

The “Labour” chapter of the Comprehensive Progressive Trans-Pacific Partnership as neoliberal regulation

by Joo-Cheong Tham

There is much that is muddy and murky about Brexit.

It is, however, clear that it will mean more trade agreements for the United Kingdom. One of the trade agreements the UK is considering joining is the Comprehensive Progressive Trans-Pacific Partnership (CPTPP). Negotiated after the United States withdrew from the Trans-Pacific Partnership (TPP), the CPTPP was signed in March 2018 by 11 nations (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam). With some exceptions, the CPTPP incorporates the text of the TPP – including Chapter 19 which deals with “Labour”.

British workers might have cause to welcome the prospect of their government joining the CPTPP. The UK Government’s *Preparing for our Future UK Trade Policy* states that “trade agreements with single countries or groups of countries can promote and support labour protections” (UK Department of International Trade, *Preparing for our future UK Trade Policy* (9 October 2017) <<https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy>>). And it has been claimed that the “Labour” chapter provides “the strongest protections for workers of any trade agreement in history” (Office of the United States Trade Representative, “Chapter 19: Labour” (5 November 2015) <<https://perma.cc/4E4N-B2E7>>).

Contrary to such rhetoric, this essay argues that the “Labour” chapter of the CPTPP constitutes a form of neoliberal regulation – faux regulation.

THE “LABOUR” CHAPTER OF THE CPTPP

This chapter is 14 pages long with 15 provisions. One provides for definitions (Art 19.1) and another proclaims the “(s)tatement of shared commitment” of the signatories as members of the International Labour Organisation (ILO) (Art 19.2). Six of the provisions impose substantive obligations upon the signatories: Article 19.3 (Labour Rights); Article 19.4 (Non Derogation); Article 19.5 (Enforcement of Labour

Laws); Article 19.6 (Forced or Compulsory Labour); Article 19.7 (Corporate Social Responsibility) and Article 19.8 (Public Awareness and Procedural Guarantees). The other seven deal with the processes for ensuring that these obligations are implemented: Article 19.9 (Public Submissions); Article 19.10 (Cooperation); Article 19.11 (Cooperative Labour Dialogue); Article 19.12 (Labour Council); Article 19.13 (Contact Points); Article 19.14 (Public Engagement); and Article 19.15 (Labour Consultations). These processes – particularly those in Article 19.15 – can ultimately lead to general dispute-settlement procedures under Chapter 28 of the CPTPP, including the establishment of an arbitral panel with the decision of panel enforced through trade sanctions.

FAUX REGULATION AS NEOLIBERAL REGULATION

The term, “neoliberal regulation”, is not an oxymoron. Markets depend on regulation. As Karl Polanyi observed decades ago, “regulation and markets, in effect, grew up together” (Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001 edition, originally published 1944) 71). More specifically, neoliberalism, in asserting the supremacy of markets, does not reject all forms of regulation — neoliberalism is not the same as *laissez-faire* regulation. Rather, it vigorously embraces regulation that foster markets and market competition. In the words of Milton Friedman, one of pioneers of neoliberalism:

*in place of the nineteenth century understanding that laissez-faire is the means to achieve (the goal of individual freedom), neoliberalism proposes that it is competition that will lead the way ... The state will police the system, it will establish the conditions favorable to competition ... (quoted in Jamie Peck, *Constructions of Neoliberal Reason* (Oxford University Press, 2010) 3-4).*

As Jamie Peck puts it, neoliberalism should be considered a political project that provides for “market-like rule” (*Constructions of Neoliberal Reason*, p 20).

It is wrong, therefore, to reduce the strategies of neoliberalism to the removal of state regulation. Neoliberalism is a project as much about reconstituting state regulation as it is about removing such regulation. This is clearly seen with the neoliberal pursuit of labour market flexibility. As many commentators have observed, the flexibility being pursued is invariably one of the employers. The drive for such flexibility has included the removal of state regulation laying down labour standards at the national level. But this does not mean a labour market free of regulation. Rather, it means, at the domestic level, a market regulated primarily through contract and property law — and, it bears emphasis, such laws clearly constitute regulation. Similarly, at the international level, the absence of specific regulation of labour standards in relation to international trade will mean that national regulation and other aspects of international trade law, such as the WTO rules, come to the fore.

Neither is neoliberalism necessarily inconsistent with intense state regulation — remember it seeks to provide for “market-like rule”. In doing so, it will, on occasion, deploy coercive state regulation. Consider for example the “command and control” regulation of trade union activities through national legislation; or, for an international example, the restructuring of collective bargaining in Greece as a condition of loans made by Troika (European Commission, European Central Bank and International Monetary Fund).

The “Labour” chapter of the CPTPP does not sit on either ends of the spectrum of neoliberal regulation (removal of state regulation and coercive state regulation). Instead, it occupies a liminal place that is part of “market-like rule” — faux regulation.

As we see with the “Labour” chapter, faux regulation is still regulation. It is so in three salient ways. First, it purports to lay down rules to govern certain activities — the “Labour” chapter seeks to “PROTECT and enforce labour rights” (*Trans-Pacific Partnership*, signed 5 October 2015 (not in force) Preamble, II (emphasis in original)). Second, it adopts the form of regulation — the “Labour” chapter is a separate chapter running into 14 pages replete with serious-sounding legal language. Third, it provides for legal processes — nearly half of the chapter’s provisions are devoted to this.

Yet, faux regulation is nevertheless *faux* as it will have an insubstantial impact on its regulatory objectives. And it is *faux regulation* in that its lack of impact will be born out of a thicket of legal technicalities. The CPTPP’s “Labour” chapter stands forth as an example of such legalised minimalism because it provides for flexible standards and standards for flexibility.

FLEXIBLE STANDARDS

By “flexible standards”, we do not simply mean to refer to flexibility in the application of labour regulation — labour regulation will invariably have such flexibility especially at the international level. What we mean to convey by this phrase are situations where the flexibility is so significant as to seriously

call into question whether a standard is being laid down; where the flexibility is so considerable that we are inclined to say that there is no legal norm.

It is this kind of flexibility that we find with the centrepiece of the “Labour” chapter, Article 19.3, which is reproduced below together with its footnotes.

Article 19.3: Labour Rights

1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:^{3 4}
 - (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, 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.
2. 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

³ The obligations set out in Article 19.3 (Labour Rights), as they relate to the ILO, refer only to the ILO Declaration.

⁴ To establish a violation of an obligation under Article 19.3.1 (Labour Rights) or Article 19.3.2, a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties.

⁵ For greater certainty, this obligation relates to the establishment by a Party in its statutes, regulations and practices thereunder, of acceptable conditions of work as determined by that Party.

Both of the sub-clauses provide for flexible standards (as understood in this paper). With sub-clause (1), there is flexibility stemming from reliance on “the rights as stated in the ILO Declaration” not only because the obligations are cast in terms of abstract rights but also because they have been extracted from the follow-up mechanisms provided under the Declaration — annual mechanisms that could provide more specific content to these rights (see *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, 86th ILC sess (adopted 18 June 1998), para 4 & Annex (Revised): Follow-up to the Declaration). Under the “Labour” chapter, authoritative rulings as to the meaning of these “rights” will issue only through arbitral decisions under Chapter 28 of the CPTPP. The grindingly slow processes under labour provisions of US trade agreements strongly suggest that this institutional mechanism will not be effective in clarifying the meaning of these rights. Notably, the first and only arbitral decision in this context — a decision to which the paper will return —

was handed down more than nine years after the relevant complaint was lodged (*In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (Final Report of the Panel) (Arbitral Panel established pursuant to Chapter Twenty, Dominican Republic – Central America – United States Free Trade Agreement, 14 June 2017)).

Footnote 3 points to a further source of flexibility. There are two significant implications of footnote 3 which can be illustrated by reference to freedom of association. First, the obligations under Article 19.3(1) do not necessarily incorporate the relevant Conventions and Recommendations relating to these rights. This will mean that Article 19.3(1) will not necessarily benefit from the greater degree of specificity found in the relevant Conventions. For instance, the two ILO Conventions on freedom of association, whilst still cast at a high level of generality, provide more detailed obligations relating to the establishment of trade unions (*Convention concerning Freedom of Association and Protection of the Right to Organise* (No 87), opened for signature 9 July 1948 (entered into force 4 July 1950) art 2); their right to constitute the rules of their organisations and to organise their activities; their autonomy from employers (*Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (No 98), opened for signature 1 July 1949 (entered into force 18 July 1951) arts 2(2) & 3); and anti-union discrimination (*Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (No 98), opened for signature 1 July 1949 (entered into force 18 July 1951) arts 1, 2(1) & 3).

Second, the meaning of rights referred to in Article 19.3(1) is not necessarily influenced by the jurisprudence of ILO supervisory bodies. The critically important question with freedom of association is whether Article 19.3(1) by providing for “freedom of association and the effective recognition of the right to collective bargaining” includes the right to strike. This right, whilst not explicitly mentioned in the ILO Conventions 87 and 98, has been held by the ILO Committee on Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations to inhere in Articles 3 and 10 of the *Convention Concerning Freedom of Association and Protection of the Right to Organise* (No 87), opened for signature 9 July 1948 (entered into force 4 July 1950).

These sources of flexibility, due to reliance on the rights recognised in the 1998 ILO Declaration, give substance to the criticism of Alston and Heenan of the Declaration that “(c)ommitment solely to a broad statement of principle ... can make the standard potentially meaningless and leave its definition open to abuse by the more powerful party in a dispute” (Philip Alston and James Heenan, “Shrinking International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work” (2004) 36 *New York University Journal of Law and Politics* 221, 246).

The warning they issued perhaps finds vindication when considering the case of the United States. The US has only

ratified two out of eight fundamental conventions (*Convention concerning the Abolition of Forced Labour* (No 105), opened for signature 25 June 1957 (entered into force 17 January 1959); *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (No 182), opened for signature 17 June 1999 (entered into force 19 November 2000)) — it is equal last with Brunei amongst TPP signatories. It has also been considered by its Labor Advisory Committee on Trade Negotiations and Trade Policy to be “out of compliance in a number of ways with fundamental labor rights” (United States Labor Advisory Committee on Trade Negotiations and Trade Policy, *Report on the Impacts of the Trans-Pacific Partnership* (Report, 2 December 2015) 69 <<https://perma.cc/7QKC-WG6K>>). And yet the 2007 Bipartisan Trade Deal, which parented the reliance on the ILO Declaration in labour chapters in US trade agreements, could state with no equivocation that the United States was in “(c)ompliance with the ILO Declaration” (Office of the United States Trade Representative, Trade Facts (Factsheet, May 2007) <<https://perma.cc/N2R7-FAWB>> 2).

As to second sub-clause of Article 19.3, its flexibility is obvious not only because of the text of footnote 5 leaves the determination of what are “acceptable conditions of work” to the discretion of individual signatory States, but also because of the lack of reference to the many ILO instruments in the areas nominated in the Article (18 Conventions and 23 Recommendations in the case of occupational safety and health (International Labour Organization, *List of Instruments by Subject and Status*, “12. Occupational Safety and Health” <<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12030:0::NO::>>); 10 Conventions and 6 Recommendations in the case of hours of work (ibid, 11 “Working Time”)).

STANDARDS FOR FLEXIBILITY

With flexible standards, we were dealing with ostensibly hard legal provisions that turned up to have rubbery insides. The “Labour” chapter further provides for legalised minimalism through standards for flexibility: non-existent standards, liquid-soft obligations; heavily qualified obligations and standards unlikely to be implemented.

The preamble to the 1998 ILO Declaration on Fundamental Principles and Rights at Work gives us a clue as to the areas where the “Labour” chapter ought to have laid down standards but failed to do so. It states that “the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers”. Rather than “special attention”, the “Labour” chapter casts these groups of workers to the margins, burying issues of their specific concern in the numerous topics that can be subject to cooperative activities between the parties (Art 19.10(6)(n) (i) and (iii)).

Accompanying the absence of standards in relation to the unemployed and migrant workers are liquid-soft obligations. We find this in Articles 19.6 and 19.7, whose text speak for themselves:

Article 19.6: Forced or Compulsory Labour

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. (emphasis added)

Article 19.7: Corporate Social Responsibility

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).

The third way in which the “Labour” chapter lays down standards for flexibility is through heavily qualified obligations. Most – if not all — breaches of the obligations in this chapter require demonstrating that they occur “in a manner affecting trade or investment”. This is explicit with the three most significant provisions (Art 19.3: Labour Rights; Art 19.4: Non Derogation; Art 19.5: Enforcement of Labour Laws). But even with the other provisions imposing substantive obligations, some of the processes under the chapter strongly suggest that allegations of their breaches need to establish how they occur “in a manner affecting trade or investment” (Art 19.2(c): Public Submissions; Art 19.11(2): Cooperative Labour Dialogue).

This cross-cutting requirement has the potential to render many of the obligations under the “Labour” chapter nugatory. This risk is highlighted by the unsuccessful complaint by US against Guatemala under CAFTA-DR - 2017 Arbitral Panel Decision, the first ever arbitration relating to labour provisions under a trade agreement, where it was an analogue of this requirement that proved to be fatal to the complaint. In the words of the arbitral panel:

The United States has proven that at eight worksites and with respect to 74 workers Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders, but not that these instances constitute a course of inaction that was in a manner affecting trade (In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (Final Report of the Panel) (Arbitral Panel established pursuant to Chapter Twenty, Dominican Republic – Central America – United States Free Trade Agreement, 14 June 2017) para 594 (emphasis added)).

Key to the decision of the panel was its interpretation of “in a manner affecting trade” so as to require the conferral of “some competitive advantage on an employer or employers engaged in trade between the Parties” (ibid, para 190). Thus, it was not sufficient in that case for a failure to effectively enforce a party’s labor laws through a sustained or recurring course of action or inaction to affect enterprises in the traded sector. What was further required, in the words of the Panel, was that “these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises” (ibid, para 196).

The difficulties with the panel’s analysis and conclusion have been incisively analysed in an abridged and annotated

version of the ruling by the International Labor Rights Forum (International Labor Rights Forum, “Wrong Turn for Workers’ Rights: The US–Guatemala CAFTA Labor Arbitration Ruling — and What to Do About It” (International Labor Rights Forum, March 2018)). This analysis makes clear the evidential challenges resulting from the ruling. These stem, firstly, from the type of information necessary to demonstrate a competitive advantage. As the International Labor Rights Forum correctly stated, the panel’s decision “requires showing that an employer gained a competitive advantage, with sufficient financial evidence and analysis to prove it” (ibid, 20). As it went on to pointedly observe, “only the most intimate cost/sales/profits information in the hands of that employer alone could support such a showing” (ibid). Second, the specificity required by the panel ruling sets up formidable evidentiary hurdles — it is impact on particular firms that needed to be demonstrated. As the International Labor Rights Forum analysis correctly put it in one case, such specificity required “a nearly impossible research job in practical terms” (ibid, 25) and in another threw up “impossible logistical hurdles” (ibid, 26). These evidentiary demands — if applied to the CPTPP — will likely asphyxiate its “Labour” chapter or at least many of its parts

Finally, there is the unlikelihood that the obligations under the “Labour” chapter, however attenuated, will be effectively enforced by the state signatories. In an earlier analysis of the TPP with the US as the dominant party, we argued that there will be a general orientation to non-application of its “Labour” chapter. Even without the US, we still anticipate an orientation to non-application. Except for Canada, none of the CPTPP signatories strongly support the “Labour” chapter; for all, the CPTPP is principally directed at market access. For “developed” countries such as Australia, Canada and New Zealand, there is the apparent belief (or hubris) that they are already in compliance with the “Labour” chapter, despite compelling evidence to the contrary especially in relation to freedom of association (see, for example, on Australia, International Labour Office, Committee on Freedom of Association, *Complaint against the Government of Australia Presented by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)* (357th report, 308th sess, Agenda Item 3, June 2010)). This false belief will carry with it the assumption that this chapter does not require any significant regulatory changes, an assumption that “developing” countries are unlikely to disturb given their own lack of compliance. All this will be reinforced by the flexibility of the chapter. Even without the US, there will likely be mutually assured non-compliance.

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