

Questioning the Advances in Global Trade: An Assessment of the Development Chapter in the Trans- Pacific Partnership

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Abstract

The Trans-Pacific Partnership is on its way to becoming the largest trade deal ever made and proposes to write the rules for global trade. The TPP includes several novelties in trade negotiation such as a chapter specifically interested in issues surrounding development. This paper offers a content-based analysis of the TPP's Development chapter to gauge the value of this symbolic addition. In order to make this assessment, the United Nations Conference for Trade and Development, the intergovernmental organization responsible for assisting developing nations in the negotiation of trade deals, serves as a reference point for the representation of developing nations' interests and the agenda for international development. Our first finding is that the Development chapter is not inconsistent with the UNCTAD's charter, but is too imprecise to represent an effective negotiation tool for the benefit of the TPP's developing members. Extending beyond the Development chapter, our second finding is that other chapters in the TPP, such as the Intellectual Property chapter and the Investment chapter, paradoxically present clear obstructions to developmental national policies, so that the TPP needs to be reworked to provide more negotiation power and preferential treatment to its developing members in order to base future trade deals on a more level footing and go beyond the standards enacted by former mega-regional trade deals.

"The Trans-Pacific Partnership (TPP) writes the rules for global trade," is the opening statement on the official United States' website dedicated to the largest regional trade deal in history awaiting ratification by the United States' Congress. The TPP has received extensive coverage in the media precisely because of its ambitious agenda and its size. The 12 member nations along the Pacific Rim currently participating in the TPP account for almost 40% of the world economy, and the number of nations that have expressed interest in joining continues to increase. The TPP is the first trade deal to include a chapter on development, an important addition as it proposes to set the standard for global trade. Including development in the global trade agenda is central to mending global economic disparities between the North and the Global South and pursuing sustainable development, especially with the diversity in levels of development between member nations. The TPP's symbolic incorporation of a chapter on development is progressive to the extent that it pursues the international standards set forth for development by intergovernmental organisms. The United Nations Conference on Trade and Development (UNCTAD) is the international body that promotes development through international trade. It has assisted developing countries in the negotiation of trade deals since 1964 and will serve as the point

of departure in considering the value of the TPP's chapter on development based on its content. While the TPP and the UNCTAD's positions on development are not incompatible per se, the TPP contains clauses that could paradoxically be detrimental to the development of its least developed members whose interests must be more firmly buttressed if the TPP is to go beyond a mega-regional trade deal based in American corporate interest.

In order to contextualize the UNCTAD's current position on trade and development here follows a brief overview of the organization's history. The United Nations Conference on Trade and Development was first held in 1964 as a response to the growing concern about the place of developing countries in the initial motions of international trade. The conference was institutionalized to meet every four years as a result of the acknowledgement of the unique positioning of developing countries and their need for representation. Since its formation, the UNCTAD has gone through three phases of existence marked by institutional changes brought about by multiple crises that affected the global economy and prompted the reconfiguration of the relation between labor and capital¹. The first phase of the UNCTAD unfolded in the context of the Welfare State characterized by the state's central role in the maintenance of national demand and closed economies. The welfare state molded the organization's pro-development ambitions between the 1960s and the 1990s. The crisis of the welfare state in the 1970s, however, caused the subordination of the state to the global flow of capital, a process embodied by the creation of the World Trade Organization (WTO) in 1995. The increase in global capital flows propelled the UNCTAD's second phase during which it supplanted its pro-development role for a seemingly converse function as the WTO's negotiation platform with developing countries. In this phase the UNCTAD promoted the signature of free trade agreements and provided technical assistance to developing countries in the liberalization of the production process and the circulation of capital. Following the crisis of the neoliberal state in the 1990s and early 2000s however, the UNCTAD began to question the correlation between the signature of bilateral trade agreements and the influx of foreign direct investment (FDI). The UNCTAD's third and current phase marked a return to its initial role as assistant to the state as a regulatory framework to foreign investment. The UNCTAD upheld state regulation, with a demand in 2003 for increased national policy space, referring to the recognition of the sovereign state's right to regulate and pursue FDIs in the scope of national development policies, and the emergence in 2012 of a New Generation of Investment Policies (NGIPs), anchored in the necessity for investments to foster inclusive growth and sustainable development generating responsible investment and corporate responsibility. The UNCTAD believes there exists a conflict between the resignation of a nation's sovereignty induced by the signing of bilateral trade agreements and a nation's necessity to implement developmental policies. The UNCTAD's current undertaking is the renegotiation of these agreements to include a sustainable development dimension.²

The Trans-Pacific Partnership (TPP) is a multilateral free trade agreement between

1 Ghiotto, Luciana, "¿UNCTAD pro-desarrollo o pro-liberalización? Un estudio de los cambios en el organismo a la luz de las políticas sobre inversiones," 5

2 Ghiotto, Luciana, "¿UNCTAD pro-desarrollo o pro-liberalización? Un estudio de los cambios en el organismo a la luz de las políticas sobre inversiones," 3.

twelve Pacific Rim countries that “promotes economic integration to liberalize trade and investment.”³ The TPP contains thirty chapters covering trade and trade-related issues, from textiles to labor standards. It is one of the largest trade deals ever written, and is considered by the United States government as complementary to the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union. The current member states of the TPP are, in order of entrance into negotiations, Singapore, Brunei, New Zealand, Chile, the United States, Australia, Peru, Vietnam, Malaysia, Mexico, Canada, and Japan. Several more countries have expressed interest in joining the partnership however, which is technically open to any country. There are ongoing debates about the exclusion of China, the world’s largest manufacturer, from the trade deal. Some argue it is crucial for the United States to counterbalance China’s influence in the region, while others say that China’s dominance in the region is inevitable⁴. China’s exclusion, and that of the BRICS, has also been argued to provide increased negotiation power to the United States and to hasten the deal negotiations. The partnership’s principle aims are familiar from past trade deals, that is, lowering trade barriers to facilitate commerce between member nations, but goes beyond prior deals in its attempt to reduce non-tariff barriers as well as tariffs.

The TPP claims to be the first trade agreement to contain a chapter on development. The Development chapter however, twenty-third in the TPP, lacks real policies and gives the impression of rhetorical sugarcoating for a trade deal based in a singular nation’s interest rather than a concrete advancement in the negotiation power of developing nations. It is not directly incompatible with sustainable development or responsible investment policies found in WTO and UNCTAD charters, but the imprecision of the Development chapter’s clauses indicates a lack of commitment to the effectual implementation of sustainable development and broad-based economic growth. The chapter consists of a series of generalities about the relationship between investment and development, such as “The Parties further recognize that transparency, good governance and accountability contribute to the effectiveness of development policies”⁵. The wording of the articles themselves lacks substance, as most articles began with “The Parties acknowledge” or “The Parties recognize,” and followed by generalized statements on a nation’s right to pursue developmental policies. The “acknowledgement” and “recognition” of such rights pales in comparison to the wording of the chapter on the Investment chapter, the breadth of which can be traced down to its reading time of 69 minutes opposed to the Development chapter’s 10 minutes. In the Investment chapter, clauses contain explicit deadlines, references to external legal texts and bodies, and an overall exactitude absent from the Development chapter.

The only policy put forth in the Development chapter is the creation of a Committee on Development composed of representatives from each party, or member nation, whose role would be to “consider ways that the Chapter may enhance the development benefits

3 Trans-Pacific Partnership, Preamble.

4 Caro, Felipe and Christopher S. Tang, “Leaving China out of the TPP is a terrible mistake.” *Fortune*. 06 Oct. 2015.

5 Trans-Pacific Partnership, 23.2.3

of this Agreement,⁷⁶ which the chapter itself fails to consider. The Development chapter states it goes hand in hand with the Cooperating and Capacity Building chapter, an equally imprecise text that also proposes a Committee to both create and implement its goals, resulting in a bureaucratic overlap with little leeway in the legal mire of the text as a whole. While it is ingenuous to think a trade deal would focus on development over the facilitation of commerce through the lowering of trade barriers, it is deplorable that perhaps the largest trade deal ever made, with the pretention of reforming global trade, so plainly favors a singular member's interest, the United States'. One would think that a chapter on development would address the interests of the less developed members, such as Cambodia, Vietnam, and Malaysia, and yet it is United States-centric in that the impetus for the development of the Asia Pacific region is to generate "more prosperous societies and stronger markets for America's goods and services."⁷⁷ Finally, the symbolic advance this chapter makes towards the pursuit of sustainable development in the global trade agenda is negated by a condition that states, "In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency."⁷⁸ This statement renders the TPP's Development chapter inferior to any of the other chapters in the deal, not only in terms of maneuvering capacity, but also in legal terms, as the final clause of the chapter states, "No Party shall have recourse to dispute settlement under Chapter 28 [Dispute Settlement] for any matter arising under this Chapter."⁷⁹ Therefore, a development policy would not justify the imposition of trade barriers, and such policies would be legally sanctioned. Rather than representing a symbolic advance in the constitution of trade deals and a step in the direction of policy space promoted by UNCTAD, the Development chapter, made up of undeniable generalities and a bureaucratic gesture, serves to underline the unilateral interest that drives the deal.

While the imprecision of the Development chapter in the TPP attests to the secondary positioning of the concern for sustainable development, it does not pose impediments to development on its own, that is, the chapter does not clash with the UNCTAD's perspective on development. Other chapters of the treaty however, such as the Intellectual Property chapter and the Investment chapter, do present direct barriers to development, and are consistently mentioned by the deal's critics as factors that refrain national policymaking and thereby reduce national sovereignty. First, the Intellectual Property chapter is a controversial chapter that critics warn of which could restrict access to medication in developing nations by implementing a higher standard "one-size-fits-all"¹⁰⁰ set of international intellectual property laws, meaning that property laws currently confined by national frontiers would extend to foreign territories. The concept of intellectual property is a central incentive for innovation and the operation of market forces, but the TPP may overturn the flexibility of the current international intellectual property laws for

6 Trans-Pacific Partnership, 23.7.2.f

7 Trans-Pacific Partnership, 23 Summary

8 Trans-Pacific Partnership, 23.8

9 Trans-Pacific Partnership, 23.9.

10 Flynn, Sean M., Brook Baker, Margot Kaminski, and Jimmy Koo, "The U.S. Proposal For An Intellectual Property Chapter In The Trans-Pacific Partnership Agreement." American University Washington College of Law (2015).

pharmaceuticals set out by the World Intellectual Property Organization that allows nations to mold medical policies to meet their needs. Doctors Without Borders writes, “The TPP agreement is on track to become the most harmful trade pact ever for access to medicines in developing countries.” The TPP considers extending the intellectual property rights on certain branded drugs, especially on innovative “biologics,” drugs grown from live cells with a high potential in the treatment of cancer¹¹, with an eight-year period of protection for the data collected in the development process of a drug. This could undermine the effort to contain the cost of medication made in the United States and delay the production of more affordable generic drugs and “biosimilars” and their access to people in developing nations of the Pacific Rim, thus increasing global inequality in access to health. States should be able to ensure the public health interests of their citizens and a provision that could harm the access to medications would undermine this responsibility. The economist Sean Flynn adds,

The proposal would make these changes in the context of a new and powerful dispute resolution system that would greatly expand the standing, venue, and causes of action that could be used to challenge domestic policies, including through actions by corporations directly against states. This is, in short, an incredibly unbalanced proposal emanating from an extraordinarily imbalanced process.¹²

The above conclusion segues into the most controversial element of the TPP, the Investor-State Dispute Settlement mechanism.

The Investor State Dispute Settlement (ISDS) mechanism is a product of the Investment chapter, and relates to disputes between private corporations and governments, as opposed to the Settlement Dispute chapter that governs disputes between governments. ISDS is a direct threat to policies aimed at development. According to the United States’ version of the TPP, the Investment chapter “deters foreign governments from imposing discriminatory or abusive requirements on American investors,¹³” principally through the ISDS mechanism, an international system whereby a multinational corporation (MNC) based in a TPP member nation can sue the sovereign government of another member nation, in which they have invested, for infringing upon their property rights. Why do nations accept these potentially constricting terms? The capital accumulation model is based on the liquidity of capital and its unrestricted flow on a global level¹⁴, and since the 1990s most bilateral trade treaties signed contain ISDS arrangements under which ad hoc international arbitration tribunals investigate whether an MNC deserves compensation from the nation under prosecution. Nations agree in the clauses of these arrangements not to interfere with

11 Calmes, Jackie, “Pacific Trade Deal Talks Resume, Under Fire From U.S. Presidential Hopefuls.” *The New York Times*. 30 Sept. 2015.

12 Flynn, Sean M., Brook Baker, Margot Kaminski, and Jimmy Koo, “The U.S. Proposal For An Intellectual Property Chapter In The Trans-Pacific Partnership Agreement.” American University Washington College of Law (2015).

13 Trans-Pacific Partnership, 9 Summary.

14 Ghiotto, Luciana, “Los tratados bilaterales de inversión y la protección a las inversiones: un análisis del caso argentino,” 253.

foreign investment in order to facilitate its profitability, thus attracting capital, inserting themselves in the global market and guaranteeing better positioning in global power relations¹⁵. In short, nations accept this legal practice to reassure foreign investors of the safety of their investment and attract more investment. These cases may be brought to the World Bank's International Center for the Settlement of Investment Disputes (ICSID), a legal body that crystalizes capital's pursuit of certainty through the law.¹⁶ Since 1990, over 100 different nations, most of which are developing nations, have been sued over 550 times, and won about one third of the time¹⁷. The United States, however, has never lost a case. Most United States' corporations win their cases against foreign governments and they are increasingly extracting advantages from ISDS clauses. This is one of the reasons "the US is demanding such provisions in the TPP, even though many of its "partners" have property protections and judicial systems that are as good as its own."¹⁸

Corporations consider that ISDS mechanisms depoliticize dispute settlements and ensure the free flow of capital in the capital accumulation model, which requires a complex legal web to protect foreign direct investments in unregulated neoliberal fluxes. The controversy is that ISDS mechanisms subject governments to foreign corporations, and place economic growth above social policies, both detrimental to sustainable development, by preventing the implementation of public policies that conflict with private foreign investment. What MNCs consider to be a violation of their property rights is a nation's attempt at legitimizing government regulation. Take for example the Uruguay vs. Philip Morris case, in which the tobacco company is currently litigating the Uruguayan government for implementing anti-smoking legislation that hurt its cigarette sales. Investment arbitration cases can cost millions of dollars to litigate and further entrench a developing nation in debt. Furthermore, the ISDS mechanism is a one-way street in which corporations may sue nations but not the other way around. "If there is a violation of other commitments – on labor and environmental standards, for example – citizens, unions, and civil-society groups have no recourse."¹⁹ While the TPP's ISDS mechanism is not a novelty in international trade, the entrenchment of this legal structure in the trade deal to lead the path for all future trade deals further orients economic governance towards the insurance of corporate interests. Surely nations have a right to defend their interests and ensure the profitability of their investments, but the ISDS mechanism is a slippery slope towards market discipline imposing itself on national sovereignty²⁰ and undermining democratic processes. In its 2015 World Investment Report, the UNCTAD demonstrated wariness

15 Ghiotto, 259.

16 Ghiotto, 263.

17 Rachel Wellhausen, Assistant Professor of Government at the University of Texas at Austin, for *The Washington Post*.

18 Stiglitz, Joseph E., "The Secret Corporate Takeover." *Project Syndicate*. 13 May 2015.

19 Stiglitz, Joseph E., "The Secret Corporate Takeover." *Project Syndicate*. 13 May 2015.

20 Ghiotto, Luciana, "Los tratados bilaterales de inversión y la protección a las inversiones: un análisis del caso argentino," 274.

towards international investment agreements, acknowledging their role in the safety of an investment climate and the facilitation of cross-border investment, but underlying experience has shown that IIAs “bite” (i.e. their protection provisions can and have been enforced by arbitral tribunals at sometimes huge costs to the State), and that – like any other international treaty – they limit the regulatory space of the contracting parties. As a result, concerns have been raised that these limits on regulatory space go too far, were not properly understood at the point of entry into IIAs or are inadequately balanced by safeguards for governments or by obligations on MNEs.²¹

Whether or not preferential trade agreements such as the TPP between nations increase the influx of foreign direct investments is a fundamental debate in the realm of international trade. While the signature of a free trade agreement by a developing nation can attract capital and spur industrialization, “economic growth is one aspect of the process of economic development.”²² Less developed nations feel compelled to lower trade barriers and accept investor-state dispute settlements to attract capital, but they are not sufficiently represented in the negotiation of the agreements and lack the infrastructure to deal with the legal consequences of these provisions. Many of the TPP’s members already have bilateral free trade agreements with each other, which suggests that there may be little effect on tariff preferences but that these novel chapters based on trade regulation rather than trade liberalization will in fact set new standards that are more constricting for governments than in the past. In an increasingly regionalized division of the production process, the TPP will also change how trade deals are negotiated. The TPP was negotiated between member nations directly rather than within intergovernmental bodies such as the World Trade Organization or the UNCTAD, which undermines these negotiation forums and the interests of the developing nations that are better represented within them. Developing nations need these organizations to support their interests and ensure that the outcomes of global trade rules benefit them. The TPP however was designed by developed nations with their own interests in mind, which has been normalized by previous free trade agreements, but if the TPP affects to transfigure the norms of global trade, it must level the negotiation ground between its developed and underdeveloped members and allocate preferential treatment accordingly, rather than impartially lowering barriers to trade.

21 Zhan, James X., “World Investment Report 2015: Reforming International Governance.” United Nations Conference on Trade and Development (2015).

22 Sen, Amartya, “Which Way Now?” *The Economic Journal*, 93.372 (1983): 745-62.

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