

TRANS PACIFIC PARTNERSHIP LABOUR CHAPTER SCORECARD

FUNDAMENTAL ISSUES REMAIN UNADDRESSED

At the beginning of the negotiation process for the Trans-Pacific Partnership (TPP), trade unions in the countries negotiating the agreement proposed labour and dispute resolution chapters which would, if adopted, address their concerns.¹ Unfortunately, the vast majority of those proposals are not reflected in the final TPP text. While acknowledging minor reforms, the TPP labour chapter will not prove to be an effective mechanism to guarantee the full enjoyment of fundamental labour rights and workplace standards. The labour chapter still maintains a state-state dispute mechanism which relies entirely on the discretion of TPP governments to prosecute claims against one another; this stands in stark contrast to the investor-state mechanisms available to corporations.

This document focuses on the major issues raised by the trade unions, their proposals and the final TPP text. In each case, the new TPP text fails to fully address the unions' concerns. In referring to pre-TPP FTAs, we here refer to the US-Peru FTA, on which the TPP labour chapter is based.

I. LABOUR OBLIGATIONS

1. Labour Rights:

Previously, the labour chapter referred to the 'rights as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.' They also included a footnote providing that the obligations 'as they relate to the ILO, refer only to the ILO Declaration.' However, the incorporation of the principles rather than that of the conventions created ambiguity as to the precise rules, which is not cured by referring to the 'rights'. The uncertainty threatens full respect for the fundamental rights and the consistent application of the labour chapter.

Unions therefore urged that the text refer instead to the ILO conventions.

Article 19.3.1 of the TPP maintains the reference to the ILO Declaration, as well as the footnote.

SCORE: NOT ADDRESSED

2. Acceptable Conditions of Work

Previously, governments were merely required to enforce laws concerning "acceptable conditions of work," defined as minimum wage, hours of work and health and safety, to the extent they had them. There was no requirement that such laws exist or conform to any international standard, nor was there a prohibition on waiving those laws to attract trade or investment.

Unions proposed three amendments. First, they recommended that the definition of acceptable conditions of work be expanded to include wages (including minimum wages), hours of work, occupational safety and health, workers representatives, termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement. Second, unions recommended that each party adopt and maintain statutes and regulations with regard to acceptable conditions of work, giving full effect to the ILO conventions and recommendations related to acceptable conditions of work. Third, the unions recommended a strict non-waiver of any labor laws, not just those related to fundamental rights.

¹ The full text of the unions' proposal is available on the ITUC website at <http://www.ituc-csi.org/the-trans-pacific-partnership-16694>

Article 19.3.2 of TPP provides that a party have laws related to ‘acceptable conditions of work’, rather than merely a commitment to enforce those laws that a party may have—if any. It does not expand the definition of acceptable conditions of work however. Further, it does not require that those laws adhere to any particular international standard, but rather ‘acceptable conditions as determined by the party.’² Thus, a party may still comply with this text merely by having laws governing hours of work, even if the maximum hours of work are excessive. There is a prohibition against the waiver of acceptable conditions of work, but it is only applicable in a special trade or customs area, such as an EPZ.

SCORE: NOT ADDRESSED

3. Non-Derogation

Previously, the non-derogation language provided that ‘no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes and regulations implementing paragraph 1 [fundamental labour rights] in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.’

Unions raised a number of concerns. First, in referring to statutes or regulations implementing paragraph 1, it excludes from the clause “acceptable conditions of work.” This allows a country to weaken its wage, hour and health and safety laws to attract trade and investment without sanction. Second, the last clause of the article allows a country to weaken laws related to a fundamental right to attract trade and investment, so long as they are not reduced to a point where they would be inconsistent with the minimum guarantee of that fundamental right. If a country were to have better laws than the international minimum, they could be reduced to the minimum level at which they would comply with international standards without sanction. Finally, unions objected to the fact that non-derogation had to happen “in a manner affecting trade or investment” (E.g. does a worker have to establish that more trade or investment actually resulted from a given waiver or derogation?). The unions proposed therefore a straight prohibition on waiving or derogating from labour laws or offering to do so.

The only amendment in TPP is that it is now prohibited to waive or derogate or to offer to do so with regard to acceptable conditions of work in EPZs.

SCORE: NOT ADDRESSED

4. Enforcement of Labour Laws

Previously, a violation of the enforcement chapter would occur only when there is a sustained or recurring course of action or inaction. Unions were deeply concerned just how much evidence they would be required to submit in order to make a claim under the agreement, particularly given limited resources. Unions recommended this requirement be met by submitting 2 or more cases and that this requirement be waived in the case of an egregious case requiring immediate attention so as not to forestall action. Further, FTAs required that a violation occur in a manner affecting trade or investment between the Parties. This has raised several questions about what is required, e.g., an intent to affect trade or investment and/or a measurable trade-distortion between the parties. It is also unclear if a violation “affects” trade if the failure to enforce the law is in a sector that does not produce goods for export but rather produces inputs for goods that are later exported.

Unions suggested eliminating this clause or at the very least defining it read broadly so that it would reach any violation in any workplace that produces a good or performs a service that enters into international trade between the parties or which is otherwise related to the direct or indirect investment of a party, no matter how small. Further, it should not be required that the petitioner need demonstrate any quantifiable impact of the labor violation on trade or investment. For example, the NAFTA Labour side agreement had no such requirement, instead imposing in the end a penalty based on the volume of trade between the parties.

Article 19.5 of the TPP simply copies the past text with regard to these issues.

SCORE: NOT ADDRESSED

² Article 19.3.2, fn 5.

5. Forced Labor

Previously, there was a requirement to effectively enforce laws on forced labour (consistent with the ILO Declaration). There was no additional obligation to take measures to combat the trade in forced labour made goods.

Unions therefore recommended an import ban on goods made in whole or in part from forced labor as an additional measure to combat better the exaction of forced labour.

Article 19.6 of the TPP requires countries to 'discourage' the importation of goods made by forced labor or forced child labor, even from countries not a party to the TPP. While progress, it falls short of a clear prohibition on the importation of such goods as urged by trade unions.³ It remains unclear what action will be required to discourage such imports in order to satisfy the agreement, but the text gives broad discretion to the parties to pursue 'initiatives it considers appropriate'.

SCORE: NOT ADDRESSED

6. Migrant Workers

The NAFTA Labour Side Agreement included protection of migrant workers, but no subsequent US FTA has done so. As the TPP includes a number of countries with significant migrant worker populations at risk of abuse, and may include more countries which may accede to the agreement, unions recommended the inclusion of text which would require equal treatment under the law to migrant workers, as well as the adoption of an annex on fair recruitment practices.

Article 9.10 on cooperative activities provides that areas of cooperation may include 'promotion of equality and elimination of discrimination in respect of employment and occupation for migrant workers, or in the areas of age, disability and other characteristics not related to merit or the requirements of employment' and 'protection of vulnerable workers, including migrant workers, and low-waged, casual or contingent workers.' While we support cooperative activities in these areas, they create no obligations on any parties.

SCORE: NOT ADDRESSED

7. Corporate Accountability

Previously, labour commitments were addressed only to states, not to enterprises. To change this, unions had recommended a clause where the parties would give full effect to the OECD Guidelines for Multinational Corporations.

Article 19.7 provides that each party shall 'endeavor to encourage enterprises to voluntarily adopt CSR initiatives on labor that have been endorsed or supported by that party.' As states don't typically endorse or support CSR initiatives (other than the OECD Guidelines), one assumes that parties will make an effort to try to get corporations to comply with them. Unfortunately, this is text which impossible to enforce.

SCORE: NOT ADDRESSED

8. Public Submissions

Previously, each party was required to accept submissions concerning issues arising under the labour chapter. However, there were no minimum procedural requirements and in many cases such guidelines were simply not adopted or made publicly available. Unions suggested the adoption of detailed procedural guidelines as to complaints submitted to the contact point.

Article 19.9 of the TPP does require the adoption and publication of procedural guidelines, though they are less prescriptive than recommended.

SCORE: PARTIALLY ADDRESSED

³ This formulation is likely in order to conform to existing US trade law which does not now impose an outright ban in such circumstances. Section 1307 of the Tariff Act of 1930 19 USC 1307 (1930) amended in 2000, prohibits the importation of such goods only to the extent that the US also produces such goods in such quantities to satisfy domestic consumption. The legislation was clearly motivated to prevent unfair competition which would undercut US manufacturing, rather than taking a stand on principle against forced labor.

II. DISPUTE SETTLEMENT

While dispute settlement procedures have improved marginally, unions noted that governments have total discretion as to whether to accept and prosecute the complaint and that the process remains far too long to provide an effective remedy. Below are some of the key issues:

1. Governments have total discretion to accept and move complaints through consultations and dispute settlement, even when complaints are completely meritorious. Thus, unions recommended that once a labor complaint has been accepted, the party should proceed through dispute resolution on all meritorious claims until the matter has been fully resolved. Unions urged the adoption of detailed action plans on the basis of complaints, which could serve as the benchmarks for assessing compliance.
2. Past FTAs provide that if a party does not implement the final arbitration report, the parties may enter into negotiations for compensation. However, negotiating the transfer of funds of a mutually agreeable amount of funds from one treasury to another will likely do little to improve labor conditions on the ground. The option to buy one's way out here should be eliminated. Similarly, the agreement allows a party to offer to pay an annual monetary assessment in lieu of suspension of benefits. The assessment is half the value of the suspension of benefits, unless otherwise agreed. This too seems ill suited for labor complaints. Targeted suspension of benefits would have the purpose of encouraging compliance with the law by employers in that sector, and would also likely result in pressure on the government from better performing firms to crack down on the worse actors in the sector. Simply paying off the US would not create the incentives needed to change corporate and governmental behavior, especially if the monetary assessment is not sufficiently high to dissuade future bad behavior.
3. It remains unclear how labour violations may be monetized for purposes of fines or sanctions. Depending on the country and sector, the monetary impact on trade or investment may in fact be low, providing no dissuasive power. There should be established a minimum suspension of benefits, regardless of the number or severity of the cases, which would be high enough to encourage parties to resolve violations of the labor chapter at the initial stages of dispute resolution.
4. Finally, as the enterprises violating the law in the first place are not sanctioned directly, unions urged that arbitrators be provided authority to tailor sanctions to impact firms directly, in addition to governments.

In general, unions suggested the following procedure:

1. The contact point should accept for review any labor complaint that sets forth facts that, if proven, would establish a violation of the labor chapter of the trade agreement. Upon acceptance of the petition, the contact point should conduct a thorough investigation of the complaint, including site visits and interviews with the petitioners, other aggrieved workers, employers and the government. The process should also include a public hearing where evidence with regard to whether the employers violated the labor laws of the party and whether the party failed to effectively enforce those laws can be presented. A report should be issued setting forth findings of fact and law on all of the claims and providing specific recommendations to the employers and the government for resolving the matter. Following its issuance, the parties should engage in ministerial consultations, be based on the recommendations and in consultation with the petitioners. The purpose of the consultations should be to negotiate an action plan with clear timelines and benchmarks for fully addressing the violations raised in the petition.
2. If the matter is not resolved through consultations, or if the plan has not been implemented, a party shall take the matter to arbitration. An arbitration panel comprised of a panel of labor law experts would review the record de novo and issue a final report, including its findings and recommendations. Based on the arbitrators' report, a binding action plan would be issued. The violating party would be given a reasonable and specific timeline to implement the action plan.
3. If a party believes that the plan has not been fully implemented, the same panel of arbitrators would be empaneled to determine if the party did in fact fail to implement the action plan, in whole or in part. If the party has failed to implement the final report, the panel should authorize suspension of benefits in the sectors in which the labor violations occurred. In addition to penalizing the government, arbitrators should be empowered to impose sanctions on employers implicated in the petition who have failed to comply with the arbitrators' report.

SCORE: NOT ADDRESSED

III. TPP INSTITUTIONS

Unions recommended that there was a strong argument that a transnational institution be established to address labour relations in a regional context. Indeed, NAFTA, which covers a tightly integrated North American region, established the Commission for Labor Cooperation. A labor commission, restructured and reformed to address the many lessons learned from the NAALC experience, including political independent staff, would be very valuable, especially as the proposed TPP membership potentially expands to an APEC-wide agreement. The purpose of such a Commission would be to act both as a forum for the social partners to address transnational labor issues and to provide research on, for example, labor law and labor inspection, labor market trends in and among countries, labor migration, industry studies and the like. It was also recommended that it be entrusted with providing regular, independent reports on compliance with the labor chapter of the TPP in order to reduce the political nature of reviews in response to submissions. An advisory council made up of government, labor and business would help to shape and guide the institution.

Under the TPP, no such institution was created. Instead, Article 19.12 of the TPP continues the inter-governmental Labour Council model, with some means to consider the views of the public (Article 19.14). Article 19.14, like past agreements, requires the establishment of national consultative bodies. In the past, Labour Council meetings have not proved effective in providing a full opportunity for workers to raise their grievances or to see them addressed.

SCORE: NOT ADDRESSED

IV. TRANSNATIONAL LABOR RELATIONS

Finally, the unions noted that FTAs do nothing to actually enhance cross-border labor relations, while at the same time promoting the global expansion of the activity of enterprises. Thus, the unions recommended that structures be established that would give employers and workers the ability to address labor relations across supply chains. It was suggested that the TPP parties adopt of language that would allow organized workers employed by a common employer in two or more TPP countries to form a council to address labor relations matters.

The TPP includes no such provision.

SCORE: NOT ADDRESSED