Not a Gold Standard for Workers’ Rights – the TPP Labour Rules
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[Mihi]

Welcome to our visitor, Burcu, and to our sideways leader and friend, Professor Jane Kelsey, thank you for everything you do. It’s a burden I appreciate more than ever after digging through treaties and arbitrations for the last few months. And thanks to the It’s Our Future team for your organising and activism and to the CTU for holding successive governments accountable on these issues, including this new one – a government that carries so many labour movement hopes.

Last week Trade Minister, David Parker, told APEC’s Business Advisory Group that:

“the new government is … looking for “gold standard” deals, with environmental and labour protections, such as we have in CPTPP, alongside lower tariffs and addressing non-tariff barriers.”

In my time tonight, I want to do three things:

- first, to debunk this myth of the TPP as a “gold standard” treaty for workers’ rights;
- second, to add to warnings about ISDS, in this case about its risks to progressive labour law reform;
- and third, to reflect on priorities for engaging with the new government on these issues in trade and investment treaties.

So, first, this myth that the TPP is a gold standard for labour rights. Let’s start with the most obvious clue that the TPP is not a workers’ rights charter. Here’s a quote from the last Minister of Trade, National Party MP Todd McClay:

“The Trans-Pacific Partnership (TPP) agreement outcomes for labour matters are the most comprehensive New Zealand has ever achieved in a free trade agreement (FTA).”

And here’s Business New Zealand’s description – remember that’s the peak body for employers:

“[The] TPP was seen as a chance to deliver a much higher standard in this space that might become the new international benchmark … [It] reflects the CTU policy agenda (at least at the time TPP was launched) very strongly. We have strong and enforceable disciplines on trade and labour and trade and environment.”

Now, here is the CTU:

“[This labour chapter] has grave weaknesses that make it weak and in practice unenforceable.”

And the International Trade Union Congress:

“the TPP labour chapter will not prove to be an effective mechanism to guarantee the full enjoyment of fundamental labour rights and workplace standards.”

and the US peak union body, the AFL-CIO:
“Rather than trying a new model, the TPP incorporates without improvement numerous provisions, including the discretion to indefinitely delay acting on labour rights violations, already known to be ineffective.”

It’s been more than 20 years since the first labour chapter in a US free trade agreement – NAFTA – so we’ve got plenty of evidence on which to base our judgment of how well they work. The short version is, that as leverage to raise global labour standards, they have a very poor record.

This is partly due to the weakness of the rules themselves. It’s partly due to official apathy which leads to a failure to implement, monitor and enforce them. But it’s largely due, in my view, to the futility – at best – and the cynicism – at worst, of including these kinds of rules in the first place.

Let’s start with one thing the rules don’t do. They don’t let countries ban imports that have been produced in conditions that violate international labour standards.

There is only one exception - as with the WTO – which is the right to ban imports made by prisoners. With all other violations, a case must go through a state-to-state dispute process. And the clincher is that it is not enough to prove the violation - like the fact that the goods were made by young children, or workers who weren’t allowed to join a union. The country taking the case also has to prove that there is an actual impact on its trade or investment with the offending country.

US FTAs are the model for the TPP labour chapter. After twenty plus years of agreements between the US and many other countries with a record of serious labour rights violations, there’s been only one case taken - by the US against Guatemala under the Central American FTA.

Just consider these timeframes: the original complaint was made by the AFL-CIO and Guatemalan unions in 2008. Three years later, the US filed for arbitration. That took six years. In 2017 the Panel issued its decision. Yes, Guatemala had systematically failed to enforce its labour laws. Yes, this led to violations of fundamental labour rights. But no, the failure had not affected trade between the two countries.

All through the TPP labour rules is this requirement to prove an effect on trade and investment. It is not enough to prove systematic abuses of labour rights. Or that global supply chains favour low labour costs, which leads to shortcuts, which give companies a trading advantage. No. Under the TPP, it is necessary to show that the violation had a specific effect on trade or investment between the parties.

Let’s look at Brunei. Before the TPP we already had an FTA with Brunei. It included labour standards. In 2015 New Zealand imported 332 million dollars’ worth of stuff from Brunei. 99% of that stuff was oil. Brunei represses freedom of speech, controls popular meetings, has no legal framework for collective bargaining and makes strikes illegal. Unions are not allowed to join international networks, and corporal punishment can follow some workplace crimes. Unions and NGOs are subject to numerous controls, sedition laws are enforced, correspondence, email and social media are monitored. Sharia rules restrict opposite gender interaction outside the family.

It’s hardly surprising that there are no active unions - the Brunei Oilfield Workers Union is the only known union in recent history and its collective agreement is long expired. Labour bondage of migrant workers is widespread, with migrants imprisoned and caned for various permit problems.

So, finding labour rights violations in Brunei is not difficult. But crude oil makes up almost all of Brunei’s exports. When the price of oil is set in the world market and by much bigger players, proving that violations impacted on trade between two countries would be a fool’s game.
This is just one example of the weakness of the labour rules in the TPP – be assured there are many.

But even if the rules were stronger, workers would still have to rely on other governments to enforce them. In 2014 the US equivalent of our Auditor General reviewed the implementation of US FTA labour provisions. They found that the Department of Labour didn’t have the capacity or the procedures to even meet the procedural deadlines set out in the Agreements that were in force – let alone to follow through on a case.

The companies that benefit from the market access in these FTAs – just as will be the case with the TPP - are themselves multinationals or part of multinational supply chains. Those multinationals are based in the very countries who are meant to be enforcing the rules against them. And there is a culture of impunity among them. The number of complaints to the ILO, the media and watchdog reports - all point to the impotence of this labour chapter approach.

And these criticisms are made under US FTAs – the country with the greatest resources and leverage in the hands of government, unions and NGOs.

In New Zealand’s case there has been no monitoring at all of labour rules in our FTAs. All our recent treaties have labour rules. The rules are like those in the TPP, except they are not subject to dispute procedures.

The complete lack of follow up makes these rules simple window dressing. MBIE papers show that New Zealand hasn’t raised a single labour rights issue under any of the processes established under any of our FTAs. Not even with Brunei!

It gets even more ironic than that. One of the core rules in these agreements – and in the TPP – is that countries are not allowed to lower their labour laws below some basic international standards to attract investment. Those standards include the right to organise and participate in collective bargaining. But the previous Government did exactly that with the Hobbit law. The Hobbit Law took away collective bargaining rights from some film workers – in clear breach of ILO norms. At the time, our FTA with Malaysia included a TPP-like clause against lowering standards in just this way. But neither New Zealand, nor Malaysia, have ever mentioned the issue.

Believe me, this really is just a snapshot of the ineffectiveness of labour chapters as a tool for respecting workers’ rights and stopping their violation.

In fact, if it’s what a “gold standard” looks like, then maybe we should be switching to crypto!

The second issue I want to touch on is how the TPP – or any other agreement which has ISDS in it – could interfere with future progressive labour law reform. After all, the new trade minister has said:

“If, for example, we changed the regulation related to taxes or environment or labour laws or public health or did anything with our public schooling system or our public health system, no, they could not [sue].”

This is clearly wrong. There is no carve-out for labour law in the TPP. New Zealand can be sued for labour measures.

There are also no specific exceptions for labour measures which would give the government an extra line of defence if it was sued.
It is true that there’ve been very few ISDS cases on labour issues. This is hardly surprising. ISDS has been a growth industry during the very same thirty years that labour law deregulation has also been a growth industry. In other words, investors have had nothing to complain about.

But several developments will change that.

Foreign investment patterns are changing in a way that will make labour laws even more relevant to foreign investors. The big growth in services trade and investment means that labour costs are becoming a much bigger component of investments. The estimate is 70-80% of the cost of services production compared to 20% for manufacturing.

Let’s imagine that a resurgent labour movement and a progressive government decided to aggressively tackle contemporary challenges - arising from concerns about inequality, and the multiple changes to the way we work that come with the fourth industrial revolution – the digital one.

That resurgent labour movement and progressive government might, for example:

- Design Labour laws and government interventions with the explicit aim of reversing the fall in union membership and collective bargaining – as a way of addressing deepening income inequality
- Close labour law gaps which have been exploited by gig economy businesses
- Require gig-companies to give labour inspectors access to their platforms to monitor labour law compliance
- Use government procurement to drive up private sector wages to living wage levels

In fact, we don’t even have to leave this room to imagine this approach. Because it’s just what we are all working on here and now in Aotearoa.

The Labour Party’s “Future of Work” report proposed a new employment-relations framework with targets for effective unionisation, and for increasing the number of workers covered by collective agreements. It would expand the rights of contractors so that all workers had the right to be paid the minimum wage, join a union, and take part in collective bargaining.

Labour in government has committed to introducing the living wage across the public sector – including, eventually, workers in contracted services. One way to manage the costs of this could be to set up local worker co-operatives and contract with them. This would deprive the big three multinational building services companies of public sector market share, perhaps leading to the loss of their private sector work too.

Fair Pay Agreements – which Labour has promised - will extend the coverage of collective agreements across industries to unwilling employers – and could lead to unexpected outcomes. What if an arbitration leading to a Fair Pay Agreement conflicted with expectations created in investor discussions with ministers and officials?

And radical reforms of independent contractor arrangements would totally disrupt the labour model at the core of platform-based, or gig economy. The effects could be significant enough on those investments that compensation demands are absolutely possible.

There are plenty of examples from ISDS cases in areas other than labour that could be applied to these kinds of measures.
There isn’t time tonight to detail the risks. But I believe labour law has a special vulnerability to claims. This is because it is so embedded in politics. Judging, in advance, how well any given policy will solve any given problem is always strongly contested.

Just think about how effectively tobacco companies have used the ISDS system - even when they have lost - to obstruct measures that are based on the best evidence available internationally. Even New Zealand, which had nothing to do with Philip Morris’s claim against Australia’s plain packaging law, delayed its own laws while it waited for the decision in the case – at the cost of lives.

Now think about how much **less certain** the evidence is around any given labour measure.

It is simply undemocratic to hand labour questions to panels of investment lawyers whose duty is to uphold investment rules. These are questions that should be answered here, at home, politically and industrially,

This brings me to my last point, which is to reflect on how we might engage with a government made up if parties that marched with us against the TPP a year ago.

Despite the U-turn, there are signs of respect for our position - in fact the Prime Minister described ISDS as “a dog” and has ruled it out of our claims in future agreements. She hasn’t said – yet – that it’s a bottom line, and we mustn’t be fooled by Europe’s alternative Investment Court.

If there is going to be respectful dialogue between the government and our movement, then a good start would be to drop the “gold standard” line on labour standards. It is a cover for fundamental problems with the whole regime of international economic law. Of course, there should be a full, new and proper assessment of this new version of the TPP.

At the heart of the problem with labour chapters, are the political and economic values which infect interpretations of the vague labour standards in them. An example is Vietnam’s current rules against having multiple unions in an enterprise. When it was in the TPP, the US pushed for this rule to be scrapped, arguing that it breached the freedom of association principle. Our own history should remind us that how a standard operates is not just a legal question but also a political and economic one. Remember how we were condemned by international labour standards experts for compulsory unionism?

From my own study of labour standards and investment agreements, I’d like to advise that no more political capital – either of the union movement or government – should be spent on labour chapters. Labour advocates should focus on the demand for national policy space, including sovereignty over labour laws and regulations. And that should also be the focus of transnational union solidarity.

Our ongoing case against ISDS must be rooted in a respect for the power of local communities to pick their own battles. As a labour movement, and a country, our job is to back those fighting for workers’ rights. That means stopping the norms of international labour law being enlisted by those who would use them to disempower workers. In the end, protecting the space for people to contest their national laws, and providing solidarity to those who fight for workers’ rights, will take us far further than any labour chapter could ever hope to.

And a final observation. Meetings like this form part of a network of dissent that is not just local, or temporary, but global, and ongoing. That network is changing the law. Some states leave the system. Others develop new model treaties. Even arbitrators invent doctrines to oil the squeaky
wheels in the trainset, rather than see their whole arbitration gravy train being decommissioned. So, don’t underestimate the importance of being here tonight, and of keeping the light shining on these issues.

Kia kaha!

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To read my Submission on the CPTPP & Labour Standards to NZ Parliament: