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April 18, 2016

Mr. Gil McGowan
President
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Dear Mr. McGowan:

Re: Labour Rights and Mobility in the Trans-Pacific Partnership

You have asked for our assessment of the potential impact of the labour rights and mobility provisions of the Trans-Pacific Partnership (TPP)[1] on Canadian workers.

As you know, under free trade regimes Canadian workers must compete with workers in other countries who are often paid far less to do similar work, and who may have no right to join a trade union, or any other basic labour rights. This is true for workers in the manufacturing sector, and ever increasingly for those in many service sectors as well.

Chapter 19 of the TPP concerns labour rights and is presented as the means for addressing problems workers confront in the global trade environment, but for the reasons described below, it is unlikely to have any salutary effect on them. The essential deficiency of these TPP rules is the inevitable consequence of their failure to specify any measurable standard by which the purported protection of labour rights might be assessed or enforced.

Chapter 12 of the TPP concerns the rights of foreign temporary workers and is certain to make things much tougher for many Canadian workers by allowing both domestic and foreign companies to bring foreign workers (and often their spouses) to Canada to take jobs that

[1] The Parties to the TPP are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

Canadians are ready, willing and able to fill. Under these rules, Canada has foresworn the right to apply needs tests, to require labour certification tests, or to impose any numerical limit on workers who Canada has accorded the right to work in Canada as long as for three years.

One can find information about the TPP on the website of Global Affairs Canada, which includes links to the text itself and a "Technical Summary of Negotiated Outcomes". As the following analysis demonstrates, the technical summaries include several misleading statements about the nature of these outcomes that consistently tout TPP benefits that are unsubstantiated, while ignoring any mention of adverse impacts.

It is noteworthy that at a time when the Liberal government is proposing to review Canada's temporary foreign workers program and ask a parliamentary committee for proposals to fix the program,[2] it has signed a trade agreement that will foreclose virtually any reform to protect Canadian workers from having to compete with foreign workers for jobs in Canada.

PART I: LABOUR RIGHTS

Chapter 19: *Labour*, sets out provisions that oblige TPP Parties to adopt laws and practices concerning labour rights recognized in the 1998 Declaration of the International Labour Organization (ILO), and to have laws governing minimum wages, hours of work, and occupational safety and health. It also requires the establishment of various processes to facilitate consultation, public input, and cooperation concerning labour matters, and would establish a Labour Council of Party representatives.

The following sets out and provides an assessment of the key provisions of the chapter.

Core Labour Rights

Article 19.3: *Labour Rights* provides in part as follows:

1. *Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:*

   (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;

[2] The Globe and Mail, Feb. 17, 2016 http://www.theglobeandmail.com/news/politics/temporary-foreign-workers-program-faces-federal-review/article28792323/.

> *(c) the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and*
>
> *(d) the elimination of discrimination in respect of employment and occupation.*

The most important thing to appreciate about TPP obligations concerning these core labour rights is that it fails to require the parties to also adopt and implement the ILO Conventions that give substance to the high-minded principles of the Declaration. While the ILO Declaration sets out the broad principles concerning fundamental labour rights, it includes no delineation of these rights or other indication of the steps that must be taken to give them effect. Thus a Party may have signed and ratified the Declaration, but failed to adopt the Convention that describes the minimum and concrete actions that a nation must take to actually implement them.

For example: Article 2 of the Declaration:

> *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 Organization 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;*
> > . . .

The Declaration provides no further indication of what steps must be taken into to put this broad principle into practice. For these details, one must look to the ILO Conventions on *Freedom of Association and Protection of the Right to Organise*, 1948 (No. 87)[3] and to the *Convention on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*.[4] Under the former, workers have the right:

- to establish and, to join organisations of their own choosing without previous authorization (Article 2).

[3] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (Entry into force: 04 Jul 1950) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312232:NO

[4] Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Entry into force: 18 Jul 1951) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:31223

- to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes, and to be free from government interference with this right (Article 3).[5]

Moreover, in some cases, while the Declaration may have been adopted by a Party, the relevant Convention has not. For example, Canada and some other TPP parties have not adopted or ratified the *Convention on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* which, *inter alia*, protects the right of workers to establish independent trade unions. [6]

It is important to note that the omission of any reference to the Conventions was a deliberate rejection of proposals by the International Trade Union Confederation[7] that it do so. Thus while the Canadian government has touted the enforceability of the TPP labour rules,[8] when it comes to the central question of core labour rights, the Parties have rejected the inclusion of any objective standards or criteria by which compliance might be measured.[9] That approach to labour rights should be contrasted with detailed TPP rules that protect intellectual property, or the rights of foreign investors and service providers.

In other words, the central commitments of Chapter 19 concerning core labour rights are only hortatory. While the Parties are exhorted to implement certain broad principles of the ILO Declaration, those principles are so ill-defined as to confound any notion that a TPP Party could be held to account for failing to give them meaningful effect.

Minimum Wages, Hours Of Work, And Health And Safety

Article 19.3(2) provides as follows:

> *Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.*

[5] Idem.

[6] Idem Article 2.

[7] http://www.ituc-csi.org/trans-pacific-partnership-labour.

[8] Technical Summary of Negotiated Outcomes: Labour Chapter http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/18-labour.aspx?lang=eng

[9] Here again ILO conventions exist that give substantive expression to the aspirational principles of the Declaration, including the Convention concerning Minimum Age for Admission to Employment (No. 138), and the Convention concerning the Abolition of Forced Labour (No. 105).

A similar problem exists with respect to the obligation of the Parties to regulate acceptable conditions of work, because no standards are established by which this commitment might be measured. Therefore a Party may comply with this obligation simply by having laws that, for example, govern hours of work even if the maximum hours of work are clearly excessive. Other matters may be simply ignored, such as those concerning termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement. Moreover, as noted below, and no matter how modest these labour protections may be, they may nevertheless be waived to attract foreign investment or promote trade.

Waiving Core Labour Rights And Protections

Article 19.4: Non Derogation, provides as follows:

> *The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws. Accordingly, no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations:*
>
> *(a) implementing Article 19.3.1 (Labour Rights), if the waiver or derogation would be inconsistent with a right set out in that paragraph; or*
>
> *(b) implementing Article 19.3.1 (Labour Rights) or Article 19.3.2 (Labour Rights), if the waiver or derogation would weaken or reduce adherence to a right set out in Article 19.3.1,* ***or to a condition of work referred to in Article 19.3.2 (Labour Rights), in a special trade or customs area, such as an export processing zone or foreign trade zone****, in the Party's territory,*
>
> ***in a manner affecting trade or investment between the Parties****.*
>
> [emphasis added]

In describing these provisions, Canada makes two assertions concerning the protection of laws relating to acceptable conditions of work, which at best, must be regarded as misleading. These are that TPP labour rules:

- ensure that laws provide acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety;
- include a non-derogation clause that prevents TPP Parties from derogating from their domestic labour laws in order to encourage trade or investment.

It is true that Article 19.4 disparages the temptation a Party might have to weaken or abandon the measures it has implemented to protect labour rights, but even here the rules are highly qualified. To begin with, Article 19.4 would not prevent a party from weakening measures to protect core labour rights to encourage trade or attract foreign investment, so long as it does not do so in a manner that is "inconsistent" with such rights. However, as noted, core labour rights are undefined and establish no minimum baseline. Moreover, any state that might be prompted to seek enforcement of these provisions, however nebulous they may be, would confront the further challenge of proving that any weakening of core labour protections occurred "in a manner affecting trade or investment." Establishing such a causal connection, given the difficulties of measurement and the variety of factors that might come into play, would be a very significant challenge.

Even more problematic is the treatment accorded the obligation to adopt and maintain rules governing acceptable conditions of work (Article 19.3(2)). This commitment may in fact be abandoned altogether except in respect of export processing or free trade zones. In other words, TPP parties are free to abandon any and all commitments to minimum wages, hours of work, health and safety rules as these generally apply to workers for the purpose of encouraging trade or foreign investment.

The Obligation to Enforce Labour Laws

Article 19.5: *Enforcement of Labour Laws* provides:

> *1. No Party shall fail to effectively enforce its labour laws* ***through a sustained or recurring course of action or inaction in a manner affecting trade or investment*** *between the Parties after the date of entry into force of this Agreement.*
>
> *2. If a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure. . . .*
>
> *3. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake labour law enforcement activities in the territory of another Party.* [emphasis added]

Two points are worth noting in respect of this obligation. The first is that Article 19.5(1) compounds the difficulty of enforcing TPP provisions concerning labour rights (noted above), by requiring that any failure to enforce labour measures be both i) sustained or recurring; and ii) have the result of affecting trade or investment. Given these qualifications on any enforcement action, it is difficult to imagine a challenge succeeding even the most egregious and ongoing cases of abuse of the most minimal protection for core labour rights.

The other point to make is that by exposing a Party to the risk of being challenged for failing to enforce its labour laws, an incentive is created for Parties to keep those domestic commitments modest given the absence of defined minimum standard of protection.

Importing Goods Produced With Child Or Forced Labour

Article 19.6*: Forced or Compulsory Labour* provides:

> *Each Party recognises the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour. Taking into consideration that the Parties have assumed obligations in this regard under Article 19.3 (Labour Rights), each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.*

Here again the TPP Parties have rejected entreaties[10] to include a commitment to adopt and implement ILO conventions on child and forced labour or to otherwise ban the importation from or outsourcing to jurisdictions where such practices are condoned.[11] Instead Parties are required to 'discourage' the importation of goods made by forced labour or forced child labour but there is no delineation of the actions that a Party must take (or even consider) to do so, only that they are free to pursue "initiatives it considers appropriate."

Corporate Accountability

Article 19.7: *Corporate Social Responsibility* provides:

> *Each Party* ***shall endeavour to encourage*** *enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party*. [emphasis added]

This provision pertains to the activities of enterprises (most often transnational corporations) as opposed to those of the state itself.

Once again the Parties have rejected the inclusion of any standard by which the notion of *corporate social responsibility* might be measured, notably those set out in OECD Guidelines for

[10] 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 labour.

[11] See for example ILO Convention No. 182 *On The Worst Forms Of Child Labour*, 1999, and Convention No. 138 *On The Minimum Age For Admission To Employment And Work*.

Multinational Corporations.[12] Rather, under this Article, each Party shall 'endeavor to encourage enterprises to voluntarily adopt CSR initiatives on labor that have been endorsed or supported by that party.' The approach is even more remarkable because the adoption of such a code of conduct would be voluntary in any event.

This exceedingly soft approach to encouraging good behavior by corporate and private investors and service providers is contrasted with the extensive and substantive rights these private interests are accorded under the TPP, including the unilateral right to seek compensation when their rights as investors are allegedly infringed.[13]

Procedural Guarantees

Article 19.8: *Public Awareness and Procedural Guarantees* sets out various obligations for the Parties to establish domestic procedures to enforce labour laws, such as they may establish. The procedures are reasonably well delineated and are, for the most part, consistent with Canadian norms with respect to administrative and judicial remedies concerning the infringement of labour rights. However, as noted, the overarching problem that belies the utility of such provisions is the failure of the TPP to impose the obligation on the Parties to establish even minimum standards for the protection of labour rights to which these procedures might be applied.

Public Submissions

Article 19.9 requires that each Party "provide for the receipt and consideration of written submissions from persons of a Party on matters related to this Chapter . . ." The Parties are obliged to consider matters raised and to provide a timely response, which may or may not be in writing. There is no other description of the actions that might be taken by a Party in response, or any requirement that it take any action, regardless of the concerns raised.

Cooperation And Dialogue

The major portion of the labour chapter is dedicated to spelling out various modalities for engaging labour and employer groups in consultations and dialogue for the purpose of promoting cooperation on labour matters. Areas of potential cooperation are delineated in detail under Article 19.10(6). Article 19.11 sets out procedures for inter-Party dialogue about similar matters. Article 19.12 would establish a Labour Council composed of senior governmental representatives at the ministerial or other level which is to meet every two years. Articles 19.13 through 19.15 set out further requirements concerning labour and public engagement.

[12] http://www.oecd.org/corporate/mne/

[13] The right to Investor-State Dispute Settlement (ISDS) is established under Chapter 9 of the TPP.

It is beyond the scope of this opinion to speculate about the potential utility of these provisions. However, because of the absence of any enforceable commitments to labour rights, if the labour provisions of the TPP are to have any salutary effect, that would have to be found in these processes of dialogue and consultation.

Dispute Resolution

The dispute provisions of the TPP are set out in Chapter 28, and may *inter alia* be invoked under Article 28(1)(b):

> *wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or that another Party has otherwise failed to carry out its obligations under this Agreement;*

In promoting the TPP, the Canadian government has emphasized the enforceability of the regime in summarizing the labour chapter of the Agreement, stating that:

> *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.*[14]

And underscoring the point by describing the labour chapter as containing:

> *… 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.*[15]

One might justifiably be skeptical about the likelihood of Canada's commitment to enforcing the labour rights set out in the TPP for several reasons. To begin with, invoking formal dispute resolution is not a common occurrence and brings with it certain risks to Canada's international standing and relationships. In addition, Chapter 17 clearly engenders a preference for consultation and dialogue. It is also important to appreciate that the interests of labour, to the extent they are considered at all in trade negotiations or enforcement decisions, have certainly not been given any priority.

But by far the most important reason to doubt that a formal dispute will ever be brought to enforce the labour provisions of the TPP is that – for the reasons described in some detail throughout this analysis – the obligations of Parties in respect of labour rights are far too vague

[14] See fn 8.

[15] Idem.

and qualified to be enforced. There is simply no objective standard by which compliance with any of the commitments set out in Chapter 17 could be measured.

Moreover, any doubt on the question is quickly resolved when one has regard to the detail and precision with which the rights investors, foreign service providers and intellectual property rights holders are set out in the texts of the TPP.

PART II: CHAPTER 12 - TEMPORARY ENTRY FOR BUSINESS PERSONS

Background

Temporary foreign workers (TFWs) have been able to enter and work in Canada since the 1960s, and their right to do so was formally introduced in legislation in the 1970s. While generally focused on skilled workers, temporary foreign worker programs were expanded to lower-skilled occupations in 2002.

As described in study published by C.D. Howe Institute:

> Between 2002 and 2013, Canada eased the hiring conditions of TFWs several times, supposedly because of a reported labour shortage in some occupations, especially in western Canada. By 2012, the number of employed TFWs was 338,000, up from 101,000 in 2002, yet the unemployment rate remained the same at 7.2 percent. Furthermore, these policy changes occurred even though there was little empirical evidence of shortages in many occupations. When controlling for differences across provinces, I find that changes to the TFWP that eased hiring conditions accelerated the rise in unemployment rates in Alberta and British Columbia.[16]

However, in 2013, a number of media accounts showing that many employers preferred hiring under the TFW program, even when Canadian workers were ready and willing to work, prompted the federal government to take some modest steps to reign in growing abuse of the program. [17]

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[16] Gross; *Temporary Foreign Workers in Canada: Are They Really Filling Labour Shortages* Commentary No. 407, C.D. Howe Institute.

[17] Idem p. 7. Among the reforms was a limit of 10 per cent on the proportion foreign workers could represent of a company's work force in low-paying jobs, and prohibited employers from hiring them in regions of high unemployment. As described below, under the TPP neither constraint would be permitted for workers from most TPP member countries.

At the same time, however, the federal government was engaged in negotiating TPP labour mobility rules that greatly exacerbate pressures on Canadian labour markets by removing the principal safeguard of Canada's TWF program, namely the requirement that a company prove that the TFWs were needed to fill job vacancies caused by domestic labour shortages.[18] If implemented, TPP rules will simply trump this key requirement and other requirement of Canada's TWF program intended to ensure that the employment opportunities of Canadian workers are protected.

Analysis

The TPP is not the first international trade agreement to include labour mobility disciplines.[19] While a comparative review of these regimes is outside the scope of this opinion, by Canada's estimate the scope of TPP provisions concerning temporary workers is much broader than that of previous commitments. For example, in describing its virtues, Canada claims that the TPP:

- secures commitments on temporary entry provisions beyond those included in the WTO *General Agreement on Trade in Services* (GATS);
- provides new commitments for business visitors providing after-sales services, as well as new commitments to extend coverage for business visitors providing after-lease services;
- improves commitments for intra-company transferees;
- provides new commitments for investors to establish a commercial presence in these markets;
- provides new commitments for certain highly-skilled professionals and technicians covering a wider range of occupations;
- provides new commitments to extend temporary entry privileges, as well as the right to work, for the spouses of certain covered business persons.[20]

As the following analysis describes, the essential effect of TPP labour mobility rules is to prohibit Canada from imposing any limit on the number of foreign workers entitled to enter the country so long as they fall under one of the broadly defined categories of workers Canada has

[18] Under Canada's TFW Program, employers must first obtain approval of a Labour Market Opinion (LMO] from Employment and Social Development Canada and foreign candidates must apply for a work permit to Citizenship and Immigration Canada (CIC). To obtain that approval, the employer, *inter alia*, must show that it made reasonable efforts to hire or train Canadians for the job. However, an LMO was not needed for companies hiring workers through intra-firm transfers or from a country with an international agreement like NAFTA.

[19] Both NAFTA (Chapter 16) and CETA (Chapter 12) include labour mobility rules.

[20] Canada: *Technical Summary of Negotiated Outcomes: Temporary Entry for Business Persons Chapter*, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/11-TemporaryEntry.aspx?lang=eng.

agreed to admit. Furthermore, for the large majority of such workers, Canada is prohibited from administering a labour certification test before that worker can enter Canada and be given a work permit.

THE SCOPE OF TPP LABOUR MOBILITY RULES

To begin with, it is important to note that the scope of TPP labour mobility rules is considerably larger than its title suggests. While presented under the heading "TEMPORARY ENTRY FOR BUSINESS PERSONS," (Chapter 12 of the draft text) these rules are neither limited to "business persons" nor to their "temporary" entry – at least not as these terms would be commonly understood.

Under Article 12.1 business person means:

> *(a)* ***a natural person who has the nationality of a Party*** *according to Annex 1-A (Party-Specific Definitions),*[21] .... [emphasis added]
>
> *who is engaged in trade in goods, the supply of services or the conduct of investment activities;*

In other words, under the TPP a "business person" is *any citizen* of a Party, whether skilled or unskilled. Moreover, in many cases the spouses of these 'business persons' are also entitled to come to Canada to work regardless of their skill level or qualifications. A description of the categories of workers whom Canada has agreed to provide work permits to under these TPP rules is considered below.

The other 'misnomer' of the Chapter's title concerns the use of "temporary" to describe the entry rights in question. For some workers covered by Canadian commitments[22] the length of stay may be as short as 6-12 months, but for many others it may be as long as three years. In all cases, these limits may be extended, and no limit is placed on the duration or number of extensions that may be permitted.[23]

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[21] See Annex I-A natural person who has the nationality of a Party means: (a) with respect to Australia, a natural person who is an Australian citizen as defined in the *Australian Citizenship Act* 2007 as amended from time to time, or any successor legislation; (b) with respect to Brunei Darussalam, a subject of His Majesty the Sultan and Yang Di-Pertuan in accordance with the laws of Brunei Darussalam; (c) with respect to Canada, a natural person who is a citizen of Canada under Canadian legislation.

[22] These are set out in Annex I2-A to Chapter 12; *Canada's Schedule of Commitments for Temporary Entry for Business Persons.* https://ustr.gov/sites/default/files/TPP-Final-Text-Annex-12-A-Temporary-Entry-for-Business-Persons-Canada.pdf.

[23] See description of these provisions below.

DE-REGULATING ACCESS TO THE CANADIAN LABOUR MARKET

The key commitment of Chapter 12 is set out in Article 12.4: *Grant of Temporary Entry.* It provides in part as follows:

> *1. Each Party shall set out in Annex 12-A the commitments it makes with regard to temporary entry of business persons, which shall specify the conditions and limitations for entry and temporary stay, including length of stay, for each category of business persons specified by that Party.*
>
> . . .
>
> *3. The sole fact that a Party grants temporary entry to a business person of another Party pursuant to this Chapter shall not be construed to exempt that business person from meeting any applicable licensing or other requirements, including any mandatory codes of conduct, to practise a profession or otherwise engage in business activities.*
> . . .

In accordance with 12.4(1), Canada and the other Parties (with the exception of the United States)[24] have set out their commitments in Annex 12-A to the TPP. In Canada's case these correspond to four general categories of workers: i) business visitors, ii) intra-corporate transferees, iii) investors, and iv) professionals and technicians. In each case Canada's commitments are reciprocal.

The essential thrust of Chapter 12 is to remove domestic controls on the number or qualifications of foreign workers that may be given a work permit and enter Canada for those categories of workers for which reciprocal commitments are made. Thus for three of the four categories of workers it has specified Canada has undertaken:

> *[to] grant temporary entry and provide a work permit or work authorization … , and will not:*
>
> *(a) require labour certification tests or other procedures of similar intent as a condition for temporary entry; or*
>
> *(b) impose or maintain any numerical restriction relating to temporary entry.*[25]

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[24] The United States is the only TPP country to make *no commitments* under Chapter 12. Consequently, American workers gain no temporary entry access to Canada under the TPP that doesn't already exist under NAFTA.

[25] TPP 12-A (Canada)(B)(4).

For the other category of foreign workers, "business visitors", Canada has also foresworn the right to "impose or maintain any numerical restriction relating to temporary entry" or to require that they obtain a work permit prior to entry to Canada.

These constraints effectively remove the possibility of imposing the needs test that is a central feature of the Labour Market Opinion required under Canada's TFW program. Thus, in stating the nature of the reciprocal commitment expected of other nations, Canada stipulates that in making a matching commitment in its schedule that nation do so:

> *without reserving the right to impose or maintain an economic needs test or numerical restriction for those business persons.*

In other words, foreign workers covered by Canada's commitments under the TPP are entitled to work in Canada even if domestic workers are readily available to fill those jobs and regardless of the unemployment rate in Canada.

THE EXPANSIVE DEFINITIONS OF TEMPORARY FOREIGN WORKERS

The rights of a foreign worker to enter Canada and obtain a work permit to be employed here depends upon whether the individual falls within one of the four categories for which Canada has extended that opportunity. Those categories are, in many cases, very broadly defined. This is particularly true for workers employed by a transnational corporation with operations in Canada and another TPP nation, and is virtually wide open for employees who fall within the definition of being Intra-Corporate Transferees.

To qualify, an Intra-Corporate Transferee must be someone who falls within the definitions of being a "management trainee on professional development", a "specialist", or an "executive or manager" of the company. The broadest of these subcategories is the "specialist" which is someone who has worked for the company for more than a year (if Canada stipulates that requirement) and who is an employee:

> *... possessing specialized knowledge of the company's products or services and their application in international markets, or an advanced level of expertise or knowledge of the company's processes and procedures.*

Arguably any individual employed by the company for a year could, by dint of that experience or any company-specific training, be said to have specialized knowledge of the company or its products, including many otherwise unskilled workers. Moreover, a claim by a company that its employee had such knowledge would be very difficult to test or corroborate.

That same corporation has other means for bringing workers to Canada who cannot be qualified as "specialists." This would include individuals who are "business visitors" who are persons for whom:

(a) the primary source of remuneration for the proposed business activity is outside Canada; and

(b) the principal place of business and the predominant place of accrual of profits remain outside Canada,

and are engaged in various activities, including sales, after-sales/leasing service, production management, or "consultations with business" associates.

However, for such employees the terms of entry are less generous, for they are only entitled to stay in Canada for six months (unless their stay is extended), and may not bring their spouses with them.

Another option for temporary entry applies to individuals who qualify under the heading "Professionals or Technicians"[26] in which case the length of stay may be for a period of up to one year, or as extended. The particular categories vary from Party to Party, but to illustrate, the schedule for Chile is attached as an Appendix "A" to this opinion.

Unlike the categories for "Business Visitors" and "Intra-Corporate Transferees", Professionals and Technicians need not be compensated from or have a principal place of business outside Canada. They may simply be hired and paid by a Canadian company. This explains why it is only this category of foreign worker for which any manner of wage protection is afforded (see discussion below).

As described above, several of these categories of foreign workers who may enter Canada under the TPP are obviously very broadly defined. Moreover, the category of Intra-Corporate Transferees designated as "specialists" is so broad as to be essentially self-defining because any employee who has worked for the company for a year and attended a company seminar or training session (however modest), could be qualified as a specialist under the TPP.

THE RIGHT OF SPOUSES TO WORK IN CANADA

The right of spouses to enter Canada and be given a work permit traces that of their partner to certain extent. For example, in the case of Intra-Corporate Transferees:

> *Canada shall grant temporary entry and provide a work permit or work authorization to spouses of Intra-Corporate Transferees of another Party where that Party has also made a commitment in its schedule for spouses of Intra-Corporate Transferees, and will not:*

[26] Canada's Annex I schedule includes country specific lists of the categories of professionals and technicians that fall within this category.

> *(a) require labour certification tests or other procedures of similar intent as a condition for temporary entry; or*
>
> *(b) impose or maintain any numerical restriction relating to temporary entry.*

Spouses are entitled to remain in Canada for as long as their partners are allowed to remain. However, unlike their partners, spouses need not themselves be qualified under any of the categories set out in Canada's questions and are nevertheless entitled to any job they can find or to carry out any work they are qualified for.

MINIMUM WAGE PROTECTION

With one exception, there is no compensation standard or minimum wage protection for foreign workers that is set out in Chapter 12. That exception is for "professionals and technicians" who, under Canada's schedule of commitments, must receive:

> *remuneration at a level commensurate with other similarly-qualified professionals within the industry in the region where the work is performed. Such remuneration shall be deemed to not include nonmonetary elements such as, inter alia, housing costs and travel expenses.*

No other category of worker, including those that are likely to be far more numerous, is entitled to a minimum wage guarantee or protection.

It is beyond the scope of this opinion to assess the potential application of federal or provincial minimum wage standards to foreign workers. However, putting aside the question of whether a foreign worker would be aware of or have a practical means to enforce such rights, it is difficult to see how minimum wage protections or other employment standards would apply to workers who are paid and employed by companies operating outside Canada, as would be the case for foreign workers who fall within the Intra-Corporate Transferee, or business visitor categories.

Moreover, and as noted, TPP labour rules (Chapter 17) do not establish minimum standards for wages, hours of work, or health and safety, and no country is prevented from derogating from such requirements to attract foreign investment other than in *foreign trade zones*[27] (Canada has none).

[27] Article 19.4(b)

THE RIGHT TO REQUIRE FOREIGN WORKERS TO BE QUALIFIED

For three categories of foreign workers[28] Canada has committed to "grant temporary entry and provide a work permit or work authorization" to a foreign worker or investor and will not "require labour certification tests or other procedures of similar intent as a condition for temporary entry".

However, Article 12.4(3) provides:

> *The sole fact that a Party grants temporary entry to a business person of another Party pursuant to this Chapter shall not be construed to exempt that business person from meeting any applicable licensing or other requirements, including any mandatory codes of conduct, to practise a profession or otherwise engage in business activities.*

Thus while a foreign worker is entitled to enter Canada and be given a work permit, he or she may be required to meet domestic licensing or other requirements. This is certainly an important safeguard to ensure that work performed or services provided in this country are carried out according to Canadian standards – assuming of course that enforcement, which will often be a provincial responsibility, is effective. The unanswered question is why foreign workers are entitled to enter Canada and be given a work permit when they may or may not be qualified, under Canadian law, to carry out the work or perform the services they have come to Canada to carry out.

SAFEGUARDS IN THE CASE OF LABOUR DISPUTES

Article 12.4(4) offers some protection against foreign workers being used to replace Canadian workers who are on strike or otherwise involved in a labour dispute. It provides:

> *A Party may refuse to issue an immigration formality to a business person of another Party if the temporary entry of that person might affect adversely:*
>
> *(a) the settlement of any labour dispute that is in progress at the place or intended place of employment; or*
>
> *(b) the employment of any natural person who is involved in such dispute.*

However, the Article would not prevent the deployment of foreign workers who are already in Canada.

[28] For the category of Business Visitor, a work permit is not required as condition of entry, but no explicit waiver is given with respect to certification.

SAFEGUARDS FOR BORDER MEASURES

Article 12.2(3) provides:

> *Nothing in this Agreement shall prevent a Party from applying measures to regulate the entry of natural persons of another Party into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that those measures are not applied in a manner as to nullify or impair the benefits accruing to any Party under this Chapter.*

It is not clear what eventuality this rule contemplates, but the proviso that any restriction on the entry of foreign workers not nullify or impair the benefits other Parties expect to derive under TPP rules is an important qualification.

ENFORCEMENT

The dispute resolution provisions of Chapter 12 are set in Article 12.10: *Dispute Settlement,* and provide in part as follows:

> *1. No Party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) regarding a refusal to grant temporary entry unless:*
>
> *(a)* ***the matter involves a pattern of practice****; and*
>
> *(b) the business persons affected* ***have exhausted all available administrative remedies*** *regarding the particular matter.*
>
> … …
>
> [emphasis added]

The dispute procedures of Chapter 28 may be invoked when a Party alleges that another Party has failed to meet its obligations under certain TPP provisions, including those in Chapter 12. Where an arbitral panel agrees that is the case, the offending Party is to bring itself into compliance with TPP rules. Where it fails to do so, compensation may be sought by the complaining Party, in lieu of which, it may retaliate.

Chapter 28's dispute procedures may not be invoked by private investors, as is the case for disputes arising under TPP investment rules. This does not mean, however, that Chapter 12 rules might not come into play in an investor-state claim for damages under Chapter 9 of the TPP because foreign investors are one of the categories of "business persons" entitled to enter Canada. A denial of entry rights might accordingly be cast as an infringement of investor rights under Chapter 9. Moreover, a foreign investor may claim that any restriction on the entry of

foreign workers that causes harm to an investment is an infringement of the broad rights and entitlements it is accorded under TPP investment rules.

As for Party to Party enforcement proceedings under Chapter 28, the need to prove a "pattern of practice" of refusing to grant entry makes the prospect of state-to-state dispute resolution remote for reasons similar to those discussed in respect of dispute settlement under Chapter 19. This is to be contrasted with the rights of foreign investors to claim damages for each and any breach of the investor rights established under Chapter 9.

When a Party refuses to permit Canadians to work in its jurisdiction, affected workers are obliged to exhaust all available administrative remedies provided by that Party, if any. If that fails they (or more likely the company that employs them) might press its national government to invoke dispute resolution where the denial reflects a "pattern of practice." If Canada responds to such an entreaty, dispute resolution, which would likely to take at least a year, may uphold the complaint. In such a case, compensation be awarded, and if it is unpaid, retaliatory action may be taken.

During the years that are likely to elapse while the entry of Canadian workers is being blocked to a particular State, workers from that State will nevertheless continue to enjoy the benefits of having unfettered access to jobs in Canada in accordance with Canada's commitments.

A more likely cause of harm to Canadian workers (over and above the flow of foreign workers into Canada through the 'open door' created under TPP rules), would arise when foreign or domestic corporations abuse the right to bring foreign workers to Canada, to import workers that do not fall within the parameters of Canada's commitments.

Cases of such abuse have been reported and documented. [29] It is also important that the TPP imposes no obligation on the corporations that may traffic in foreign workers, and provides no recourse against them. The only remedy for Canadian workers who discover that a company is abusing TPP rules will be to press Canada to step up monitoring and enforcement of the flow of foreign workers into Canada.

For these reasons, one should not expect a speedy resolution for disputes concerning non-compliance or abuse of TPP temporary foreign worker rules.

However the more important point is that even where TPP rules are fully complied with, absent full employment in a particular sector of the domestic economy, the interests of Canadian

[29] See discussion above, and as one example, the HD Mining Company in northern British Columbia set as a job condition the ability to speak Chinese as a job pre-requisite to defeat the chances of a domestic worker being hired (CBC 2012).

workers are likely to be seriously harmed by the inflow of foreign workers to fill scarce jobs that domestic workers are ready and able to fill.

CONCLUSION

The labour rights provisions of the TPP include no substantive or even minimum standards by which compliance could be measured, and so there is no realistic prospect of holding TPP Parties to account for any failure to establish and preserve core labour rights or reasonable standards for wages, hours of work, health and safety or other work related matters. At their highest, TPP labour rules will have a hortatory effect and may inform the labour dialogue and consultation processes described by the TPP, should these take place.

However, in the context of the TPP, this potential and marginal gain for workers, should it arise, must be considered in light of the adverse impacts of the regime for working people.[30] This is patently apparent in the case of TPP labour mobility rules that remove the ability of Canada to regulate the inflow of foreign workers to take jobs unemployed Canadians are qualified for and ready to perform. If implemented, these affects will likely be immediate, severe in times of high unemployment, and because they will be entrenched in a multi-party international treaty, effectively irreversible.

Yours truly,

Steven Shrybman
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[30] Several critiques of the TPP have been published by unions and civil society groups to document the adverse impact the TPP will have on the auto sector, drug prices, and other social services.

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APPENDIX A

Canada will grant the following specialty occupations temporary entry for the nationals of Chile.

Professionals:

All occupations listed in the National Occupational Classification (NOC) levels 0 (Managers) and A (Professionals), except for:

All health, education, and social services occupations and related occupations
All professional occupations related to Cultural Industries
Recreation, Sports and Fitness Program and Service Directors
Managers in Telecommunications Carriers
Managers in Postal and Courier Services
Judges, Lawyers and Notaries except for Foreign Legal Consultants

Technicians:

The following occupations listed in the NOC level B (Technician) unless otherwise indicated:

Civil Engineering Technologists and Technicians
Mechanical Engineering Technologists and Technicians
Industrial Engineering Technologists and Technicians
Construction Inspectors and Estimators
Engineering Inspectors, Testers and Regulatory Officers
Supervisors in the following:

- Machinists and Related Occupations
- Printing and Related Occupations
- Mining and Quarrying
- Oil and Gas Drilling and Service
- Mineral and Metal Processing
- Petroleum, Gas, and Chemical Processing and Utilities
- Food, Beverage, and Tobacco Processing
- Plastic and Rubber Products Manufacturing
- Forest Products Processing
- Textile Processing

Contractors and Supervisors in the following:

- Electrical Trades and Telecommunications Occupations
- Pipefitting Trades
- Metal Forming
- Shaping and Erecting Trades
- Carpentry Trades
- Mechanic Trades
- Heavy Construction Equipment Crews
- Other Construction Trades
- Installers, repairers, and servicers

Electrical and Electronics Engineering Technologists and Technicians
Electricians
Plumbers
Industrial Instrument Technicians and Mechanics
Aircraft Instrument, Electrical, and Avionics Mechanics, Technicians, and Inspectors
Oil and gas well Drillers, Services, and Testers
Graphic Designers and Illustrators
Interior Designers
Computer and Information Systems Technicians*
International Purchasing and Selling Agents

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