

*Trexit or Trenegotiation ? Can the
Trans-Pacific and Trans-Atlantic
Partnerships Be Resurrected in
Democratically and Socially
Responsible Form or Will the Regional
Mega-Agreements Die Stillborn ?*

By Marley S. Weiss, Professor of Law
University of Maryland Francis King Carey School of Law
mweiss@law.umaryland.edu
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Plan

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I.

**TPP, TTIP, TISA and other Mega-FTA
Proposals:**

**“NAFTA on Steroids” or the Mis-
Named “Free Trade Agreements”**

Elements of Older US FTA Model

- Free movement of goods as main focus
- Limited free movement of services (partial exceptions for government procurement, public services even when privately provided)
- Free movement of capital (physical and investment)
- Investor Protection
- No free movement of workers, although MNC ERs may move high level employees across party borders in a privileged manner.
- Figleafs on Labor Rights, Environmental Protection

NAFTA/NAALC Model – Harmful Effects on Workers and Citizens (1)

- Cross-border flow of goods entailed a parallel cross-border mobility of manufacturing, taking with it jobs, destroying or reducing bargaining units, and undermining trade union strength in the U.S. and Canada, while the existing industrial relations system in Mexico ensured not only lower priced labor but little real “freedom of association” and collective bargaining that was often purely fictitious; early creation of supply chains.
- Changes in agricultural trade caused severe losses to Mexican peasants, resulting in mass migration to US and urbanized portions of Mexico.

NAFTA and NAALC – Harmful Effects on Workers and Citizens (2)

- Chapter 11 Protection of Foreign Investors
 - Broad language regarding direct and indirect “expropriation” of the investment; Minimum Standard of Treatment, including Fair and Equitable Treatment (FET) and Full Protection and Security (FPS)
 - Arbitral tribunals shielded from public scrutiny and closed to participation by trade unions, NGOs, workers, citizens other than the complaining investor and the government
 - Deterrent impact on enactment of pro-worker (and pro-consumer, etc.) as constituting a “taking” of part of the investor’s investment

NAFTA and NAALC – Harmful Effects on Workers and Citizens (3)

- Free movement of services had limited coverage, but established principles, parallel to that of the GATS, of MFN and NT.
- These principles apply as well to movement of goods, but their potentially deregulatory and anti-democratic effect is much stronger as to services.
- Both are equality principles, MFN comparing the treatment of the foreign service provider to those from any other foreign country, and NT comparing the foreign service provider to those of the host country.
- Both MFN and NT are interpreted as precluding 2 types of discrimination – disparate treatment, a/k/a direct discrimination, and disparate impact, a/k/a indirect discrimination.
- Social legislation of a wide variety of types, including particularly labor legislation, is subject to challenge on these grounds, most likely using a disparate impact/indirect discrimination approach.

Key Gaps

- True cross-border issues affecting workers and labor were wholly omitted:
- Workers' compensation for trans-border workers was omitted;
- Choice of law/private international law regarding labor law applicable to workers sent across borders to perform services was omitted;
- Freedom of association and collective bargaining for trans-border workers and trans-border representation of employers was omitted;
- Although NAFTA (not the NAALC) addressed some issues about visas for high level managers and professionals working in a host country at the behest of their home country employer, these were excluded from the NAALC and not conceptualized as part of 'labor rights;'
- Free movement of goods, services, and capital were covered but not that of the workers themselves. There was no free movement of workers, although increasingly there was movement at the EMPLOYER's behest and under the employer's sponsorship. The agreements excluded any affect on each country's immigration laws.

Partial Successes

- The recognition of gaps and failures in NAFTA has led to progressive strengthening of labor provisions as well as other social chapters in subsequent US (and Canadian)-party free trade agreements.
- Eventually, the “fast track” or trade promotion authorization legislation incorporated conditions on any subsequently-negotiated US-party free trade agreements, including inclusion in the main agreement of the labor provisions. Without including such provisions, the trade agreement will not be subject to a simple up and down vote in Congress, hence will be subject to repeated amendment and unlikely to ever be approved.
- As trade unions, workers’ rights and other NGOs worked together across borders to utilize the submissions process for complaints of country violations, they built alliances and working relationships.
- Limited institutional structure – is this a strength or a weakness?

Post-NAFTA/NAALC Successes

- As a result of these Congressional pressures, later trade agreements included all labor provisions within the enforcement clauses, no longer excluding freedom of association and the right to bargain collectively, although some of the original 11 labor subject have been omitted – most noteworthy, the prohibition of discrimination against migrant labor.
- Benchmarking against ILO core standards became standard, at first as hortatory, but later, as binding and enforceable.
- Procedures and remedies merged with those applicable to trade in goods and services (but not investor protection). Better than exclusion from trade remedies, but doubtful that coverage in regular system will be sympathetic to labor rights.

Post-NAFTA/NAALC Pluses & Minuses

- Where NAFTA/NAALC simply assumed all 3 countries had in place existing and effective labor laws, since the 2007 strengthening of the conditions for fast track approval, free trade agreements with Colombia, Panama, Peru, Korea and others have imposed heightened pre-Congressional approval scrutiny on party legislation, and often have required important legislative changes to bring the labor laws into conformity with ILO standards as a condition of submission of the agreement to Congress.
- Mixed success in inducing legislative change to improve labor laws in party countries; much less success in actual effective implementation and enforcement.
- Persistent killings of trade union organizers as glaring evidence of failure of some agreements.
- The institutional structure for the labor chapter in each later agreement, and to some extent, the institutional structure for all chapters, remains bare bones compared to the EU.

TPP Countries

- NAFTA 3 = U.S., Mexico and Canada
- Australia
- Brunei Darussalam
- Chile
- Japan
- Malaysia – Labor Trafficking Problem
- New Zealand
- Peru
- Singapore
- Vietnam – Union/Freedom of Association Problem

TPP, TTIP and TISA – NAFTA on Steroids

1. Many more (12 for TPP; EU 28 + US for TTIP or 27 minus UK) countries covered
2. Broadened range of covered services with negative instead of positive list
3. Government procurement coverage broadened, especially important re services; TISA might take this even farther.
4. Investor protection language is only modestly different from that contained in NAFTA, which has led to many problems in I-S arbitration. The EU in TTIP pushed for a standing investment tribunal (also CETA). This would solve the problem of arbitrators who primarily represent parties in I-S arbitration changing hats to sit occasionally as “neutrals” and might promote more consistency of interpretation, depending on whether the tribunal embraces “stare decisis,” but would not solve other I-S problems.

TPP, TTIP and TISA – NAFTA on Steroids

5. “Regulatory coherence” as major (but very uncertain) part of program – “eliminate unnecessary barriers and make member state regulatory systems compatible and transparent.”

6. Labor provisions have been lauded by the Obama administration as far stronger than under prior agreements, but differences are outweighed by procedural limitations

7. Few gains are projected from increased trade in goods, since duties are already at or near zero in the developed country markets on most goods; the main “efficiency” gains are projected to result from reduction in “non-trade barriers,” especially “regulatory coherence” and to a lesser extent, from the aggregation of several countries participating in, *e.g.*, a supply chain manufacturing process.

8. Not only is it a mis-characterization to call these “FTAs” when trade in goods is a small fraction of their impact, the “free” label also mis-describes them, when nearly all trade lawyers and academics agree that these are all “managed trade” agreements.

TISA

- TISA in theory only will cover services, but it has investor protection implications as well
- Would cover all EU-US TTIP member states, and many but not all TPP countries, plus others – about 50 in countries in total.
- Wikileaks draft reveals a negative list approach, NT and MFN much like services chapters in US FTAs.
- Would cover government services procurement to a great extent, and essential public services such as water and health.
- **Has a built-in one-way ratchet in favor of liberalization.**
- Would appear to override services chapters in TPP and TTIP to the extent TISA is more liberalized.

TPP & TTIP “Investor Protection”

- Procedurally, a privatized, skewed investor-state arbitration process. ICSID &/or UNCITRAL or separate (like NAFTA) tribunal. As to TTIP, the EU is proposing creating an investment court instead.
- Substantively:
 - (1) Expropriation prohibition, going beyond physical property to some/all forms of non-tangible property (e.g., financial investments, IP, regulatory permits).
 - (2) Two equality clauses: MFN and NT. Both have disparate treatment/direct discrimination elements as well as disparate impact/indirect discrimination elements.
 - (3) “Fair and equitable treatment.” (FET)
 - (4) “Full protection and security” (FSP)
 - (5) “Minimum standard of treatment” (MST) = incorporation of customary international law re foreign investment protection.
 - (6) “Reasonable expectations” of the investor are to be protected.

States Free to Change Regulations?

- COMPENSATION IS REQUIRED FOR ANY “EXPROPRIATION” PER THE ABOVE, ALTHOUGH THE REGULATORY CHANGE MAY PROCEED IF
 - (A) “FOR A PUBLIC PURPOSE; AND
 - (B) IMPLEMENTED IN A NON-DISCRIMINATORY MANNER.”
- COMPENSATION IS BASED ON FAIR MARKET VALUE (FMV) OF THE IMPAIRED INVESTMENT.

TPP and TTIP (1)

- Impact of investor protection chapter likely to be exacerbated by “regulatory coherence”
- Both will **“narrow the regulatory space”** of each member state.
- Expanded coverage of services means decreased ability to governments to regulate services without causing discriminatory impact under MFN and/or NT, again narrowing regulatory space
- “Mutual recognition” of professional qualifications would have a huge impact on professional occupational labor markets within Party countries, but unlikely to be realized.
- “Regulatory space” means democracy; national and local citizen control.
- Ironically, the more the state is removed from the process, the more the need for trade unions and worker interest representation vehicles

TPP and TTIP (2)

- Supposed strengthening of labor provisions
- ITUC and other trade union proposals were ignored by Obama Administration in negotiating TPP.
- Obama Administration fudge on Malaysia's tier 2 v. tier 3 categorization regarding its notoriously high rate of usage of trafficked labor.
- Vietnam will supposedly, somehow, permit the establishment of independent unions; currently, the traditional state socialist system integrates government, communist party, and the party trade union at national level, and at the level of the enterprise integrates enterprise management, trade union, and communist party presence, with officials among these three in a revolving door arrangement.

TPP and TTIP (3)

- Consider the example of the “democratic deficit” of the European Union, and the impact of the Troika (ECB, European Commission and IMF) on Greece.
- Consider the recent growth in anti-immigrant, racist, and anti-Semitic political parties and organizations in many EU countries, and the deterioration of actual into formal democracy in several countries, e.g., Hungary, Poland. The BREXIT campaign and the American Trump phenomenon drew on similar themes in somewhat covert forms.
- How much is “regulatory coherence” a re-seizing of government control away from MNEs, how much is it a deregulation program, how much is it a program to put control in the hands of the MNEs?
- Why is the US government so intent on negotiating these agreements? (and the Canadian and Mexican governments)? Whose interests will these agreements serve?

Enhanced Labor Provisions?

- The Obama administration has been trumpeting that it has obtained enhanced labor commitments in the TPP negotiations.
- This administration has done far more to utilize and enforce labor chapters in US-FTAs than any of its predecessors.
- Nevertheless, Colombia and other stark examples demonstrate the limited effectiveness of these labor chapters in producing true change in partner countries which are resistant to labor rights.
- Now, as part of negotiating TPP, the Obama administration has again encountering partner countries whose labor legislation must be changed to be in compliance with the labor chapter obligations. Pre-ratification implementation efforts with Malaysia, Vietnam and Brunei have greatly exceeded those under prior agreements.

Enhanced Labor Provisions?

- The larger problem is the clear history in prior FTAs that when countries have had to modify their labor laws to comply with the Labor Chapter terms, post-FTA they routinely “fail to effectively enforce” these provisions, thereby violating their primary Labor Chapter obligation.
- Although the Obama administration has done an admirable job initiating enforcement of Labor Chapter provisions against a few noncompliant partner countries, delays and diplomacy have slowed the processes to a crawl and yielded little change on the ground; moreover, the Bush administration demonstrated that a US administration hostile to these provisions can render them a dead letter. Assuming the Trump administration does not just walk away from these agreements, it is hard to imagine them mounting vigorous enforcement of the labor (and environmental, etc.) chapter.

TPP Labor Chapter Improvements

- As in recent, prior US FTAs, incorporates ILO standards benchmarking for the laws of Parties as to the four core labor rights areas of
 - Freedom of association and collective bargaining;
 - Child labor
 - Forced labor
 - Employment discrimination
- In addition, obligates member countries to adopt and maintain laws providing minimum acceptable standards for wages, hours of work, and occupational safety and health, a strengthening of prior language.

TPP Labor Chapter Improvements (2)

- As in previous, recent US FTAs, prohibits Parties from waiving or derogating from laws regarding core labor standards “in a manner affecting trade or investment.”
- For the first time, covers “export processing zones” (EPZs) with specific obligations regarding these three types of minimum labor standards, and prohibiting Parties from weakening their normal labor laws in these EPZs.
- Maintains language in recent US FTAs requiring parties not to fail to effectively enforce their labor laws in a sustained or recurring pattern that would affect trade or investment between the Parties.

TPP Labor Chapter Improvements (3)

- A new obligation requires Parties to discourage importation of goods that are produced in other countries by forced labor, including forced child labor, or that contain inputs produced by forced labor, whether the source country is a TPP Party or a third country.
- Bilateral implementation plans with Vietnam, Malaysia, and Brunei Darussalam.
- Vietnam – eliminate monopoly of communist party trade union confederation, recognize right to strike and implement true collective bargaining.
- Malaysia – primarily eliminate structures and practices permitting and encouraging use of forced or trafficked labor, especially migrant forced labor; additional provisions regarding freedom of association eliminating restrictions on union organization, collective bargaining, and the right to strikes, and altering laws which until now permitted subcontracting to undermine freedom of association.

TPP Labor Chapter Improvements (4)

- Brunei Darussalam, under pressure in the course of joining the TPP, joined the ILO and amended its labor laws; to conform regarding freedom of association, it altered the government's previous discretion to register or de-register a trade union, remove some restrictions on trade union operations and activities, assure that domestic trade unions may join international confederations. The new laws also improved prohibitions against child labor and forced labor. The country also committed to adopting and implementing a minimum wage law for the first time as well as a law prohibiting employment discrimination.
- Mexico was to create similar reforms regarding collective bargaining and freedom of association.

II.

Who Benefits?

Value Chains and MNE Responsibility

Why the Extended Supply Chain?

- 1) Search for cheapest labor, including direct and indirect labor costs plus applicable formal and enforcement labor regime;
- 2) Technological and methodological changes improving ability of end user MNE to indirectly control many aspects of production processes without physical presence, and without the type of control usually required under national law to label a work relationship one of “employment;”
- 3) If work activity is to be done in another country, the MNE often legally must establish a separate entity in any event. The choice to contract out elements of work, rather than create a subsidiary or joint venture is further encouraged by enhanced legal and PR insulation; licensure, however, may yield insufficient control to protect the MNE brand although it is another option.

Why the Extended Supply Chain?

- Free trade and investment has made the cross-border, extended supply chain possible.
- The mobility of goods across borders puts workers everywhere in competition with each other, provided the goods or services they are producing can be exported without large costs in transportation, transmission or loss of quality or content control for the MNE.
- Free movement of capital, too, is essential to make this system functional.
- Much of the pressure by multinational business for mega-FTAs, and especially “regulatory coherence” aspects of their content is to reduce barriers other than customs processes which limit their ability to treat the globe as a single market in labor, goods and services.
- Many efforts through UNGP (Ruggie Principles), new push for ILO Convention, etc., to impose more binding, less voluntary forms of MNE responsibility for labor conduct in lower tiers of extended supply and value chains. Efforts to counter-act the inherently deregulatory and employer-empowering consequences of the neo-liberal “free trade” regimes.

III.

Who Bears the Cost?

**Dislocated Workers, Disrupted
Worker Representation
Mechanisms; Damaged Democracy**

Violating the (US) Equal Pay Act Remedial Principle

- The US Equal Pay Act remedy requires always “leveling up” the underpaid gender, rather than lower wages of the higher paid gender or “meeting in the middle.”
- The effects of the series of FTAs has been to raise the wages of workers in less developed countries by shifting employment from developed countries to those less developed countries, decimating jobs, destroying workplaces, industries, and trade union representation in the process, cumulatively damaging affected communities, and by altering the supply-demand in the developed country labor markets, dropping wages for workers in lower skilled jobs in industries exposed to international trade, and to a lesser extent, in all jobs in those labor markets.

Promises, Promises

- The neo-liberal promise, manifested in extreme form in connection with trade, has been that over time, everyone would benefit.
- In fact, the burdens have been concentrated on the workers and communities exposed to foreign labor competition by virtue of the transnational supply chains fostered by the “FTAs.”
- Rectifying economic development obstacles at the expense of lower skilled workers in developed economies has generated a backlash among these voters in the developed economies, as their relative and absolute economic position within their societies has declined, and their expectations for themselves and their families have been thwarted.

Labor v. Services, Procurement and Investor Protection Chapters

Strengthened Labor Chapters, even during a pro-labor rights US administration, are not a reasonable trade-off for expanded services, government procurement and ISDS chapters.

The potential mischief in terms of both labor markets and labor rights of each of these other chapters is far greater than any benefit from the Labor Chapter itself, whether to US workers or those in partner countries.

Although TTIP includes many partner countries within the EU whose labor rights are strong than those in the US, the services and procurement chapters may destabilize union representation and be used to challenge labor and social clauses which are “indirectly discriminatory” (*i.e.*, have a disparate impact) upon foreign partner business competitors.

Labor v. Services, Procurement and Investor Protection Chapters – Bad Deal

- The *Viking/ Laval* line of cases show the potential for mischief in a regime in which labor rights are in play against economic “freedoms” and the administrative and adjudicatory actors involved in the resolution are likely to tilt in favor of economic “freedoms” rather than “fundamental labor rights.”
- The ISDS scheme continues to empower foreign-based MNCs to challenge as “expropriatory” any legislative change that detracts from the profitability of their initial investment in a host country; this threatens the ability of all partner-countries to legislate and regulate in the interests of the health, safety, and welfare of workers and consumers. Procedural changes in the I-S tribunal do not solve this problem.

IV.

Can We “Bring Back”

Manufacturing Jobs ?

Changes in the Nature and

Future of Work

Technologically-driven Changes in Work

- 1) 3-D “printing” means less mass production, more nearly artisanal manufacturing; shift from workers producing goods to workers writing code to instruct the machine to produce the goods (i.e., shift from work making goods to producing services or intangible goods)
- 2) Roboticization – fewer and fewer workers producing the same volume of mass produced (and eventually artisanal, too) goods; some types of services, too, while others require AI which will have a much longer time horizon

Effects on FTA and Supply Chain Models

- Some production may become more localized, or even return to cottage industries and do-it-yourself via 3-D printing; the software writing, however, may be global or turn into “gig” economy “jobs.”
- Developing countries may be unable to emulate the Asian Tigers/China model of climbing the economic development ladder through manufacturing exported goods; roboticization will eventually become so cheap as to displace even ultra-cheap labor
- China now is encouraging businesses to roboticize, to reduce its rising labor costs; in the long run, this may mean it never fully absorbs its rural surplus labor and that the gains from development remain even more disproportionately in the hands of its “capital” owners (with ties to the party leadership), stalling out further improvement of the standard of living of most workers, and decreasing current trends towards offshoring lower-skilled work from China to less-developed Asian countries

Implications for Mega-FTA Effects

- Reduced cross-border supply chains will render irrelevant some of the projected consequences of FTAs in terms of job loss in developed countries as well as job gains in developing country members
- Localization and do-it-yourself trends may undermine MNE power and control provided they do not succeed in seizing regulatory control through “regulatory coherence”-type measures and through “investor protection.
- Services chapters in TPP and TTIP and the TISA will play a much bigger role than movement of goods not only because delivery of services is rapidly growing as compared to provision of goods as a portion of GDP but also because technological displacement of human workers will progress more rapidly in the provision of goods than in the provision of services.

V.

**Rethinking Trade and Investment
Agreements in Light of the
Future of Work and the Future of
Democracy**

What Might Be Done?

- 1) Stop referring to these as free trade agreements, or even as regional integration agreements in public discourse.
- 2) Moratorium on new agreements until solutions are devised to the de-democratization problem.
- 3) Moratorium on expansion of inclusion of public services and government procurement coverage in these agreements.
- 4) Total elimination of ISDS and regulatory coherence.
- 5) Include obligatory provisions for social insurance covering workers displaced by trade, and for communities affected in the aggregate above a set level.
- 6) Include a mandatory circuit breaker for labor shocks, invocable by workers and their representatives, rather than treating employers and industries as adequately representing the interests of their workers in connection with trade.

What Might Be Done?

- Include a clause mandating effectuation of all clauses of the agreement in interpreting any clause?
- Perhaps reconsider trade doctrine, developing an alternative legal rule, eliminating discriminatory effects as the main standard, and requiring a loose version of discriminatory purpose to find a national law or policy to be in violation of MFN or NT, especially regarding services. Or omit coverage of services until a better approach is devised.
- Address true trans-national labor subject matter in any regional integration agreement.
- Impose supply chain liability on MNCs under the domestic labor laws most favorable to the workers?
- Free movement of workers? Not at the behest of the employer but of the workers themselves. Pros and cons.
- Reinstate the traditional private international law rule that the labor law of the country where the work is performed is the law that controls the wages, hours, and terms and conditions of employment of the worker.

Democracy With(out) Borders?

- The core problem of mega-international agreements is the democratic deficit they create, a void filled at regional/global level by the private regulatory power of MNCs and their aggregate representation bodies.
- At national and workplace level, the parallel democratic void is both the undue influence of MNCs over democratic government and the deteriorating representation capacity of trade unions and other worker representation bodies in the face of intensifying employer power.
- Terminating existing FTAs could stop or reverse this power shift, but at the price of immense dislocation to workers around the world, a shock similar to that gradually and cumulatively imposed on workers in the developed economies by the impact of the FTAs themselves. Suspending adoption of new ones, on the other hand, would allow time to manage existing shocks and create new approaches.