The Convergence or Divergence of China’s FTAs and the TPP? A Case Study of the China-Korea FTA

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Abstract: The China-Korea FTA, whose subsequent negotiations will start in less than two years, is taken as a case study for the possible effect of the TPP on China’s trade pacts. A key questions will be discussed: is the China-Korea FTA more likely to converge toward or diverge from the TPP? The paper argues that, first, there is a trichotomy for the TPP provisions: “investment friendly rules”, “sensitive requirements”, and the “middle” rules. They may get different responses in the China-Korea FTA. Second, the China-Korea FTA is more likely to converge toward than diverge from the TPP, but is likely to become a TPP-lite. Third, the China-Korea FTA is among the groups of China’s agreements that are more likely to converge toward the TPP than others. Finally, the development of the China-Korea FTA is about much more about the rule development, and the rule implement is crucially important. China’s future FTAs can be expected to build upon the progress made in the China-Korea FTA.

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1. Introduction

The TPP is a landmark mega free trade agreement (FTA), which will bring about profound effects for economies in and outside the TPP zone. Moreover, the TPP is not just a trade agreement, and has extended to a very large swath of issues. As a major trading partner with the US and a number of other TPP members, China will feel the effect of the TPP, which in turn may affect the development of China’s FTAs. In other words, there is little doubt that the TPP will affect the subsequent negotiations of the China’s trade and investment agreements, since this mega FTA could significantly affect the businesses of China and the FTA partners. Theoretically China may choose to join the TPP or develops its own FTA template. In any case, the “upgrading” of the current China’s agreement or the conclusion of new FTAs will be a feasible choice to mitigate some of the effects exerted by the TPP. Even if China decides to join the TPP, it will take quite some time for it to happen. In the short to medium run, the development of China’s FTAs will mainly depend on the upgrading of existing FTAs or new FTAs. Moreover, the State Council of China issued Opinions on Speeding up the Implementation of Free Trade Area Strategy (the Opinions) in December 2015.\(^1\) The Opinions, if properly implemented, could add fresh impetus to the subsequent FTA negotiations.

The most recent China’s new agreements are the China-Korea FTA\(^2\) and the China-Australia FTA, both of which came into effect in late 2015. Both countries are among China’s major trading partners, and these agreements are commercially important. Within these two FTAs, the China-Korea FTA has set out a more detailed roadmap for subsequent talks. The timeframes for the negotiations seem to be strict. Further negotiations will be initiated before the end of the 2017, two years after the effective date of the agreement.\(^3\) Both parties will seek to conclude the talks in two years after

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\(^2\) It may also be referred to as ChKFTA in the footnotes.

\(^3\) ChKFTA Annex 22-A, para 8 (2015).
they commence negotiations. Moreover, the China-Korea FTA also covers more non-trade concerns and corresponding chapters (e.g., environment, competition). The China-Korea FTA progressed in several discrete but important areas by liberalizing trade and level the playing field for market actors to some extent. It could be used to “test the water” for deeper obligations. Given the relatively ambitious subsequent talks plan and broader coverage of the China-Korea FTA, the China-Korea FTA provides an excellent case study for the possible effect of the TPP on China’s agreements.

Therefore, the paper probes into the following questions: is the China-Korea FTA more likely to converge toward or diverge from the TPP? If such convergence is possible, will the China-Korea FTA be more likely to converge toward the TPP than other China’s FTAs? Due to space limits, the article does not intend to conduct the comprehensive comparison of the China-Korea FTA and the TPP, or to evaluate the merits of the provisions either of these agreements. These issues deserve separate and careful in-depth analysis. Instead, the focus is on whether the China-Korea FTA is likely to converge with the TPP, particularly from the features of the China-Korea FTA. As the author has argued elsewhere, the China–Korea FTA has four features compared with previous Chinese FTAs: expanded coverage, highlighted focus on services and investment, increased non-trade concerns of competition and environment, and enhanced good governance norms. This following parts will analyze these four aspects respectively, predicting the possible impact of the TPP on the subsequent negotiation of the China-Korea FTA.

2. Coverage

The China-Korea FTA has a broader coverage than previous agreements of China. In particular, it expands to areas such as electronic commerce to facilitate the development of trade under new technology. Its electronic commerce chapter is unprecedented in China’s trade agreements. Certain rules on intellectual property and customs procedures have also been written to take the digital technology into account.

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4 Id. at, Annex 22-A, para 9.
5 For the purpose of this article, SOEs issues are classified as non-trade concerns due to its impact on competition.
It would facilitate the trade and reduce processing time in some aspects. However, the China-Korea FTA is not a deep FTA and has not addressed all issues.

The TPP include a number of areas that are not dealt with in the China-Korea FTA, including state-owned enterprises (SOEs), designated monopolies, labor, regulatory coherence, anti-corruption, and development. Some areas are touched upon by the China-Korea FTA, but are treated as separate chapters in the TPP. They are either left for future negotiations (e.g., government procurement) or calls for further work (e.g., SMEs, cooperation, capacity building). SMEs issue is touched upon in the China-Korea FTA economic cooperation rules,7 but is dealt with as a dedicated chapter in the TPP. Related to the TPP, there is a Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries, which is separate from the TPP text and is not legally binding. This currency issue is not dealt with in the China-Korea FTA.

By and large, the TPP covers a broader range of areas than the China-Korea FTA. Some areas missing in the China-Korea FTA may not be a big gap as the TPP provisions themselves are at the early stage (e.g., competitiveness and business facilitation). Among the areas that not covered by the China-Korea FTA, a number of them are highlighted in the TPP, such as SOEs. These rules are the difficult part for China to adopt in the short term.

The China-Korea FTA also extends to certain special issues that are not covered by the TPP. They include the prohibition of the surrogate value methodology in anti-dumping investigations, and the zeroing issue. It reflects the differences in the interests of the negotiating parties in trade remedies, which the TPP does not impose new substantial disciplines.

The TPP and the ChAFTA do have similar coverage in WTO-covered areas, investment, and some new issues (e.g., electronic commerce, competition, environment). They cover the majority of trade in goods and services as well as investment. Usually the TPP contains stricter rules than the China-Korea FTA in these

7 ChKFTA Article 17.9. 2015.
areas. For the common coverage of the TPP and ChAFTA, marked difference may exists regarding their requirements. For instance, the TPP has, for the first in US FTAs, requires the minimum data protection period in the development of drugs and criminal penalties for the misappropriation of trade secrets, with the former being deemed to be “the single most controversial” TPP provision. Another example is data flow. For some issues that are covered by both sides (e.g., traditional knowledge), the China-Korea FTA requirements may be more detailed but they could be soft-law ones. Different from the TPP, the China-Korea FTA seems to encourage “the equitable sharing of benefits arising from the use of genetic resources and traditional knowledge”. As a salient feature of the China-Korea FTA, the coverage expansion related to digital trade and new technology seems to converge toward the TPP. Digital trade rules could be found in the TPP chapter on electronic commerce and attracts a lot of attention. On balance, the convergence seems to be stronger than divergence. Certain issues remain open, including whether the China-Korea FTA will extend to areas such as regulatory coherence, SOEs, designated monopolies, anti-corruption, and labor.

Regarding the subsequent negotiations, the China-Korea FTA does not provides for a detailed plan regarding how the coverage may be expanded. The TPP seems to have a faster pace of expansion of coverage. For instance, the TPP SOEs rules envisage further negotiations on two aspects: (i) extending rules to SOEs controlled and designated monopolies controlled or designated at at sub-central level of government, and (ii) expanding disciplines on non-commercial assistance and adverse effects to supply of services by SOEs. It remains to be seen how these two FTAs will expand their coverage in the future.

Given the needs of trade practices, it is safe to say that the China-Korea FTA will cover a wider range of issues in the future. The wider coverage may in turn affect the general balance of the negotiation outcome, and could, if properly managed, facilitate
more progress in the rule development. In other words, the broader coverage may bring new dynamics of the FTA negotiations given the availability of more levers to set.

3. Services and investment

3.1 Similarities

There are several common points between the ChAFTA and the TPP regarding investment and services. First, investment and services trade rules receive particular attention. Both FTAs have a broad range of rules that deal with services. The importance of services could be easily found in the structure of the TPP. There are four special chapters on cross-border services trade, financial services, people mobility, and telecommunications. Additionally, other chapters will be relevant to services, including investment (e.g., investment in services), e-commerce, SOEs (e.g., SOEs providing services), and certain “horizontal” chapters (e.g., environment chapter regarding environment services). Although some differences exist in structure as discussed below, the ChAFTA also deal with services trade and investment through several chapters. As with the TPP, financial services and telecommunications both get their own chapters in the China-Korea FTA.

Second, investment rules and services rules are closely linked. They will apply concurrently under many circumstances. Services firms may be protected by investment rules such as those on the minimum standard of treatment, expropriation, compensation, transfers, and the investor-state dispute settlement (ISDS). For instance, the application of a minimum standard of treatment under the TPP investment chapter to financial services is new among the FTAs.11 Similar arrangement is also provided in the ChAFTA.12 The TPP chapters on investment, cross-border trade in services, and financial services have a close relationship among themselves. For instance, certain provisions of TPP chapters on investment and cross-border trade in services are incorporated into the chapter on financial services and

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12 ChKFTA Article 12.18.2. 2015.
therefore apply to financial services. 13 These investment rules include, inter alia, Section B of Chapter 9 (Investment), Articles 9.6 (Minimum Standard of Treatment), 9.7 (Treatment in the Case of Armed Conflict or Civil Strife), 9.8 (Expropriation and Compensation), 9.9 (Transfers), 9.14 (Special Formalities and Information Requirements), 9.15 (Denial of Benefits), 9.16 (Investment and Environmental, Health and other Regulatory Objectives), 10.10 (Denial of Benefits), and 10.12 (Payments and Transfers). The China-Korea FTA also contains a services-investment linkage provision, which will enable the investment rules applicable to services and financial services when conditions are met.

Third, there are a number of similar rules for investment and services in these two FTAs, such as the minimum standard of treatment in investment. As an example of some similar key provisions, the prudential carve out in financial services in both FTAs are nearly identical except that the China-Korea FTA does not refer to cross-border financial service supplier. 14 With regard to investment, the China-Korea FTA eliminates forum shopping by the investors. The submission of an investment dispute to a domestic court or one of the prescribed arbitrations will exclusion other investor-state arbitrations. 15 The TPP also prohibits the forum shopping in investor-state dispute resolution. 16 The China-Korea FTA resembles the TPP in the deference to financial experts in the dispute settlement such as the consideration of subject matter expertise of adjudicator appointments. 17 As it stands, there is no appellate review in the state-investor dispute resolution in either of the FTAs. Slightly different from the TPP, 18 the China-Korea FTA does not provide for the possibility of the appellate review in the ISDS dispute. However, the ChAFTA calls for the negotiations on such possibility. Moreover, Korea’s FTAs with Australia, Canada and the US have also envisaged the possible bilateral appellate mechanism. 19 The China-Korea FTA and the TPP are similar in the cross road on whether an appellate review is to be developed.

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13 TPP Article 11.2.2. 2016.
14 ChAFTA Article 9.5 (2015); TPP Article 11.11.1. 2016.
15 ChKFTA 12.12.5. 2015.
18 TPP Article 9.23.11. 2016.
The answer is more likely to be yes than no to ensure the enhanced consistency and predictability of the investor-state dispute resolution.

### 3.2 Differences

Notable differences exist in services rules. Regarding many of these differences, the China-Korea FTA is likely to converge toward the TPP. Regarding rule structure, the TPP is different from the China-Korea FTA. The TPP contains, inter alia, a chapter on cross-border services trade instead of a general services trade chapter in the China-Korea FTA, and annexes on special issues such as on professional services. 20 Regarding the approach of liberalization, the TPP adopts a negative list approach for services and investment. It calls for much more liberalization of services. Regarding the national treatment, the TPP extends to the pre-establishment stage of investment. 21 In the future, the China-Korea FTA will adopt a similar structure with a chapter on cross-border trade in services, which deals with services provided by cross-border supply and consumption abroad. 22 The China-Korea FTA will also shift to the negative list approach in the subsequent talks, which probably will take place after the conclusion of the US-China investment treaty negotiations. Moreover, the China-Korea FTA is likely to extend the national treatment to pre-establishment stage of investment if the China-US investment treaty is concluded.

For the ISDS involving financial services, the TPP has provided for a dispute settlement procedure to determine whether the prudential reasons or other exemptions exist. 23 The claimant needs to request a joint determination by authorities of home and host countries, which is binding on the arbitration tribunal. 24 If such determination is not achieved, either authorities could turn to the state-to-state FTA dispute settlement proceedings for a binding decision by a new panel on whether such exception in financial services chapter exist. 25 If no party seeks a new panel, the arbitrators will presume that the home country takes the same position with the host

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21 Id. at, Article 9.4.1.
22 ChAFTA Annex 22-A, paras 4, 10. 2015.
24 Id. at, Article 11.22.2(a), 11.22.2(b).
25 Id. at, Article 11.22.2(c).
country unless the home country makes submissions to the arbitration tribunal.26 This procedure helps to protect the right to regulate by the financial authorities, and is likely to be positively considered by the China-Korea FTA negotiators in the future talk.

Meanwhile, there are seemingly nuanced but important differences among the TPP and the China-Korea FTA. The TPP requires the financial expertise or experience in the appointments of not only state-to-state panelists27 but also the investor-state arbitrators. 28 The China-Korea FTA seems to set similar requirements mainly for state-to-state dispute resolution concerning financial issues (e.g., prudential carveout).29 Regarding stricter rules against frivolous claims, the TPP provides for the possibility of awarding to the winning party reasonable costs and attorney's fees. 30 Another difference is that the TPP investment chapter includes a separate annex on public debt, which limits the access to the ISDS under certain circumstances (e.g., the negotiated restructuring,31 the 270-day break between the consultation request and the submission of an ISDS claim32). These TPP requirements will probably be transplanted into the China-Korea FTA to ensure the quality of the investor-state dispute resolution, reduce frivolous cases, or give special consideration to the public debt.

It remains to be seen whether and to what extent other large differences will be narrowed. Some ChAFTA investment rules are more lenient than corresponding stipulations of the TPP. For the prohibition of performance requirements, the China-Korea FTA prohibits those on export or technology transfer,33 which is much narrower than the TPP counterpart.34 Compared with the China-Korea FTA, the TPP makes it easier for investors to submit claims to arbitration without the possible precondition of a domestic administrative review. Different from the TPP, the China-Korea FTA

26 Id. at, Article 11.22.4(b).
27 Id. at, Article 11.21.3.
28 Id. at, Article 11.22.1.
29 ChKFTA Article 9.12. 2015.
30 TPP Article 9.23.6, 9.29.4. 2016.
31 Id. at, Annex 9-G, para 2.
32 Id. at, Annex 9-G, para 3.
33 ChAFTA Article 12.7. 2015.
34 TPP Article 9.10. 2016.
allows the party to require the investor to go through a domestic administrative review procedure before submitting the claim to investment arbitration.\(^{35}\) The domestic administrative review procedure may take up to four months. Such requirement is not found in the TPP investment chapter. It is possible for China to take more stringent requirements but such requirement may not be as strict as that of the TPP.

In sum, the China-Korea FTA should generally converge toward the TPP, as signaled by crucial aspects including the negative list approach for investment and services, rule structure adjustment, and the possible national treatment for the pre-establishment stage of the investment.

4. Non-trade concerns

As it stands, the China-Korea FTA takes important but limited step toward including the non-trade concerns in its framework. The China-Korea FTA resembles the TPP regarding two stand-alone chapters for environment and competition. From this perspective, the China-Korea FTA also goes beyond the ChAFTA that does not include these two chapters. The China-Korea FTA and the TPP are similar in non-trade concerns, including the promotion of consumer welfare in competition chapter.

However, the China-Korea FTA rules on non-trade concerns are not deep and are different from the TPP in several aspects. First, the China-Korea FTA non-trade concern rules in these chapters are mild commitments and cover a quite limited number of issues. The China-Korea FTA commitments start to pay attention to environmental impact,\(^ {36}\) enforcement of environmental measures,\(^ {37}\) principles in competition law enforcement,\(^ {38}\) and information exchange in competition law.\(^ {39}\) In contrast, the TPP environment chapter covers the broadest range of issues among trade agreements.\(^ {40}\) The TPP environment chapter covers a broad and large swath of issues, addressing issues such as fish subsidies, illegal trafficking in wildlife, illegal logging,

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35 ChKFTA Article 12.12.7. 2015.
36 ChAFTA Article 16.6. 2015.
37 Id. at, Article 16.5.
38 Id. at, Article 14.3.
39 Id. at, Article 14.9.
conservation of biodiversity, and a low-emissions and resilient economy. Environment chapter of the TPP not only imposes much deeper and wider obligations but also requires the proper implementation of these rules.

Both FTAs contain a short chapter on competition chapter. However, the TPP contains important rules such as the private right of action, which is missing in the China-Korea FTA. Regarding competition, the TPP includes a dedicated chapter on SOEs and designated monopolies other than the chapter on competition policy. The TPP SOEs chapter sets detailed disciplines for, inter alia, non-discrimination treatment.

Second, these obligations are not subject to the binding dispute settlement proceedings. Here the TPP and the ChAFTA are similar as both FTAs exempt the competition chapter from the dispute settlement mechanism. Therefore, the completion authorities are left with more room, and the softer approach of coordination is preferred than the hard law requirement. As one of the biggest differences between the ChAFTA and the TPP, ChAFTA rules regarding non-trade concerns are not enforceable under the agreement’s dispute settlement mechanism. Other TPP rules on non-trade concerns are usually subject to binding dispute settlement procedure. For instance, the TPP allows the access to its dispute settlement mechanism regarding labor disputes if they cannot be solved by labor consultations. The China-Korea FTA is same with the NAFTA and the Dominican Republic-Central America FTA in exempting and environment cases from the dispute settlement process. In practice, the China-Korea FTA is weaker in discouraging infractions than the TPP.

Third, there are no provisions in other non-trade concerns like labor. China-Korea FTA does not contain the chapter on labor. The TPP incorporate a stand-alone labor chapter and the related disputes are, as discussed above, also subject to the FTA

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42 Id. at, Article 17.4.
43 Id. at, Article 19.15.13.
dispute settlement system if the labor consultation fails.\textsuperscript{45} It probably constitutes one of the biggest gap between the China-Korea FTA and the TPP.

The TPP contains much more concrete and stricter rules than those of the China-Korea FTA. It is likely that the China-Korea FTA will expand its scope in the further negotiations. In developing the rules on non-trade concerns, the China-Korea FTA represents a step forward but it should not be exaggerated. China is interested in enhancing non-trade concerns rules in environment and competition. Judging from the China-Korea FTA rules on environment and competition, there is more likelihood for convergence than divergence. However, the possible convergence toward the TPP is rather challenging both in respect of the width (including the expansion of current rules, and the uncertainties regarding the incorporation of labor rules) and the depth of commitments.

5. Good governance

Good governance rules in the China-Korea FTA and the TPP will guarantee the traders and investors justice and predictability. Similarities exist between the TPP and the China-Korea FTA. Good governance requirements of the China-Korea FTA mainly consists of four categories: even-handedness, efficiency and effectiveness, due process, and transparency.\textsuperscript{46} Among them, the ChKFTA rules generally subject trade decision making to the stronger norms of publicness. These two FTAs are similar in many aspects, such as transparency requirements (e.g., publication, administrative proceedings, review and appeal, and information provision). The promotion of economic efficiency and consumer welfare is highlighted as the objective of the TPP competition chapter,\textsuperscript{47} which is consistent with the understanding in the U.S.\textsuperscript{48} The China-Korea FTA competition chapter\textsuperscript{49} has nearly the objectives with the TPP counterpart, which are economic efficiency and consumer welfare. The China-Korea FTA is only slightly different here by adding another objective to prevent “the benefits

\textsuperscript{45} Id. at Articles 19.15.12, 19.15.13.
\textsuperscript{46} Wang, ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY, 134 (2016).
\textsuperscript{47} TPP Article 16.1.1. 2016.
\textsuperscript{48} R. Michael Gadbaw, Competition Policy, in ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES 85, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).
\textsuperscript{49} ChKFTA Article 14.1. 2015.
of trade liberalization from being undermined”. 50 The TPP provides for procedural fairness in competition law enforcement, 51 and the procedural fairness is also recognized by the China-Korea FTA as a principle in competition law enforcement.

Both FTAs are also similar in their rule structure and the combination of soft- and hard- law obligations. The China-Korea FTA transparency rules could be divided into rules in the transparency chapter (Blanket Provisions) that apply to the whole FTA with few exceptions, and rules in other chapters (Sectoral Provisions) which apply to specific areas. 52 The TPP adopts the same structure: a general transparency chapter and sectoral provisions in different chapters. Both hard-law and soft-law languages are found in good governance norms of these two FTAs.

The TPP requirements on good governance are deeper and broader than those of the China-Korea FTA. Some examples regarding due process and transparency are given here. Although both FTAs requires the procedural fairness, the TPP imposes stricter and much more detailed requirements on procedural fairness in areas such as competition policy in which the procedural fairness in enforcement is “one of the important achievements of the TPP”.53 As another example, regulatory coherence refers to the adoption of good regulatory practices in terms of regulatory measures and regulatory cooperation.54 It involves the whole process of regulatory measures, from planning, designing, to issuing, implementing and to reviewing these measures.

For transparency, the TPP set higher transparent requirements than the China-Korea FTA in areas such as the ISDS and the state-to-state dispute settlement. The TPP ISDS hearings are open to the public, 55 and the publication of relevant documents (e.g., pleadings, awards, and, if available, minutes or transcripts of tribunal hearings). 56 Moreover, written amicus curiae submissions may be considered by arbitrators after consulting with the parties to the TPP investor-state dispute. 57 Therefore, the TPP will

50 Id. at.
51 Id. at, Article 16.2.
53 Gadbaw, Competition Policy 86. 2016.
54 TPP Article 25.2.1. 2016.
55 Id. at, Article 9.24.2.
56 Id. at, Article 9.24.1.
57 Id. at, Article 9.23.3.
allow more participation by the public including civil societies in the ISDS. In the same vein, the state-to-state dispute panel hearings are also generally open to the public.58

Although the ChAFTA and the TPP increase transparency and forbid discrimination, the TPP contains rules that cover new subjects. The TPP contain transparency rules that apply to SOEs. They include a list of SOEs in a TPP party, 59 the designation of a new monopoly or the expansion of an existing monopoly, 60 and the detailed information regarding SOEs and designated monopolies upon request (e.g., the shares owned by the party or SOEs, a description of special shares or voting hold by the party or SOEs). 61 In other words, the TPP members can further request detailed information on SOEs besides the availability of the list of SOEs.

The TPP also contains new types of good governance rules that are not found in the China-Korea FTA. As a key component of regulatory coherence rules, regulatory impact assessments are an soft “should” obligation.62 The TPP regulatory coherence chapter is subject to other chapters in case of conflict with other chapters.63 Even though these requirements are relaxed by these conditions, they are expected to affect the countries in a profound way. As a third example, the TPP contains concrete anti-corruption rules which are covered by the FTA dispute settlement mechanism. They require the measures to combat corruption, the application and effective enforcement of anti-corruption law, and the participation of private sector and society. These rules also call for the promotion of integrity among public officials.

Over the time, the China-Korea FTA may narrow the gap with the TPP regarding good governance by imposing stricter obligations in the FTA and building capacity at home. Among these requirements, the TPP soft-law obligations provide flexibility in and may be considered first in the possible convergence of the China-Korea FTA toward the TPP. For China, the good governance requirements could provide

58 Id. at, Article 28.13(b).
59 Id. at, Article 17.10.1.
60 Id. at, Article 17.10.2.
61 Id. at, Article 17.10.3.
62 Id. at, Article 25.5.1.
63 Id. at, Article 25.10.
incentives to improve trade governance. Having said that, it is to be seen whether
certain more challenging rules such as those on anti-corruption will be considered in
the future negotiations of the China-Korea FTA.

6. Conclusion

First, the TPP provisions could be divided into three groups and there is a
trichotomy. At one extreme, a number of TPP provisions can be referred to as
“investment friendly rules”. They protect the right to regulate, ensure the quality of
investor-state dispute resolution, and reduces the barriers to investment. Concerning
investment and services, these rules are likely to be adopted by China’s FTAs. A
typical example is the negative list approach for the pre-establishment stage of
investment and services trade provided through commercial presence, which has been
explicitly stipulated in the guideline of subsequent talks of the China-Korea FTA. A
second example is the procedure to determine whether exemptions in financial
services chapter exist in the ISDS, which could lead to a joint determination of home
and host financial regulators or a SSDS panel’s decision. It leaves more room for
financial authorities of FTA parties. Another example is the explicit requirement on
the consideration of subject matter expertise of ISDS arbitrator appointments. Others
may include the rules discouraging frivolous investor-state disputes. The China-Korea
FTA contains a framework for ongoing dialogue and talks on services and investment.
Rules on services and investment has become a central focus of the China-Korea FTA,
and are likely to be affected by these investment friendly rules. This could particularly
the case regarding investment rules as China seeks to protect its outbound investment
and to attract foreign investment. China seems to have more demand for liberalizing
investment than services trade through commercial presence, although sometimes
these two aspects can hardly be separated. Overall, the China-Korea FTA may
replicate the mechanism in the TPP.

At the other extreme, the provisions on sensitive issues such as SOEs and anti-
corruption requirements could lead to more concerns. They can be called as “sensitive

64 ChKFTA Annex 22-A, para 3. 2015.
requirements” that are deeply intrusive in general. The TPP is also in the process of updating its rules in certain areas such as SOEs.\textsuperscript{65} It is interesting to see whether the widening gap between the ChAFTA and the TPP may arise. These rules appear to be related to the China-Korea FTA rules on non-trade concerns and some good governance rules. The China-Korea FTA, although not comparable with larger FTAs, is one of the deepest FTAs of China. It is better equipped to possibly converge with the TPP. The fact that China takes non-trade concerns chapters is a good sign. The China-Korea FTA may be cause for optimism. The obligations of sensitive areas may be incorporated but framed as mild commitments not subject to dispute settlement proceedings. China will probably continue to adopt an incremental approach but at a faster pace. It could be a platform to experiment the TPP-like clauses and establish a foundation for more ambitious commitments in future talks.

The rest of the TPP rules falls within the third category, the “middle” rules. Most of the China-Korea FTA rules discussed above seem to fall between these two extremes. They include the China-Korea FTA rules on expanded coverage, and “traditional” good governance rules (e.g., publication). The China-Korea FTA is likely to be converge toward these TPP “middle” rules.

Second, the China-Korea FTA is more likely to converge toward than diverge from the TPP, but is likely to become a TPP-lite. Such convergence is possible in the four aspects: coverage, services and investment, non-trade concerns, and good governance. Among these four aspects, rules on non-trade concerns and good governance could be quite intrusive ones, and therefore are difficult to be adopted. As mentioned at the beginning of the paper, one possibility is that the China-Korea FTA will develop quite different and new rules compared with the TPP. Such possibility is not strong given the past practice of China’s FTAs. A rather limited number of innovation could be found in China’s FTAs, such as the China-Korea FTA’s Outward Processing Zone (OPZ), which is not rare in Korean agreements, and the ChAFTA’s combination of positive and passive list approach (it is probably an interim arrangement, not a permanent position). The recent China-ASEAN FTA Upgrading Protocol does not

\textsuperscript{65} TPP Annex 17-C. 2016.
draw up substantial different rules from the TPP, possibly partially due to the ongoing parallel negotiations of the Regional Comprehensive Economic Partnership (RCEP). In practice, the development of new norm is demanding in terms of the capacity of the parties. The TPP adopts a “pragmatic, flexible and dynamic model”. The China-Korea FTA has taken a similar approach although its obligations are not comparable with the TPP. Overall, the likelihood of convergence is greater than that of divergence. It is possible for the China-Korea FTA to fit into the trajectory of the TPP in the long term.

However, difficulties and uncertainties exist in sensitive issues for a number of reasons. Regarding the template of the FTA, the China-Korea FTA largely builds on the WTO rulebook and seems to move towards the NAFTA, and the TPP requirements go far beyond the WTO norm and represent significant development of the NAFTA model. Therefore, the China-Korea FTA and the TPP vary dramatically particularly regarding new issues (e.g., labor, environment, regulatory coherence). Regarding the nature, the distinct attributes of the bilateral FTA differ substantially from the mega FTAs that involve a much larger swath of issues and countries. The China-Korea FTA is likely to deal with and prioritize issues of interests for one of the party particularly those of common interests (e.g., e-commerce), and could make limited progress even in some of these aspects (e.g., agriculture, traditional medicine). On a related note, the convergence will partially depend on the pace of China’s other trade and investment treaties, as well as domestic legal reform. Progress in these areas could be reflected in the China-Korea FTA. These differences lead to uncertainties in the possible convergence, and the convergence will demand a lot of efforts.

Third, the China-Korea FTA is among the groups of China’s agreements that are more likely to converge toward the TPP than others. Although the China-Korea FTA does not contain rules that are as not stringent as mega FTAs, it is one of the “deepest” FTAs among China’s trade pacts. It is better equipped and has better foundation for stricter obligations. The China-Korea FTA also has provided for probably one of the

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67 Gadbaw, Competition Policy 89. 2016.
most detailed plan for subsequent FTA negotiations. The future negotiations of ChAFTA could be a test case for China’s approach to new generation trade rules.

Moreover, the FTA partners seem to play an important role in shaping China’s FTAs. The similarities between the TPP and Korea’s previous FTAs as well as Korea’s application for joining the TPP will substantially contribute to a possible convergence. Many provisions of the TPP are similar to the Korea-US Free Trade Agreement (KORUS FTA). The KORUS FTA has been “widely acknowledged as a baseline template for the TPP” because it represents the “highest standards” of US previous practice. The TPP builds on or resembles the KORUS FTA in a number of aspects, including the consumer protection, labor, the application of dispute settlement procedures to environment issues, environment obligations including their depth and implementation, the option of a monetary payment to avoid retaliation in the implementation stage of dispute settlement. In another crucial area of financial services, the TPP builds on the counterpart of the KORUS FTA. The ISDS provisions in the TPP also “substantially replicate” the corresponding rules in the KORUS FTA. A possible reason for certain similar provisions between the two FTAs is that the China-Korea FTA may also be affected by the KORUS FTA. The potential accessions to the TPP may lead to the convergence towards the KORUS FTA. Korea has formally asked to join the TPP trade deal, and China does not exclude the possibility of joining the TPP. The China-Korea FTA is more likely to converge toward the TPP than other FTAs with partners who do plan to join the TPP.

Last but not least, the development of the China-Korea FTA is about much more about the rule development. The rule implementation is also crucially important, which is beyond the scope of this article and deserves attention. In addition, besides the four aspects discussed above, the TPP has set much stricter requirements in a

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69 Gadaw, Competition Policy 88. 2016.
70 Cathleen Cimino-Isaacs, Labor Standards in the TPP, see id. at 47, 52, (2016).
71 Jeffrey J. Schott, TPP and the Environment, see id. at 33, (2016).
72 Id. at, 40.
73 Jennifer Hillman, Dispute Settlement Mechanism, see id. at 108, (2016).
74 Gelpern, Financial Services 92. 2016.
75 Gary Clyde Hufbauer, Investor-State Dispute Settlement, see id. at 110, (2016).
76 Anna Fifield, South Korea has formally asked to join the 12-nation Trans-Pacific Partnership trade deal., THE WASHINGTON POST, April 15, 2015. 2015.
number of areas. The intellectual property protection is an example, particularly regarding the data protection in the development of pharmaceuticals. 77 For instance, the China-Korea FTA has a provision on protection of rights management information (RMI), which is similar with the TPP regarding its structure. However, it is less stringent or detailed than the TPP in certain aspects (e.g. the prohibition of broadcasting, distributing or importing for distribution copies of works, performances or phonograms). 78 These higher level of protection may be discussed in subsequent negotiations and probably need to be addressed on a case-by-case basis.

China’s future FTAs can be expected to build upon the progress made in the China-Korea FTA. The paper has discussed the possibilities of convergence of the China-Korea FTA with the TPP. The China-Korea FTA parties will carefully evaluate whether this FTA will impose more requirements, and how much more. In the future, the China-Korea FTA will make some progress although it probably will not go as far as some may hope. Political willingness would be crucial here. For the future development of the China-Korea FTA, an intelligent balance needs to be made between trade liberalization and regulatory autonomy. It will then rely on the compromise that is to be made over a wide range of issues.

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77 Id. at, Article 18.50.
78 Id. at, Articles 18.69.1(a)(i), 18.69.1(a)(ii).
TPP (2016).

ChAFTA (2015).


Anna Fifield, *South Korea has formally asked to join the 12-nation Trans-Pacific Partnership trade deal,*, THE WASHINGTON POST, April 15, 2015. 2015.