2011).

Various international trade agreements (prior to the TPP) also directly and indirectly promote CSR. The North American Free Trade Agreement (NAFTA) included two supplementary agreements which addressed labour and environmental concerns which arose over the course of transnational trade.³⁵ The United States-Peru and Canada-Peru FTAs (both of 2009) are among the FTAs in the world to directly promote CSR by explicitly referring to “corporate social responsibility” as opposed to labour or environment concerns.³⁶ The TPP is now the most recent FTA to include CSR provisions within the text of the Agreement

2 *Domestic measures*

Certain countries have taken the initiative to include CSR provisions within State legislation. The United Kingdom Companies Act imposes a duty on directors to have regard to the impact of the company’s operations on the community and the environment.³⁷ The Companies Act of India requires certain companies to form a CSR Committee and implement a CSR policy within the company.³⁸ The State-Owned Enterprises Act of New Zealand calls for State-owned enterprises to exhibit “a sense of social responsibility”.³⁹

Some States promote CSR through non-binding means. In the United States, the Department of State monitors CSR and provides guidance and support for businesses engaging in CSR practices.⁴⁰ The United States Secretary of State also administers the ‘Award for Corporate Excellence’, to send a signal of the country's commitment to further CSR.⁴¹ Various government departments have also made CSR practices more attractive by granting business licences and permissions which are conditional on integrity and disclosure of performance, introducing whistle-blower protection, government sponsored auditing schemes and tax incentives.⁴² In Mexico, qualifying companies can be certified as being sustainable, following voluntary biennial audits.⁴³ The Canadian government promotes awareness and understanding of CSR matters by funding conferences and workshops, involving companies, representatives of host

³⁵ North American Free Trade Agreement (NAFTA) 32 ILM 289, 605 (1993) (opened for signature 17 December 1992, entered into force 1 January 1994).

³⁶ United Nations Environment Programme, above n 9, at 7.

³⁷ Companies Act 2006 (UK), s 172(1)(d).

³⁸ The Companies Act 2013 (India), s 135.

³⁹ State-Owned Enterprises Act 1986, s 4(1)(c).

⁴⁰ United States Department of State “Corporate Social Responsibility” <www.state.gov>.

⁴¹ United States Department of State “Secretary of State’s Award for Corporate Excellence” <www.state.gov>.

⁴² Gill, above n 18, at 470.

⁴³ For more information, see <www.profepa.gob.mx>.

governments.⁴⁴ It has also set up the Office of the Extractive Sector Corporate Social Responsibility Counsellor which helps reduce and resolve conflicts between companies involved in extracting coal, oil and gas and affected communities overseas.⁴⁵ Although these initiatives do not bind or compel companies to be socially responsible, they provide a strong incentive to do so by offering benefits and attractions.

3 CSR measures taken by companies

Domestic measures are only applicable to companies operating within the limit of that particular State jurisdiction and do not control actions along global supply chains. Companies have consequently developed supplementary means of implementing CSR along entire supply chains. This reduces the risk of human rights abuse and damage to the environment and offers protection beyond the home jurisdiction of the parent company.

A large number of multinational companies have introduced codes of conduct composed of various guidelines and standards,⁴⁶ including social, labour and environmental requirements which go beyond the business activities of the implementing organisation.⁴⁷ Codes of conduct often operate on the basis of “comply or explain”, where suppliers are required to comply with the code or explain as to why they have not been complied with. However, companies can encounter various problems when codes of conduct are introduced. The company initiating the code holds responsibility of governance of all the companies within the supply chain to guarantee compliance of the code.⁴⁸ This may be difficult where the supply chain spans across a number of countries with different legal and cultural backgrounds. Moreover, codes of conduct are “vague and poorly monitored”, and are generally not actionable for breach.⁴⁹ Furthermore, companies often wish to maintain good, long-term relationships with suppliers and may be reluctant to take action against non-complying suppliers. Unequal bargaining power within the supply chain, especially in regard to small businesses, may also make it difficult to impose and enforce codes of conduct.

⁴⁴ “Corporate Social Responsibility” Global Affairs Canada <www.international.gc.ca>.

⁴⁵ “Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor” Global Affairs Canada <www.international.gc.ca>.

⁴⁶ Esben Rahbek Pedersen and Mette Andersen “Safeguarding corporate social responsibility (CSR) in global supply chains: how codes of conduct are managed in buyer-supplier relationships” (2006) 6 J Publ Aff 228 at 229.

⁴⁷ S Roberts “Supply chain specific? Understanding the patchy success of ethical sourcing initiatives.” (2003) 44(2) Journal of Business Ethics 159 at 163.

⁴⁸ Pedersen and Andersen, above n 46, at 230.

⁴⁹ Pedersen and Andersen, above n 46, at 231 and 237.

Suppliers too may be reluctant to comply with codes of conduct. The benefits gained from practising CSR are often not evenly distributed among supply chains. The reputation built around good ethical conduct is often attached to a particular brand, which is held by only one of the companies within the chain. While this company reaps the full benefits of CSR practices, other companies within the supply chain would only get indirect benefits (such as increased business), while also having to bear the costs of implementing the CSR measures.⁵⁰ Furthermore, many manufacturing companies act as suppliers for different distributors and brands, all of which may have varying CSR standards. It may then be difficult for one supplier to enforce all these varying standards within one company. This may entice suppliers to breach codes of conduct with poor practice of CSR in order to maximise profits.

Companies often employ internal and third-party auditors to conduct audits within the supply chain and report on compliance with codes of conduct. However, audits can be unreliable, as accurate monitoring of daily work conditions and environmental practices of hundreds or thousands of contractors based in multiple parts of the world can be practically and financially overwhelming.⁵¹ On numerous occasions, audit reports have been found to contain inaccurate information. For instance, one report of a garment factory in Pakistan cited work conditions and safety standards to be compliant with those of the SA18000. But three weeks later, nearly 300 people were killed in a fire in the very same factory due to horrific safety conditions which breached even the most basic safety standards.⁵² Such events illustrate the complications and difficulties faced when implementing CSR measures across global supply chains. The inadequacy of existing measures therefore exemplifies the need for more reliable and enforceable CSR measures.

D The Relationship between the TPP and CSR

The fact that CSR provisions are found within the TPP indicates that CSR has been a relevant and influential factor in shaping the overall framework of the TPP. The TPP was drafted amidst much secrecy, with little transparency,⁵³ making it difficult to ascertain the factors which were most influential during the drafting process. However, it may be presumed that CSR principles relating to labour and the environment played an important role, owing to the fact that CSR is *expressly* provided for in multiple

⁵⁰ Pedersen and Andersen, above n 46, at 230.

⁵¹ Barbara J Fick “Corporate Social Responsibility, Free Trade and the Trans-Pacific Partnership” (29 June 2015) The CLS Blue Sky Blog <<http://clsbluesky.law.columbia.edu>>.

⁵² American Federation of Labor-Congress of Industrial Organizations *Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Worker Rights* (April 2013) at 4.

⁵³ Joseph E Stiglitz “On the Wrong Side of Globalization” *The New York Times* (online ed, New York, 15 March 2014).

chapters of the Agreement.⁵⁴ This approach reflects the new cultural and commercial attitude that profit-making interests of shareholders are unlikely to be achieved unless regard is had to other stakeholders.⁵⁵ A similar approach was taken when the United Kingdom Companies Act was drafted to require directors to have regard to CSR-related obligations, such as the impact of the company's operations on the community and the environment.⁵⁶

It is possible that CSR principles played a similar role in causing the TPP to be drafted in a manner which broadened the scope of duties imposed upon countries. Prior to the TPP, only a handful of FTAs explicitly contained CSR provisions within their text,⁵⁷ making the TPP one of the first multilateral trade agreements to include CSR provisions. Therefore it can be inferred that CSR has been a relevant factor in the TPP drafting process. Thereon, it follows that CSR is intended to be taken into consideration when giving effect to the relevant provisions of the TPP, to subsequently improve CSR practices within TPP countries. Accordingly, the following chapters of this paper examine these relevant provisions of the TPP and their potential to administer more effective CSR measures.

III How Can the TPP Affect CSR?

The TPP contains 30 chapters (and numerous annexes) which extensively provide for various aspects of international trade. However, only certain provisions within the TPP have been identified as having a noteworthy effect on CSR. Accordingly, only these provisions and their effects are examined in this paper. The Agreement contains two separate chapters solely dedicated to labour and environment issues. As these issues form the core of CSR obligations, their impact on CSR will be discussed separately in the following two chapters of this paper.

A Champions CSR and Encourages Future Use

The TPP is an avant-garde legal instrument containing multiple provisions which expressly call for the promotion of CSR. These provisions, contained within Investment, Labour and Environment Chapters of the Agreement, oblige Parties to encourage enterprises operating within their jurisdiction to voluntarily adopt CSR

⁵⁴ Such as the Labour, Environment and Investment chapters.

⁵⁵ Rachel C Tate "Section 172 CA 2006: the ticket to stakeholder value or simply tokenism?" (2012) 3 Aberdeen Student L Rev 112 at 113.

⁵⁶ Companies Act 2006 (UK), s 172(1)(d).

⁵⁷ Such as the United States-Peru Free Trade Agreement (2009) and the Canada-Peru Free Trade Agreement (2009).

practices.⁵⁸ The express inclusion of CSR provisions in an expansive multilateral agreement such as the TPP makes a clear statement as to its importance. Negotiating CSR provisions at the same time as the trade and investment provisions spotlights CSR issues (which are otherwise allocated backseats) and sends a signal to both signatory and non-signatory States that CSR is central to trade and investment activities.⁵⁹

Highlighting the importance of CSR through international trade agreements can also have a ripple effect, causing CSR provisions to be more frequently included in similar (national and international) agreements in future. A survey of numerous international investment agreements found that the use of CSR subsequently increased in countries that had included environment and labour provisions within their agreements.⁶⁰ Similarly, the inclusion of environmental provisions in the NAFTA led to the inclusion of environmental agreements in all subsequent regional trade agreements negotiated by the United States (such as those with Singapore, Chile, Australia, Bahrain and Morocco).⁶¹ Accordingly, it is possible that the inclusion of CSR in the TPP could likewise increase its use in future agreements and further publicise CSR.

Such trends can consequently induce countries to become accepting of such standards in future agreements. For instance, when Chile first entered into trade agreements with Canada and the United States, the country had no choice but to accept the stringent environmental provisions which supplemented the agreements. However all subsequent agreements and their environmental provisions were voluntarily accepted because the country had come to expect trade agreements to contain appropriate environmental provisions.⁶² Perhaps, the inclusion of CSR provisions in trade agreements would, in time, prompt States and corporations to accept and implement such provisions without objection.

There is of course no evidence to show that omitting to include CSR provisions in trade agreements has a detrimental effect on CSR implementation. Countries, such as Brazil, do not include CSR provisions in their trade agreements and nonetheless have strong CSR programmes.⁶³ In these instances, it is important to note that the inclusion of CSR

⁵⁸ Trans-Pacific Partnership, arts 9.17, 19.7 and 20.10.

⁵⁹ United Nations Environment Programme, above n 9, at 34.

⁶⁰ Organisation for Economic Co-operation and Development *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD Publishing, Paris, 2008) at 136.

⁶¹ Organisation for Economic Co-operation and Development *Environment and Regional Trade Agreements* (OECD Publishing, Paris, 2007) at 25.

⁶² Organisation for Economic Co-operation and Development, above n 61, at 46.

⁶³ United Nations Environment Programme, above n 9, at 28.

provisions can help further improve and polish up existing CSR practices to achieve higher CSR standards.

Despite these advantages of the CSR provisions, there are also some drawbacks. The TPP does not explicitly instruct States as to how, and to what extent, CSR initiatives should be promoted. This is left to the discretion of States, which would allow them to be compliant with this provision according to the lowest possible standards with minimal effort. However discretion may also be beneficial as it gives flexibility for States to develop and implement the most suitable CSR initiatives which can be funded and implemented by corporations within their territory at a comfortable pace. Furthermore, there would be a backlash if the TPP dictated CSR practices which consequently proved to be unsuitable or unreasonably taxing on businesses or the economy (which would then undermine the very purpose of the free trade agreement).⁶⁴ Therefore the TPP strikes a good balance by requiring States to promote CSR while granting them autonomy to decide how this should be done, to ensure the best outcome.

B How Can States Promote CSR?

The TPP specifically instructs States to encourage enterprises to *voluntarily* adopt CSR practices thereby preventing States from legally obliging their adoption. Therefore companies cannot be forced to implement CSR measures if they do not wish to do so. While this may seem counterproductive, leaving implementation at the discretion of companies may have its advantages. Studies have found that corporate governance policies that promote CSR through internal coordination are more effective than traditional “command-and-control” approaches.⁶⁵ Empirical evidence also shows corporations to be more willing to consider means of enforcing compliance when they are allowed to operate and perform their own monitoring.⁶⁶ Therefore, the less-dictatorial approach of the TPP may in fact further encourage the adoption of CSR practices among corporations.

An important issue in this regard is how States should encourage companies to adopt CSR practices without pressuring them to neglect their profit-making objectives. One possible method is for States to introduce non-binding CSR codes, similar to codes of good governance. Codes of good governance are implemented on the basis of “comply or explain”, whereby States give companies the choice of complying with the code or providing reasons as to why they have not been complied with.⁶⁷ A similar approach

⁶⁴ United Nations Environment Programme, above n 9, at 31.

⁶⁵ Gill, above n 18, at 465.

⁶⁶ Gill, above n 18, at 465.

⁶⁷ Ruth V Aguilera and Alvaro Cuervo-Cazurra “Codes of Good Governance” (2009) 17(3) Corporate Governance: An International Review 376 at 383.

could be adopted to encourage the implementation of CSR codes within TPP Parties. Companies with the highest levels of compliance could be rewarded by being awarded grants, funding, recognition, publicity or other prizes to incite compliance.

States can also facilitate complaint and dialogue channels for stakeholders to alert corporations of relevant issues, and encourage the establishment of CSR board committees and business ethics units within corporations. In this manner, the adoption of CSR practices remains voluntary and at the discretion of companies, but at the same time, prevents them from completely disregarding government initiatives.

Additionally, States could provide funding and facilities for research and education on the benefits of CSR. Where States have identified the most effective CSR practices for their country, initiatives could be taken to disseminate them to the public. Many enterprises are found to value principles and guidelines proposed by public authorities, as it serves as a benchmark their own policies and performance, and also promotes a level playing field.⁶⁸ Therefore States could introduce such policies through model laws, guidelines and action plans which could be voluntarily adopted. In addition to domestic policies, States could also endorse and promote internationally recognised CSR initiatives.⁶⁹

Some States have introduced legal regulation to compel companies to report on their CSR performance and social and environmental practices. The German and Belgian governments require investments to report on the environmental and social performance. French legislation requires certain publicly traded French companies to report on their social and environmental practices.⁷⁰ Similar measures could be adopted within TPP States to compel CSR reporting and encourage companies to improve their CSR results. A 2011 survey has found that most companies located within TPP Parties such as New Zealand, Singapore, Mexico, Chile and Canada have failed to adequately implement or report on their CSR efforts.⁷¹ The survey also found that small and medium-sized enterprises (SMEs) and trade and retail industry sectors are less inclined to report on their CSR efforts as opposed to larger businesses.⁷² Therefore it is important that these States intensify their efforts to encourage reporting, especially within SMEs

⁶⁸ European Commission, above n 34, at 7.

⁶⁹ Such as the OECD Guidelines for Multinational Enterprises, United Nations Global Compact and ISO 26000 standards.

⁷⁰ United Nations Environment Programme, above n 9, at 33.

⁷¹ KPMG International *KPMG International Survey of Corporate Responsibility Reporting 2011* (Publication number 110973, November 2011) at 5.

⁷² KPMG International, above n 71, at 11 and 13.

and trade sectors, which are highly likely to take advantage of the free trade provisions of the TPP.

Parties could also require State-owned enterprises to adopt and implement CSR measures to set a good example to privately-owned companies, as in the case in New Zealand.⁷³ Where companies have followed up on these initiatives, States could reward them by awarding prizes and recognition to commend and publicise their CSR efforts. This initiative has proved to be successful in the EU, where it has enhanced CSR collaboration between enterprises and stakeholders, produced innovative CSR measures and raise global awareness on the positive impact that business can have on society.⁷⁴ The TPP provisions could have similar results if such initiatives are taken by the Parties.

Advocating CSR through multinational fora has proved to be successful on previous occasions. A policy published by the European Commission provided support to promote CSR principles by facilitating awareness-raising, best practice exchange, cooperation among Member States, research and education, not unlike the TPP.⁷⁵ Evidence suggests that the policy has played a significant part in successfully encouraging more EU companies to implement CSR initiatives.⁷⁶ The TPP, which offers similar channels of support, could have a similar positive effect on companies within its territory.

C Interpretation of the TPP

The interpretation of a treaty, according to the Vienna Convention on the Law of Treaties, should be conducted in light of its object and purpose.⁷⁷ It has been recommended that tribunals interpreting the agreement can guide themselves according to the purpose expressed in the title and the preamble.⁷⁸

The preamble of the TPP provides for high levels of environmental protection through effective enforcement of environmental laws, the promotion of sustainable development through good environmental practices and the protection and improvement of labour rights, working conditions and living standards.⁷⁹ This

⁷³ As previously mentioned on page 11, the State-Owned Enterprises Act 1986 (NZ) requires State-owned enterprises to act in a socially responsible manner.

⁷⁴ CSR Europe "European CSR Awards" <www.csreurope.org>.

⁷⁵ European Commission, above n 34, at 4.

⁷⁶ European Commission, above n 34, at 4-5.

⁷⁷ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(1).

⁷⁸ *Siemens AG v the Argentine Republic (Jurisdiction)* ICSID ARB/02/08, 3 August 2004 at [81].

⁷⁹ Trans-Pacific Partnership, preamble.

preambular inclusion of issues which are closely related to CSR obligations is useful, as it allows TPP provisions to be interpreted in the light of such CSR commitments. Parties and adjudicators could refer to the preamble for guidance, and in the event of a dispute involving labour or environmental elements, tribunals may decide matters in a manner that favours upholding and promoting CSR principles. This is not unheard of, as similar content within preambles of international trade agreements have been taken into consideration in previous arbitral cases. In *S D Myers, Inc v Canada*,⁸⁰ an arbitral decision regarding NAFTA provisions, the tribunal concluded that the provisions should be interpreted in the light of the environmental clauses contained within its preamble. Accordingly, disputes relating to labour or environmental concerns within the TPP may also be resolved in consistence with the CSR principles contained within its preamble.

D National Treatment for Originating Goods

The TPP requires Parties to award national treatment for goods imported from and exported to other TPP Parties,⁸¹ by eliminating customs duties and prohibiting export subsidies. These measures are intended to bring down trade-barriers and increasing cross-border trade, which could have several impacts on the CSR practices of companies within TPP countries.

1 Favourable treatment for originating goods

Under TPP provisions, customs duties are eliminated for “originating goods”,⁸² thereby granting them favourable treatment over non-originating goods (which are, for instance, produced or sourced outside the territory of a TPP Party).⁸³ If the CSR provisions of the TPP are effective in encouraging the adoption of CSR practices of companies within TPP States, originating goods are likely to be produced by businesses which are more socially responsible. Subsequently, originating goods would be more ethically produced as opposed to non-originating goods. Preferential treatment awarded to originating goods can cause an increase in the export and import of originating goods within TPP territories, which are then more widely circulated among the TPP countries. Owing to this, the TPP indirectly favours goods which have been produced by CSR-compliant businesses. This may subsequently compel competing businesses, which export non-originating goods, to adopt similar CSR standards to compete in a more ethical market.

⁸⁰ *S D Myers, Inc v Canada (Award)* Bryan P Schwartz, Edward C Chiasson, J Martin Hunter 13 November 2000 at [220].

⁸¹ Trans-Pacific Partnership, art 2.3.

⁸² Article 3.2 defines originating goods as goods which are wholly sourced or produced within the territory of a TPP Party, or otherwise meet certain additional requirements set out in Chapter 3.

⁸³ Article 2.4.

Distributors and sellers would be more inclined to import goods from such businesses due to the free trade provisions of the TPP. To compete with these originating goods, exporters and producers of similar non-originating goods outside TPP territory would be compelled to make their products more attractive to importers within TPP countries. If they lower the prices of non-originating goods to match those of duty-free originating goods, originating goods would still have the additional advantage that they have been produced by socially responsible companies. Therefore, producers of non-originating goods would also have to be more CSR-compliant to compete with the standards of originating goods. In this manner, the TPP may also have an effect on CSR practices of companies operating beyond its territorial limits.

The provisions relating to originating goods are also applicable to textile and apparel goods.⁸⁴ They would favour businesses in, for instance, Vietnam, a major exporter of garments and textiles.⁸⁵ Competing businesses in other countries with comparable garment and textile export, such as China, India or Bangladesh, could then accordingly be affected by these TPP provisions. The provisions could, in this instance, then affect business practice in some of the world's largest economies.

2 Prohibition of export subsidies

The TPP prohibits Parties from granting export subsidies for goods destined to other Parties.⁸⁶ Export subsidies are funds given by a State to a business to encourage export of goods. This prohibition of export subsidies will result in companies receiving less funds for business activities, including the administration of CSR measures within the company. Companies may be forced to cut down on costs in non-profit making areas of business, such as CSR programs. Furthermore, companies which produce goods for export are most likely to be suppliers at the bottom of the supply chain with little reputation attached to their brand, and may see no incentive to continue CSR practices with limited funds. Therefore, TPP provisions may hinder progress of CSR practice among suppliers primarily exporting goods to other Parties.

E Investment

The TPP encourages cross-border investment by awarding national treatment to investors of other Parties and their investments.⁸⁷ The investment chapter also contains an express CSR provision whereby Parties are required to encourage investors from

⁸⁴ Trans-Pacific Partnership, art 4.2.

⁸⁵ "Strengths of the Vietnam textile and garment industry" (14 March 2016) Vietnam Trade Promotion Agency <www.vietrade.gov.vn>.

⁸⁶ Trans-Pacific Partnership, art 2.21.

⁸⁷ Article 9.4.

other TPP Parties (operating within its territory or jurisdiction) to voluntarily adopt CSR principles which it endorses or supports.⁸⁸ This can include foreign investors who may otherwise be unwilling to incorporate CSR measures if they are unfamiliar to them or have not been tested in their home countries.

It is likely that foreign investors will be more inclined to implement CSR within business policies where they are encouraged by the host State. The fact that the CSR practices that are promoted are endorsed by the State gives them a degree of accreditation regarding their effectiveness or suitability within that country, which may be attractive to foreign investors. Implementing locally recognised measures can also benefit investors as they are more likely to be acknowledged and recognised by local shareholders, other stakeholders and consumers. States also stand to benefit from foreign investors implementing CSR measures for business activity which takes place within its jurisdiction, as it would offer greater protection of its employees and the environment. But the fact that States can only *encourage* and not compel implementation of CSR minimises the effectiveness of this provision to some extent.

When encouraging CSR under the Investment Chapter, it is important that States use techniques which are specifically tailored for foreign investors. One such successful initiative is that of the Dutch government's Centre for the Promotion of Imports from developing countries (CBI). This Agency provides training to exporters from developing countries on codes of conduct and social and environmental issues and offers a website with extensive resources related to CSR.⁸⁹ States may also endorse measures similar to those practised in the United States, by offering tax incentives and granting business licenses and permissions for foreign investors with a good CSR record, thereby inciting them to take on CSR practices.

F Dispute Settlement

Disputes among Parties which relate to the application or interpretation of provisions of the TPP may be resolved under Chapter 28, which allows Parties to take action against other Parties for conduct which is inconsistent with TPP provisions. Breach of TPP provisions relating to labour, the environment and CSR are therefore actionable under this Chapter. An independent Panel will issue a decision that binds both Parties, and non-compliance is penalised by compensation to the complaining Party or suspension of benefits to the responding Party.⁹⁰ This Chapter could therefore have an impact on CSR in the several ways.

⁸⁸ Articles 9.2 and 9.17.

⁸⁹ United Nations Environment Programme, above n 9, at 28.

⁹⁰ Trans-Pacific Partnership, arts 28.3, 28.7, 28.19 and 28.20.

Firstly, the dispute settlement process serves as a preventive measure where a breach of obligations under the TPP is imminent. A State is less likely to breach labour, environment and CSR obligations where there is a prospect that such a breach is actionable under dispute settlement procedures. This may pressure States to conform to TPP requirements by proper adherence to labour and environmental standards and encouragement of CSR measures. In regard to the CSR provisions, results of encouraging practice of CSR is most likely to be seen if enterprises actively introduce and practice CSR in the course of business. States are therefore likely to put in substantial efforts to achieve these results and demonstrate compliance to other Parties.

Secondly, action can be taken against failure to comply with TPP requirements. If a Party does not meet the required labour or environment standards or fails to promote and encourage CSR among enterprises, other concerned Parties may take action against the responding State. The dispute settlement Panel may then direct the responding Party to take appropriate steps to encourage CSR and meet TPP standards. This may include amending relevant domestic laws or introducing new measures which effectively satisfy TPP requirements.

Thirdly, the penalties awarded under this chapter serve as an incentive for States to comply with orders of the dispute settlement Panel. The prospect of facing penalties (such as compensation and suspension of benefits) for non-compliance with Panel orders would compel Parties to conform to the directions of the dispute settlement Panel by improving the relevant labour, environment or CSR standards.

In these regards, Chapter 28 effectively holds States responsible for their CSR obligations under the TPP. However, the provisions of this chapter do not provide a means of holding enterprises themselves accountable, even under domestic laws. The incorporation of CSR principles is merely voluntary for enterprises and their adoption is left to the discretion of enterprises. Therefore provisions under this chapter may not be effective even where States fulfil their obligations of encouraging and promoting CSR, and the incorporation of CSR is therefore completely dependent on how persuasive and encouraging States can be.

G Assistance for Small and Medium-Sized Enterprises

Small and medium-sized enterprises (SMEs) can often be reluctant to implement and practice CSR as they lack the funding, time and human capital (employees), due to their smaller size and turnover. Therefore they rely on public actors such as their

governments to support their CSR initiatives.⁹¹ The TPP assists SMEs in this regard by requiring States to support them by providing a summary of the TPP and any relevant information.⁹² States are also required to establish a Committee on SMEs to help them benefit from TPP provisions (including CSR provisions).⁹³ These provisions may allow SMEs to obtain advice and assistance from the State regarding appropriate CSR practices and consequently adopt those which are most suitable for their enterprise.

H A Level Playing Field

It is often difficult for CSR principles to expand beyond the boundaries of its originating State due to various differences between countries. A study conducted in 2008 identified that some of the most prominent obstacles to the diffusion of CSR were cultural differences, language differences and inadequacy of communication and information tools.⁹⁴ Foreign investors and importers may also not have knowledge of relevant CSR guidelines and regulations in their other countries and may have to rely on local NGOs to retrieve that information.⁹⁵ This can be time consuming and difficult to communicate to suppliers abroad, making it difficult to adopt or to cooperate on CSR measures. The TPP addresses these issues by providing a platform for sharing and discussion through contact points and committees,⁹⁶ and accordingly mitigates communication barriers.

The study also found corruption to be a major obstacle to implementing CSR measures in developing countries, and companies often do not have a policy to deal with corruption overseas.⁹⁷ The TPP can also assist in this regard as it contains anti-corruption provisions to counter such problems.⁹⁸ In this manner, the TPP levels the playing field between the Parties, thereby allowing CSR measures to easily diffuse between TPP Parties.

⁹¹ Jamal El Baz and others “Influence of National Institutions on the Corporate Social Responsibility Practices of Small- and Medium-sized Enterprises in the Food-processing Industry: Differences between France and Morocco” (2016) 134(1) *J Bus Ethics* 117 at 119.

⁹² Trans-Pacific Partnership, art 24.1.

⁹³ Article 24.2.

⁹⁴ Francesco Ciliberti, Pierpaolo Pontrandolfo and Barbara Scozzi “Investigating corporate social responsibility in supply chains: a SME perspective” (2008) 16 *Journal of Cleaner Production* 1579 at 1584.

⁹⁵ Ciliberti, Pontrandolfo and Scozzi, above n 94, at 1586.

⁹⁶ These provisions are examined in more detail in the labour and environment chapters of this paper.

⁹⁷ Ciliberti, Pontrandolfo and Scozzi, above n 94, at 1586.

⁹⁸ Trans-Pacific Partnership, chapter 26.

I Overall Effects

As examined above, the TPP can greatly benefit CSR practices in numerous different ways. Although the Agreement does not authorise Parties to legally enforce CSR practices among enterprises, it is likely that CSR measures will ultimately be adopted due to increasing influence from States, consumers and competing businesses. Therefore, it is concluded that the TPP does have a beneficial effect on CSR, albeit in an indirect manner.

IV Protection of Labour Rights

The TPP dedicates an entire chapter for better protection of labour rights within TPP states. This chapter explores the present labour standards within TPP Parties and discusses how the provisions of the TPP may affect these standards for better or for worse.

A Current Labour Standards of the TPP Parties

Current labour standards within the TPP Parties are greatly varied. Whilst some States such as New Zealand, Singapore and Chile generally conform to labour standards set out in the ILO Conventions,⁹⁹ the same cannot be said of other States.

Although developed countries including Australia, Canada and Japan are compliant with most ILO Conventions, corporations have been found to abuse employees in other aspects. Foreign workers employed by Australian companies are regularly underpaid and exploited, and major Australian corporations have been found to have used temporary visa provisions to evade the consequences of such conduct under domestic laws.¹⁰⁰ In Canada, certain provincial laws allow children over the age of 12 to work in any industry, with no restrictions on the type of occupation, tasks undertaken or the time of work.¹⁰¹ Similar laws in the United States allow child labourers working in agricultural sectors to be exposed to hazardous working conditions which are overlooked by the State.¹⁰² In Japan, foreign workers employed to intern at Japanese companies are found to work under poor working conditions for a pay below the minimum wage.¹⁰³ In these instances, disadvantaged employees are not adequately

⁹⁹ Some inconsistencies are nevertheless present within these States, especially with regard to various freedom of association and collective bargaining rights.

¹⁰⁰ United States Labour Advisory Committee for Trade Negotiations and Trade Policy *Report on the Impacts of the Trans-Pacific Partnership* (2 December 2015) at 69.

¹⁰¹ Above n 100, at 73.

¹⁰² Jo Becker “Child Laborers. In America. In 2014.” (17 September 2014) Human Rights Watch <www.hrw.org>.

¹⁰³ Above n 100, at 76.

protected by domestic laws. It is therefore the responsibility of the employing company to ensure that employees are treated fairly by *exceeding* their legal obligations and being socially responsible.

Developing countries such as Brunei, Malaysia, Mexico, Peru and Vietnam also have inadequate labour laws to protect domestic and migrant workers. Corporations based in these countries then exploit these lax domestic laws to engage in forced labour,¹⁰⁴ as well as child labour.¹⁰⁵ For instance, large electronics companies such as Intel and Dell source the production of parts from Malaysia, where they have been produced by forced labour conditions; employers detain important documents and passports belonging to employees, leaving them trapped in employment with no access to justice.¹⁰⁶ In Mexico, companies enter into contracts with employer-dominated Unions without the consent of their employees, who are then subject to unfair terms of these contracts against their will.¹⁰⁷ The Peruvian government has also failed to enforce its labour laws, and consequently, goods produced for export in the garment, textile and agriculture sectors are often sourced from forced labour and child labour.¹⁰⁸ Meanwhile, Brunei exercises strict labour laws which actively prevents workers from exercising their fundamental rights. For instance, exercise of rights relating to freedom of association and collective bargaining is prohibited and failure to adhere may result in harsh punishment or indefinite detention without trial.¹⁰⁹ In these instances, it is evident that these TPP Parties have failed to adequately implement and uphold fundamental labour rights at the domestic level.

The improved labour standards under TPP provisions could perhaps fill this regulatory gap by obliging States to promote CSR, thereby indirectly compelling companies to offer better protection of labour rights by adopting and implementing appropriate CSR measures. In addition, the United States has signed Labour Consistency Plans with

¹⁰⁴ Forced labour is defined according to the Convention Concerning Forced or Compulsory Labour (ILO No 29) 39 UNTS 55 (opened for signature 28 June 1930, entered into force 1 May 1932). Forced labour includes all involuntary work or services provided to a private or third party under the threat of some form of penalty. The work or services provided need not be illegal under State or international law as the illegality relates to the nature of the employment relationship.

¹⁰⁵ Above n 100, at 76-83 and 87-88; United States Department of Labor “List of Goods Produced by Child Labor or Forced Labor: Vietnam” (2014) <www.dol.gov>; United States Department of Labor “List of Goods Produced by Child Labor or Forced Labor: Malaysia” (2014) <www.dol.gov>.

¹⁰⁶ Malaysia Investment Development Authority “Top 10 US Companies in Malaysia” (2012) <www.mida.gov.my>.

¹⁰⁷ Above n 100, at 80; Richard Marosi “Product of Mexico” *Los Angeles Times* (online ed, Los Angeles, 7 December 2014).

¹⁰⁸ Above n 100, at 85.

¹⁰⁹ Above n 100, at 71.

Brunei, Vietnam and Malaysia to amend the shortcomings in their domestic laws.¹¹⁰ Where these Consistency Plans compel States to improve the protection of labour rights, this also can set an example to companies to follow in the footsteps of the State by improving their own labour standards by being socially responsible.

B Does the TPP Affect these Labour Standards?

The TPP contains numerous provisions (including an express CSR provision) which can not only improve labour standards within the Parties but also improve CSR practices of companies within these States. These provisions and their effects are examined below.

1 Labour obligations imposed by the TPP

The labour provisions of the TPP embody the four fundamental labour rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.¹¹¹ The fundamental rights represented in the Declaration are the freedom of association and right to collective bargaining, elimination of forced or compulsory labour, abolition of child labour and the elimination of discrimination in respect of employment and occupation.¹¹² All Parties are required to adopt and maintain these rights their domestic legal systems. The rights promoted by the Declaration stem from eight ILO Conventions,¹¹³ and are intended to be recognised by all ILO Member States (including States which have not ratified the Conventions). The Declaration itself is not enforceable; only the complementary Conventions can be enforced if they are ratified by a State. All the TPP Parties, however, have not ratified all eight ILO Conventions.¹¹⁴ Therefore, these rights cannot be enforced within certain Parties. For example, Brunei

¹¹⁰ Further detail regarding the Labour Consistency Plans can be found on the website of the United States Trade Representative at <<https://ustr.gov/tpp>>.

¹¹¹ International Labour Organisation *Declaration on Fundamental Principles and Rights at Work* (18 June 1998).

¹¹² Trans-Pacific Partnership, arts 19.2.1 and 19.3.1.

¹¹³ Namely, Abolition of Forced Labour Convention (ILO No 105) 320 UNTS 291 (opened for signature 25 June 1957, entered into force 17 January 1959); Convention Concerning Forced or Compulsory Labour (ILO No 29) 39 UNTS 55 (opened for signature 28 June 1930, entered into force 1 May 1932); Discrimination (Employment and Occupation) Convention (ILO No 111) 362 UNTS 31 (opened for signature 25 June 1958, entered into force 15 June 1960); Freedom of Association and Protection of the Right to Organise Convention (ILO No 87) 68 UNTS 17 (opened for signature 9 July 1948, entered into force 4 July 1950); Right to Organise and Collective Bargaining Convention (ILO No 98) 96 UNTS 257 (opened for signature 1 July 1949, entered into force 18 July 1951); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182) 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000); Convention Concerning Minimum Age for Admission to Employment (ILO No 138) 1015 UNTS 297 (entered into force 19 June 1976); Equal Remuneration Convention (ILO No 100) 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953).

¹¹⁴ <www.ilo.org>.

and the United States have collectively not ratified seven of the eight fundamental conventions.¹¹⁵ Moreover, some of the fundamental conventions have not been ratified by at least five of the 12 TPP Parties and cannot be enforced within their jurisdiction. Therefore, the inclusion of these fundamental rights within the text of the TPP compels all TPP Parties to adopt satisfactory domestic regulations to protect and maintain these rights. This makes them enforceable within all TPP States, including States such as the United States and Brunei which have not ratified a majority of the conventions.

It is contended that the protection of these fundamental rights by domestic law will compel corporations to put in more effort, not only to meet the higher legal standards but also to market themselves as being socially responsible. Domestic recognition of fundamental labour rights raises the bar of employee protection within that country. If legal standards are raised, this raises the bar of CSR standards within the country (since CSR obligations require companies to go *beyond* their legal obligations). Accordingly, higher labour standards could improve labour-related CSR practices within TPP States.

The provisions under the labour chapter (including the CSR provision) can be enforced by Parties by dispute settlement procedures under Chapter 28 of the TPP. In this regard, these labour provisions are more enforceable than those of previous FTAs,¹¹⁶ and are therefore more likely to compel States to comply with requirements under this chapter.¹¹⁷ Enforceable provisions have been effective in previous FTAs such as the Dominican Republic-Central America FTA. When the Guatemalan government failed to enforce its labour laws, the United States administration took the matter to arbitration to force the country to prosecute abusive employers and enforce its labour laws.¹¹⁸ The TPP could help hold States responsible in a similar manner and ensure that its labour laws are complied with, thereby improving labour and CSR standards within TPP countries.

In addition to the fundamental rights, the TPP requires States to maintain acceptable conditions of work with regard to minimum wage, hours of work and occupational health and safety.¹¹⁹ However the Agreement does not specify what constitutes of

¹¹⁵ Only the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182) 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000) has been ratified by both Brunei and the United States.

¹¹⁶ Such as those of the United States-Chile Free Trade Agreement, the United States-Singapore Free Trade Agreement and the North American Free Trade Agreement (NAFTA).

¹¹⁷ United States Trade Representative “TPP Chapter Summary: 19 Labor” (2015) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership>> at 7.

¹¹⁸ Editorial “Pacific Trade and Worker Rights” *The New York Times* (online ed, 21 November 2015).

¹¹⁹ Trans-Pacific Partnership, art 19.3.2.

acceptable standards, and standards for each country are to be determined by each respective country. In this regard, even States which adopt and maintain very low standards will not breach provisions of the TPP. Countries such as Malaysia, Brunei and Singapore have low wages below the poverty line and unacceptable health and safety standards which are not addressed by the TPP.¹²⁰ Corporations within these countries can then easily market themselves as being socially responsible by imposing labour standards just above the legal requirement. In this regard, the TPP has overlooked a golden opportunity to push States and companies to improve their CSR efforts in relation to minimum wage, hours of work and occupational health and safety.

Whether the TPP will have an effect on CSR will therefore depend on the domestic measures adopted by each individual State. If States take the initiative to adopt high standards, domestic CSR standards will also automatically be raised, and companies will be compelled to put in more effort if they wish to market themselves as being socially responsible. Therefore, it is up to States to ensure that high levels of legal protection are afforded to employees.

2 The CSR provision

The TPP contains an express provision for CSR within the labour chapter. The provision is similar to that in the Investment chapter and requires each Party to encourage enterprises to voluntarily adopt CSR initiatives on labour issues which are endorsed or supported by that Party.¹²¹ Whilst this provision does not authorise States to coerce enterprises to adopt CSR practices, this is an important provision as it requires States to be more involved in CSR initiatives rather than leaving it up to corporations.

When a State encourages the practice of labour-related CSR, this could send a clear signal to enterprises, as well as to shareholders and other stakeholders, that CSR is an important aspect of good business conduct. Uninformed employees affected by unethical business conduct would be made aware that the companies they work for have ethical obligations which exceed their legal responsibilities. Where they fail to meet fulfil these obligations, employees could then urge companies to adopt and implement better CSR practices. The involvement of States could also provide backing to interested groups such as trade unions, activists and human rights organisations who wish to influence and assist corporations adopt CSR measures.

Similar to the investment chapter, the labour chapter of the TPP does not explicitly suggest any labour-related CSR measures which should be promoted. However, as

¹²⁰ United States Labour Advisory Committee for Trade Negotiations and Trade Policy, above n 100, at 66.

¹²¹ Article 19.7.

discussed in the previous chapter of this paper, this leaves room for States to promote measures which they deem to be most appropriate and effective within their jurisdiction.

As States cannot legally oblige companies to adopt and implement CSR measures which are purely voluntary, there is a possibility that companies may choose to ignore the efforts of States to promote CSR within its jurisdiction. However, if CSR measures were made a legal requirement, this too may have damaging consequences. Where these legal requirements are too burdensome, corporations may threaten to close down the business or lay-off employees. The ratification of the NAFTA brought about such consequences, where US employers threatened to close down their plants, and 12% of the employers followed through with this threat, leaving numerous workers unemployed.¹²² The fact that CSR implementation is left to the discretion of employers may therefore prevent displeased employers from resorting to such drastic measures and may, in fact, be the more effective method of urging corporations to adopt CSR measures.

3 Discouraging the production of goods by forced labour

It is estimated that forced labour generates over 43 billion US dollars per year, and the Asia-Pacific region (which includes a majority of TPP States) accounts for 56% of this global total.¹²³ The TPP requires Parties to discourage the import of goods which have been produced or sourced by forced labour or compulsory labour (including forced or compulsory child labour).¹²⁴ This provision would allow Parties to ban the import of goods produced in countries such as Brunei, Malaysia, Mexico, Vietnam and Peru, where there is evidence that forced labour subsists. This provision greatly benefits the promotion of CSR as it can compel companies to act responsibly towards its employees even where it is not required by the respective domestic laws. Where domestic laws fail to adequately protect employees from forced or compulsory labour, companies would be driven to offer adequate protection and good treatment to ensure that their goods are not rejected or banned by other concerned Parties. The economic benefits offered by the TPP (through the elimination of trade barriers) and the prospect of obtaining good trade deals would be appealing to companies, and would encourage them to trade within TPP territory by conforming to TPP provisions. In this manner, the TPP could pressure companies to exceed their legal obligations and engage in ethical conduct and CSR.

¹²² Kate Bronfenbrenner “We’ll close! Plant closings, plant-closing threats, union organizing and NAFTA.” (1997) 18(3) *Multinational Monitor* 8 at 8.

¹²³ International Labour Office *Profits and Poverty: The economics of forced labour* (Geneva, 2014) at 7 and 13.

¹²⁴ Trans-Pacific Partnership, art 19.6.

4 *Assistance for implementing CSR*

Parties to the TPP are required to accept submissions from interested persons and provide them with access to tribunals to enforce provisions under the labour chapter.¹²⁵ This would allow disadvantaged employees and interested groups such as trade unions and NGOs to communicate with States on issues relating to CSR, giving them a voice in monitoring and enforcing rights.¹²⁶ States could then use such feedback to address relevant issues and introduce and promote more appropriate and effective CSR measures. Where a State has failed to satisfy its obligation to assist enterprises with implementing CSR, these disadvantaged parties can take action through a tribunal to coerce the State to be more involved in CSR matters.

TPP Parties are also required to cooperate and assist each other with the implementation of provisions within the labour chapter, and CSR is expressly listed as one possible area of cooperation.¹²⁷ Cooperation may be enabled through workshops, seminars, research and even the exchange of technical expertise and assistance.¹²⁸ Parties may also get advice from other Parties on matters relating to the labour chapter (including CSR matters).¹²⁹ This can help developing countries such as Vietnam and Mexico, where CSR and labour rights may not be well protected and promoted. Developed countries such as New Zealand and Canada can advise and assist these countries with introducing more effective CSR measures related to labour issues.

The TPP mandates that each Party should establish a Labour Council (composed of government officials) and contact points to facilitate communication and coordination between interested persons and Parties and between the Parties themselves.¹³⁰ Each Labour Council is tasked with agreeing on a work programme for implementing the provisions of the labour chapter (including the CSR provision). As the Labour Council is composed of government officials, the government would be at the heart of promoting and encouraging CSR. Government officials are also likely to be well-informed of labour rights violations within their country and would be able to recommend appropriate and effective CSR measures to counter these violations. The lack of capacity to negotiate and insufficient coordination between trade and labour ministries has proved to be a hurdle when determining appropriate CSR measures.¹³¹ Contact points can address such issues by easing coordination between the relevant

¹²⁵ Trans-Pacific Partnership, arts 19.8 and 19.9.

¹²⁶ Fick, above n 51.

¹²⁷ Articles 19.10.1 and 19.10.6(t).

¹²⁸ Article 19.10.7.

¹²⁹ Article 19.11.

¹³⁰ Articles 19.12 and 19.13.

¹³¹ Organisation for Economic Co-operation and Development, above n 61, at 39.

ministries which need to be involved. Enterprises that are interested in adopting CSR measures may also resort to contact points for advice regarding the most appropriate and effective CSR measures.

The active involvement of the government in this manner would set a good example as a role model and may persuade private entities as well as other Parties to follow suit. The Labour Council is also required to accept views of interested persons on matters relating to the labour chapter, including the CSR provision.¹³² This is beneficial as it facilitates communication and input from CSR activists, trade unions and other experts in this field regarding labour violations and appropriate CSR responses.

The above provisions enhance the importance of CSR by easing communication and coordination through the sharing of information. But it should be noted that the power to initiate good CSR under these provisions mostly lies within the State and the appointed officials. If a State or its Labour Council deems that CSR is not a priority for the State and its corporations, the Council may not allocate sufficient time and effort to address CSR issues. In most countries, the lack of motivation or opposition from higher levels of government has been identified as one of the main hurdles for the implementation of CSR.¹³³ However, the fact that failure to fulfil labour obligations is actionable under the dispute resolution chapter of the TPP could encourage States to consider CSR within its domestic labour agenda.

C Will the TPP Improve Labour-Related CSR Standards?

The TPP sets high standards for the protection of labour rights. Consequently, it is likely that most labour-related CSR measures would then become legal requirements. Corporations would therefore be required to improve their labour protection efforts to market themselves as being socially responsible. The TPP assists in this regard, especially by means of the provisions which promote CSR and allow for cooperation between the Parties. Although these provisions have no binding effect, they can, in the very least, educate companies and encourage them to consider adopting CSR measures. Accordingly, it is concluded that the TPP can have a positive effect on CSR.

V Protection of the Environment

Corporations, both national and multinational, can have an immense impact on the environment over the course of business. Trade liberalisation brought about by FTAs can increase this impact on the environment as a result of increased sourcing,

¹³² Trans-Pacific Partnership, art 19.14.

¹³³ Organisation for Economic Co-operation and Development, above n 61, at 39.

production and movement of goods. This is especially true in the case of businesses involving the sourcing or production of goods (such as mining, textile production or chemical manufacturing). Research suggests that increased trade can affect air quality (through increased emissions of harmful gases), the ozone layer, water bodies and ecosystems; discharge of toxic substances, global warming and waste production is expected to increase, adversely affecting human, animal and plant life.¹³⁴ Existing national laws, which may not have previously regulated trade on such a large scale, may not address or prevent these impacts.

Consequently, some businesses take matters into their own hands by adopting CSR measures to counter adverse environmental impacts. But not all corporations take the initiative to do so, thereby causing irreversible harm to the environment by discharging toxic waste, and causing damage and destruction to wildlife, habitats and the atmosphere. The improved environmental protection standards contained in the TPP may address these shortcomings and reduce harm caused to the environment by encouraging better CSR practices among corporations. This chapter explores how the TPP may bring about such change and promote better CSR practices relating to environmental protection.

A Can International Trade Affect Environmental CSR Practices?

A study conducted across 108 countries over a period of six years has found that increased international trade influenced the increased the adoption of ISO 14001 standards,¹³⁵ which are complementary to environmental CSR practices. It was found that where export destinations (importing countries) had a higher number of ISO 14001 certifications, firms in exporting countries were also influenced to join this regime, resulting in a higher number of certifications within the exporting countries as well.¹³⁶ It can be inferred from this finding that buyers and importers can influence suppliers and exporters to adopt and implement CSR measures such as the ISO 14001. Given that the elimination of trade barriers under TPP provisions is likely to increase international trade between buyers and suppliers, international trade under TPP regulation can be used as a tool to introduce and improve environmental CSR measures in exporting countries.

¹³⁴ Japanese Study Group on Environment and Economic Partnership Agreements / Free Trade Agreements *Guideline on Environmental Impact Assessment of Economic Partnership Agreements and Free Trade Agreements in Japan (English Summary)* (Ministry of the Environment, Government of Japan, March 2004) at 6.

¹³⁵ Prakash and Potoski, above n 5, at 357.

¹³⁶ Prakash and Potoski, above n 5, at 357.

CSR practices can also be affected by foreign investments, which are provided for under Chapter 9 of the TPP. Multinational corporations are likely to want to adopt environmental CSR practices which are acceptable in all the countries they trade and invest in, to avoid costs of adapting different CSR models for each country. However domestic CSR measures are developed in an ad hoc manner and vary from country to country, limiting its coherence and making it confusing for business owners and consumers.¹³⁷ Foreign investments may help in this regard by serving as a “vehicle” to transmit flexible environmental CSR practices,¹³⁸ which are suitable for implementing across a number of countries. This is already found to be the case in international trade under bilateral trade agreements.¹³⁹ If this is also true for multilateral agreements such as the TPP, corporations in countries with high inflows of foreign investments may be influenced by the investors to adopt these versatile and suitable CSR practices.

B Environmental Obligations Imposed by the TPP

The TPP requires Parties to aim for high levels of environmental protection but each Party has the discretion to determine the level of protection maintained within their country.¹⁴⁰ All existing domestic laws are required to be strictly enforced and Parties are prohibited from derogating from these laws to encourage trade and investment.¹⁴¹ Parties are also required to implement and enforce all multilateral environmental agreements which they have ratified.¹⁴² If these TPP provisions encourage States to implement strict environmental laws, they could consequently compel enterprises to be more accountable for their effects on the environment. Additionally, States can push corporations to practice better CSR to meet the high levels of environmental protection mandated by the TPP.

The TPP also encourages engaging the public in the *development* of domestic environmental measures. For instance, arts 20.5 and 20.6 require Parties to accommodate “public participation and consultation ... in the development and implementation of measures” concerning the protection of the ozone layer and marine environments.¹⁴³ In addition to binding legal measures, it is possible that these measures could include voluntary CSR measures which have been endorsed by that respective State. In this case, public participation and consultation could include that of concerned corporations and organisations which have an effect on the environment. States could

¹³⁷ United Nations Environment Programme, above n 9, at 27.

¹³⁸ Prakash and Potoski, above n 5, at 354.

¹³⁹ Alan Rugman, Julie Soloway, and John Kirton *Environmental Regulations and Corporate Strategy: A NAFTA Perspective* (Oxford University Press, Oxford, 1999) at 30.

¹⁴⁰ Trans-Pacific Partnership, art 20.3.2.

¹⁴¹ Article 20.3.6.

¹⁴² Article 20.4.

¹⁴³ Trans-Pacific Partnership, arts 20.5.2 and 20.6.2.

encourage the input of environmental organisations and experts who can recommend effective CSR measures. Company directors and other interested entities could draw attention to areas where CSR practice in this regard has not been successful and request States to assist and provide advice regarding better CSR measures. This may also pressure competing businesses to take similar steps. Corporations which take part in these consultations would be prompted to administer any ensuing State-recommended CSR measures at the company level, thus improving CSR practice within the organisation.

The environment chapter also requires Parties to take measures to combat illegal trade in fauna and flora, by implementing stricter domestic laws and improving efforts to track down such trade.¹⁴⁴ Businesses which obtain fauna or flora from suppliers within TPP territories may wish to demonstrate compliance with these domestic laws to avoid a tarnished reputation and possible legal consequences. Furthermore, businesses may also wish to ensure that their suppliers complied with these laws to prevent them from being decommissioned or penalised. It is likely that businesses would want to avoid the arduous task of finding new, reliable suppliers to replace the trusted, long-term suppliers they have lost. Compliance of suppliers can be administered by businesses only through CSR measures (overseen by mechanisms such as codes of conduct or regular audits). In this manner, the TPP compels such businesses sourcing from within TPP countries to improve their CSR standards. This provision is particularly important as TPP countries account for more than 25% of the global food trade and approximately 25% of global timber and pulp production.¹⁴⁵ Therefore it could have a tremendous effect on CSR on a large, international scale. This could also influence companies which source from suppliers from non-TPP countries. The sustainable sourcing within TPP countries may pressure competing businesses to ensure that their suppliers also comply with these standards. In this regard, the TPP may improve CSR standards both within and beyond its signatory States.

Despite the numerous effective provisions contained within the TPP, the agreement is not without any negative effects. It has been identified that the TPP could have a negative impact on environmental CSR practices outside of the United States with regard to climate change. Provisions relating to climate change have, surprisingly, not been included in the TPP and therefore other Parties are not bound by such limitations. Only the United States is currently committed to have regard to climate change by limiting its carbon emissions (following the implementation of a bilateral agreement with China). Investors in other TPP Parties could therefore choose to profit from the

¹⁴⁴ Article 20.17.

¹⁴⁵ United States Trade Representative “TPP Chapter Summary: 20 Environment” (2015) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership>> at 6-8.

exclusion of climate change policies by exploiting cheap, high-emission processes, thereby undermining and thwarting other CSR efforts put forth by the TPP.

C The CSR Provision

The environment chapter of the TPP contains an express CSR provision, similar to that of the labour chapter, indicating that the drafters of the TPP considered it an important matter with regard to environmental as well as labour protection. The provision requires Parties to encourage enterprises to voluntarily adopt CSR principles that are related to the environment and are endorsed by that Party.¹⁴⁶ Unlike the labour chapter however, the environment chapter goes on to propose some voluntary mechanisms (such as voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships) which can be adopted by the Parties.¹⁴⁷ Where companies use environmental CSR measures to promote their products, Parties are also required to encourage them to be truthful and promote competition and innovation, and where possible, encourage compliance with international standards.¹⁴⁸

Similar to the labour CSR provision, these provisions get States, governmental officials and other experts directly involved in promoting and marketing CSR initiatives to corporations. The proposed voluntary mechanisms can even serve as a starting point or benchmark for States to draw up their own means of encouraging CSR. States may also be more willing to promote measures that have been endorsed by the TPP – they are pre-acknowledged by other TPP Parties therefore it would be easier to cooperate with these Parties when obtaining advice and assistance regarding their implementation. Businesses which wish to take advantage of the free trade policies within TPP territories are also more likely to want to adopt TPP-endorsed CSR practices. Traders who promote their goods in other TPP States based on their CSR practices may find it easier to do so with practices endorsed by the TPP. Consumers and competitors in other TPP States would be more familiar with the operation and effectiveness of these CSR standards they are also practised within their own country. In the best circumstances, this may even pressure competing businesses in other TPP States and beyond to adopt similar practices to compete on equal footing. In this regard, the TPP could persuade States to promote (and consequently encourage businesses to adopt) better environmental CSR standards.

¹⁴⁶ Article 20.10.

¹⁴⁷ Article 20.11.

¹⁴⁸ Article 20.11.3.

D Enforcement by Dispute Settlement Procedures

Similar to the labour chapter, provisions of the environment chapter (including the CSR provision) are subject to dispute resolution procedures if they are not complied with by a State.¹⁴⁹ Again, this would be a strong incentive for States to effectively implement any environmental provisions related to CSR and would contribute towards better CSR practices among enterprises. However, a 2007 report found that environmental dispute settlement provisions in FTAs have never been exercised by States.¹⁵⁰ For example, when provisions of the United States-Peru FTA were breached, there was a “systemic lack of enforcement” of the agreement,¹⁵¹ even though there was indisputable evidence that provisions of the agreement had been violated. Furthermore, dispute settlement provisions under the environment chapter are more onerous than the corresponding labour provisions. States are required to engage in three separate levels of consultation before commencing the dispute resolution process, which may discourage States from commencing action. Therefore, there is a possibility that dispute settlements under this chapter may not be enforced with regard to CSR provisions.

However, there is anecdotal evidence that such procedural provisions act as deterrents to under-enforcement of environment laws. The United States-Singapore FTA, for instance, influenced Singapore to more effectively enforce its domestic laws in relation to illegal wildlife transshipment with legislation.¹⁵² The TPP dispute settlement provisions may serve a similar purpose in relation to the implementation of CSR provisions in the environment chapter.

E Cooperation and Assistance for Implementation

Numerous provisions of the environment chapter allow Parties to assist and cooperate with each other to satisfactorily fulfil TPP obligations, including those relating to CSR. Each Party is required to establish a contact point and an Environment Committee (composed of government representatives) to facilitate communication and cooperation in this regard.¹⁵³ Parties may also cooperate and consult on matters related to the environment chapter,¹⁵⁴ and cooperation may include providing technical assistance for training, conducting workshops and conferences, sharing best practices and policies and exchanging experts among Parties.¹⁵⁵ These provisions would allow countries with

¹⁴⁹ Trans-Pacific Partnership, art 20.23.

¹⁵⁰ Organisation for Economic Co-operation and Development, above n 61, at 124.

¹⁵¹ Trade and Environmental Policy Advisory Committee *The US-Trans-Pacific Partnership Free Trade Agreement* (3 December 2015) at EIA Annex.

¹⁵² Organisation for Economic Co-operation and Development, above n 61, at 125.

¹⁵³ Trans-Pacific Partnership, art 20.19.

¹⁵⁴ Articles 20.12.2 and 20.19.

¹⁵⁵ Article 20.12.5.

weaker environmental policies to seek advice and assistance from countries with more stringent laws and higher levels of protection. In this manner, TPP Parties may also cooperate to determine the most effect CSR practices. As noted in the previous chapter of this paper, insufficient coordination between relevant ministries is one of the biggest problems faced when introducing CSR practices. The Environment Committee and contact points can expedite communication and coordination in this regard between trade and environment ministries of the Parties and between the governments of the Parties themselves.

Parties are also required to consult on environmental matters with experienced and knowledgeable persons prior to the implementation of TPP obligations.¹⁵⁶ Accordingly, States may consult with national advisory committees, environmental groups, non-governmental organisations and even enterprises and businessmen prior to endorsing and promoting a particular CSR practice, to ensure that the most effective and appropriate measures are selected.

F Public Submissions

If environmental provisions relating to CSR are not implemented by a Party, interested persons (the public) from that Party may make a Public Submission to the Party under art 20.9.¹⁵⁷ This would compel the violating Party to consult with the Environment Committee and implement the relevant provision within three years of the submission,¹⁵⁸ thereby fast-tracking the promotion and implementation of CSR principles. Public submissions are also found to work more effectively than State-to-State procedures. Governments may not be well-informed about environmental effects on all parts of the country, and affected citizens may bring them to light.¹⁵⁹ Citizens may also be keen to ensure that environmental measures are complied with, especially where they are directly affected, for instance, by air pollution or toxic waste disposal in their neighbourhoods. Public submissions can also be more cost effective, especially in countries with limited financial resources. Where governments are unable to fund the monitoring of national environmental measures, citizens could do so at no cost to the State.

Public submissions have also been effective in practice, bringing about improved environmental protection. For example, public submissions brought under the North American Agreement on Environmental Cooperation (NAAEC) have resulted in improved environmental protection in countries such as Canada and Mexico.¹⁶⁰

¹⁵⁶ Article 20.8.

¹⁵⁷ Article 20.9.

¹⁵⁸ Article 20.9.6.

¹⁵⁹ Organisation for Economic Co-operation and Development, above n 61, at 127-128.

¹⁶⁰ Organisation for Economic Co-operation and Development, above n 61, at 127.

Although these submissions did not concern CSR matters, it is possible that similar action could be taken where CSR measures are not implemented. In some arbitral cases,¹⁶¹ public submissions have persuaded governments to deny permission for projects which can have a negative environmental impact.¹⁶² Where the public would generally not have a say in such matters (even though they are affected by business activities), public submissions provisions allow the public to voice their concerns. This can consequently pressure businesses to act more responsibly towards the public by adopting CSR practices to appease the public and ensure that their projects are approved.

G Will the TPP Improve Environmental CSR Practices?

The environment provisions greatly promote adoption of CSR initiatives within TPP States. The provisions for CSR and public submissions, in particular, may persuade corporations to adopt CSR practices. Accordingly, the TPP could have a beneficial impact on CSR with regard to environmental measures.

VI Conclusion

The above chapters illustrate the numerous effects, both positive and negative, that the TPP may have on CSR within and beyond the Party-States. However, the individual analyses of each area of impact (such as State participation, labour and the environment) indicate that the majority of potential effects are likely to have a positive and beneficial impact on CSR. Therefore, from a holistic perspective, it appears that that the TPP can benefit CSR.

The CSR provisions within the TPP offer practical solutions to the existing concerns surrounding corporate accountability. By requiring States to actively engage in promoting and implementing CSR measures, the TPP manages to address the accountability deficit for the actions of companies in several ways. The TPP may compel States to introduce domestic CSR measures which bind the directors or managers of companies (in a manner similar to the Companies Act 2006 of the United Kingdom),¹⁶³ thereby addressing any accountability deficit arising due to the corporate veil or the separate legal personality of the company. The multilateral nature of the Agreement and the import and export provisions related to CSR could help address some CSR issues beyond each individual State, thereby overcoming the lack of

¹⁶¹ See, for example, *Metalclad Corporation v Mexico (Award)* ICSID ARB(AF)/97/1, 30 August 2000; *Tecnica Mediambientales Tecmed SA v United Mexican States (Award)* ICSID ARB(AF)/00/2, 29 May 2003.

¹⁶² Organisation for Economic Co-operation and Development, above n 60, at 155.

¹⁶³ Previously discussed on page 11.

jurisdiction to control activities beyond the State. Such regulation could also pressure companies to urge suppliers and subsidiaries to conform to TPP standards required by States. Where States introduce services to promote CSR (such as State-facilitated dialog channels, State-conducted audits and legal regulation of CSR reporting), they may prove to be more successful than the ineffective measures currently being practiced within companies (such as codes of conduct and internal audits). If the TPP ultimately improves the CSR practices of companies within its States, it would assist these companies achieve their primary profit-making objectives in the long run.

There is a possibility that States may choose to ignore or deprioritise the promotion of non-legal CSR principles. Promotion requires money, labour and time, which developing countries such as Vietnam or Brunei may be unable to afford, leading to a stagnation of CSR efforts within these countries. Moreover, the fact that compliance with CSR provisions is merely voluntary could mean that business too could choose to ignore any measures put forth by States. Furthermore, it may be that the enforcement of the TPP CSR provisions will not have a positive practical effect in improving responsible corporate behaviour, as it only binds States and not the companies themselves, and therefore cannot hold companies responsible.

Nonetheless, the enforcement of the CSR provisions could spotlight CSR issues and highlight its importance. This in itself is an initiative – a step further towards recognising the advantages CSR has to offer. The inclusion of CSR principles also broadens the group of people who have *locus standi* to voice their concerns. In this regard, the enforcement of the CSR provisions could serve a useful purpose in the long run.

Accordingly, it is determined that the beneficial effects of the TPP outweigh any potential disadvantages it may have. Therefore, for the purpose of this thesis, it is concluded that the TPP is indeed a boon for CSR, at least within TPP territories.

BIBLIOGRAPHY

PRIMARY SOURCES

A International Instruments

Abolition of Forced Labour Convention (ILO No 105) 320 UNTS 291 (opened for signature 25 June 1957, entered into force 17 January 1959).

Convention Concerning Forced or Compulsory Labour (ILO No 29) 39 UNTS 55 (opened for signature 28 June 1930, entered into force 1 May 1932).

Convention Concerning Minimum Age for Admission to Employment (ILO No 138) 1015 UNTS 297 (entered into force 19 June 1976).

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182) 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000).

Discrimination (Employment and Occupation) Convention (ILO No 111) 362 UNTS 31 (opened for signature 25 June 1958, entered into force 15 June 1960).

Equal Remuneration Convention (ILO No 100) 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953).

Freedom of Association and Protection of the Right to Organise Convention (ILO No 87) 68 UNTS 17 (opened for signature 9 July 1948, entered into force 4 July 1950).

International Labour Organisation *Declaration on Fundamental Principles and Rights at Work* (18 June 1998).

North American Free Trade Agreement (NAFTA) 32 ILM 289, 605 (1993) (opened for signature 17 December 1992, entered into force 1 January 1994).

North American Agreement on Environmental Cooperation (NAAEC) 32 ILM 1480 (1993) (opened for signature 17 December 1992, entered into force 1 January 1994).

North American Agreement on Labor Cooperation (NAALC) 32 ILM 1502 (1993) (opened for signature 17 December 1992, entered into force 1 January 1994).

Organisation for Economic Co-Operation and Development *OECD Decision of the Council on the OECD Guidelines for Multinational Enterprises* C(2000)96/FINAL (27 June 2000).

Right to Organise and Collective Bargaining Convention (ILO No 98) 96 UNTS 257 (opened for signature 1 July 1949, entered into force 18 July 1951).

Trans-Pacific Partnership (opened for signature 4 February 2016).

Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

B National Legislation

Companies Act 2006 (UK).

The Companies Act 2013 (India)

C Cases

Adams v Cape Industries Plc [1990] Ch 433 (CA).

Salomon v Salomon [1897] AC 22 (HL).

D Arbitral Decisions

Metalclad Corporation v Mexico (Award) ICSID ARB(AF)/97/1, 30 August 2000.

S D Myers, Inc v Canada (Award) Bryan P Schwartz, Edward C Chiasson, J Martin Hunter 13 November 2000.

Siemens AG v the Argentine Republic (Jurisdiction) ICSID ARB/02/08, 3 August 2004.

Tecnica Mediambientales Tecmed SA v United Mexican States (Award) ICSID ARB(AF)/00/2, 29 May 2003.

E Papers and Reports

American Federation of Labor-Congress of Industrial Organizations *Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Worker Rights* (April 2013).

European Commission *A renewed EU strategy 2011-14 for Corporate Social Responsibility* (COM/2011/0681 FINAL, 25 October 2011).

European Commission Directorate-General for Employment and Social Affairs *Promoting a European Framework for Corporate Social Responsibility* (Office for Official Publications of the European Communities, July 2001).

International Labour Office, Special Action Programme to Combat Forced Labour *ILO Global Estimate of Forced Labour: Results and Methodology* (International Labour Office, June 2012).

International Labour Office *Profits and Poverty: The economics of forced labour* (Geneva, 2014).

Howard Mann *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (International Institute for Sustainable Development, February 2008).

Japanese Study Group on Environment and Economic Partnership Agreements / Free Trade Agreements *Guideline on Environmental Impact Assessment of Economic Partnership Agreements and Free Trade Agreements in Japan (English Summary)* (Ministry of the Environment, Government of Japan, March 2004).

KPMG International *KPMG International Survey of Corporate Responsibility Reporting 2011* (Publication number 110973, November 2011).

John Gerard Ruggie *Business and Human Rights: The Evolving International Agenda* (Corporate Social Responsibility Initiative, Working Paper No 31, June 2007).

Trade and Environmental Policy Advisory Committee *The US-Trans-Pacific Partnership Free Trade Agreement* (3 December 2015).

United Nations Commission on Human Rights *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (United Nations Economic and Social Council, E/CN.4/2006/97, February 2006).

United Nations Environment Programme *Corporate Social Responsibility and Regional Trade and Investment Agreements* (DTI/1429/GE, 2011).

United States Labour Advisory Committee for Trade Negotiations and Trade Policy *Report on the Impacts of the Trans-Pacific Partnership* (2 December 2015).

United States Labour Advisory Committee for Trade Negotiations and Trade Policy *The US-Peru Free Trade Agreement: Report of the Labour Advisory Committee for Trade Negotiations and Trade Policy* (1 February 2006).

SECONDARY SOURCES

A Books

N Boeger, R Murray and C Villiers (eds) *Perspectives on Corporate Social Responsibility* (Edward Elgar Publishing, Gloucestershire, 2008).

Andrew Crane and others (eds) *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, New York, 2008).

Milton Friedman and Rose Friedman *Capitalism and Freedom* (University of Chicago Press, Chicago, 1962).

A Gutmann and D Thompson *Why Deliberative Democracy?* (Princeton University Press, New Jersey, 2004).

Bryan Horrigan *Corporate Social Responsibility in the 21st Century* (Edward Elgar Publishing, Gloucestershire, 2010).

Organisation for Economic Co-operation and Development *Environment and Regional Trade Agreements* (OECD Publishing, Paris, 2007).

Organisation for Economic Co-operation and Development *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD Publishing, Paris, 2008).

F Perrini, S Pogutz and A Tencati *Developing Corporate Social Responsibility: A European Perspective* (Edward Elgar Publishing, Gloucestershire, 2006).

Alan Rugman, Julie Soloway, and John Kirton *Environmental Regulations and Corporate Strategy: A NAFTA Perspective* (Oxford University Press, Oxford, 1999).

P Sands *Lawless World: America and the Making and Breaking of Global Rules* (Allen Lane, London, 2005).

Kiyoteru Tsutsui and Alwyn Lim (eds) *Corporate Social Responsibility in Globalizing World* (Cambridge University Press, Cambridge, 2015).

W Visser and others *The A to Z of Corporate Social Responsibility* (John Wiley & Sons, West Sussex, 2007).

Mike Wright and others (eds) *The Oxford Handbook of Corporate Governance* (Oxford University Press, Oxford, 2013).

Jennifer A Zerk *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, Cambridge, 2006).

B Journal Articles

Ruth V Aguilera and Alvaro Cuervo-Cazurra “Codes of Good Governance” (2009) 17(3) *Corporate Governance: An International Review* 376.

Jamal El Baz and others “Influence of National Institutions on the Corporate Social Responsibility Practices of Small- and Medium-sized Enterprises in the Food-processing Industry: Differences between France and Morocco” (2016) 134(1) *J Bus Ethics* 117.

P Blumberg “Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems” (2002) 50 *Am J Comp L* 493.

Kate Bronfenbrenner “We’ll close! Plant closings, plant-closing threats, union organizing and NAFTA.” (1997) 18(3) *Multinational Monitor* 8.

Archie Carroll “A Three-Dimensional Conceptual Model of Corporate Performance” (1979) 4(4) *Acad Manage Rev* 497.

Archie Carroll “Corporate social responsibility: The centerpiece of competing and complementary frameworks” (2015) 44 *Organizational Dynamics* 87.

Francesco Ciliberti, Pierpaolo Pontrandolfo and Barbara Scozzi “Investigating corporate social responsibility in supply chains: a SME perspective” (2008) 16 *Journal of Cleaner Production* 1579.

Jose M Cruz and Tina Wakolbinger “Multiperiod effects of corporate social responsibility on supply chain networks, transaction costs, emissions, and risk” (2008) 116 *Int J Production Economics* 61.

A Gill “Corporate Governance as Corporate Social Responsibility: A Research Agency” (2008) 26(2) *Berk J Intl L* 452.

Neil Gunningham, Robert Kagan and Dorothy Thornton “Social License and Environmental Protection: Why Businesses Go beyond Compliance” (2004) 29(2) *Law Soc Inq* 307.

Joshua D Margolis and James P Walsh “Misery Loves Companies: Rethinking Social Initiatives by Businesses” (2003) 48 *Admin Sci Q* 268.

Layna Mosley and Saika Uno “Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labour Rights” (2007) 40 *Comp Polit Stud* 923.

Esben Rahbek Pedersen and Mette Andersen “Safeguarding corporate social responsibility (CSR) in global supply chains: how codes of conduct are managed in buyer-supplier relationships” (2006) 6 *J Publ Aff* 228.

Aseem Prakash and Matthew Potoski “Racing to the Bottom? Trade, Environmental Governance and ISO 14001.” (2006) 50(2) *Am J Polit Sci* 350.

S Roberts “Supply chain specific? Understanding the patchy success of ethical sourcing initiatives.” (2003) 44(2) *J Bus Ethics* 159.

Rachel C Tate “Section 172 CA 2006: the ticket to stakeholder value or simply tokenism?” (2012) 3 *Aberdeen Student L Rev* 112.

Joshua Waleson “Corporate Social Responsibility in EU Comprehensive Free Trade Agreement: Towards Sustainable Trade and Investment” (2015) 42(2) *Legal Issues of Economic Integration* 143.

Minka Woermann “In corporations we trust? A critique of contractarian based corporate social responsibility models” (2011) 5(1) *African Journal of Business Ethics* 26.

C Guidelines and Standards

International Organization for Standardization *ISO 26000:2010 Social Responsibility* (2010).

Organisation for Economic Co-operation and Development *OECD Guidelines for Multinational Enterprises* (2011).

Social Accountability International *SA8000* (1997).

D Newspaper and Magazine Articles

Rob Cooper “Inside Apple’s Chinese ‘sweatshop’ factory where workers are paid just £1.12 per hour to produce iPhones and iPads for the West” *Daily Mail* (online ed, United Kingdom, 25 January 2013).

Rebecca Howard “Trans-Pacific Partnership trade deal signed, but years of negotiations still to come” *Reuters* (online ed, Wellington, 4 February 2016).

Richard Marosi “Product of Mexico” *Los Angeles Times* (online ed, Los Angeles, 7 December 2014).

Joseph E Stiglitz “On the Wrong Side of Globalization” *The New York Times* (online ed, New York, 15 March 2014).

Tim Worstall “The TPP, World’s Largest Trade Pact, Finally Gets Signed” *Forbes* (online ed, United States 4 February 2016).

Editorial “Pacific Trade and Worker Rights” *The New York Times* (online ed, 21 November 2015).

Editorial “The ethics of business: Good corporate citizens, and wise governments, should be wary of CSR” *The Economist* (London, 22 January 2005).

E Internet Material

Jo Becker “Child Laborers. In America. In 2014.” (17 September 2014) Human Rights Watch <www.hrw.org>.

CSR Europe "European CSR Awards" <www.csreurope.org>.

Barbara J Fick "Corporate Social Responsibility, Free Trade and the Trans-Pacific Partnership" (29 June 2015) The CLS Blue Sky Blog <<http://clsbluesky.law.columbia.edu>>.

Malaysia Investment Development Authority "Top 10 US Companies in Malaysia" (2012) <www.mida.gov.my>.

Dan Merica and Eric Bradner "Hillary Clinton comes out against TPP trade deal" (7 October 2015) CNN Politics <<http://edition.cnn.com>>.

New Zealand Foreign Affairs and Trade "Trans-Pacific Partnership Labour and Environment Fact Sheet" <www.tpp.mfat.govt.nz>.

United States Department of Labor "List of Goods Produced by Child Labor or Forced Labor: Malaysia" (2014) <www.dol.gov>.

United States Department of Labor "List of Goods Produced by Child Labor or Forced Labor: Vietnam" (2014) <www.dol.gov>.

United States Trade Representative "TPP Chapter Summary: 19 Labor" (2015) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership>>.

United States Trade Representative "TPP Chapter Summary: 20 Environment" (2015) <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership>>.

Vietnam Trade Promotion Agency "Strengths of the Vietnam textile and garment industry" (14 March 2016) <www.vietrade.gov.vn>.

Jeffrey Zients "Investor-State Dispute Settlement (ISDS) Questions and Answers" (26 February 2015) The White House <www.whitehouse.gov/blog>.

F Internet Resources

<<http://stats.oecd.org/glossary>>.

<<https://ustr.gov/tpp>>.

<www.ilo.org>.

<www.interpraxis.com>

<www.iso.org>.

<www.tpp.mfat.govt.nz>.

<www.unglobalcompact.org>.

G Other Resources

Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, Minnesota, 2014).

International Labour Office *Membership in the International Labour Organization: Information Guide* (Geneva, 2014).