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TPP: Omissions, Weaknesses, and Erosion and the Howevers

Joan Hoffman

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by Joan Hoffman 11/2015

What is the potential impact of the Trans Pacific Partnership Treaty on sustainability? A review of some of the issues raised by critics and of the treaty itself reveals omissions, weaknesses and erosion of rights, but also some “howevers”, or mitigating factors that modify some of the concerns. The focus is primarily but not exclusively on the intertwined effects of the environmental and investment chapters. Hopefully this limited discussion will help clarify some of the issues germane to the larger conversation about this very complex treaty.

Omission:

Climate Change: Traded goods are generally delivered with the use of fossil fuels, because unlike renewable energy sources, such as wind and solar, fossil fuels are storable and portable. There is no acknowledgement in the TPP of the resulting tension between expanding trade (which can, under the right circumstances, improve human welfare) and mitigating climate change. The environmental chapter does mention the “transition to a low emissions economy,” environmental protection and sustainable development, and corporate responsibility is mentioned in both the environmental and investment chapters. However, the emphasis for the first three concepts is on the need for cooperation in pursuit of these goals as they “strengthen their trade and investment relations,” and participation in corporate responsibility is merely encouraged. (USTR a,c 2015)

The seriousness of our climate change problem calls for us to account for and mitigate the carbon footprint over the life cycle of our economic production and trading activities (e.g. Melzer 2014)). Trade and investment decisions are market activities undertaken by individual investors for their individual gain, led by market prices and costs that do not account for the impact of investment on society at large. Just as fishers, considering only their individual boat hauls, can deplete fish stocks, cumulative investments can deplete our environment. However, the TPP, although it addresses environmental and labor issues, conceptually privileges trade and investment motivated by individual profit-making and is a missed opportunity to lead us toward more sustainable paths of economic undertakings, and, by virtue of this omission, leads us towards a less sustainable future.

The Obama administration’s assessment of political realities apparently lead it to divert its climate change goals to the Paris talks and to emphasize environmental protections in the TPP (Sivarum 2015). However, the goal for carbon reduction being considered in Paris is well below the carbon budget level recommended by scientists in order to keep the rise in the earth’s temperature below the critical level of 3.6 degrees Celsius (Gillis 2015). Thus, in both instances world leaders have failed to meet their grave responsibilities to take the steps needed to preserve the endangered human habitat (e.g. Kolbert 2013) . The omission of explicit consideration of climate change and mitigating trade policies is a serious loss for the human species.

Weakness

Environmental Treaty language –Critics point out that weak language in the Environmental Chapter of the TPP dilutes obligations towards 6 of 7 multilateral environmental treaties in comparison to the language used in all US trade agreements since 2007 and the multilateral

treaties themselves. Only the language used for the CITES treaty on illegal trade in wild flora and fauna maintains the requirement that the countries “adopt, maintain and implement the laws, regulations and all other measures” needed to fulfill their obligations under the treaty.” For the other treaties, rather than calling for formal legal protection, some manner of “striving” to protect is called for. The diluted language is also below the standard set for these treaties in two congressional agreements: a 2007 bipartisan agreement between the President and the Democrats, and the fast-tracked Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (e.g., Sierra Club 2015).

Conservation language: While a wide range of conservation issues are mentioned, generally the language only calls for an effort and not obligation to create formal national law used for other trade agreements and for the 7 multilateral environmental treaties (e.g. Sierra Club 2015) .

Food safety: This agreement favors the use of what is termed the “scientific” approach to food and drug safety used in the US in which a substance is termed safe unless proved unsafe. In contrast, the precautionary approach, in which a substance is unsafe unless proved safe, is used in Europe. Further, it is thought that the use of the “scientific” criteria among Asian countries in the TPP will put pressure on Europeans to weaken their precautionary principle and to adopt the weaker “scientific” standard. (Lind 2015). We have a growing understanding of the hazards of chemicals, such as the dangers of pesticides to the bees which pollinate our food and the association between chemicals and cancer (EPA 2014, PSR 2015). Our food and drugs have chemicals added to and in them. It is alarming that less rather than more rigor in the testing of food and drugs is being enshrined in this agreement.

The labor language is considered a repetition of ILO mandates and ineffective in strengthening the effort to achieve those mandates (Bolle 2014, Klein 2015, PC 2015).

Erosion

Dispute resolution provisions ultimately can undermine protection of the public interest: Dispute resolution, a critical part of human affairs, is vital for trade agreements and commerce in general. Legal commerce with access to law and the courts, can, unlike the illegal drug trade, avoid violence in settling disputes. Similarly, given the absence of international governments, methods of dispute resolution for disputes over international trade have been sought to reduce the chance of violence and also to enhance the willingness of investors to engage in trade. As global trade has expanded, the means of settling disputes have evolved. There has been a gradual shift from methods based on negotiation, which are judged to favor the more powerful nations, to methods based on rules such as those used in arbitration agreements. The arbitration mechanism used in the TPP, investor state dispute settlement (ISDS), has been used for about 50 years in thousands of agreements, largely because developing countries wanted to reassure and attract investors by offering an arbitration proceeding as an alternative to their own court systems which were perceived to be corrupt. Foreign investors can seek redress in the courts of the countries in which they have made an investment. The ISDS has historically been used very little in the US, which has a relatively strong court system. (Some argue that this result may also reflect the ability of corporations to influence our courts). Also the mechanism has not been used very often. Decisions have often gone to the states, and investor recovery of funds has been relatively low (Jackson 1997, Klein 2015 ,CSIS 2014). So, what is the problem?

Five problems considered to have the potential to interfere with the ability of nation states to protect their environment and society can be mentioned here: arbitrator bias and inability to appeal decisions in a system accessible only to foreign investors; lack of transparency; the definition of expected profits as an investment; the minimum standard of treatment criterion; and, lack of a financial cap.

First, the arbitrators are often lawyers considered friendly to corporations and there is no appeal of decisions. This system is available only to foreign and not domestic corporations, and labor cannot use the system. It takes pressure off countries to reduce corruption in their judicial systems. Investors do not first have to use the judicial system.

Second, the system has previously not been automatically public and transparent. The TPP does have language calling for distribution of documents to the public, for public hearings and for allowing filings by interested parties, but there are phrases regarding “protected information” that could preclude such openness. However, there is also language seeking to avoid inappropriate protection of information. Additionally, the treaty does allow public submission of complaints.

Third, investments in this and other treaties have defined investment as including expected profits, language which resulted in Ecuador being fined 1.8 billion dollars for an environmental regulation that interfered with the expected profits of Occidental Petroleum (PCb). The TPP has language in the preamble and investment chapter which seeks to protect the right of states to regulate and protect their environment. The investment chapter includes environmental (but not labor) guarantees: *“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.”*

Also, although the TPP investment chapter defines investment as including expected profits, a section of that chapter states that inconsistencies between the investment and other chapters will be decided in favor of the other chapter. Additionally, the language appears to disallow cases based on investor expectations alone: *“The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.”*...

Hence, for this treaty it is possible that expected profits will not conclusively undermine environmental regulation. However, labor regulations are not equally protected.

However, a fourth concern, may undermine this attempt at protection. It is the expansion of power of foreign investors in the phrase in the TPP and other treaties that call for a “minimum standard of treatment” for foreign investors. The WTO agreement allows foreign investors to contest only unequal treatment relative to domestic investors. However, the minimum standard of treatment does not require such comparisons. While the language above from the investment chapter might guard against the minimum standard of treatment being used to contest environmental regulations affecting an investment, there has been criticism of tribunals’

tendencies to be overly generous to investors with regard to regulations (Wallach 2012). And, there is no appeal of tribunal decisions.

A fifth concern is expense. There is no cap on financial penalties.

Summary:

In sum, this treaty does not rise to the challenge we face in climate change. The criticism of the treaty is complex for it does make strides to protect the environment, to increase transparency, to include the public and to overcome the threats to environmental protection embedded in the investment chapter and the ISDS system. If the treaty passes, these protections will be welcome. However, the treaty does not provide the caliber of protection we need, and in its privileging of trade and special investor tribunals, it ultimately undermines our ability to protect ourselves.

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