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What's the Big Deal?
Understanding the Trans-Pacific Partnership

Does the TPP work for workers?

Analyzing the labour chapter of the TPP

Laura Macdonald and Angella MacEwen

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Summary

Contemporary trade agreements commonly include a chapter on labour, or a labour side accord, which is supposed to guarantee that the agreement will not contribute to the tendency toward a "race to the bottom" in the global economy.[1] For example, Chapter 19 of the Trans-Pacific Partnership (TPP) treaty includes provisions that are supposed to ensure that "core labour standards," as defined by the International Labour Organization (ILO), are respected by signatory states.[2] Global Affairs Canada states:

> The Agreement provides the opportunity to raise and improve labour standards and working conditions in TPP member countries through an ambitious level of obligations to ensure that national labour laws and policies in partner countries respect international labour standards. Canada is committed to fundamental labour rights, and supporting high labour standards through a fully enforceable TPP Chapter is a key part of that commitment.[3]

This is not the view of labour federations from many of the participating TPP countries, as well as a range of human rights–focused non-governmental organizations (NGOs) and academics, who argue the labour chapter fails

to provide sufficient tools to address labour rights violations — even where they are most apparent as in Brunei, Malaysia, Mexico, and Vietnam.[4] The experience of workers under similar free trade agreements provides ample evidence to back this position.

The text of the TPP labour chapter is modelled on earlier labour accords or chapters starting with the labour side accord to the North American Free Trade Agreement (NAFTA), the trade agreement Canadians are probably most familiar with. Since signing NAFTA, the United States and Canada have continued to promote labour provisions tied to trade agreements, and there has been some progress in making these provisions stronger. Nevertheless, like the NAFTA side accord, these agreements remain largely ineffective for addressing labour rights violations, and they fail to counteract the negative impacts on working people of other, stronger provisions in contemporary trade agreements. As the ILO pointed out recently, "no complaint has given rise to a decision of a dispute settlement body or even led to sanctions."[5]

This study will first review the contentious history of labour provisions in recent free trade agreements to clarify the weaknesses of this approach as a tool to support labour rights. It then breaks down the TPP labour provisions and their likely impact on working conditions and labour law.

From NAFTA to the TPP: Do labour clauses work?

It is helpful to look at the labour provisions in NAFTA, not just because this is the most important trade agreement that Canadians are subject to, but also because it has served as a model for other Canadian and U.S. FTAs including the TPP. NAFTA was initially negotiated without a labour side accord or labour chapter within the agreement itself. The North American Agreement on Labour Co-operation (NAALC) was a political response to the intense opposition to NAFTA from labour unions and their allies in the United States. Canada, like Mexico, was a reluctant signatory to the NAALC. After his election in 1992, former president Clinton insisted on the inclusion of labour and environment side accords in NAFTA to appease opponents of the agreement and ensure its passage in Congress. According to the text of the NAALC, Canada, the United States, and Mexico committed to "improve working conditions and living standards in each Party's territory," and to promote, "to the maximum extent possible," the 11 labour rights set out in an annex to the agreement.[7]

Government summary of the TPP labour chapter[6]

- Contains enforceable commitments to protect and promote internationally recognized labour principles and rights.
  - This includes the International Labour Organization's (ILO's) 1998 Declaration on Fundamental Principles and Rights at Work.
- Includes commitments to ensure that national laws and policies provide protection of the fundamental principles and rights at work, including:
  - the right to freedom of association and collective bargaining; and
  - the elimination of child labour, forced labour or compulsory labour, and of discrimination in respect of employment and occupation.
- Ensures that laws provide acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety.
- Encourages co-operation on labour matters and encourages companies to adopt voluntary corporate social responsibility initiatives related to labour issues.
- Includes a non-derogation clause that prevents TPP parties from derogating from their domestic labour laws in order to encourage trade or investment.
- Includes structures to implement and monitor compliance with the commitments in the chapter:
  - A party may request consultations with another party on any matter arising under the chapter in order to jointly decide on any course of action to address the matter.
  - Establishes a mechanism through which members of the public can raise concerns about labour issues related to the chapter.
- Includes enforceable dispute settlement procedures in cases of non-compliance, to help ensure that all labour obligations are respected.

The side-agreement approach had several key weaknesses. First, it meant the labour provisions could not be enforced through the same dispute resolution processes in NAFTA itself. Secondly, the NAALC did not create new common labour standards, but merely committed the members to enforce their own existing labour legislation. The agreement does mention some "guiding principles," which mostly reflect standard ILO principles. However, the parties are just encouraged to promote these principles and

not necessarily to enforce them.[8] Thirdly, and most importantly, there were no effective sanctions attached to violations of the labour side agreement.

The NAALC established national administrative offices (NAOs) in the labour departments of each signatory state. Individuals, labour union leaders, and human rights defenders from each of the three countries can file complaints about the behavior of one of the other states to their country's NAO.[9] If the NAO decides to accept a case for review, it begins a formal investigation, and may hold public hearings and issue a formal report. Different types of violation result in different types of punishment — from ministerial consultation, in the case of standards related to industrial organization (e.g., the right to strike), to possible trade sanctions in the case of submissions that involve allegations of child labour, minimum wage disputes, or health and safety violations.[10] A flurry of labour cases were submitted in the five years after the NAALC came into force. But their number dwindled after that to the point where today the agreement is rarely used. Trade unions and other workers' rights advocates found that the formal complaint mechanism almost never resulted in ministerial consultations or sanctions.

The NAFTA countries also created a North American Commission for Labour Co-operation (NACLC), with a secretariat to be based in Washington, D.C. (later moved to Dallas, Texas), to oversee the labour side agreement. Initially the NACLC would handle follow-up actions from NAFTA ministerial consultations, special research projects, and other trinational labour co-operation activities. The member states had so little commitment to the process that, as the number of complaints under the NAALC slowed, the secretariat eventually disappeared.

Not only are the sanctions for labour violations much weaker than those available in NAFTA to promote the interests of corporations and investors, the process for bringing cases to adjudication is long and cumbersome. NAOs report to the labour ministries in each country, and as such cannot guarantee impartiality. In the case of Canada, the effectiveness of the process is further limited by the constitutional mandates of the provinces, as only five (Alberta, Manitoba, Quebec, Prince Edward Island, and Nova Scotia) have ratified the NAALC.[11]

In Mexico, the country where workers might have been expected to benefit most from the labour side accord, systematic violations of labour rights abound in a broader context of widespread human rights violations that endangers labour and human rights activists and undermines the country's system of industrial relations. Human rights violations have escalated rapidly in the country over the past 10 years, exemplified by the disappear-

ance of 43 students from the teacher's college in Ayotzinapa, Guerrero in 2015. These young men are now presumed dead. As Amnesty International reported in its 2015–16 country assessment of Mexico:

> Impunity persisted for grave human rights violations including torture and other ill treatment, enforced disappearances and extrajudicial executions. More than 27,000 people remained missing or disappeared. Human rights defenders and journalists continued to be threatened, harassed or killed. The number of detentions, deportations and complaints of abuse of irregular migrants by the authorities increased significantly. Violence against women continued to be widespread. Large-scale development and resource exploitation projects were carried out without a legal framework regarding the free, prior and informed consent of Indigenous communities they affected.[12]

The most serious problem faced by Mexican trade unions is the failure of the Mexican government to enforce labour and other laws, particularly those around freedom of association and collective bargaining. Many workers are "represented" by employer-dominated unions that sign collective agreements (so-called "protection contracts") the workers themselves have never seen or ratified. Workers who attempt to form independent unions are frequently targeted by violence from employers and the employer-dominated unions, often with the collusion of state officials.

This situation has been the subject of public reports under the NAALC, but no trinational action has ever been taken.[13] The ILO has also raised serious concerns about the threats to freedom of association in the country, which has not yet been addressed through any NAFTA mechanism. As a result, wages are artificially depressed, and more multinational corporations are moving operations to Mexico to take advantage of the systematic exploitation of Mexican workers — exactly the opposite of the higher standards that were promised when NAFTA was signed.

Labour provisions since NAFTA

Following NAFTA, U.S. trade unions and their Democratic allies in Congress continued to push the United States Trade Representative (USTR) to strengthen the labour provisions in new free trade agreements. For example, the U.S.–Jordan and U.S.–Chile FTAs and the Dominican Republic–Central America Free Trade Agreement (DR–CAFTA) included labour provisions in the main text rather than in side agreements. U.S. concerns with DR-CAFTA

were particularly strong because of the serious labour and human rights violations in many of the five countries involved (Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua). As a result, signatory countries were required to provide a report on their current labour laws, list areas where improvement was needed, and report on progress every six months between 2007 and 2010.[14]

In this generation of U.S. labour agreements only one labour provision is enforceable through the same or similar dispute settlement mechanisms as for the rest of the FTA.[15] Each party to these treaties agrees it "shall not fail to effectively enforce its labor laws…in a manner affecting trade between the Parties." A petitioner must therefore show that a government did not enforce its labour laws before a case can be sent to dispute resolution. For a case to be successful at the dispute resolution stage, the petitioner would then need to prove the labour violation had an impact on trade between the two nations. (This is the same burden of proof required in the TPP labour chapter.) Failure to enforce labour laws was the basis for the first labour case pursued to the dispute settlement stage by the U.S. government in response to a 2008 filing by U.S. and Guatemalan labour unions. It took seven years for the case to be heard.

The most recent U.S. model of labour provisions in FTAs was established in the so-called May 10 Agreement, or Bipartisan Trade Deal.[16] The most important provisions it sets out are that countries must adopt, maintain, and enforce the four fundamental rights named in the 1998 ILO Declaration, and that violations of the labour chapter are subject to the same dispute settlement mechanism as other violations of U.S. FTAs. The TPP labour chapter is based on this model, which is also found in the U.S. FTAs with Peru (2009), Panama (2012), Colombia (2012), and South Korea (2012).

Since NAFTA, Canada has signed a series of trade agreements, mostly on a bilateral basis, which also contain labour co-operation agreements. The 1997 agreement with Chile was based closely on the NAFTA model. The 2002 agreement with Costa Rica was similar but with an even more reduced system of enforcement. After this point, Canada began to include somewhat stronger language for labour rights. Newer agreements with Peru (2009), Colombia (2011), Jordan (2012), Panama (2013), and Honduras (2014) contain an agreement to implement ILO standards, and specifically reference the 1998 ILO Declaration and the ILO's Decent Work Agenda. The Canada–South Korea agreement (2015) includes a labour chapter, rather than a side agreement on labour co-operation, but it does not specifically refer to the ILO Declaration, only to "internationally recognized labour rights."

Recent Canadian agreements also contain a clause that prohibits parties from engaging in practices that derogate from domestic laws in order to encourage trade or investment. These agreements contain formal dispute settlement processes for cases involving violations of core labour rights, or where there exists a persistent pattern of failure to comply with domestic laws. In the agreements with Panama, Peru, and Colombia, however, fines are limited to US$15 million (about C$19 million), and are to be paid into a fund designed to implement the action plan.[17] This limit on sanctions is in stark contrast with awards under investor–state dispute settlement cases, which have gone into the billions and there is no upper limit. Furthermore, the imposition of fines is a weaker tool than trade sanctions, including abrogation of preferential trade status, which can be applied to violations of other provisions in the trade agreement itself.[18] The TPP would be the first trade agreement for Canada under which labour obligations are subject to the main dispute settlement mechanism of the FTA.

Beyond the formal provisions of these agreements, labour unions and other civil society organizations doubt whether many of the countries involved in the TPP will be able to live up to the minimum labour standards therein. They are concerned, with good reason, that other aspects of the free trade agreement, such as its market liberalization requirements and investor protections, may adversely affect workers and peasants, exacerbating existing conflicts and thus fueling the systematic violation of workers' rights. For example, in the case of the Canada–Colombia agreement, civil society organizations (CSOs) question the effectiveness of the labour agreement in the context of widespread violations of labour rights and the large number of murders of labour activists in Colombia.[19]

Similarly, Gerda van Roozendaal's careful analysis of the impact of the DR–CAFTA on labour rights in Guatemala argues that the agreement represents a failed case of forced diffusion of labour standards, even though labour disputes may be pursued through the agreement's main dispute resolution mechanism. Van Roozendaal states the failure results from weak formulation of the labour provisions and sanction mechanisms, and the lack of follow-up action. In a country that has experienced widespread violence against trade union actors and systematic violation of workers' rights, this is not a surprising conclusion.[20] Similar concerns exist for several of the countries involved in the TPP agreement.

ILO fundamental rights

2. Declares that all members, even if they have not ratified the conventions in question, have an obligation arising from the very fact of membership in the [ILO] to respect, to promote and to realize, in good faith and in accordance with the constitution, the principles concerning the fundamental rights which are the subject of those conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

Core conventions

Fundamental conventions

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

TPP labour chapter analysis

As mentioned above, the labour provisions in the TPP and other recent U.S. FTAs are a product of policy shifts in response to pressure from labour unions to improve on the NAFTA model. Since the May 10 Agreement of 2007, the USTR has included in its FTAs a fully enforceable obligation to "adopt and maintain" fundamental labour rights as stated in the ILO Declaration. This is sometimes referred to as the second generation of worker rights in U.S. FTAs.

Four elements of the May 10 Agreement are incorporated in the TPP labour chapter:

1. Requirement to adopt, maintain, and enforce the four fundamental rights named in the 1998 ILO Declaration.
2. Clarification that a country cannot defend its failure to enforce labour law on the basis of resource allocation or resource limitations.
3. A prohibition from lowering labour standards covered by the treaty in a manner affecting trade or investment.
4. Labour obligations must be enforceable through the same dispute settlement mechanisms, and have access to the same penalties, as those available for other obligations under the FTA.

The first requirement is somewhat limited because it refers to the ILO Declaration alone, and not the details of the eight core conventions relating to those fundamental rights or to the procedures found in the "follow-up" to the 1998 ILO Declaration. The requirement to enforce labour laws is limited by the necessity that non-enforcement must have occurred "in a manner affecting trade or investment between the parties," and "through a sustained or recurring course of action or inaction." The following provides more detailed examination of these four elements.

Requirement to adopt and maintain fundamental labour rights

Article 19.3.1 of the TPP establishes the requirement of signatories to adopt and maintain the four fundamental rights stated in the ILO Declaration. As in prior U.S. FTAs, this requirement is limited by referring to the declaration alone, not to the details of ILO conventions or the follow-up. Article 19.3.2 establishes the requirement to adopt and maintain laws and regulations on minimum wages, hours of work, and occupational safety and health. This article is limited by a footnote clarifying that it refers to "acceptable conditions of work as determined by that Party."[21] Both articles are further limited by the requirement to demonstrate that the failure to adopt or maintain a specific statute or regulation affects trade or investment between the parties.[22] The Canada–European Union Comprehensive Economic and Trade Agreement (CETA) has stronger language in its labour chapter referring to the ILO's Decent Work Agenda and committing to implement ILO conventions that have already been ratified, as well as committing to "continued and sustained efforts" to ratify those ILO core conventions not yet ratified. The TPP presented a real opportunity to advance the language on labour rights, but failed to do so.

Requirement to enforce fundamental labour rights

Article 19.5 of the TPP deals with the enforcement of labour laws. As in the May 10 Agreement, non-enforcement is limited to cases of a "sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties."[23] This presents an extremely high bar for any potential complaints regarding enforcement under the TPP.

Prohibition from lowering labour standards

Article 19.4, the "non derogation clause," deals with weakening or lowering labour standards to encourage trade or investment. The TPP has different statements on 19.3.1 (fundamental rights) and 19.3.2 (acceptable conditions of work). Article 19.4 (a) specifies a general prohibition on weakening or offering to weaken labour laws with respect to 19.3.1 (fundamental rights), but contains nothing with respect to 19.3.2 (acceptable conditions of work). Article 19.4 (b) applies only to special trade and customs areas such as export processing zones (EPZs), and specifies the obligation around non-derogation with respect to both 19.3.1 and 19.3.2. This seems to imply that parties to the TPP would be permitted to weaken laws around minimum wages, hours of work, and occupational safety and health *outside* of EPZs, even if it were clear that doing so would affect trade or investment between the parties. For example, member states must adopt and maintain a minimum wage according to 19.3.2, but they are within their rights to lower that minimum wage outside export processing zones in order to attract investment. If this is the case, it is difficult to imagine a successful TPP labour complaint related to acceptable conditions outside of EPZs.

Equal access to dispute settlement

While the TPP does officially offer equal access to dispute settlement for labour violations, there is a lengthy process of co-operation (Article 19.10), co-operative labour dialogue (Article 19.11), and labour consultations (Article 19.15) before a party may request a dispute settlement panel be established. Cases may be raised by individual workers, unions, or other civil society actors, but are actually brought by governments. For example, unions in Canada and Vietnam might make a submission to Canada's labour department on behalf of workers in Vietnam — an institutionally awkward arrangement for protecting labour rights. Documenting violations will be time

consuming and expensive given the requirement to demonstrate an impact on trade or investment between the parties. The lack of reference to the details of the ILO core conventions further limits the extent to which existing ILO jurisprudence will be helpful in resolving disputes. On the other hand, the article on co-operation (19.10) is extensive, and may be a more effective route for raising labour standards in TPP nations because of the possibility of trade sanctions if co-operation fails.

Additional features of the TPP

Two additional articles of the TPP labour chapter are mostly symbolic. Article 19.6 recognizes the goal of eliminating forced labour in TPP member country supply chains, and encourages signatories to discourage the importation of goods produced through forced labour. The second, Article 19.7, encourages voluntary initiatives on corporate social responsibility. It is unclear how either article will be effective.

Conclusion

Labour chapters in free trade agreements have not evolved significantly in the eight years since the May 10 Agreement in the U.S. The TPP was potentially an opportunity to raise the bar even higher for labour rights, specifically by referencing core ILO conventions, the "follow-up" to the ILO Declaration, and the ILO Decent Work Agenda. This did not happen. For Canada, although the TPP labour chapter is better than previous Canadian FTAs, it could not hope to mediate the negative impacts on workers of modern trade and investment agreements. [24]

The case of Mexico shows that labour chapters are ineffective when these agreements create such asymmetry between business and labour in national and regional processes. The U.S.–Guatemala labour case shows just how lengthy, expensive, and mostly ineffective the dispute resolution process can be. It is hardly surprising, then, that labour unions have been among the strongest opponents of recent trade agreements, including now the TPP. The weak and cumbersome labour rights dispute processes in the agreement provide little comfort to workers in any of the participating countries.

Unions from nine of the 12 signatory states to the TPP have proposed an alternative labour chapter that builds on and improves the labour and dispute resolution chapters of the U.S.–Peru FTA.[25] Unfortunately, while

business groups were regularly consulted throughout the TPP negotiating process, labour unions in Canada were given little opportunity to put their alternative proposals on the table. As such, the TPP simply reproduces an ineffective rights regime while further expanding a free trade model that has perpetuated labour rights violations in many countries.

Notes

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2 Trans-Pacific Partnership. Chapter 19: Labour Chapter. Available at: https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/19.-Labour-Chapter.pdf

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4 AFL-CIO. The Trans-Pacific Partnership: Four Countries That don't Comply With U.S. Trade Law. (2015) Accessible at: http://www.aflcio.org/content/download/150491/3811471/file/TPPreport-NO+BUG.pdf.

5 International Labour Organization. Can trade liberalization and social progress go hand-in-hand? (2013) Accessible at: http://www.ilo.org/newyork/voices-at-work/WCMS_229471/lang--en/index.htm. The United States is currently engaged in a labour enforcement case against Guatemala, under the DR-CAFTA. A decision has not yet been issued. Further details on the US-Guatemala labour enforcement case can be found online: https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr

6 Global Affairs Canada. The Labour Chapter.

7 The North American Agreement on Labour Cooperation. Accessible at: http://www.labour.gc.ca/eng/relations/international/agreements/naalc.shtml

8 Angel Torres. "A Wishful Thought: Enforceability and Avoidance of Labor Provisions in Foreign Trade Agreements." (2014) *Law and Business Review of the Americas*. Vol. 20, p. 627. The "guiding principles" referred to in the NAFTA agreement are: 1) The freedom of association and protection of right to organize; 2) The right to bargain collectively; 3) The right to strike; 4) The prohibition of forced labor; 5) Labor protections for children and young people; 6) Minimum employment standards, including minimum wage; 7) The elimination of employment discrimination; 8) Equal pay for women and men; 9) The prevention of occupational injuries and illnesses;

10) Compensation for occupational injuries and illnesses; and 11) Protection of migrant workers. North American Agreement on Labor Cooperation (NAALC), September 13, 1993, Annex 1.

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11 Labour Program, Government of Canada. Available at: http://www.labour.gc.ca/eng/relations/international/agreements/naalc.shtml

12 Amnesty report available at: https://www.amnesty.org/en/countries/americas/mexico/report-mexico/

13 See: AFL-CIO. Mexico: Labor Rights Concerns, 2015. Accessible at: http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP/Labor-Rights/Mexico-Labor-Rights-Concerns; Arturo Alcalde Justiniani; ¿Dónde quedó el acuerdo laboral paralelo al TLCAN? Accessible at: http://www.rmalc.org/historico/tratados/tlcan/documentos/2007/acuerdo%20laboral%20paralelo%20al%20TLCAN.pdf. See also Observation (CEACR) - adopted 2010, published 100th ILC session (2011), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Mexico (Ratification: 1950), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2326537:NO; Observation (CEACR) - adopted 2012, published 102nd ILC session (2013), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Mexico (Ratification: 1961), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3079532:NO; Observation (CEACR) - adopted 2012, published 102nd ILC session (2013), Worst Forms of Child Labour Convention, 1999 (No. 182) - Mexico (Ratification: 2000), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3085618:NO.

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20 Gerda van Roozendall. "The Diffusion of Labour Standards: The Case of the U.S. and Guatemala." (2015) *Politics and Governance*, Vol. 3, no. 2, p. 27.

21 Trans-Pacific Partnership. Chapter 19: Labour Chapter, footnote 5.

22 Trans-Pacific Partnership. Chapter 19: Labour Chapter, footnote 4.

23 Trans-Pacific Partnership. Chapter 19: Labour Chapter, Article 19.5.1.

24 ILO, *Social Dimensions of Free Trade Agreements*, 2015, Accessible at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf

25 The Trans-Pacific Partnership Agreement: Model Labour and Dispute Resolution Agreement (2012). Accessible at: http://www.ituc-csi.org/IMG/pdf/full_ituc_transpacific_partnership_labor_chapter.pdf

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