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THE TPP WILL NOT CHANGE NAFTA AS PROMISED

*Phuong Tran**

PROponents of the Trans-Pacific Partnership (TPP) are alleging that the TPP will bring greater protections for unions, human rights, the environment, and small businesses than the North American Free Trade Agreement (NAFTA).¹ The problem with the TPP, however, is that there is no real mechanism to enforce these commitments. The TPP will expand markets and increase competition for NAFTA members, but it will not change NAFTA as promised.

The TPP is a trade agreement signed on February 4, 2016, by twelve countries across the Pacific Rim.² It includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.³ These nations represent nearly forty percent of global gross domestic product (GDP).⁴ The TPP includes thirty chapters that address a variety of topics like trade in goods and services, investment, intellectual property, labor, the environment, and dispute settlement.⁵ The twelve nations have two years to ratify or reject the agreement.⁶

NAFTA is an agreement signed by Canada, Mexico, and the United States, which created a trilateral trade bloc in North America.⁷ NAFTA was formed out of the economic and political interests of its members who geographically comprise of most of North America.⁸ NAFTA was signed on December 17, 1992.⁹ It fully entered into force a year later, on

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1. *The Trans-Pacific Partnership: Upgrading the North American Free Trade Agreement* (NAFTA), OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/TPP-Upgrading-the-North-American-Free-Trade-Agreement-NAFTA-Fact-Sheet.pdf> (last visited June 5, 2016).

2. *Trans Pacific Partnership trade deal signed in Auckland*, BBC (Feb. 4, 2016), <http://www.bbc.com/news/business-35480600>.

3. *Id.*

4. *See Overview of the Trans Pacific Partnership*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/tpp/overview-of-the-TPP#> (last visited July 24, 2016).

5. Press Release, Office of the U.S. Trade Rep., Summary of the Trans-Pacific Partnership Agreement (October 2015).

6. *Id.*

7. ANGELES VILLAREAL & IAN FERGUSON, CONG. RESEARCH SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (2015).

8. *Id.*

9. *Id.*

January 1, 1994.¹⁰ NAFTA has twenty-two chapters, also covering a wide variety of topics like trade and dispute settlement.¹¹ NAFTA also has two supplements: the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).¹² The NAAEC's primary goal is to ensure NAFTA members effectively enforce environmental laws through appropriate governmental action.¹³ This is designed to prevent a country that has the least environmental consciousness from receiving the greatest investment benefits.¹⁴ The NAALC's primary goal is to improve working conditions and living standards in Canada, Mexico, and the United States.¹⁵

If the TPP is ratified, it will replace NAFTA as the biggest trade deal in history.¹⁶ Proponents of the TPP allege that the TPP will upgrade NAFTA by promoting protections for the environment, labor rights, and small and medium businesses.¹⁷ This paper will examine the likelihood of proponents keeping such promises.

I. COMMITMENTS ON PROTECTING THE ENVIRONMENT

Proponents of the TPP allege that the TPP adopts the highest environmental standards of any trade agreement, creating new tools to combat illegal wildlife trafficking and improving enforcement of conservation laws.¹⁸ While NAFTA includes side agreements on environmental obligations, the TPP includes a chapter within its text.¹⁹ While NAFTA at least has some enforcement mechanisms, although often ineffective, the TPP has no enforcement mechanisms other than the threat of trade sanctions.²⁰ Trade sanctions are not an effective enforcement mechanism as

10. *Id.*

11. North American Free Trade Agreement, NAFTA SECRETARIAT, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> (last visited June 4, 2016).

12. *North American Agreement on Environmental Cooperation*, SECRETARIAT OF THE COMM. FOR ENVTL COOPERATION, <http://www.ccc.org/sites/default/files/naaec.pdf> (last visited June 5, 2016); *North American Agreement on Labor Cooperation: A Guide*, U.S. DEPT. OF LABOR: BUREAU OF INT'L LABOR AFFAIRS, <https://www.dol.gov/ilab/trade/agreements/naalcdg.htm> (last visited June 4, 2016).

13. *See North American Agreement on Environmental Cooperation*, *supra* note 12.

14. *See North American Agreement on Labor Cooperation*, *supra* note 12.

15. *Id.*

16. Jessica Glenza, *TPP deal: US and 11 other countries reach landmark Pacific trade pact*, GUARDIAN (Oct. 5, 2015, 8:47 AM), <https://www.theguardian.com/business/2015/oct/05/trans-pacific-partnership-deal-reached-pacific-countries-international-trade>.

17. Greg Nelson, *Chart of the Week: How the Trans-Pacific Partnership Improves on NAFTA*, WHITE HOUSE (Apr. 23, 2015, 4:48 PM), <https://www.whitehouse.gov/blog/2015/04/23/chart-week-how-trans-pacific-partnership-improves-nafta>.

18. *Id.*

19. Trans-Pacific Partnership, Chapter 20: Environment, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited June 5, 2016).

20. Howard Chang, *The Environment Chapter of the Trans-Pacific Partnership: An Environmental Agreement within a Trade Agreement*, 47 No. 5 ABA TRENDS 16, 17 (2016).

they often depend on the discretion and political interests of the other member countries.

Potential members of the TPP, including Vietnam and Peru, have serious environmental violations. For example, the illegal logging, smuggling and laundering of timber is a serious issue in Vietnam. Vietnam is “very willing to take timber smuggled” from neighboring Laos and Cambodia.²¹ According to the London-based Environmental Investigation Agency (EIA), the Vietnamese army played a key role in smuggling wood from Vietnam’s neighbors’ jungles.²² Vietnam is also a key player in global illegal wildlife trade as a trader, transporter, trafficker, and end-consumer of wildlife.²³ After China, Vietnam is considered as “the next port of call.”²⁴ Furthermore, key environmental issues in Peru include deforestation, desertification, pollution of rivers and coastal waters from municipal and mining wastes, and depletion of fisheries as a result of overfishing.²⁵ For example, many indigenous communities in Peru suffered from ailments after thousands of barrels of oil leaked into the Amazon jungle.²⁶

As mentioned above, NAFTA has a side agreement on environmental issues.²⁷ The NAAEC was to be implemented by an intergovernmental organization called the Commission for Environmental Cooperation (CEC), which Canada, Mexico, and the U.S. created.²⁸ The CEC examines environmental trends in the region and advocates for environmental solutions to eliminate climate change.²⁹ Although the CEC has successfully created greater environmental consciousness, it fails to hold member countries to environmental standards.³⁰ The CEC also has no authority to enforce compliance.³¹ In short, NAFTA falls short on providing environmental protections with ‘teeth,’ and the TPP is no different.

21. ‘Corrupt’ Officials in Laos Blamed Over Illegal Timber Trade with Vietnam, RADIO FREE ASIA (Nov. 26, 2014), <http://www.rfa.org/english/news/laos/timber-smuggling-11262014170709.html>; see also *Timber smuggling to Vietnam continues*, LAND ISSUES WORKING GRP. (June 6, 2015), <http://www.laolandissues.org/2015/06/06/timber-smuggling-to-vietnam-continues/>.

22. *Vietnam army smuggling timber in Laos: activists*, TERRADAILY (July 28, 2011), http://www.terradaily.com/reports/Vietnam_army_smuggling_timber_in_Laos_activists_999.html.

23. Rachel Nuwer, *In Vietnam, Rampant Wildlife Smuggling Prompts Little Concern*, N.Y. TIMES (Mar. 3, 2015), <http://www.nytimes.com/2015/03/31/science/in-vietnam-rampant-wildlife-smuggling-prompts-little-concern.html>.

24. *Id.*

25. *South America: Peru*, CIA WORLD FACTBOOK (Jun. 4, 2016), <https://www.cia.gov/library/publications/the-world-factbook/fields/2032.html>.

26. Wyre Davies, *Indigenous community in Peru suffers after oil spill*, BBC (Mar. 15, 2016), <http://www.bbc.com/news/world-latin-america-35803496>.

27. See *North American Agreement on Environmental Cooperation*, *supra* note 12.

28. *Id.*

29. David Vincent, *The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?*, 23 MINN. J. INT’L L. 1, 9-10 (2014).

30. *Id.*

31. *Id.*

II. COMMITMENTS ON PROTECTING WORKERS' RIGHTS

Proponents of the TPP allege that it adopts the highest labor standards of any trade agreement, including fully enforceable requirements to protect the freedom to form unions and bargain collectively, prohibitions against exploitative child labor and forced labor, protections against employment discrimination, and requirements for acceptable conditions of work.³² But Vietnam and Peru, two potential members of the TPP, have serious violations to workers' rights.

Vietnam has signed up for numerous labor agreements in the past but has consistently failed to implement them.³³ It is likely that the TPP will simply be another promise unkept and will do little to benefit workers and farmers. According to the Human Rights Watch, the Communist Party has maintained "a monopoly on political power and allows no challenge to its leadership."³⁴ Basic rights including freedom of speech, press, union, and association are restricted.³⁵ Human Rights Watch also reports "tens of thousands of men, women and children are being held against their will in government-run forced labor centers in Vietnam."³⁶ Underage workers are also very common in Vietnamese factories.³⁷ As an unfortunate consequence of Vietnam's system, labor unions may be formed under the TPP but will still be controlled by the Party.³⁸ Furthermore, in Peru, public protests against large-scaled mining projects, government policies, and private sector initiatives, have led to confrontations between police and protesters.³⁹ These confrontations resulted in the shooting deaths of civilians by state security forces.⁴⁰

While the TPP adopts some of the International Labor Organization (ILO) regulations,⁴¹ the ILO does not have any authority to issue sanctions against a member country that has committed labor violations.⁴²

32. See *Trans-Pacific Partnership, Chapter 19: Labour*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour.pdf>.

33. See *Agence France-Presse, Vietnam sees reform opportunities, labor challenges in TPP*, RAPPLER (January 17, 2016), <http://www.rappler.com/world/regions/asia-pacific/119319-vietnam-labor-reform-trans-pacific-partnership>.

34. See *Vietnam*, HUMAN RIGHTS WATCH, <https://www.hrw.org/asia/vietnam>.

35. *Id.*

36. *Id.*

37. See Libby Nelson, *How the TPP could change where your clothes come from*, VOX (Nov. 11, 2015), <http://www.vox.com/policy-and-politics/2015/11/11/9715652/tpp-textiles-clothes-garments>.

38. See *Vietnam: End Thuggish Repression of Activists, Trade Pact Pledges on Labor Not Matched by Changes on the Ground*, HUMAN RIGHTS WATCH (Jan. 27, 2016), <https://www.hrw.org/news/2016/01/27/vietnam-end-thuggish-repression-activists>.

39. *World Report 2015: Peru*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2015/country-chapters/peru> (last visited June 4, 2016).

40. *Id.*

41. See *Trans-Pacific Partnership, Chapter 19.3: Labour Rights*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour.pdf>.

42. Deirdre Salsich, *International Workers' Rights Enforced Through Free Trade Agreements: DR-CAFTA and the DOL's Case Against Guatemala*, 25 N.Y. INT'L L. REV. 19, 19-21 (2012).

Without the ability to enforce labor standards, the TPP will likely become another unenforceable promise.

III. ENFORCING COMMITMENTS IN THE LABOR AND ENVIRONMENT CHAPTERS BY THE THREAT OF TRADE SANCTIONS

The TPP proponents also allege that commitments in the Labor and Environment chapters to dispute settlement will be upheld by the threat of trade sanctions.⁴³ But history has shown that the threat of trade sanctions is inadequate, especially when the member countries' interests intertwine with local politics. For example, Guatemala was a beneficiary of the Generalized System of Preferences (GSP); a U.S. trade program which required members such as Guatemala to comply with "internationally recognized worker rights."⁴⁴ The Guatemalan government violated these requirements by accusing trade union activists of links to the guerillas, organizing assassinations, arrests, and torture of trade union activists.⁴⁵ Despite these violations, the United States decided not to revoke Guatemala's GSP status.⁴⁶

The United States has also failed to maintain its commitments in past trade deals. For example, the United States failed to timely maintain its commitments regarding labor rights in the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA). In 2008, the AFL-CIO and six Guatemalan labor organizations filed a public submission with the U.S. Department of Labor's Office of Trade and Labor Affairs (OTLA), under the DR-CAFTA, the group documented the failure of the government of Guatemala to comply with the labor rights chapter of that agreement.⁴⁷ It took three years before the United States agreed to pursue formal dispute settlement, the first time a labor case has ever moved to enforcement.⁴⁸ Then it took a total of seven years for the case to actually be heard—in April 2015.⁴⁹ So far the panel already has twice-delayed issuing a ruling and made it clear it would not be making a final decision in 2015.⁵⁰ According to labor groups, more than seventy union organizers were murdered after Guatemala signed the agreement.⁵¹ It will likely take years for the Guatemala case to be decided, if it is decided at all.⁵² In the meantime, all DR-CAFTA benefits remain in effect for

43. Chang, *supra* note 20.

44. *Reporting on Worker Rights, County Reports on Human Rights Practices for 2011*, U.S. DEP'T OF STATE, <http://www.state.gov/documents/organization/186764.pdf>.

45. Salsich, *supra* note 42.

46. *Id.*

47. *See Guatemala*, AFL-CIO AM. UNIONS, <http://www.aflcio.org/Issues/Trade/Guatemala> (last visited June 4, 2016).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

Guatemala.⁵³

IV. COMMITMENTS ON HELPING SMALL AND MEDIUM BUSINESSES

While the TPP states “support[ing] the growth and development of micro, small and medium-enterprises” as one of its commitments,⁵⁴ the TPP’s policies may actually damage such enterprises. Very small percentages of small and medium-sized businesses export goods abroad.⁵⁵ With limited resources and experience, very few want to expand their businesses to different continents where they will face complex regulations and different market needs.⁵⁶ The vast majority of small and medium-sized businesses focus on serving local markets, not on exporting to new markets.⁵⁷ Only a few innovators who are on the path to becoming large corporations will benefit from the TPP.⁵⁸ Thus, the TPP will not bring much benefit to the vast majority of small and medium businesses.

The TPP may even harm small and medium business because it allows large manufacturers, who have access to cheap labor and mass production, to come in and compete. Vietnam and Peru are the typical destinations for industries that require low-wage labor, such as mining, apparel, footwear, and textiles. For example, Vietnam has the fourth largest population in the TPP, with more than sixty percent of the population in working age.⁵⁹ Vietnam has by far the lowest GDP per capita among TPP member states at \$2,052.30.⁶⁰ Minimum wages in Vietnam are divided into four regions, ranging from 0.60 cents to 0.86 cents per hour.⁶¹ The average wage is approximately 0.80 cents per hour.⁶² Similarly, Peru has a population of approximately thirty-two million people, with sixty

53. Cole Stangler & Maria Galluci, *As US Promotes TPP As A Way To Improve Labor Standards, Guatemala Shows Failed Promises Of Previous Trade Deals*, INT’L BUS. TIMES (Nov. 05, 2015), <http://www.ibtimes.com/us-promotes-tpp-way-improve-labor-standards-guatemala-shows-failed-promises-previous-2171795>.

54. *Trans-Pacific Partnership, Preamble*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf>.

55. *See Small and Medium-Sized Enterprises, TPP Chapter Summary Small and Medium Sized Enterprises*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Small-and-Medium-Sized-Enterprises.pdf> (last visited June 4, 2016).

56. *Id.*

57. Nish Acharya, *Where The TPP Misses The Mark For Small Business And Entrepreneurs*, FORBES (Nov. 6, 2015), <http://www.forbes.com/sites/nishacharya/2015/11/06/where-the-tpp-misses-the-mark-for-small-business-and-entrepreneurs/#7c26c2441c5f>.

58. *Id.*

59. *See South and Southeast Asia: Vietnam*, CIA WORLD FACTBOOK (Jan. 5, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html>.

60. GDP per capita (current US\$), World Bank, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited June 4, 2016).

61. *See Vietnam approves minimum-wage hike of 15 percent in 2015*, THANH NIEN NEWS (Nov. 11, 2014), <http://www.thanhniennews.com/business/vietnam-approves-minimum-wage-hike-of-15-percent-in-2015-33793.html>.

62. *Id.*

percent of the population in the workforce.⁶³ Peru is the next lowest GDP per capita at \$6,541.00.⁶⁴ Minimum wage in Peru is approximately 1.33 dollars an hour.⁶⁵

The TPP will boost the profit of large corporations, especially for those in the garment industry. For example, Nike, which manufactures forty-three percent of all the shoes made in Vietnam,⁶⁶ has to pay \$1.65 for each pair of shoes it exports.⁶⁷ Tariffs on clothing can be as high as thirty-two percent, as they are for T-shirts made from manmade fibers like polyester.⁶⁸ The TPP will get rid of those tariffs for countries that have agreed to the trade deal.⁶⁹ Some will vanish as soon as it goes into effect.⁷⁰ Women's skirts and dresses, for example, can be imported for free, providing significant savings for the garment industry.⁷¹

V. INVESTMENT ARBITRATION UNDER TPP – A CONTINUED THREAT TO SOVEREIGNTY OF MEMBER COUNTRIES

The TPP also includes the Investor-State Dispute Settlement (ISDS),⁷² which already exists under Chapter 11 of NAFTA.⁷³ The ISDS provisions permit foreign investors to bring claims against governments if they do not uphold the protections offered in the trade pact.⁷⁴ The ISDS mechanism does not prevent corporations from challenging labor and environmental protections, which might unintentionally lead to the use of ISDS as a means of repealing such protections.

Moreover, ISDS allows corporations to sue member countries for unlimited cash compensation—in private and non-transparent tribunals—

63. See *South America: Peru*, CIA WORLD FACTBOOK (Jun. 5, 2016), <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/pe.html>.

64. *Id.*

65. Peru Minimum Monthly Wage, TRADING ECON., <http://www.tradingeconomics.com/peru/minimum-wages> (last visited June 5, 2016).

66. Peter Pham, *The TPP-Induced Love Triangle Between Nike, The U.S. And Vietnam*, FORBES (Oct. 29, 2015, 11:36 PM), <http://www.forbes.com/sites/peterpham/2015/10/29/the-tpp-induced-love-triangle-between-nike-the-u-s-and-vietnam/#7cfa62ab61b8>. (The remainder is manufactured in China at twenty-eight percent, Indonesia at twenty-five percent, and other countries at four percent.)

67. Libby Nelson, *How the TPP Could Change Where Your Clothes Come from*, VOX (Nov. 11, 2015, 3:00 PM), <http://www.vox.com/policy-and-politics/2015/11/11/9715652/tpp-textiles-clothes-garments>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See *Trans-Pacific Partnership, Chapter 28: Dispute Settlement*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/TPP-Final-Text-Dispute-Settlement.pdf>.

73. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

74. David Sirota, *Trade Pact: How the Trans-Pacific Partnership Gives Corporations Special Legal Rights*, INT'L BUS. TIMES (June 22, 2015, 8:31 AM), <http://www.ibtimes.com/trade-pact-how-trans-pacific-partnership-gives-corporations-special-legal-rights-1975817>.

over nearly any law or policy that a corporation alleges will reduce its profits.⁷⁵ For example, in *Ethyl Corp. v. Canada*, Ethyl Corporation brought a \$251 million lawsuit against a new Canadian environmental law that banned a chemical component produced by Ethyl called MMT.⁷⁶ Ethyl brought the case to an ISDS tribunal under NAFTA.⁷⁷ After Ethyl won a preliminary ISDS decision, Canada settled the case by paying thirteen million dollars in damages, lifting the ban, and advertising the safety of MMT, even though Ethyl's home country, the United States, bans the use of MMT for safety concerns.⁷⁸

Even though ISDS awards only bind the respective parties and have no binding effects on subsequent arbitration cases, nothing prevents arbitrators from using these awards as guidance for their subsequent decisions. Arguably, later tribunals may be strongly influenced by the decisions or reasoning of prior tribunals. Thus, while arbitral decisions are not formally binding on other tribunals as precedent, they may still affect the development of international norms, and may have chilling effects on a nation's regulations.

VI. CONCLUSION

Proponents of the TPP allege that the TPP puts strong, fully enforceable labor and environmental provisions at the core of the agreement. They claim the TPP has the strongest labor and environmental provisions ever included in a trade agreement. But there are no independent mechanisms to enforce the rules except by means of local government enforcement or trade sanctions. Ultimately, the TPP will expand markets if adopted, but it likely will not change the fundamental provisions of NAFTA.

75. *Trans-Pacific Partnership*, SIERRA CLUB, <http://www.sierraclub.org/trade/trans-pacific-partnership> (last visit on March 27, 2016).

76. Michelle Sforza & Mark Vallianatos, *NAFTA & Environmental Laws: Ethyl Corp. v. Canada*, GLOB. POLICY FORUM (April 1997), <https://www.globalpolicy.org/component/content/article/212-environment/45381.html>.

77. *Id.*

78. *Id.*

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