



COMMENTARY

The TPP, Part I: A deal too far

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January 2016

With the release of the Trans-Pacific Partnership Agreement (TPP) last fall, a debate has been growing over the so-called “trade” agreement among twelve Pacific Rim countries. Should governments ratify the deal? Will it expand trade in a significant way? Who will be the winners and losers? But defining winners and losers only in trade terms will miss the much broader impacts of the TPP and hide the broader basis required for assessing its real impacts. In Canada, where IISD is headquartered, Trade Minister Chrystia Freeland has initiated formal consultations on the TPP, promising it is open for full discussion. This is a welcome initiative. For IISD, this is a deal too far and its ratification should be rejected by the minister. In its place, there is a need to fundamentally re-consider the role that trade and investment agreements make to supporting inclusive and sustainable growth. This commentary summarizes IISD’s concerns with the TPP, and a follow up article will begin outlining solutions.

Trade agreements have been expanding in scope since the advent of North American Free Trade Agreement in 1994. Yet, today, the anticipated trade impacts of the TPP are actually very modest. There is a growing consensus that the total growth in GDP will represent no more than 1 per cent, on average, for all participation states, from now until 2030.¹ A more robust study by Tufts University trade economists suggests far less, with a growth of

just 0.28 per cent over 10 years.² While this may be a large number in raw terms, nothing fundamental will change as a result of these provisions. Rather, it is the non-trade provisions that will have a far greater impact on national and global economies.

Since the establishment of the World Trade Organization (WTO) in 1995, regional and mega-regional trade negotiations have continued to expand in scope while the WTO itself continues to struggle to find a path forward. The TPP marks the new zenith of this expansion. It is not an accident. As stated by United States President Barak Obama during the negotiations, and proclaimed loudly and proudly on the United States Trade Representative website when negotiations concluded, it was designed and negotiated to ensure that U.S. policy-makers define the new rules of the 21st century international economic order. All other governments were expected to align to these policies, and this is what has happened. Clearly, Canada and the other negotiating states were policy-takers in this negotiation, not policy-makers.

The global context for understanding the implications of this outcome was set out very clearly by the World Economic Forum when it identified its top 10 economic trends of 2015:

¹ World Bank (2016, January). *Potential macroeconomic implications of the Trans-Pacific Partnership*. Retrieved from <http://www.worldbank.org/content/dam/Worldbank/GEP/GEP2016a/Global-Economic-Prospect-2016-January-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf>

² J. Capaldo & A. Izurieta (2016, January). *Trading down: Unemployment, inequality and other risks of the Trans-Pacific Partnership Agreement*. Global Development and Environment Institute, Working Paper No. 16-01.



At the top of this year's list is worsening income inequality. As the world's rich continue to accumulate wealth at record rates, the middle class is struggling. Today, the top 1% of the population receives a quarter of the income in the United States. Over the last 25 years, the average income of the top 0.1% has grown 20 times compared to that of the average citizen. Last year, this trend ranked second place in the Outlook; this year, it rises to the top.³

The Credit Suisse 2015 *Global Wealth Report* shows that the numbers are increasingly stark: for the first time, less than 1 per cent of the global population controls over 50 per cent of global wealth.⁴ The TPP, by focusing its rules on the protection of existing wealth owners and large businesses, will worsen this increasing growth in income inequality. Its non-trade rules ensure those with the most capital now can protect their position, at the expense of economic development opportunities for the poor and the middle class, and of the environment. And the most pronounced impact of the trade provisions themselves, according to the Tufts study, will be ongoing downward pressure on wages in all participating states. This result should not be very surprising: the only stakeholder group engaged by governments in the negotiation process was big business, and this has traditionally been the focus of U.S. treaty-making in the economic sphere. For Canada, with a new prime minister who campaigned on the theme of stopping the growing income inequality at home and promoting middle class interests, this deal should be especially alarming.

³ World Economic Forum (2015). Outlook on the global agenda 2015 (p. 7). Retrieved from www3.weforum.org/docs/GAC14/WEF_GAC14_OutlookGlobalAgenda_Report.pdf

⁴ Credit Suisse Research Institute. (2015). *Global Wealth Report 2015* (p. 19). (<https://publications.credit-suisse.com/tasks/render/file/?fileID=F2425415-DCA7-80B8-EAD989AF9341D47E>). See also Oxfam (2016), *An economy for the 1%* (p. 11) (https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf), which finds that the richest 62 individuals have the same wealth as half the world's population.

Trade agreements have mushroomed in scope on the simplistic assumption that more rights for economic actors always equals better. More trade rights equals more growth equals more development.⁵ More investment rights equals more growth equals more development. More intellectual property rights somehow equals more growth. But these assumptions of growth and development are often simply not true and, even when they are, few people ask, for whom?

Critically, the promoters of these assumptions never ask if the growth is sustainable from environmental, social or economic perspectives. The assumption that growth will be inclusive and positive is not tested by results. But increasingly, the evidence is that the simple assumption of "more is always better" is incorrect: the growing rather than narrowing disparity in wealth within and between countries shows the need to reassess these assumptions and the international rules on globalization they are leading to. The international law regimes underpinning globalization must both support vigorous national measures to ensure diverse and inclusive growth, and ensure environmental protection is not subject to the economic rights of a narrow set of stakeholders. The TPP, whether by the simple default application of decades-old negotiating assumptions or by design, fails on both these counts. We can do better.

The intellectual property (IP) chapter, for example, will provide new support to big pharma and big IT firms with longer periods of intellectual property protection and easier routes to renewing patents through marginal changes in the technologies. Stronger protections against generic drugs is one example that will cost consumers millions of dollars and make treatments unavailable to millions in need for years to come. The initial principle behind pharmaceutical patents was that IP rights would ensure high levels of research for new medicines. But the extensions of patent rights in this IP chapter will ensure that the ability of drug companies to maintain the high prices seen in the United States will be expanded to other countries with public healthcare systems.⁶ The patent protections in the TPP will

⁵ The World Bank study, for example, argues that there will be 11 per cent growth in trade, but this translates into just 1 per cent growth in GDP over 15 years.

⁶ See *Trans-Pacific Partnership*, art. 18.46 (Patent Term Adjustment); art. 18.50(1)(a) (Pharmaceutical Data Protection/Protection of Undisclosed



also increase the ability of companies to gouge consumers by making it harder for governments to set maximum prices.

There are other new technology impacts in the TPP, notably in Chapter 14 on electronic commerce. Here, we see risks, for example, being posed to net neutrality, the simple concept that ensures all Internet users have equal rights to access the data they are seeking, rather than privileging those who can buy or sell better access to data through higher user fees.⁷

Equally if not more critically, the same chapter threatens government privacy laws over Internet-gathered data by preventing governments from requiring data to be stored in the country where it is collected.⁸ When data is exported for storage and processing, it becomes very hard for the governments of the countries where that data was gathered to enforce the privacy rights related to that data. Those privacy rights can fall in jeopardy as data gatherers—private and governmental—can move data storage to places with weaker privacy laws. The United States is one such place where the rights of data holders and users can be more vigorous than the privacy rights of those whose data is now ubiquitously collected. Making corporate competition for data storage the pre-eminent value decreases the values associated with our data privacy issues.

The investment chapter, with all its so-called new protections for state policy space, reads suspiciously like old treaties dressed up in a few new frills. Language on protecting critical environmental regulation functions, for example, notes the right of governments to adopt new measures, but only as long as they are consistent with all the provisions of the agreement. In other words, the investment chapter reinforces the rules that such laws are subject to the primacy of investor rights. This was the position in NAFTA. The so-called new

Test or Other Data); art. 18.50(1)(b) (Patent Linkage); art. 18.50(2) (Pharmaceutical Data Protection [marketing exclusivity] for New Clinical Information or New Compounds); art. 18.63 (extends copyright term to 70 years). Retrieved from <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpa-full-text>.

⁷ Ibid., art. 14.10 is of particular relevance. See additional commentary at <https://www.eff.org/deeplinks/2015/11/release-full-tpa-text-after-five-years-secrecy-confirms-threats-users-rights>

⁸ Ibid., art. 14.13(2): “No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”

protections of policy space have not changed this. Governments will, for example, have to look over their shoulders on an ongoing basis to gamble on whether measures to implement the new Paris Agreement on Climate Change fall within the protected rights of foreign investors, who will maintain an unfettered right to challenge them if the TPP is ratified.

The oft-heard retort that such rights already exist in other agreements is facile: just because they exist under other existing agreements is not a reason to support expanding these rights in new agreements. It is the lessons learned from these other agreements that should give great caution not to simply repeat them.

For many of the smaller developing countries, critical development tools that are frequently used to share economic benefits from new investments are prohibited by the agreement. Many of these prohibitions will apply in resource development projects within Canada as well, especially in the natural resource sectors.⁹ Limitations on local economic development tools connected with, for example, the future development of Ontario’s resources in the Ring of Fire will affect the province’s ability to maximize its economic benefits. These prohibitions will be enforceable by an ever-broadening array of foreign-owned companies who may invest in Canada’s natural resources.

The investment chapter ensures that foreign investors retain broad rights to challenge all forms of government measures designed to protect human health, the environment, social welfare and other normal government functions, including rights based on the incredibly general notion of the “expectations of investors.”¹⁰ The reliance on old

⁹ See *ibid.*, art. 9.9(1)(b) restricting countries from requiring an investor “achieve a given level or percentage of domestic content;” (c) “purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;” (f) “transfer a particular technology, a production process or other proprietary knowledge to a person in its territory.”

¹⁰ *Trans-Pacific Partnership*, Art. 9-A(6)(4) on minimum standard of treatment of investors refers in very open terms to the notion of “investor’s expectations.” Similar language in relation to expropriation, however, is differently drafted, leaving much space to argue over the intentions of the drafters. More carefully drafted: Annex 9-B(3)(a)(ii): “The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:... the extent to which the government action interferes with distinct, reasonable investment-backed expectations”.



treaty language in many instances, instead of newer language even found in the Canada-EU CETA, will open the door to even broader interpretations of the investor rights that are included in NAFTA and other investment treaties.

Language to expand the role of privatized investors against state arbitration at the expense of national courts is included in the deal. There is a clear inclusion of rights to international arbitration instead of using domestic courts in the event of disputes over contracts and permits that govern many investments, even when these instruments specify domestic courts as the forum for settling disputes. The TPP will thus actually expand the rights of investors to circumvent domestic courts, including Canada's, in favour of the increasingly controversial investor-state arbitration.¹¹

In reality, there are few, if any, new safeguards on the application of investor-state arbitration. The current NAFTA-type model is embedded and deepened, guaranteeing investors the ongoing ability to threaten governments with international arbitration in response to planned new laws, as they have successfully done to ward off tobacco control, environmental measures and other laws.

Arbitration rights come with a separate and self-contained legal system that severely limits reviews of even the legal correctness of the arbitral decisions. In short, arbitrators have an extraordinarily broad right to be legally wrong in their decisions.¹² This denies the very accountability

that is essential to ensuring that the rule of law prevails, and risks expanding the already growing array of expansive and conflicting interpretations of the treaty provisions in favour of the rights of foreign investors. These inconsistent interpretations, in turn, mean governments can never fully assess in advance the tests they have to meet to comply with the treaty terms: it depends too much on who the arbitrators are after the fact. The drafters know these uncertainties only favour the investors. Governments now have to assess if this continues to be the right direction for establishing investor rights. We believe it is not.

In addition, these broader and deeper private sector rights are not compensated by corresponding improvements in environmental protection. While the environmental chapter does make some small advances, even those will rely on the further development of institutional processes and meetings of the environment committee, which will only take place over the first 3–5 years of the life of the agreement, if then. For the most part, however, the environment chapter reinforces the status quo rather than actively promoting enhanced environmental protections. Neither it, nor the chapter on general exceptions to the agreement, seeks to shield governments from claims by investors against new environmental protection measures, including those taken in pursuit of international obligations such as the recent Paris Climate Change Agreement.

That the TPP should come out so one-sided is not unexpected. The absence of public transparency in its negotiation was countered by the singular access of large industry associations and business representatives to texts and negotiators, including in Canada and the United States. This one-stakeholder form of access is now stacked up against an increasingly common statement that

decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Code from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Code; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law

(ii) the award is in conflict with the public policy of Canada.”)

¹¹ See *Trans-Pacific Partnership*, art. 9.18.

¹² See International Centre for Settlement of Investment Disputes. (2006). *ICSID Convention, Regulation and Rules*, art. 52 (Parties can only seek annulment on the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based; Commercial Arbitration Act, R.S.C., art. 34(2) (1985) (Can.) (An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Canada; or (ii) the party making the application was not given proper notice of the appointment of an (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the



the treaty cannot be modified—only full up or down decisions are to be made by the negotiating governments. Minister Freeland has promised an open mind on all options. Canadians deserve no less. One thing is certain: democratic principles cannot tolerate that one group of economic actors gets privileged access to a complex negotiation while other stakeholders are told that no changes can be made when they are allowed to finally see the text. That type of negotiating process must be ended.

The approach that more trade and other economic rights for corporations are always better has run its course. The imagery of the early 20th century that what is good for Ford or General Motors is good for the country is no longer viable in a globalizing economy with multiple levels of economic and social actors. The TPP shows how more and more economic rights for one set of economic actors—current capital owners, investors and large business—accompanied by more constraints on governmental abilities to ensure inclusive economic development and a sustainable planet can be taken too far. Just counting trade winners and losers simply ignores the broader array of impacts of the growth in these agreements. Ignoring them does not make them go away, but allows them to deepen.

As the international economic law for globalization moves ever deeper into supporting the rights of just one stakeholder in the global economy, it systematically constrains the rights of governments to enhance and protect the rights of other stakeholders. The poor, the middle class and the planet are the ongoing victims of this approach to economic globalization. It is time for Canada to say that this is a deal too far. Rather, Canada should use this as a jumping-off point to lead a new global dialogue on the right directions for trade agreements. Part 2 of this commentary will focus on how trade agreements should and can be instruments to support, rather than impede, achieving the globally adopted Sustainable Development Goals.

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