

THIRD WORLD

RESURGENCE

ISSUE No. 303-304

KDN PP6738/01/2013 (031)

www.twn.my



**Why we should say NO to
the Trans-Pacific Partnership**



ISSN 0128-357X



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Double
issue

Editor's Note

AFTER nearly six long years of secret negotiations, the Trans-Pacific Partnership (TPP) agreement has at last seen the light of day. Negotiators from the 12 contracting parties settled its final terms on 5 October and released the text a month later. More critically, the people of these countries on whose behalf and for whose benefit the gruelling negotiations were meant to be carried out are now able to see what is in store for them.

For the average citizen, having access to the revealed text of a 30-chapter, almost-6,000-page trade treaty is one thing; making sense of its almost incomprehensible legalese and convoluted obligations is another. And what will be even more incomprehensible to them will be the fact that the text, like any true revealed text, cannot be amended.

However, while it can be accepted, it can also be rejected in toto. That task of determining this now falls upon the respective legislatures of the signatory nations. The agreement requires such assent as a *sine qua non* for its legal validity.

This must not be misread as a genuine albeit belated submission to the people's will. The fact is that in this process national legislatures cannot be bypassed altogether as (particularly in the case of the developing-country parties to the agreement) legislation will have to be enacted to give effect to the far-reaching changes imposed by the trade pact. Far from being an exercise in democracy, this belated turn to national legislatures is the necessary means of locking these countries into the regime of liberalisation, deregulation and privatisation which constitutes the essence of this treaty.

Even before its contents were made public, there were fears, originating from leaks of some parts of the draft, that the TPP was mainly directed at serving corporate interests by compelling signatory countries to liberalise their investment rules, deregulate their financial markets and privatise their public and state enterprises. Even more alarming were the perceived moves to impose on signatory states a stricter intellectual property rights regime and a juridical framework and system wholly favourable to big corporations.

Now that the treaty has been made public, it is clear that all these fears were well founded.

Of major concern to developing countries are the intellectual property provisions of the treaty, which will prove to be particularly devastating to their public health systems. By beefing up even further the already exorbitant patent rights enjoyed by Big Pharma under the current international regime, the TPP enhances the monopolistic control these companies have on the production and marketing of vital drugs.

The treaty affords new opportunities for these patent holders to extend the time limits on the validity of their patents. Specifically, it facilitates the increasing resort to the notorious practice of 'evergreening', under which drug companies secure renewed patent protection for a drug whose patent is due to expire, by using a variety of questionable strategies, e.g., slight variations on the original drug, new forms of release, new dosages and new combinations. By means of such dubious strategies,

they succeed in keeping generic versions off the market and the drug prices artificially high. For developing countries battling epidemics such as HIV/AIDS and hepatitis, the impact of the TPP can therefore be disastrous.

The TPP provisions on financial services are another source of concern. These provisions impose on signatory countries an obligation to maintain a regime of free, unrestricted capital flows in and out of the country. Ignoring the lessons of the 1997 Asian financial crisis and the 2007-08 Great Recession about the dangers of destabilising financial flows, the provisions effectively prohibit the imposition of capital controls. To make matters worse, states are also obliged to permit the entry of risky financial assets (such as the toxic derivatives which played a major role in the 2007-08 global financial crisis) in their financial markets if such assets are available in the markets of any other signatory state. If a signatory state moves to ban such a product, it stands in danger of being sued under the provisions of the TPP by the financial firm which issued the product.

It is unlikely that such legal action will be instituted in the local courts of the host country under that country's domestic laws. This is because, although the TPP is a government-to-government agreement, its incorporation of an 'investor-state dispute settlement' (ISDS) system privileges a foreign investor with the right to bring a claim against the host government before an arbitral tribunal. Given the fact that the arbitrators are drawn from a small, tightly knit group of Northern corporate lawyers who alternate between acting as judges in one dispute and lawyers in another, it is not surprising that their decisions have betrayed a strong corporate bias. The staggering awards they have made on the most spurious challenge by foreign investors claiming 'a loss of potential profits' against government regulations imposed in the public interest have only served to confirm the charge that, in the ultimate analysis, the TPP is a 'corporate charter.'

There is much else in the TPP that is against the public interest and detrimental to the developmental goals of the countries of the South. With national legislatures set to debate this agreement, it is imperative to intensify the national and international campaign to reject the agreement.

Our cover story focuses on many of the disturbing aspects of the TPP. Attention is drawn to how it will impact on the fundamental right of access to medicine and healthcare. Other developmental concerns such as the TPP's imposition of a regime of extreme financial deregulation are also highlighted. An analysis of the ISDS system seeks to show how national judicial systems will be subordinated to foreign arbitral tribunals in the interests of corporations. The broader threat posed to democracy, national sovereignty and human rights is also broached.

— The Editors

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Third World
RESURGENCE

www.twn.my

No 303/304 Nov/Dec 15 ISSN 0128-357X



A man holding up a placard during a protest in Tokyo against the Trans-Pacific Partnership (TPP) agreement. The recently released final text of the accord shows that the TPP would be even more damaging to the public interest than earlier feared and should be rejected.

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THIRD WORLD RESURGENCE is published by the Third World Network, an international network of groups and individuals involved in efforts to bring about a greater articulation of the needs and rights of peoples in the Third World; a fair distribution of world resources; and forms of development which are ecologically sustainable and fulfil human needs.

THIRD WORLD RESURGENCE is published monthly by Third World Network, 131 Jalan Macalister, 10400 Penang, Malaysia. Tel: 60-4-2266728 Fax: 60-4-2264505. Email: twn@twnetwork.org
Printed by Jutaprint, No. 2, Solok Sungai Pinang 3, 11600 Penang, Malaysia.
Cover Design: Lim Jee Yuan
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The high cost of Indonesia's fires

The raging forest fires in Indonesia which have had such calamitous ecological, health and economic consequences for the region are not the product of biophysical causes but of corporate greed. *Nithin Coca* explains.

ENORMOUS fires have been burning for several months on the Indonesian side of Borneo and on Sumatra. The resulting haze has been a catastrophe for the region, with severe impacts for human health and wildlife. The fires are also a climate disaster, resulting in 1.62 billion metric tons of carbon dioxide emissions so far this year – triple Indonesia's normal annual output.

'The haze is a humanitarian disaster caused by a man-made environmental crisis, and threatens the health of millions,' said Annisa Rahmawati, a forest campaigner with Greenpeace Indonesia. 'Decades of destruction have turned Indonesia's forests and peatlands into a ticking climate bomb.'

Indonesia's tropical forests are one of the world's three major 'lungs', along with the Amazon and Congo river basins, sucking up vast amounts of carbon and emitting oxygen. The Indonesian forests also support immense biodiversity – 10% of the world's known plant species, 12% of mammal species and 17% of all known bird species can be found on the archipelago. This biodiversity is exhibited in beautiful ways. For example, Sumatra is the only place on the planet where rhinos, tigers, elephants and orangutans all live alongside each other.

Critical to this rich landscape are Indonesia's peatland swamp forests, which form in moist soil that prevents organic material from fully decomposing. These peat bogs and swamps, though less biodiverse than other tropical forests, contain some of the densest carbon stock in the world. They are a critical component of the natural carbon sink in South-East Asian forests and regulate climate glo-



A soldier drags a hose while fighting a peatland fire in Ogan Ilir, Sumatra.

bally.

Unfortunately, tropical rainforests and peatlands across Indonesia have been burning since August. With more than 130,000 fire hotspots detected so far, the scale of the fires is unprecedented.

So why are we seeing such bad fires this year? In short, timber and palm oil development, exacerbated by the fact that El Nino has prolonged the dry season.

'Companies destroying forests and draining peatland have made Indonesia's landscape into a huge carbon bomb, and the drought has given it a thousand fuses,' Bustar Maitar, Indonesian forest project leader for Greenpeace South-East Asia, said in a statement.

Fires are not a common part of the ecological cycle in Indonesia and, according to sources on the ground in Sumatra, did not frequently occur before 1997. Not coincidentally, that is when the palm oil and pulp booms transformed the landscape.

'There is no natural fire there – it is all caused by people,' said Dr Robert Field, a fires expert at Columbia University's Earth Institute. 'Fire is completely preventable.'

Indonesia is the global leader in terms of palm oil, pulpwood and tim-

ber production, and fires are used to clear the land and make way for agricultural production. The driving force behind this destructive system is foreign demand. In the United States, palm oil is being used by companies including PepsiCo, Nissin and Frito Lay as an alternative to hydrogenated oils. In Europe, it is used as a biofuel. Today, the biggest markets for palm oil are China and India.

Of course, there are other ways to clear forest, but fire is often cheaper – set a fire and then nature takes over. Fires also provide an opportunity for land grabs in Indonesia, adding an additional incentive for those who want land. Due to restrictions on deforestation, pristine forests are more difficult to legally convert into palm oil or pulp plantations. But recently burned forest and peat? It becomes 'degraded land' that is ripe for agricultural production. Greenpeace has already observed this pattern of land grabbing on recently burned land in Borneo.

'Fire is mostly due to social politics rather than through biophysical causes, but the actions enacted by [the Indonesian] Government focus mostly on fighting fire, not the underlying causes – poverty, conflict and large companies,' said Herry Purmono, a scientist of forest governance at the Indonesia-based Center for International Forestry Research, and a professor at Bogor Agricultural University.

When you really dig in though, fire isn't cheap at all. It has expensive externalities, most obviously the haze and smoke. These costs are not borne by those burning the land, but instead are passed on to the entire region. The haze has caused respiratory

problems in more than 500,000 people. The ultimate toll on wildlife is not yet known, though scientists believe that the impact on endangered species like the orangutan and Sumatran elephant might be severe.

And then there are the carbon emissions. Since September, the daily emissions in Indonesia have exceeded the daily emissions of the entire US economy. So far, Indonesia has moved from being the sixth largest emitter in the world to the fourth largest.

Consider also the estimated \$50 million per day spent on firefighting in October, not to mention the \$14 billion in estimated negative economic and tourist impacts from the fire. This money could have been better used towards ecosystems restoration and forest preservation.

If the true costs of deforestation were factored into the cost of palm oil, it would no longer be such a cheap alternative. Any long-term solution to the fire problem necessitates a strong push for sustainable palm oil and pulpwood supply chains.

'From now on, there must be a unanimous agreement that any company putting lives at risk by clearing forests will be unable to sell its products,' said Longgena Ginting with Greenpeace Indonesia. 'Companies that ignore the warnings and continue to destroy forests and peatlands must be held responsible for fires and haze engulfing South-East Asia.'

The fires are expected to burn into January, and beyond that, local NGOs are pushing for ecosystems restoration and a ban on development on peatlands. Indonesia's President Joko Widodo has pledged to create a new agency that would rehabilitate degraded land and prohibit planting on peatlands. This, more than anything, will help prevent future fires from burning. In the end, though, to truly make a difference, the global economic system must be transformed to value forests, biodiversity and clean air more than corporate profits. ◆

This article first appeared on the website of Earth Island Journal (www.earthisland.org/journal).

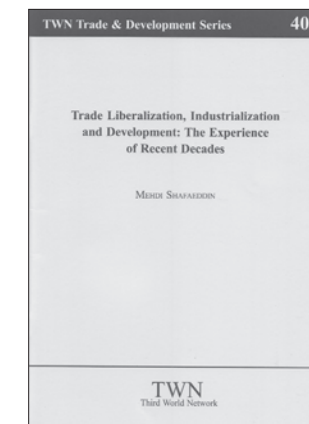
Trade Liberalization, Industrialization and Development: The Experience of Recent Decades

By Mehdi Shafaeddin

In this paper, the author analyzes the experience of countries in trade liberalization in the light of the debate between neoliberals and neo-developmentalists. The latter regard selective and gradual trade liberalization as necessary at a certain level of development and industrialization. The former group advocates universal, across-the-board and rapid liberalization by developing countries, irrespective of the level of development and industrialization of the country concerned.

The historical evidence from the early industrialization period, the author finds, does not support the claims of the advocates of universal and across-the-board free trade. More recent experience from the last quarter-century also bears this out, with developing countries which had undertaken full-blown trade liberalization facing de-industrialization or becoming locked in low-value-added manufacturing based on natural resources and assembly operations.

The paper also specifically compares the recent performance of China and Mexico, two economies which share similarities but which have followed different approaches to trade liberalization and industrialization. Mexico has been following policies recommended by the neoliberals, while the Chinese government has pursued an experimental and developmentalist approach, implementing policies for building the capabilities of domestic firms while also gradually liberalizing



Trade & Development series no. 40
ISBN: 978-967-5412-49-3 48pp

international trade. Their contrasting experiences, it is argued, point to developing countries' need for a dynamic and flexible trade policy that not only eschews premature liberalization but also operates in tandem with a development-oriented industrial policy.

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Brazilian mine disaster releases dangerous metals

The collapse in November of a mining dam in the Brazilian state of Minas Gerais, which resulted in the inundation of a whole town under a sea of mud contaminated with toxic iron ore waste and silica, was one of the country's worst environmental disasters.

Both the mine operator (a joint venture between mining giants BHP Billiton and Vale) and the Brazilian authorities have come under fire from UN rapporteurs for their negligence in failing to take measures to avert the accident.

Luisa Massarani

THE environmental disaster that has followed the collapse of a dam at a Brazilian mine on 5 November has caused unprecedented damage in that country and will have irreversible negative effects on human health and the environment, according to experts.

The accident buried the small historic town of Bento Rodrigues, a sub-district of Mariana, under mud. At least 11 people have died and more than 600 were displaced. In addition, the water supply of more than 250,000 people in the area was interrupted as it was contaminated with heavy metals.

Tonnes of mud made up of iron ore waste and silica, originally estimated to be about 25,000 Olympic swimming pools in volume, have spread over 800 km and reached one of the largest Brazilian rivers, the Rio Doce. The contaminated mud, in which the Minas Gerais Institute of Water Management has found toxic substances like mercury, arsenic, chromium and manganese at levels exceeding drinking water limits, has reached the coast of the state of Espírito Santo. It could potentially impact the wider marine ecosystem.

The risks go beyond the particular chemical elements found in this mud. Dam water was also contaminated with harmful bacteria.

Many are blaming the disaster on Samarco, which is the Brazilian mining company in charge of the dams. The company is a joint venture between the mining giants Vale of Bra-



The collapse of a dam at a Brazilian mine on 5 November buried the town of Bento Rodrigues under contaminated mud.

zil and BHP Billiton of Australia.

More dams at risk

Although it was initially announced that two dams had collapsed in the mine, representatives of the National Department of Mining Production surveyed that area by air and have confirmed that only the Fundao dam collapsed. They warned, however, that Samarco's Santarem dam has been 'overrun' and remains at risk of collapse, as does the company's Germano dam.

'As there was never an environmental incident of this magnitude, it is impossible to calculate the real impact right now,' says Klemens Laschefski, a researcher at the Federal University of Minas Gerais.

'The changes in the flow of the

river in respect to the currents and the new geochemical conditions in the sediments will bring profound ecosystem changes, which will also influence the species, including with the possibility of disappearance of endemic species,' Laschefski warns. In addition, he says water plants in the area are endangered because the mud that now covers them will eventually harden like cement, due to its high iron content.

Aloysio da Silva Ferrao Filho, a researcher at the Oswaldo Cruz Foundation, agrees that the situation is dire. 'The entire ecosystem is under threat and the impacts can even reach the marine food chain, possibly even the Abrolhos coral reefs, which are quite sensitive to sedimentation of inorganic material,' he told *Chemistry World*.

Ferrao says these effects can last

for decades. He says the high concentrations of heavy metals in the water samples from the Rio Doce could lead to the bioaccumulation of metals in the food chain, and possibly reach toxic levels in some organisms.

Biodiversity lost

‘The biodiversity of the river is completely lost,’ Ferrao states. ‘Several species, including endemic ones, must be extinct.’ Although some recovery must be expected through restocking from other tributaries, he says it is impossible to estimate how long such reclamation would take.

Several investigations are underway to determine the causes of the disaster, including one by federal and state prosecutors, and others by the Brazilian Institute for the Environment and an independent group of researchers.

Samarco states that several small seismic tremors that occurred in the area could have caused the dam damage, but some experts point to negligence on the part of the company and the government bodies responsible for overseeing the mine.

For example, Laschefski states that the risks of rupture of the Fundao dam, and the lack of a contingency plan for such a scenario, were well documented back in 2013. Nevertheless, he says that Samarco has not taken measures to address such threats, and actually increased its waste production.

On 11 November, the CEOs of Vale and BHP Billiton jointly pledged to support Samarco in creating an emergency fund to rebuild damaged infrastructure and provide relief for those affected by the disaster. In fact, Samarco representatives signed an agreement with state and federal prosecutors on 16 November to pay at least \$250 million to cover emergency measures.

On 13 November, a judge in Mariana granted an injunction freezing \$75 million in Samarco’s bank account to provide for reparations to local victims of the accident. The previous day, Brazilian President Dilma Rousseff had confirmed a \$62.5 mil-

lion fine for the mining company, announcing that other fines could be forthcoming. ♦

This article is reproduced from the website of Chemistry World (www.rsc.org/chemistryworld), the print and online magazine of the Royal Society of Chemistry.

‘This is not the time for defensive posturing’ – UN rights experts

TWO United Nations independent experts on environment and toxic waste on 25 November called on the government of Brazil and relevant businesses to take immediate action to protect the environment and health of communities at risk of exposure to toxic chemicals in the wake of the catastrophic collapse of a tailing dam on 5 November.

‘This is not the time for defensive posturing,’ said the UN Special Rapporteur on human rights and the environment, John Knox, and the Special Rapporteur on human rights and hazardous substances and wastes, Baskut Tuncak. ‘It is not acceptable that it has taken three weeks for information about the toxic risks of the mining disaster to surface.’

‘The steps taken by the Brazilian government, Vale and BHP Billiton to prevent harm were clearly insufficient. The Government and companies should be doing everything within their power to prevent further harm, including exposure to heavy metals and other toxic chemicals,’ they stressed.

New evidence shows the collapse of a tailing dam belonging to a joint venture of Vale and BHP Billiton (Samarco Mining SA) released 50 million tons of iron ore waste containing high levels of toxic heavy metals and other toxic chemicals in the Doce River. Hospitals in Mariana and Belo Horizonte, the capital city of Minas Gerais State, have received several patients.

‘The scale of the environmental damage is the equivalent of 20,000 Olympic swimming pools of toxic mud waste contaminating the soil, rivers and water system of an area covering over 850 kilometres,’ Knox warned.

The expert noted that the Doce River, one of Brazil’s great water-

sheds, ‘is now considered by scientists to be dead and the toxic sludge is slowly working its way downstream towards the Abrolhos National Marine Park where it threatens protected forest and habitat. Sadly the mud has already entered the sea at Regencia beach, a sanctuary for endangered turtles and a rich source of nutrients that the local fishing community relies upon.’

‘The Brazilian authorities should assess whether Brazil’s laws for mining are consistent with international human rights standards, including the right to information,’ said Tuncak, who recently presented a special report on the right to information in the context of hazardous substances to the UN Human Rights Council.

‘Under international human rights standards, the State has an obligation to generate, assess, update and disseminate information about the impact to the environment [of] hazardous substances and waste, and businesses have a responsibility to respect human rights, including conducting human rights due diligence,’ the expert stressed.

The Special Rapporteurs stated that ‘this disaster serves as yet another tragic example of the failure of businesses to adequately conduct human rights due diligence to prevent human rights abuses.’

‘There may never be an effective remedy for victims whose loved ones and livelihoods may now lie beneath the remains of [the] tidal wave of toxic tailing waste, nor for the environment which has suffered irreparable harm,’ they said. ‘Prevention of harm must be at the centre of the approach of business whose activities involve hazardous substances and wastes.’ – *Office of the UN High Commissioner for Human Rights* ♦

The twisted logic of the Fed's new 'Operation Twist'

The recent decision by the US Federal Reserve to raise interest rates which had been near zero since 2008 was a response to pressure from Wall Street, says *Gerald Epstein*.

THE US Federal Reserve announced on 16 December that it would raise policy interest rates by $\frac{1}{4}$ to $\frac{1}{2}$ of 1%, ending the seven-year policy of keeping Fed interest rates near zero, and would embark on a path of 'gradual' interest rate increases in order to 'normalise' interest rates.

This announcement had been long expected by pundits, economists and the financial markets, and, more to the point, had long been pushed by Wall Street and their supporters. It was telling that the first question asked by a reporter in Fed Chair Janet Yellen's press conference following the announcement was not a question at all. The reporter blurted out a sigh of relief: 'Finally!' he exulted. The *Financial Times*' Lex column headline: 'US Monetary Policy At Last'.

In fact, the financial media have been huge cheerleaders for a rate hike. In the months leading up to this announcement, much of the business press had been pushing for an increase. In September, when the Fed did not raise rates, much of the financial press ran headlines like this one from the *Wall Street Journal*: 'The FED Blinks'. The *Journal* was not alone with phrases like 'the open market committee sat on its hands'. Blinking and hands sitting: these suggest lack of courage, weakness and worse. Neil Irwin of the *New York Times* personalised it to Janet Yellen with a 17 September headline: 'Why Yellen Blinked on Interest Rates.'

Well, on 16 December, Yellen did not blink, and the financial press and many economists and pundits were clearly pleased. Yet, as thoughtful members of the press and economists pointed out, economic conditions are not much better, and in some ways are worse, in December than they had

been in September.

Writing almost immediately after the decision, Dean Baker of the Center for Economic and Policy Research (CEPR) gave multiple reasons why data do not support a decision to raise rates. He points out that while the official unemployment rate of 5% is not particularly high, 'most other measures of the labour market are near recession levels.' The percentage of the workforce working part-time but who really want full-time jobs is near the highs reached after the 2001 recession. The percentage of workers willing to quit their jobs to look for a better job is also at near recession highs. 'If we look at employment rates, the percentage of prime-age workers (ages 25-54) with jobs is still down by almost three full percentage points from the pre-recession peak.' Finally, wage stagnation is still significant, even despite some recent low gains.

The signs of weakness and uncertainty globally are also still strong. John Authers of the *Financial Times* shows in a series of graphs that market participants expect inflation to fall further, not rise to the 2% level expected by the Fed. Oil prices continue tumbling, which could be a source of demand for consumers but, like other aspects of deflation, put downward pressure on important sectors and, if they interact with excessive debt, can contribute to pressures for a debt deflation spiral. Global equities have fallen along with oil and other commodity prices, perhaps a sign of weakening profit expectations. And, importantly, the value of the dollar continues to rise, which might help foreign exporters but serves as a drag on US economic production by making it less competitive. This problem is ex-

acerbated by the fact that the European Central Bank is moving in the opposite direction by lowering interest rates – even into negative territory.

All of this raises the obvious question: how could Janet Yellen and the Federal Reserve justify their rate increase now, despite strong signs that there is little economic basis for doing so?

Call this the Fed's new 'Operation Twist': an exercise not in twisting the term structure of interest rates to lower long rates and raise short rates as in earlier times, but in twisted logic, plain and simple.

This was apparent in the Fed's press release, and even more in Yellen's press conference following the Federal Open Market Committee meeting. Her justification for raising rates rested on several questionable, and even strange, twists of logic.

The first, and most important, is the confidence the Fed has that inflation will continue to rise towards its 2% target, even though, by raising rates, the Fed will be putting downward pressure on the economy. They are thus creating an additional 'headwind' to join the other global forces in the domestic and global economies – weak demand in China, commodity market gluts, and uncertainty over terrorism and global security – that all suggest that inflation will remain weak.

Part of the reason they believe inflation will rise despite the increase in interest rates and other negative forces is that they believe that, with lower unemployment, workers will achieve the bargaining power to raise their real wages. But in the current context of weak bargaining rights, globalisation by US multinational corporations and the continued weak-

ness in the labour market domestically, worker real wages are likely to continue doing what they have done for decades now: remain relatively stagnant.

These odd examples of twisted logic seem minor, though, compared to some of the more bizarre arguments made by Yellen and the Fed.

In her statement and answers to questions after her remarks, Yellen said several times that the increase in interest rates is a strong sign of the Fed's confidence in the strength of the American economy. Because, after all, if the US economy were not doing well, then of course the Fed would not be raising rates, right?

Here is an example of the Fed trying to play the classic game of the 'confidence fairy' – we will raise your confidence by pretending we are confident. But it is rather more like 'whistling past the graveyard': with the data out there for everyone to see, most are unlikely to be fooled. It is also a little like saying: we are going to get in our truck and run you over because we are confident that you are strong enough to take it.

And here is perhaps the strangest twisted logic of all: Yellen said that they want to raise rates now because they are worried that if there is a downward shock to the economy, with interest rates at the zero bound, they will have fewer tools (less ammunition) to counteract the shock.

Doesn't this sound like she is saying 'we are going to create a downward shock, so later it is easier to counteract it'?

The final example is the argument that they want to raise rates preemptively now, before there is any clear sign of excessive inflation, because lags in monetary policy mean that if they wait they might be too late and then they will have to raise rates more abruptly and this will be even more disruptive.

We must ask the question: who do more rapid increases disrupt? The answer is likely to be the speculative financial markets, and the banks who might find that the speculative positions they take have been mistaken. So here, in paying excessive concern for the speculative financial markets, the Fed is willing to raise interest rates

before the labour market is really ready.

This also begs the question: where does the 2% inflation target come from? It is completely arbitrary, which even Ben Bernanke, the architect of the new inflation targeting at the Fed, admits. Would it be better to allow a shallow rate increase trajectory at the appropriate time, and let inflation overshoot its arbitrary 2% target, than risk prematurely nipping the recovery in the bud?

To be sure, Yellen repeatedly said that the increase in rates will be gradual. But projections by the Fed policymakers suggest anything but a gradual rate increase. These projections of the expectations of the policymakers (not their plans, to be clear) show interest rates rising to between 2% and 3% by the time the new President is inaugurated.

Why is it that Yellen – clearly a very smart economist who is committed, like perhaps no Fed Chair before her, to trying to achieve full employment and reduce inequality – would engage in such questionable arguments and problematic actions?

The most likely answer is probably that Yellen faces enormous pressure from her own committee and outside forces to raise rates sooner rather than later. These outside forces are the banks. A series of papers have shown that in general, bank profits increase with higher interest rates. Economists at the Bank for International Settlements (BIS) have done empirical work that suggests that higher interest rates improve bank profits; and others at the International Monetary Fund (IMF) have done careful empirical work suggesting that in the US higher interest rates raise income inequality.

But in the time of the great financial crisis and quantitative easing (QE), the relationship between monetary policy, bank profits and inequality is actually more complicated than this. In a series of papers at the Institute for New Economic Thinking (INET), Juan Montecino and I show that quantitative easing by the Fed initially improved bank profitability and helped corporate profits in other sectors as well, such as automobiles and construction. It did also raise

employment and helped workers and the middle class, but at the same time QE worsened income inequality by delivering large asset price gains to the wealthiest Americans.

By the later phases of QE, though, most banks in the US did not continue benefiting from loose monetary policy and then the attitude of Wall Street towards expansionary policy likely faded. As Tom Ferguson and I showed in the case of prematurely aborted expansionary monetary policy in the 1930s, the banks began to lose more from lower interest rates than they gained in asset price appreciation and expanded demand.

The result is that the more standard pattern identified by the IMF and BIS economists of lower interest rates hurting bank profits has likely returned. And with it has come the blistering pressure to raise rates.

Facing this pressure, Yellen has most likely decided play a strategic game: give in to the demands from her colleagues for a move towards higher rates, while expecting to be able to drag her feet in the future on raising too rapidly, in the hope of keeping monetary policy 'accommodative' along the way.

Will this gambit – which has caused her to twist her logic like a pretzel – work? It seems like a long shot. Finance has its long knives drawn and it has plenty of allies on its side. At the same time, though, the fragility of the global economy will weigh in on her side.

The tragedy, of course, is that this is not the game she should be playing. First, fiscal policy needs to be much more aggressive in promoting needed investment. Moreover, rather than beating a strategic retreat, Yellen and allies should be engaging in much more creative, direct job promotion and direct promotion of local infrastructure investment, as proposed by groups like QE for the People in the UK, associated with Jeremy Corbyn, and the Fed Up Campaign here in the US. To make that happen, we need to keep pushing. And fast. ♦

Gerald Epstein is Professor of Economics and a founding Co-Director of the Political Economy Research Institute (PERI) at the University of Massachusetts, Amherst. This article is reproduced from the Triple Crisis blog (triplecrisis.com).

The forthcoming adjustment shock

Since 2010, many countries have been pursuing policies of fiscal contraction involving steep cuts in public expenditure despite the obvious widespread distress these have caused. According to IMF reports, there is expected to be no change in these policies until at least 2020, with developing countries being hardest hit. *Isabel Ortiz* surveys the bleak scenario.

ANALYSIS of the latest International Monetary Fund (IMF) expenditure projections for 187 countries between 2005 and 2020 reveals that there have been two distinct phases of government spending patterns since the onset of the global economic crisis.

During the first phase (2008-09) many countries introduced fiscal stimulus and expanded public spending as a countercyclical measure to cushion the impacts of the global crisis on their populations. Overall, 137 countries (or 73% of the world) ramped up expenditure, with the average annual expansion amounting to 3.3% of gross domestic product (GDP). About 50 high- and middle-income countries announced fiscal stimulus packages totalling \$2.4 trillion, of which approximately a quarter was invested in social protection measures.

The second period of crisis (2010 onwards) is marked by fiscal adjustment. In 2010, premature budget cuts became widespread, despite the ongoing and urgent need of vulnerable populations for public support.

This phase is characterised by two major contractionary shocks, the first occurring in 2010-11 and the second expected to hit in 2016 and continue at least until 2020.

According to IMF projections, 2016 marks the beginning of a second major period of expenditure contraction globally. Overall, budget reductions are expected to impact 132 countries in 2016 in terms of GDP and hover around this level until 2020. The developing world will be the most severely affected. Overall, 81 developing countries, on average, are projected to cut public spending during the forthcoming shock versus 45 high-income countries. Expenditure contraction is expected to impact more



An anti-austerity protest in Athens. From 2010 onwards, premature government budget cuts became widespread globally, despite the ongoing and urgent need of vulnerable populations for public support.

than two-thirds of all countries annually, affecting more than six billion persons or nearly 80% of the global population by 2020.

A review of recent IMF reports indicates that governments are weighing various adjustment measures, as summarised below.

Eliminating or reducing subsidies: Overall, 132 governments in 97 developing and 35 high-income countries are reducing subsidies, predominantly on fuel but also on electricity, food and agriculture. The Middle East and North and Sub-Saharan Africa are the regions being hardest hit.

Wage bill cuts/caps: As recurrent expenditures like salaries of teachers, health workers and local civil servants tend to be the largest component of national budgets, an estimated 130 governments in 96 developing and 34 high-income countries are considering containing the wage bill, often as a part of civil service reforms.

Rationalising and further target-

ing social safety nets: Overall, 107 governments in 68 developing and 39 high-income countries are considering rationalising their spending on welfare, often by revising eligibility criteria and targeting to the poorest, reducing social protection coverage. IMF country reports generally associate targeting with poverty reduction, as a way to reconcile poverty reduction with austerity; however, targeting risks excluding large segments of vulnerable and low-income households. Rather than targeting and scaling down to achieve cost savings over the short term, there is a strong case for scaling up social protection for all.

Reforming old-age pensions: Approximately 105 governments in 60 developing and 45 high-income countries are discussing changes to their pension systems, such as through raising contribution rates, increasing eligibility periods, prolonging the retirement age, lowering benefits, sometimes structural reforms of contribu-

tory social security pensions. As a result, future pensioners are expected to receive lower benefits.

Labour market flexibilisation is being discussed by 89 governments in 49 developing and 40 high-income countries. Reforms include revising the minimum wage, limiting salary adjustments to cost-of-living benchmarks, decentralising collective bargaining, and easing firing and compensation arrangements at the enterprise level. Labour market reforms are supposedly aimed at increasing competitiveness and supporting businesses during recessions. However, available evidence suggests that labour market flexibilisation will not generate decent jobs. On the contrary, in a context of economic contraction, this approach is likely to generate labour market 'precarisation', depress domestic incomes/demand and ultimately hinder recovery efforts.

Reforming health systems: 56 governments in 34 developing and 22 high-income countries are discussing reforms to their healthcare systems, generally through increasing fees and co-payments as well as by introducing cost-saving measures in public health centres.

Increasing consumption taxes on goods and services: Some 138 governments in 93 developing and 45 high-income countries are considering options to boost revenue by raising value-added tax (VAT) or sales tax rates or removing exemptions. However, increasing the cost of basic goods and services can erode the already limited incomes of vulnerable households and stifle economic activity. Alternatively, progressive tax approaches should be considered, such as taxes on income, inheritance, property and corporations, including the financial sector.

Privatisation of public assets and services: According to IMF reports, this revenue generation approach is being pondered by 55 governments in 40 developing and 15 high-income countries. Sales proceeds produce short-term gains, but also long-term losses given the lack of future revenues; additionally, privatisation risks include layoffs, tariff increases, and



Some 56 governments in developing and high-income countries are discussing reforms to their healthcare systems, generally through increasing fees and co-payments as well as cost-saving measures in public health centres.

unaffordable and low-quality goods and public services.

Projections using the UN Global Policy Model indicate that the spending cuts will negatively affect GDP and employment in all regions. Global GDP is estimated to be 5.5% lower by 2020, resulting in the loss of millions of jobs.

Projections using the UN Global Policy Model indicate that the spending cuts will negatively affect GDP and employment in all regions.

In difficult times, it is imperative that countries aggressively explore all possible alternatives to promote national socio-economic development with jobs and social protection. There are many options, available in virtually all countries:

- reallocating public expenditures;
- increasing tax revenues;
- expanding social security cov-

erage and contributory revenues;

- lobbying for aid and transfers;
- eliminating illicit financial flows;
- using fiscal and foreign exchange reserves;
- borrowing or restructuring existing debt;
- adopting a more accommodative macroeconomic framework.

The projected fiscal contraction trajectory is questionable in terms of timing, scope and magnitude. Policymakers should be encouraged to recognise the high human and developmental costs of poorly designed adjustment strategies and to consider alternative policies that support a recovery for all. It does not need to be a decade of adjustment; policymakers have a variety of options to expand fiscal space at their disposal, which should be examined in open, national dialogue. — IPS

Isabel Ortiz is the director of the Social Protection Department at the International Labour Organisation (ILO). This article is based on the working paper 'The Decade of Adjustment: A Review of Austerity Trends 2010-2020 in 187 Countries' by Isabel Ortiz, Matthew Cummins, Jeronim Capaldo and Kalaivani Karunanethy, and its policy brief, published by the ILO Social Protection Department, the Initiative for Policy Dialogue at Columbia University and the South Centre.

Developing countries facing huge losses from illicit financial flows, says new report

A new report has revealed that there has been a phenomenal jump in the scale of illicit financial flows from developing and emerging economies in recent years.

Bassey Udo

OVER \$7.8 trillion was siphoned from the world's developing and emerging economies between 2004 and 2013, and over \$178 billion of that amount was from Nigeria, a new report on global illicit financial flows has said.

Nigeria is among the world's top 20 countries with the biggest losses from skewed financial transactions, the report noted.

South Africa leads the pack in Africa with \$209.22 billion lost over the period. It occupies the seventh position in the global rankings.

Globally, China leads with \$1.39 trillion, followed by Russia (\$1.05 trillion), Mexico (\$528.44 billion), India (\$510.29 billion), Malaysia (\$418.54 billion), Brazil (\$226.67 billion), Thailand (\$191.77 billion) and Indonesia (\$180.71 billion).

Others include Kazakhstan (\$167.40 billion), Turkey (\$154.50 billion), Venezuela (\$123.94 billion), Ukraine (\$116.76 billion), Costa Rica (\$113.46 billion), Iraq (\$105.01 billion), Azerbaijan (\$95.00 billion), Vietnam (\$92.94 billion), the Philippines (\$90.25 billion) and Poland (\$90.02 billion).

Illicit financial flows are transactions involving the transfer of the proceeds from the exploitation of the resources from a particular region to another, either through money laundering and other illegal means, or commercial activities, without the commensurate value in returns.

The report published in December by Global Financial Integrity (GFI), a Washington DC-based research and advisory group, said illicit financial flows from developing and emerging economies, which stood at

just \$465.3 billion in 2004, rose sharply to \$1.1 trillion in 2013 alone.

Titled 'Illicit Financial Flows from Developing Countries: 2004-2013', the report, which described the phenomenal jump in scale, showed that illicit financial flows first exceeded the \$1 trillion mark in 2011.

Authored by GFI's chief economist, Dev Kar, in partnership with his junior counterpart, Joseph Spanjers, the report ranked Nigeria 10th among the world's top 20 countries devastated by illicit financial flows.

The study involved the analysis of discrepancies in balance-of-payments data and direction of trade statistics (DOTS), as reported to the International Monetary Fund (IMF) to detect flows of capital illegally earned, transferred and/or utilised.

Detailed findings from the report showed that the growth rate of illicit financial flows for the 2004-13 period averaged 8.6% in Asia and 7% in developing Europe as well as in the Middle East and North Africa (MENA) and Asia-Pacific regions.

The report identified Sub-Saharan Africa as the region suffering the biggest blow from the negative impact from illicit financial outflows, with an average of 6.1% of its gross domestic product (GDP) finding their way out to other regions without returning.

About 5.9% of the GDP of developing economies in Europe was affected, according to the report, while the impact averaged a staggering 4% of GDP for the developing countries and 3.8% of GDP for Asia.

The report also said about 3.6% of the entire value of the economic activities of countries in the Western Hemisphere was lost through illicit financial transactions, while the figure for the Middle East, North Africa, Afghanistan and Pakistan was 2.3%.

Other findings from the report showed that trade fraud accounted for \$6.5 trillion of the illicit outflows, with China, Russia, Mexico, India and Malaysia as the biggest exporters of illicit capital over the period.

Damaging problem

The report said that, in seven of the 10 years studied, global illicit financial flows outpaced the total value of all foreign aid and foreign direct investment flowing into poor nations.

'This study clearly demonstrates that illicit financial flows are the most damaging economic problem faced by the world's developing and emerging economies,' GFI President Raymond Baker said.

He said the report confirmed the concerns at the 2015 United Nations General Assembly that for the international Sustainable Development Goals (SDGs) to be achieved, it would require significant curtailing of the illicit flows to meet the mantra of 'trillions not billions' needed to fund the SDG campaign.

This was in line with the objective of Goal 16.4 of the SDGs, which calls on countries to significantly reduce illicit financial flows by 2030.

Although the report observed that the international community is yet to agree on the goal indicators, it said

that the technical measurements have been identified to provide baselines and track progress made on underlying targets and, subsequently, the overall SDGs. The indicators, the report explained, would not be finalised until March 2016. But it called on the IMF to conduct the annual assessment.

The report urged world leaders to focus on promoting openness in the global financial system, particularly by establishing public registries of verified beneficial ownership information on all legal entities, while all banks should know the true identities of owner(s) accounts opened with them.

'Government authorities should adopt and fully implement all of the Financial Action Task Force's (FATF) anti-money laundering recommendations; laws already in place should be strongly enforced,' the report recommended.

Besides, it asked policymakers to demand that multinational companies publicly disclose their revenues, profits, losses, sales, taxes paid, subsidiaries and staff levels on a country-by-country basis.

In addition, it said all countries should actively participate in the worldwide movement towards the automatic exchange of tax information as endorsed by the Organisation for Economic Cooperation and Development (OECD) and the G20.

Other policy recommendations included the need for customs agencies to treat trade transactions involving a tax haven with the highest level of scrutiny, while governments should significantly boost their customs enforcement by equipping and training officers to better detect intentional misinvoicing of trade transactions, particularly through access to real-time world market pricing information at a detailed commodity level.

The report also emphasised the need for governments to sign on to the Addis Ababa Tax Initiative to further support efforts to curb illicit financial flows as a key component of the development agenda. ♦

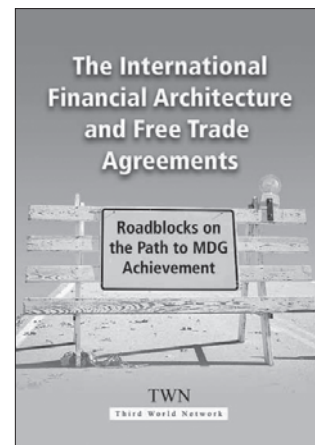
This article was first published by Premium Times (Nigeria) (www.premiumtimesng.com).

The International Financial Architecture and Free Trade Agreements

Developing countries' efforts to meet the Millennium Development Goals (MDGs), a set of development and anti-poverty targets adopted by the international community, are confronted with a host of challenges, not least those posed by an unfavourable international economic setting.

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The analysis in these papers



ISBN: 978-967-5412-45-5 48pp

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Latin America to push for food security laws as a bloc

Legislators from 17 Latin American nations meeting in Lima in November have resolved to harmonise the region's laws to safeguard food security for their peoples. *Milagros Salazar and Aramis Castro report.*

LAWMAKERS in the Parliamentary Front Against Hunger in Latin America and the Caribbean decided at a regional meeting to work as a bloc for the passage of laws on food security – an area in which countries in the region have shown uneven progress.

The 15-17 November Sixth Forum of the Parliamentary Front Against Hunger (PFH) in Lima, Peru drew more than 60 legislators from 17 countries in the region and guest delegations from parliaments in Africa, Asia and Europe.

The coordinator of the regional Front, Ecuadorean legislator Maria Augusta Calle, told Inter Press Service (IPS) that the challenge is to 'harmonise' the region's laws to combat poverty and hunger in the world's most unequal region.

Calle added that a number of laws on food security and sovereignty have been passed in Latin America, and the challenge now is to standardise the legislation in all of the countries participating in the PFH to strengthen policies that bolster family farming.

In Latin America, 81% of domestically consumed food products come from small farmers, who guarantee food security in the region, according to the United Nations Food and Agriculture Organisation (FAO), which has advised the PFH since its creation in 2009.

Twelve of the 17 Latin American countries participating in the PFH already have food security and sovereignty laws, Calle said. But it has not been an easy task, she added, pointing out that several of the laws were approved only after long delays.

During the inauguration of the Sixth Forum, she said the region has reduced hunger 'by 50% [since 1990], but this is still insufficient. We can-



A panel of the Sixth Forum of the Parliamentary Front Against Hunger in Latin America and the Caribbean. The Front is seeking to harmonise the region's laws on food security.

not continue to live in a world where food is a business and not a right. It cannot be possible that 80% of those who produce the food themselves suffer from hunger.'

Peruvian food security bill

The fight against hunger is an uphill task, and the forum's host country is a clear illustration of this.

In Peru, the draft law on food security was only approved by Congress on 12 November, after two years of debate. The legislature finally reacted, just three days before the Sixth Forum began in the country's capital. But the bill still has to be signed into law and codified by the executive branch in order to be put into effect.

"How can it be possible for a government to put forth objections to a law on food security?" Peruvian Vice President Marisol Espinoza asked during the opening of the Sixth Forum.

Espinoza, who left the governing Peruvian Nationalist Party in October,

took the place of President Ollanta Humala, who had been invited to inaugurate the Sixth Forum.

The coordinator of the Peruvian chapter of the PFH, Jaime Delgado, told IPS that he hopes the government will sign the new food security bill into law without setting forth observations.

Indigenous leader Ruth Buendia, who took part in the Sixth Forum in representation of rural communities in Peru, said the government should pass laws to protect peasant farmers because they are paid very little for their crops, even though they supply the markets in the cities.

'What the government has to do is regulate this, for the citizens,' Buendia, who belongs to the Ashaninka people, told IPS. 'Why do we have a government that is not going to defend us? As we say in our community: 'Why do I have a father [the government]?' If they want investment, OK, but they have to regulate.'

Another controversial question in the case of Peru is the over-two-year

delay in the codification and implementation of the law on healthy food for children and adolescents, passed in May 2013, which requires that companies that produce food targeting this age group accurately label the ingredients.

Congressman Delgado said food companies are lobbying against the law, which cannot be put into effect until it is codified. 'It would be pathetic if after so much sacrifice to get this law passed, the government failed to codify it because of the pressure from business interests,' said Delgado.

He said that in Peru, over \$200 million is invested in advertising for junk food every year, according to a 2012 study by the Radio and Television Consultative Council.

Calle, from Ecuador, said the members of the PFH decided to call for the entry into effect of the Peruvian law, in the Sixth Forum's final declaration. 'The 17 countries [that belong to the PFH] are determined to see the law on healthy food codified in Peru. We believe it is indispensable. It is a wonderful law,' said the legislator.

She explained that in her country food and beverage companies have been required to use labels showing the ingredients, despite opposition from the business sector. 'In Ecuador we have had a fabulous experience [regarding labels for junk food] which we would like businesses here in Peru to understand and not be afraid of,'



Native varieties of potatoes displayed at a food fair during the Sixth Forum of the Parliamentary Front Against Hunger. Defending native products forms part of the right to food promoted by the legislators from Latin America and the Caribbean.

Calle said.

The regional coordinator of the PFH said that to address the problem of food being seen as business rather than a right, 'we need governments and parliaments committed to the public, rather than to transnational corporations'.

Watershed

Another country that has made progress is Brazil, where laws in favour of the right to food include one which requires that at least 30% of the food that goes into school meals be purchased from local small farmers, Nazareno Fonseca, a member of the PFH regional consultative council, told IPS.

Calle said Brazil's efforts to boost food security, in the context of its 'Zero Hunger' programme, marked a watershed in Latin America. The PFH regional coordinator noted that the person responsible for implementing the programme in its crucial first two years (2003-04) as extraordinary food security minister was Jose Graziano da Silva, Director-General of FAO since 2011.

Spanish Senator Jose Miguel Camacho said it is important for legislators from Latin America and the Caribbean to act as a bloc because 'there is still a long way to go, but these forums contribute to that goal'.

The commitments in the Sixth Forum's final declaration focus on three main areas: food security, where the PFH is working on a single unified framework law; family farming; and school feeding.

Peru's health minister, Anibal Velasquez, said the hope is that 'the commitments approved at the Sixth Forum will translate into laws'.

And the president of the Peruvian Congress, Luis Iberico, said people did not enjoy true citizenship if basic rights were not guaranteed and hunger and poverty still existed.

The indigenous leader Buendia, for her part, asked the PFH legislators for a greater presence of the authorities in rural areas, in order for political declarations to produce tangible results. — IPS



In Latin America, 81% of domestically consumed food products come from small farmers.

Reject the TPP in the public interest

After nearly six years of excruciating negotiations, the 12-nation Trans-Pacific Partnership (TPP) agreement was finalised in October in Atlanta. The text of this ostensibly trade treaty, hitherto secret, has now to be approved by the national legislatures of the negotiating states. *Jomo Kwame Sundaram* explains why this treaty, which reflects the interests of powerful corporations from the US and other rich countries, should be rejected, especially by the developing negotiating countries.

PARLIAMENTS, including the US Congress, have a rare opportunity to protect the public interest for the present as well as future generations. For the recently concluded Trans-Pacific Partnership (TPP) agreement to come into effect, it must first be ratified by national parliaments.

Contrary to its pretensions, the TPP is not mainly about 'free trade'. Both the US and Malaysia, for example, are among the most open economies in the world, and there is little more to do in terms of reducing tariffs further.

The main trade constraints involve non-tariff barriers, such as the restrictions on solar panel exports from Malaysia, which the TPP will not address. Likewise, for other TPP partner countries, such non-tariff barriers will not be addressed by the TPP.

OECD countries with more competent trade negotiating capacity – such as the US, New Zealand, Canada, Australia and Japan – delayed agreement on the TPP at an earlier meeting in Honolulu in mid-year – not without good reason – before agreeing in Atlanta in October. It is telling that the delay was due to squabbling over how best to manage trade in particular areas, reflecting influential lobbies in their respective countries. In fact, the so-called free trade agreement will actually protect and even advance interests that run contrary to free trade.



The Trans-Pacific Partnership (TPP) has little to do with free trade but reflects the interests of powerful corporations.

The TPP is mainly about investment and intellectual property, primarily on behalf of the most powerful business lobbies involved. It will strengthen monopolistic intellectual property rights (IPRs) well beyond the already onerous and restrictive provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement of the World Trade Organisation (WTO).

Meanwhile, contrary to conventional wisdom, there is growing evidence that IPRs hardly promote research, but may actually impede innovation. In fact, specific TPP provisions will limit competition and raise consumer prices. Thus, the TPP will slow innovation besides threatening public health and the common good.

The TPP will strengthen IPRs for big pharmaceutical, information technology, media and other companies which make their money from the monopoly status conferred by such rights. For example, the TPP would

allow pharmaceutical companies to have longer monopolies on patented medicines, keep cheaper generic medicines off the market, and block the development and availability of similar new medicines.

ISDS: The best justice money can buy

The TPP will also strengthen foreign investor rights at the expense of local business and the public interest. With its provisions for an investor-state dispute settlement (ISDS) system, it obliges governments to compensate foreign investors for losses of expected profits in binding private arbitration!

ISDS will thus confer foreign corporate investors with the right to sue national governments for regulatory or policy changes that they claim diminish the expected profitability of their investments. It has been and can be applied even where the rules are non-discriminatory or when profits are made by causing public harm.

Foreign corporate interests insist that the ISDS is necessary to protect property rights where the rule of law and credible courts are lacking – which is a clear display of contempt for national courts. Yet, the US is seeking the same in the Transatlantic Trade and Investment Partnership (TTIP) deal with the European Un-



Negotiators from the TPP countries at a press conference after finalising the agreement in Atlanta, USA, in October.

ion, even though the US has not explicitly impugned the integrity of European legal and judicial systems.

The ISDS provisions make it hard for governments to conduct their basic obligations – to protect their citizens' health and safety, to ensure economic stability and to safeguard the environment.

Imagine what would happen if a widely used herbicide like glyphosate is found to pose a cancer risk, as decided by the World Health Organisation (WHO) and as has been suspected since the 1970s but suppressed by the US Environmental Protection Agency, according to recent revelations in the US. Under the ISDS, to ban toxic materials, the government would be liable to compensate the manufacturers not to kill its own people, instead of forcing them to com-

pensate the victims who have already been harmed!

The taxpayer will be hit twice – first, to pay for the health damage caused by the herbicide, and then to compensate the toxic herbicide manufacturer for its 'lost profits' if and when the government steps in to ban a dangerous product. This will deter governments from banning such substances, putting the public, both workers and consumers, at risk.

TPP versus Doha Development Round

Like many other recent bilateral and plurilateral international trade agreements, the TPP has little to do with free trade, but instead reflects the interests of the powerful corporations behind the other OECD national trade

negotiators involved.

Already, the rush to conclude the TPP before mid-December's Nairobi WTO ministerial conference will further undermine the likelihood of early conclusion of the WTO's Doha 'Development' Round of trade negotiations, which began with expectations of rectifying the anti-developmental outcomes of the previous Uruguay Round.

By undermining WTO multilateral trade negotiations, bilateral and plurilateral trade agreements are the antitheses of what they purport to do, namely trade liberalisation. But joining the TPP also undermines existing commitments, e.g., to the ASEAN Free Trade Area (AFTA). Perhaps more seriously, such alignment abandons the ASEAN commitment to a 'zone of peace, freedom and neutrality' (ZOPFAN).

TPP politically driven

It is no secret that the main motivation for the TPP for the US is to exclude China. The broad support for the China-mooted Asian Infrastructure Investment Bank (AIIB), even from traditional US allies, was a major embarrassment which the White House is desperate to overcome.

Within the US, the TPP has more support from Republicans than Democrats. Criticisms of the TPP are growing among US politicians, not only among the leading Democratic presidential contenders, including Hillary Clinton, but also from leading Republican presidential aspirant Donald Trump.

Considering the paltry economic benefits as well as great risks involved, developing-country governments joining the TPP are probably doing so for non-economic reasons. In light of this, members of parliament in the TPP partner countries have an opportunity to reject this threat to the public interest. They are our last defence against a TPP 'own-goal'. ♦

Jomo Kwame Sundaram, a Malaysian economist, is Assistant Director-General and Coordinator for Economic and Social Development at the Food and Agriculture Organisation of the United Nations, and received the 2007 Wassily Leontief Prize for Advancing the Frontiers of Economic Thought.



The herbicide glyphosate has been found by the World Health Organisation to pose a cancer risk. Due to investor-state dispute provisions in agreements like the TPP, governments will be deterred from banning such toxic materials as they would be liable to compensate the manufacturer for 'lost profits'.

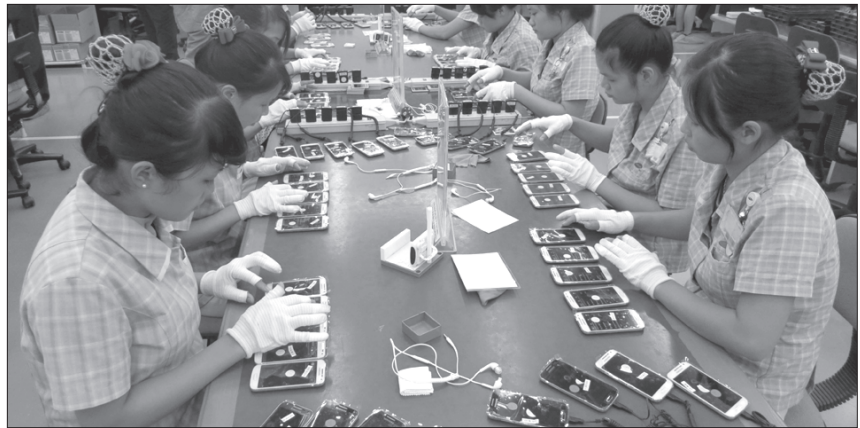
Investment and ISDS in the TPP

Of the 30 chapters in the TPP agreement, it is the chapter dealing with investment that has been most contentious. This is because, even though the TPP is a government-to-government treaty, it empowers a foreign private investor to sue a host government. *Karina Yong* explains the treaty's provision of an investor-state dispute settlement (ISDS) system which is the enabling mechanism for this extraordinary privilege.

IN the past, free trade agreements primarily focused on the lowering of import tariffs among the parties to the agreement. This is not so with the current generation of trade agreements. The Trans-Pacific Partnership (TPP) agreement is no different. Out of 30 chapters in the TPP, only five deal with conventional trade issues. The devil is in the details, as they say, and of particular concern is Chapter 9 on investment and investor-state dispute settlement (ISDS). This chapter gives extraordinary rights to foreign investors and protection of their investments and profits.

Under an agreement, only the actual parties to the agreement can sue each other. Thus, in a World Trade Organisation (WTO) agreement, where governments are the parties, only governments can sue each other. However, what is astonishing about the TPP is that, although it is a government-to-government agreement, it allows an individual foreign investor to sue the host government through the ISDS system. On the other hand, the agreement has no reciprocal provision which authorises the host government to initiate a claim against the foreign investor.

The ISDS system has been heavily criticised. United Nations Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, has called for the abolishment of ISDS. 'Over the past 25 years bilateral international treaties and free trade agreements with investor-state dispute settlement have adversely impacted the international order and undermined fundamental principles of the UN, State sovereignty, democracy and the rule of law. It prompts moral vertigo in the unbiased



Workers at a foreign-owned electronics factory in Vietnam. The TPP limits the right to impose the very performance requirements that ensure foreign direct investment will add value to the local economy.

observer,' he noted.

'Far from contributing to human rights and development, ISDS has compromised the State's regulatory functions and resulted in growing inequality among States and within them,' the expert stated.¹

Investment and the reasonable expectations of the investors

What are the issues pertaining to the investment chapter of the TPP?

1. The definition of 'investment' is so wide that it would extend the TPP's coverage of investor rights far beyond actual physical property to a complex variety of situations. Investment is defined as every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. A non-exhaustive list sets out the variety of forms an investment may take and it includes: an enterprise;

shares, stocks and other forms of equity; bonds and the like and loans; futures, options and other derivatives; contracts in the nature of turnkey, construction, management, production, concession, revenue-sharing and such like; intellectual property rights; grants under a party's laws of permits, licences, authorisations and such like; and 'other tangible or intangible', movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.²

As can be seen, intellectual property rights (IPRs) are also defined as investments. The consequence of including IPRs in the definition of investment is serious, particularly in terms of affecting access to affordable medicines. This is specifically dealt with under point 4 below.

Further, also included are investments which exist before the coming into force of the TPP or after, and national, state and local governments are bound by the provisions of the investment chapter.

Hence, 'investment' seems to cover every conceivable endeavour

under the sun – no matter how remotely connected to the investment. Then there is the ‘investment agreement’, i.e., an agreement that is concluded after the date of entry into force of the TPP between the government and the foreign investor. The form of ‘investment agreement’³ that may be enforced by way of ISDS covers many situations. It even includes contracts with the government granting rights:

- to a country’s natural resources⁴ such as oil, gas, rare earth minerals, timber, gold and iron ore, and to explore, extract, refine, transport, distribute or sell these;
- to supply services on behalf of the party for public consumption for power generation or distribution, water treatment or distribution, telecommunications or such like;
- to undertake infrastructure projects, such as construction of roads, bridges, dams and pipelines, predominantly for public purpose.

The provisions are also wide enough to allow compensation claims even over failed attempts to make an investment. The qualifying criterion for attempting to invest is ‘concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence’. A government’s decision whether or not to approve a foreign investment can be subject to an ISDS challenge by an investor. Only four countries in the TPP have successfully excluded themselves from this serious impediment to a country’s decision-making process: Australia, Canada, Mexico and New Zealand.⁵

2. ‘Investor’ is defined as such that it would allow companies from non-TPP countries to incorporate themselves in a TPP party and sue under the ISDS provision.

A non-party investor can sue if it can show that its enterprise has ‘substantial business activities’ in the territory of a party.⁶ If past decisions on similarly worded provisions are an indicator, this only requires it to station some staff in rented premises of a party (see the case of *AMTO v Ukraine* under the Energy Charter

Treaty).⁷ This means that a non-party investor can quite easily channel investments through a party to take advantage of the extensive rights accorded to party-investors.

This in fact happened in the Philip Morris case against Australia’s tobacco plain packaging laws. The tobacco giant Philip Morris is US-based but the US-Australia free trade agreement does not contain ISDS provisions. Philip Morris then rearranged its assets to become an investor in Hong Kong and proceeded to bring an action under the Hong Kong-Australia investment agreement which did contain ISDS provisions. It launched a suit against Australia alleging expropriation of its IPRs due to Australia’s tobacco plain packaging laws.⁸

3. Foreign investors will be able to sue the host government even if there has been no takeover or seizure of an asset. They can demand compensation if new policies that apply to domestic and foreign firms alike impact upon their investments – by claiming under ‘expropriation’ when a government action reduces the value of the foreigner’s investment or claiming under ‘minimum standard of treatment’ (MST) when the expected level of regulatory scrutiny changes and thereby undermines the investor’s ‘expectations’ of how it should be treated.⁹ Under the TPP any policy change or even an attempt to change policy (by some initial concrete steps) after an investment is established, which an investor alleges affects its investment, can be challenged. This allows the use of the MST provision to freeze a country’s laws to the time when the investor made (or concretely planned to make) the investment. In effect, there can be no new laws nor changes to existing laws adverse to the foreign investor.¹⁰

Expropriation: ‘Expropriation’ is defined in the TPP as direct expropriation as well as indirect expropriation. Under national law, compensation is only given for direct expropriation, i.e., when the government has actually acquired an asset. Under the TPP, however, indirect expropriation means that a claim can be made against the government if a govern-

ment action reduces the value of a foreign investment, even when there has been no takeover or seizure of an asset. Indirect expropriation can arise when a government action interferes with ‘distinct, reasonable investment-backed expectations’ of the investor.¹¹ As such, tribunals have ruled in favour of investors that claimed losses (including reduced expectations of future profits) due to changes to existing policies or the introduction of new government policies, measures and regulations. The tribunal decides what amounts to a ‘reasonable’ expectation and what amounts to expropriation on a case-by-case basis.

Minimum standard of treatment (MST): This clause in the TPP states that all covered investments shall be treated in accordance with customary international law principles, including fair and equitable treatment (FET) and full protection and security. MST/FET has been the most successful basis for investors’ challenges of government policies in past trade agreements due to the manner in which the tribunals have interpreted the law. While the TPP does stipulate how customary international law principles are to be determined, past tribunals have ignored similar stipulations.¹²

Some tribunals have found FET violations for government regulatory actions that simply contradicted what investors argued were their ‘reasonable expectations’. In *Occidental Exploration and Production Co v Ecuador*, the reasonable-expectations requirement meant that ‘there is certainly an obligation not to alter the legal and business environment in which the investment has been made.’¹³ Hence, this provision has been interpreted by some tribunals as the need to provide the investor a stable legal and business framework or predictable investment environment. Investors have sued on the ground of non-renewal or change in terms of licences or contracts, changes in policies or regulations that investors claim will reduce their expectations of future profits, or when governmental action has gone against the level of regulatory scrutiny that an investor might

have had when dealing with a previous government. The claims of unfair treatment can be ‘practically limitless’ in scope, according to a study by the UN Conference on Trade and Development (UNCTAD).¹⁴

Further, as pointed out by Gus Van Harten in his paper ‘Foreign Investor Protection and Climate Action: A New Price Tag for Urgent Policies’, an ISDS claim comes with a huge price tag – legal and arbitration costs are estimated at \$8 million on average for both sides per case, with costs exceeding \$30 million in some cases. Law firms can charge as much as \$1,000 an hour. As an example, the Philippines has spent \$58 million defending itself against one investor.¹⁵ One study found that even when governments win, they still have to pay their own costs in 70% of the cases.¹⁶ However, when investors win, they only have to cover their own costs in 40% of the cases.¹⁷ Some governments find the legal fees so unaffordable they are willing to settle the dispute by dropping their proposed law, as Uruguay was going to do for its tobacco control measures until Bloomberg Philanthropies funded their defence.¹⁸

The size of ISDS claims can have a chilling effect on the policies and regulations of the governments that face them. Also, the cost of bringing such claims would make ISDS effectively inaccessible to the great majority of small and mid-sized companies.

In 2005, a legal adviser to the Sri Lankan Ministry of Foreign Affairs stated: ‘Sri Lanka believes that an expansive interpretation of regulatory measures could circumvent the national policy space, hindering the government’s right to regulate, creating a risk of “regulatory chill”, with governments hesitant to undertake legitimate regulatory measures in the public interest for fear of claims for compensation being preferred by investors.’

Case examples of regulatory chill include:

- In the face of a \$2 billion action against it by a Swedish energy giant, Germany had to dilute its environmental standards restricting the

use and discharge of cooling water for a coal-fired power plant on the banks of the Elbe River, resulting in serious negative impacts on the river and its wildlife.¹⁹

- New Zealand is holding off its plans to implement plain packaging standards until the matter on the same issue between Philip Morris and Australia is resolved.²⁰

- Indonesia was forced to water down regulations to ban open-pit mining in protected forest areas.²¹

- In Guatemala, internal government documents obtained through the country’s Freedom of Information Act show how the risk of one of these cases weighed heavily on one state’s decision not to challenge a controversial gold mine, despite protests from its citizens and a recommendation from the Inter-American Commission on Human Rights that it be closed down. Such an action, the documents warned, could provoke the company, owned by Canadian mining giant Goldcorp, to gain ‘access to international arbitration and subsequent claims of damages to the state’. The mine was allowed to stay open.²²

‘Safeguards’: Proponents of the TPP, on the other hand, claim that the agreement has sufficient ‘safeguards’ and ‘carveouts’ to balance narrow commercial foreign interests against the public interest, and to preserve the government’s prerogatives in acting in the interest of public health, the environment or other areas in need of government intervention. Constant reference is made to Articles 9.6.4 and 9.15 and Annexes 9A and 9B in the TPP, substantially to say that the government’s regulatory space is protected. However, the inadequacies of these measures are clear when we look at how previous tribunals have construed similarly worded provisions in other treaties.

Article 9.6.4 relates to MST. As stated above, MST is the ground most frequently used by investors under ISDS. Article 9.6.4 states that the *mere fact* that a party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of the article on MST, even if loss results. It

has been suggested that this improved provision really addresses an irrelevant question. Robert Howse, a professor of international law at New York University who is currently writing a book on ISDS, said the problem with the new provision is that no finding of a violation of the MST obligation has ever rested solely on the fact that an investor’s expectations were not met.²³ Further, Article 9.6.4 now represents a codification of the wide interpretation to FET given by the tribunals. It in effect confirms that a governmental action that may be inconsistent with an investor’s expectations can found a claim, so long as it is not the sole reason.

Todd Weiler, who has served both as an arbitrator in investment disputes and as counsel to investors, has stated, ‘I can’t recall any tribunal that, if you put this provision in that agreement, that the result would be different either way.’ As explained by Howse, many cases that centre on an MST claim have examined whether a government made ‘representations’ to an investor that created certain expectations, and whether the government subsequently took some unfair or arbitrary action that was at odds with those representations. In cases where a tribunal finds a breach, it is not simply because the expectations were not met, but because the series of events led to a larger overall finding that the state acted in an unfair or arbitrary manner, he said. Howse further pointed out that the question should be less whether the investor had certain expectations, than whether the manner in which the government backs away involves some kind of impropriety.²⁴ Failing which, it is submitted, we could still have a *Bilcon v Canada* situation on our hands.

In the case of *Bilcon v Canada*,²⁵ the tribunal decided that a company refused permission to expand a quarry for environmental reasons did not receive fair treatment. The provincial and federal governments had rejected the proposal for the quarry following the recommendations of a joint review panel of experts that had carried out three years of extensive community consultation, hearings and review of

documentation. While agreeing that the interference with the investors' economic expectations, standing alone, would not violate the FET obligation and was merely a factor to take into account, the tribunal attached significance to Canada's statements in the promotional materials to attract new mining investments to a region. The reasonable expectations thus created, ruled the tribunal, were frustrated when the federal and provincial officials denied the investors the environmental permits.

It is important to note that *Bilcon* chose not to sue under the domestic system, which did not provide for a damages claim. As pointed out by Lisa Sachs and Lise Johnson, respectively director of the Columbia Center on Sustainable Investment and head of Investment Law and Policy at the Columbia Center, the parties to the North American Free Trade Agreement (NAFTA) – the United States, Canada and Mexico – have all repeatedly clarified that ISDS is not meant to be a court of appeals sitting in judgment of domestic administrative or judicial decisions. Yet in *Bilcon v Canada*, the majority of the arbitrators paid only lip service to the NAFTA states' positions.²⁶ (There was a 20-page dissenting judgment in *Bilcon* by Donald McRae.)

Further down in the TPP, Article 9.15 says: 'Nothing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.' However, this entire provision is rendered meaningless by the words 'otherwise consistent with this chapter'.

Next is Annex 9A, which seeks to define customary international law in an effort to limit the manner in



The International Centre for Settlement of Investment Disputes (ICSID) is the international arbitration tribunal at the World Bank where most ISDS claims have been filed. Picture shows one of the hearing rooms at ICSID headquarters in Washington.

which the MST provision has been used. However, this is the same wording as was used in the annex of the investment chapter of the Central America-US Free Trade Agreement (CAFTA). This was tested in two cases brought by investors and both times the investment tribunal failed to consider this annex and instead interpreted 'fair and equitable treatment' broadly and the governments lost.²⁷

In relation to expropriation, Annex 9B(b) states that non-discriminatory health, safety, environmental and other public interest regulatory actions do not constitute indirect expropriations but even these can indeed be challenged as expropriations in 'rare circumstances'. This opens up the possibility of such regulatory actions being subjected to challenges by the investor which ad hoc tribunals will decide on a case-by-case basis. Further, as Sanya Reid Smith points out in her paper 'Potential Human Rights Impacts of the TPP', assuming that the ISDS tribunal does actually take the annex into account, the limitations therein still do not seem to be sufficient to safeguard all regulatory actions that TPP governments may need to take, including for human rights reasons.²⁸

The TPP does contain a corporate social responsibility (CSR) provision. However, parties to the TPP have to merely *encourage* their investors to *voluntarily* incorporate CSR princi-

ples into their internal company policies. No sanctions are proposed for their failure to do so or to implement any policy it declares. Nor does a party have similar reciprocal rights under the TPP to sue the corporation for investments that have gone bad or that compromise the rights of people and the environment of the country.

4. Foreign private investors will be able to enforce World Trade Organisation (WTO) provisions on intellectual property via the ISDS mechanism,

thereby restricting the policy space to ensure access to affordable medicines.

As investment is defined to include IPRs, private foreign corporations can now claim against the government for policies that affect their IPRs (for example, a policy to ensure affordable medicines). Without this provision, claims of any violation of IPRs under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) cannot be instituted by private corporations against governments, as WTO rules can only be enforced when one government formally challenges another government before a WTO tribunal. In addition, the governments that signed the TRIPS Agreement deliberately included ambiguous language in the treaty to grant flexibility to each government to interpret the terms in line with domestic needs. The danger now lurks, however, of a foreign investor restricting the use of such flexibilities through the ISDS system. In one such case, Canada relied on TRIPS flexibilities to revoke pharmaceutical company Eli Lilly's patents. Eli Lilly then instituted an ISDS action against Canada for a total of \$500 million under the 'fair and equitable treatment' provision in NAFTA's investment chapter.²⁹

5. The TPP limits the right to impose the very performance requirements that ensure foreign direct in-

vestment (FDI) will add value to the local economy, such as requirements on equity ownership, establishing joint ventures with local investors, technology transfer and the use of local content.

What is an investment agreement if not for foreign direct investment? Developing countries expect the TPP to increase FDI, which in turn is supposed to bring increased economic development. However, inward FDI does not necessarily correlate with increased economic growth. Commentators have pointed out that: 'A hands-off approach to FDI, as to any other form of capital, can lead to more harm than good. FDI policy needs to be embedded in the overall industrial strategy in order to ensure that it contributes positively to economic dynamism. Channelling and shaping FDI and related activities to support overall industrial development objectives require that the state have sufficient space to enforce performance requirements on the operations of foreign investors.'³⁰

Subject to the sectors and activities that countries list in the schedule to Annex II, and the limited exceptions under Article 9.9.3 and 9.9.4, there are a large number of performance requirements that a government cannot impose on an investor of a party as well as a non-party.³¹ These include requirements on transferring a particular technology, a production process or other proprietary knowledge to a national.

As an example, in Malaysia, one of the parties to the TPP, technology transfer is in fact entrenched in several international treaties (such as the Convention on Biological Diversity) to which Malaysia is a party. However, this TPP provision will in fact reverse the obligation of the parties under those treaties.

The prohibition on imposing certain performance requirements does not prevent a party from adopting or maintaining measures, including environmental ones, that are necessary to secure compliance with the party's laws and regulations. But this is negated by the provision that the laws and regulations must not be inconsis-

ent with the TPP.³² Performance requirements are also allowed by the TPP when these are measures necessary to protect human, animal or plant life or health.³³ This provision is more restrictive for government than its counterpart in the WTO's General Agreement on Tariffs and Trade (GATT) 1947 [Article XX(b) of GATT], while another comparable provision³⁴ is narrower than its counterpart in GATT [Article XX(g) of GATT], which provides for WTO members to take measures relating to the conservation of exhaustible natural resources. Given that 43 out of 44 attempts to employ GATT Article XX in disputes before WTO dispute settlement panels have failed, this does not bode well for the successful use of the more restrictive TPP exceptions.

6. The TPP grants the foreign investor pre-establishment rights. This means that these investors can enter and establish themselves in the host country on terms no less favourable than what the country accords to its local investors, as well as acquire, expand, manage, operate and dispose of their property. This makes it more difficult for the host state to screen and reject the entry of investments and investors from the other countries signing the agreement.

7. The foreign investor is enabled to freely transfer capital into and out of the country as well as repatriate its profits. This places limits on the regulation and control of capital flows by the host state. The only country exempted in the TPP is Chile, which can adopt measures to ensure currency stability with some conditions. It can establish restrictions or limitations on capital movements to or from Chile as well as related transactions.³⁵

The provision on freedom of capital flows is perceived to have a negative impact. Even the International Monetary Fund (IMF) now recognises capital controls as a legitimate policy tool for preventing or mitigating financial crises.³⁶ Just early last year US Federal Reserve economists publicly supported capital controls as they can 'lead to significant welfare improvement'. Many noted econo-

mists worldwide have declared their open support for such controls³⁷ – to no avail, it appears, as the TPP still embeds the requirement for free capital flows in its provisions.

TPP proponents claim that the requirement has been mitigated by two safeguards. But these safeguards are restricted to remedying balance-of-payments and external financial difficulties and 'exceptional' macroeconomic problems.³⁸ No other policy objectives, such as to prevent destabilising asset bubbles, are allowed.

Secondly, the safeguards are temporary and must be phased out progressively. Anything requiring a more permanent resolution (such as actions on capital inflows designed to *avoid* balance-of-payments and other macroeconomic problems) is prohibited, so balance-of-payments problems can only be tackled once they've occurred.

Thirdly, permitted controls must be terminated within 18 months. Extensions may be secured for additional periods of a year, but one-half of the parties can overrule this request.³⁹ It should be noted that Malaysia extricated itself from the 1997 East Asian financial crisis by maintaining such controls over 10 years.

Fourthly, it is the ISDS tribunal that decides when such safeguards over capital controls will apply, thereby taking the power away from central banks (the only concession being for situations relating to application of laws relating to bankruptcy, securities trading, criminal offences, financial reporting and compliance with court orders; and for the application of laws relating to social security, public retirement or compulsory savings programmes).⁴⁰

8. The 'most favoured nation treatment' (MFN) standard requires that a host state treat the investor or investment of another member state as favourably as any other investor or investment of another state, whether or not that other state is a member of the TPP.

As leading arbitration lawyer George Kahale III pointed out, many provisions in the TPP investment

chapter may be an improvement on previous trade deals. However, all this hard work could be for nothing because of another provision: ‘Why would you spend so much time and effort doing a great job in negotiating narrow provisions to this treaty, when you have a “most favoured nation” (MFN) clause?’

Essentially, an MFN clause is tantamount to a classic wipeout move. Arguably, it would enable foreign corporations from TPP states to make a claim against the host state based on the provisions in any other trade deal signed by that host state, no matter which country it was signed with. That means it does not matter how carefully the TPP is drafted; foreign investors can cherry-pick another treaty the host state has signed and sue the government based on the provisions included in that treaty. Kahale has described MFN as ‘a dangerous provision to be avoided by treaty drafters whenever possible’ because it can turn one bad treaty into protections ‘never imagined for virtually an entire world of investors’.⁴¹

The TPP does contain a clarification in Article 9.5.3: ‘For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B [on ISDS].’

What the above means is that procedural rules are excluded, but not substantive investment rules. This seems to imply that no action can be brought if the MFN provision is violated. Whether the fears expressed earlier are well founded awaits adjudication by an ISDS tribunal. In any event, the investor can still proceed with actions claiming violation of the MST/FET provisions, citing in support (among other matters) the favoured treatment accorded to others. Hence, claimants will be able to import substantive rules from older, even more investor-friendly investment treaties.

9. Non-conforming measures (NCMs): Each country’s new NCMs are set out in a schedule in Annex II.⁴² Generally, in the context of the investment chapter, the obligations which a

party may be excused from fulfilling are specified. These relate to national treatment, MFN, performance requirements (or part), and the appointments of senior management and board of directors.

Significantly, the TPP does not excuse TPP governments from having to abide by some provisions that have been noted for restricting governments’ policy space, namely: minimum standard of treatment and fair and equitable treatment, expropriation and free capital flows.

Furthermore, the exemption is also circumscribed by its precise wording; anything else not explicitly listed (perhaps because it was not contemplated or foreseen) is subject to the obligation of conforming to the TPP. This is the effect of the ‘negative list’ approach of the TPP – anything not specifically excluded remains part of the TPP rubric. This has serious implications as any new sector or activity will automatically be included in the TPP’s obligations. The fact that certain areas – like tobacco – need to be specifically excluded implies that the general safeguards will not prevent cases from being pursued in respect of other public interest areas not specifically excluded.

ISDS – the enforcement mechanism of the investment chapter

ISDS was originally included to protect investors from arbitrary expropriation and to ensure non-discriminatory treatment for foreign investments by judiciaries that were not considered fully independent from their governments. Simply put, its purpose was to encourage investment in countries with weak legal systems. This is, however, unnecessary in relation to the parties to the TPP. As US Senator Elizabeth Warren pointed out in an opinion piece, countries in the TPP are hardly emerging economies with weak legal systems.⁴³ For example, Canada, Australia, Japan and Singapore have well-respected legal systems that multinational corporations navigate every day. And where investment is in a country with a weak le-

gal system, the investor should just buy political-risk insurance.

Too wide a scope

Originally a claim could be made under ISDS for direct taking away (expropriation) of the business of the investor, for example, when a government nationalised an enterprise or industry. Now, as stated above, claims for indirect expropriation mean that ISDS attacks can be made even against government actions and policies related to financial instruments, intellectual property, regulatory permits and more. These fears have actually been borne out in ICSID decisions on similar provisions in past trade agreements. ICSID – the International Centre for Settlement of Investment Disputes – is the international arbitration tribunal at the World Bank where most ISDS claims have been filed.

Chilling effect on state regulatory powers

As stated above, since the government can be sued before an international tribunal, it will be difficult for a government to make new policies, as it cannot predict whether certain policies it wishes to introduce or change are allowable, since it is uncertain or unpredictable how a tribunal will view them. This will affect a wide range of policies at the core of socio-economic development, including policies on investment, equity shares, financial flows, capital controls and financial stability, health and safety, the environment, intellectual property and access to medicines and educational materials, and government procurement.

ISDS is investor-biased

A few lawyers (mainly American and European) monopolise the investment arbitration business, and they act as lawyers in one case and arbitrators in other cases. Many of their firms are also known to seek and encourage investors to take up cases. In one known case, one of the arbitrators was a member of the board of directors of the parent company of the investor that took up the case. Yet the review

panel ruled that the decision would remain and there was no need for the case to be heard again by another panel.

No appellate mechanism or consistency

The decision of the tribunal is final, as there is no appeal mechanism. Thus a country involved in an arbitration case has to accept the decision, including the award, if any, even if it is dissatisfied with the decision and the reasoning behind it. As there is no system of precedent or accountability to a higher court, the tribunal decisions are often seen as arbitrary and have been known to contradict each other in similar cases.

Exorbitant awards and costs

Countries have to pay exorbitant legal and arbitration costs averaging over \$8 million per dispute and exceeding \$30 million in some cases. The Philippines spent \$58 million defending two cases against a German firm.⁴⁴ Many of the ISDS claims have tended to be very high in recent years, running to even billions of dollars. Awards are usually lower, but some recent ones have also been very high, such as the \$2.3 billion award granted to an American oil company against Ecuador.⁴⁵ The ability to enforce these awards through seizure of assets owned by the government and located abroad makes ISDS a very powerful tool.

Bypassing the judiciary

Unlike the local investor, the foreign investor can completely bypass domestic courts. As happened in the Occidental Petroleum-Ecuador case,⁴⁶ a foreign investor can relitigate an entire claim before an international arbitration tribunal if it is unhappy with the outcome of a case at the domestic level. Under the TPP, the investor can bring a claim before domestic courts, then appeal if a decision goes against it, but if unhappy with the way things are going, it can then file a 'discontinue' waiver and start a claim under ISDS before an international tribunal.⁴⁷ Or the foreign investor can choose to bypass the domestic court

process entirely while dragging the host government before an international investment tribunal to litigate its claim.

This waiver provision does not apply when the investor is charged in a national court for violating a law. If it loses the case against it before the domestic court, it can file an ISDS claim which may ultimately overrule the decision of the local court. This happened in a suit brought by Lago Agrio villagers in Ecuador against oil giant Chevron for massive contamination of the Amazon. To avoid paying damages awarded by Ecuador's highest court, Chevron filed various actions in the US and finally an ISDS claim – in which the tribunal suspended enforcement of the multi-billion-dollar domestic court ruling even before it decided on whether it had jurisdiction to hear the claim.⁴⁸

This highlights the constitutional and other objections about the serious undermining of the defining role of national courts in a democracy which vests power in three separate branches of government – the executive, the legislature and the judiciary. In this case the three-member panel in effect ordered the government of Ecuador to violate its own Constitution, interfered with the independent judiciary and stopped the court's ruling in what would amount to a breach of Ecuador's constitutionally enshrined 'separation of powers' – a legal concept that was probably not foreign to the panellists. Many commentators have deprecated this vast power of the ISDS system as unconstitutional.

As more than 130 US law professors declared in a March 2015 letter to Congress and the US President: 'ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement. It weakens the rule of law by removing the procedural protections of the justice systems and using an unaccountable, unreviewable system of adjudication.'⁴⁹ This followed a letter to similar effect signed by former judges, law professors and prominent lawyers.⁵⁰

Other commentators point out that other countries have withdrawn or threatened to withdraw from the ICSID Convention because of perceived biases in ISDS. South Africa has started terminating existing bilateral investment treaties (BITs) with countries like Belgium, Luxembourg, Germany and Switzerland.⁵¹ In March 2014, Indonesia announced plans to terminate more than 60 BITs with countries such as China, France, Singapore and the UK; it has in the meantime terminated its BIT with the Netherlands, taking effective force from July 2015.⁵²

Conclusion

Parties must rethink their decision to sign the TPP. More than anything else, it has been recognised by UNCTAD that 'the current state of the research is unable to fully explain the determinants of FDI, and, in particular, the effects of [international investment agreements (IIAs)] on FDI'. UNCTAD delivered that synopsis alongside its own study finding that 'results do not support the hypothesis that [IIAs] foster bilateral FDI.'

Further, a study done by Public Citizen and Global Trade Watch in 2014 showed that while countries bound by ISDS pacts have not seen significant FDI increases, countries without such pacts have not lacked for foreign investment. Brazil, for example, has consistently rebuffed IIAs with ISDS provisions, yet remains the world's fourth most popular destination for FDI and the leading destination of FDI in Latin America, where most other countries have signed numerous pacts with ISDS terms. ♦

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Endnotes

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- 2 Article 9.1

- 3 Article 9.1
- 4 Does not include land, water or radio spectrum
- 5 Annex 9H
- 6 Article 9.14
- 7 See <http://www.italaw.com/sites/default/files/case-documents/ita0030.pdf>
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- 9 Article 9.7.1. See also Annex 9B-3.
- 10 See Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in US FTAs & BITs Demonstrate FET Definition Must Be Narrowed', Global Trade Watch, 5 September 2012
- 11 Annex 9B-3
- 12 Annex 9A; *Teco Guatemala Holdings v Guatemala*, ICSID Case No. ARB10/23, 19 December 2013, <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/10/23>
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TPP = Transnational Pharmaceutical Profiteering

The TPP has enhanced the monopoly patent protection currently enjoyed by pharmaceutical corporations at the expense of ordinary consumers, contends

Brook Baker.

AFTER five years of secret negotiations directed and controlled by pharmaceutical lobbyists and drug-company-dominated trade advisory groups, the official text of the Trans-Pacific Partnership negotiated by the Obama administration has been released. The text confirms critics' worst fears – pharmaceutical behemoths like Pfizer, Bristol-Myers Squibb, Merck, GlaxoSmithKline and Abbott Laboratories have gained expanded monopoly protections and greatly enhanced enforcement rights.

Patients, both domestically and abroad, will suffer delayed access to more affordable medicines and biologics. In the US, resulting price increases will lead to even more rationing and burgeoning out-of-pocket payments. In low- and middle-income TPP partners, excessive prices that neither patients nor governments can afford can and will result in death.

In the mind-numbing blur of thousands of pages, killer text can be found. There are express mandates requiring patent term extensions beyond the 20 years required by international law. There are mandatory monopolies on new uses of known medicines and provisions that make it easier to get secondary patents that are only weakly inventive and that also lengthen patent monopolies. There are additional monopolies on the regulatory data submitted by Big Pharma on small molecule medicines, monopolies blocking generic competition that start at five years but can be extended for successive three-year periods. And there are new monopolies on biologic regulatory data that effectively forestall the marketing of biosimilars for at least eight years.

To guard against the risk of price controls and non-listing of their new-

est high-priced medicines, the drug companies have also gained privileged access to government bodies that make decisions on product listing and reimbursement rates. The pharma-fox is in the cost-cutting hen house.

Ever attentive to the details of profiteering, Big Pharma and Big Bio have also expanded their repertoire of enforcement rights. Mandatory injunctions, expanded damages and enhanced border measures will be required. Even more dangerously, biopharmaceutical monopolists have now gained unprecedented powers in the TPP's investment chapter to directly sue governments when their expectations of monopoly profits are thwarted by a government's patent, data-related and pricing decisions and rules.

In low- and middle-income TPP countries, excessive medicine prices can and will result in death.

Drug companies are hiding their glee at new monopoly rights by complaining that they didn't get everything they wanted, especially 12 years of monopoly protection on biologic regulatory data. Every time Big Pharma fails to get every last drop of blood money it wants, it complains that its future research and development projects will wither and die. This is an industry that is consistently one of the top three most profitable in the world. Company valuation and annual sales each exceed a trillion dollars.

One out of every five healthcare dollars in rich countries is spent on medicines and annual price escalation of medicines is consistently many multiples of inflation rates. And in developing-country TPP partners like Vietnam, Peru, Chile, Mexico and Malaysia, government health budgets will be strained and people living with preventable, treatable and curable illnesses will do without. People living with HIV, hepatitis C and other diseases will simply not have affordable access to newer medicines embargoed by the TPP's monopoly protections.

The Obama administration has liked to claim that the TPP represents a new gold-standard trade agreement – a trade agreement for the 21st century and for all countries. The TPP is indeed a gold standard ... for the hugely profitable and profiteering pharmaceutical industry. But it is a budget buster for governments, insurers and patients, and a disaster for the right to health domestically and abroad.

Many forces are lining up against the TPP in the US, including Members of Congress. Trade, environmental, labour, Internet-freedom, health and other constituencies are trying to get their voices heard. Fortunately, the TPP is not yet a done deal, despite its past secrecy and Fast Track legislation that will limit Congressional debate and amendatory authority. Once again AIDS activists know that 'pills cost pennies, but greed costs lives'. It's time to act-up again. ♦

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How the TPP will restrain the growth of generic medicines and access to affordable medicines

The final text of the Trans-Pacific Partnership agreement confirms beyond doubt the apprehensions expressed by civil society, academia and the generic industry about new barriers to access to medicines, says *DG Shah*.



Patients in TPP countries would have to continue to pay higher prices for medicines for at least 10 more years.

THE final full text of the recently concluded 12-country Trans-Pacific Partnership trade agreement was recently released. The key elements in the TPP and their likely impact on the pharmaceutical industry – both innovative and generic – are noted below.

Patentability criteria

The TPP member states have surrendered their sovereign right to define ‘patentability’ criteria. Not only have they surrendered their right, they have agreed to grant patents for:

- a) new uses of a known product;
- b) new methods of using a known product;
- c) new processes of using a known product.

This would lead to the ‘ever-greening’ of patents and result in an average extension of monopoly by at least five years. Some can stretch it beyond five years, as was done by Novartis AG for the anti-cancer drug Gleevec (imatinib). This would en-

courage innovators to go for low-hanging fruits at the cost of more difficult-to-succeed efforts. Generics will slow down and patients will have to wait longer for affordable treatments.

Patent term extension

The TPP member states have agreed to adjust the term of the patent for ‘unreasonable’ delays in the issuance of patents. The ‘unreasonable’ period is defined as ‘more than five years from the date of filing of the patent application’. Likewise, any delay in granting marketing approval for a drug will entitle the rights holder to extension of the patent term.

The patent term adjustment provision has several implications. Firstly, it would enable the rights holder to delay launch of the product in relatively low-priced markets, particularly developing countries. Secondly, to delay the launch, the innovators may even furnish incomplete

data to the drug regulator to make the approval process look tardy and inefficient.

Thirdly, it would thus deny access to a new medicine in the lower-priced markets. Fourthly, even after the expiry of a patent in the developed countries, the product would retain monopoly status in the developing countries. This could on average give at least two years of extended monopoly, further impacting generic growth and patient access.

Protection of undisclosed test data

Commonly known as ‘data exclusivity’, the protection ensures that a drug regulator cannot rely on the innovator’s data for approval of a subsequent manufacturer’s application for a specified period from the date of marketing approval to the innovator. This would ensure extended monopoly for innovators in developing countries, though the patent may have expired in developed countries. This is because innovators launch their new drugs in low-priced countries years after their launch in the developed economies.

As regards biologic drugs, the TPP member states are required to either grant eight years of exclusivity or deliver a ‘comparable outcome in the market’ through ‘other measures’. This would add to the period of monopoly for innovators and delay the launch of generics.

Patent linkage

‘Patent linkage’ means linking



The additional monopoly granted to innovators under the TPP may reduce pressure on them to research new drugs and develop new remedies.

marketing approval by the drug regulator to the patent status of the drug. The Orange Book system as it operates in the US generally provides a 30-month time frame to the drug regulator for approval of a generic (Abbreviated New Drug Application) product.

The proposed obligation could effectively lead to three to four years of additional monopoly in other markets, as they do not have a formal system similar to the Orange Book which binds the drug regulator to approve a generic product within the stipulated time frame. This would benefit innovators and delay launch of generics, depriving patients of an affordable alternative.

Compulsory licences

The intellectual property provision in the TPP's investment chapter will curtail governments' ability to use a compulsory licence as a tool to negotiate the price of a medicine with the rights holder, as was done by Brazil for antiretroviral medicines. It provides that the meaning of the World Trade Organisation (WTO)'s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) can be subject to review and arbitration led by the private rights holders.

The review extends to 'adequate' or 'reasonable' compensation or remuneration for non-voluntary use of intellectual property rights; the stand-

ards of patentability; and other issues to determine the extent to which an action or policy is 'consistent' with the TPP intellectual property chapter.

This would not only lead to 'forum shopping' between the WTO's Dispute Settlement Body and the TPP's investor-state dispute settlement (ISDS) mechanism, but also empower the private rights holder investors (and not end consumers) to bring cases against governments and benefit from sanctions.

Eli Lilly & Co.'s \$500 million suit under the North American Free Trade Agreement (NAFTA) against Canada for the Canadian Federal Court's invalidation of the Zyprexa (olanzapine) patent is a portent of the shape of things to come. Not only the government but also the judiciary of a country will be subject to arbitration proceedings by a private investor.

Border measures

The TPP member states have agreed to empower certain 'competent authorities' such as customs to initiate border measures, including against goods in transit.

Thus, goods originating in a non-member state and destined for another non-member state, if transiting through a TPP member state, could be seized for alleged violation of intellectual property rights as determined by the customs authorities, and

not through the judicial process. This would certainly curtail generic companies' reach to many markets.

Dispute settlement mechanism

The inclusion of intellectual property as a covered asset in the TPP investment chapter is potentially more consequential than anything in the intellectual property chapter itself. It enables private investors to use the ISDS mechanism under the investment chapter to interpret the intellectual property chapter as well as the TRIPS Agreement.

This will provide the arbitrators in the ISDS mechanism with discretion to interpret and decide on compliance with the TRIPS Agreement, even though the WTO has its own dispute settlement mechanism. This would change the dynamics, as private parties would have less restraint than states regarding policy space as well as the perspective of seeing intellectual property rights as innovation stimulants rather than as assets.

Collective impact

Thus, the collective impact of the TPP on the pharmaceutical industry will be to grant at least 10 years of additional monopoly to innovators in various ways. This may reduce pressure on innovators to research new drugs and develop new remedies. Consequently, the society at large will suffer.

It would also mean that patients in TPP countries would have to continue to pay higher prices for 10 more years. Those who can't afford these will have to suffer without medicines that could have cured them.

This will in turn slow down the development and commercialisation of generics elsewhere in the world, depriving people of access to affordable medicines. ♦

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Released TPP text confirms deadly impact on access to medicines

The case of HIV/AIDS patients in Malaysia

The following statement by the *Malaysian AIDS Council*, an umbrella organisation which supports and coordinates the efforts of non-governmental and other organisations working on HIV/AIDS issues in the country, explains the broadly shared concerns over the potential adverse impact of the TPP on access to essential drugs.

THE Trans-Pacific Partnership (TPP) Agreement is a plurilateral trade agreement involving 12 countries including Malaysia and led by the United States. It contains 30 chapters, but only 4-5 of these pertain to traditional trade matters. The chapter that is of the most concern to the Malaysian AIDS Council is the intellectual property chapter. With the release of the finalised text on 5 November, we as an organisation are horrified to note the confirmation of our very worst fears – that these provisions will put generic medicines out of the hands of patients all over Malaysia and decimate the public health budget.

Access to medicines in Malaysia

Malaysia relies heavily on generic medicines, with data showing that pharmacists recommend generic substitution for 85% of all brandname requests of medicines in Malaysia. A regional study involving 10,000 cancer patients found that approximately 45% of Malaysian cancer patients suffer from ‘financial catastrophe’ where medical costs exceed 30% of household income 12 months after diagnosis. In regard to HIV treatment, Malaysia currently pays up to eight times more for the HIV drug lopinavir-ritonavir when compared to countries in the same income bracket (Figure 1). More recently a new drug (sofosbuvir) that can cure hepatitis C is being priced at an unaffordable RM357,000 (\$84,000) for 12 weeks’ treatment.

The generic versions of these HIV and hepatitis drugs can be ob-



Medicine shelves in a Malaysian pharmacy. Because of the TPP's stringent intellectual property provisions, Malaysian patients will have to wait longer to access more affordable generic drugs.

tained at a fraction of these costs. For instance, generic versions of sofosbuvir can be provided at RM750.06-1,579.07 (\$171-360) for 12 weeks’ treatment. Examples of price differences between innovator and generic drugs used in palliative care settings in Malaysia are contained in Figure 2. Given that the median monthly household income in Malaysia is RM4,585, it is important that access to generics is protected.

With the implementation of the TPP, generic versions of these life-saving medications will not be available for additional (more than 20 years if patents for new indications are applied) years following registration. This means the government of Malaysia and Malaysians will have to pay the full price of branded medications at very very high prices.

Recently, the Minister of International Trade and Industry Mustapa Mohamed argued that the data exclusivity or patent provisions in the TPP

‘will not have an influence on the price of drugs’. This statement is simplistic. What provisions in the TPP would do is extend patents and have exclusivity periods that would delay the entry of generics, meaning that Malaysians would have to pay innovator prices for longer. Innovator prices, as evidenced by Figure 2, are higher than generic prices.

It should also be noted that post-adoption of similar TRIPS-plus provisions in the Jordan-US free trade agreement, the delay of generic medicines cost Jordan an extra \$18 million per year. Malaysia has been lucky to have a Ministry of Health that fully comprehends the cost impact of higher medicine prices for longer. In October 2015, the Deputy Minister of Health stated: ‘The Health Ministry has announced that we do not agree with the extension of the duration of [the patent of] medicines as it will burden the people.’ It is clear that, based on the release of the finalised

text, the concerns of the Ministry of Health have been deemed insignificant.

Biologics exclusivity

The finalised text of the TPP has similar intellectual property provisions to leaked texts previously commented on by Bantah TPPA [a coalition of Malaysian civil society groups opposing the TPP]. In addition to patent extensions, the text contains a controversial provision in the intellectual property chapter requiring five or eight years of biologics exclusivity. Many cancer medications are biologic, including the breast cancer drug Herceptin which costs RM8,000 (\$2,600) per cycle with 17 cycles of treatment needed, costing a total of RM136,000 (\$44,000) for the entire treatment.

The finalised text states (in Article 18.52 on 'Biologics'):

'1. With regard to protecting new biologics, a Party shall either:

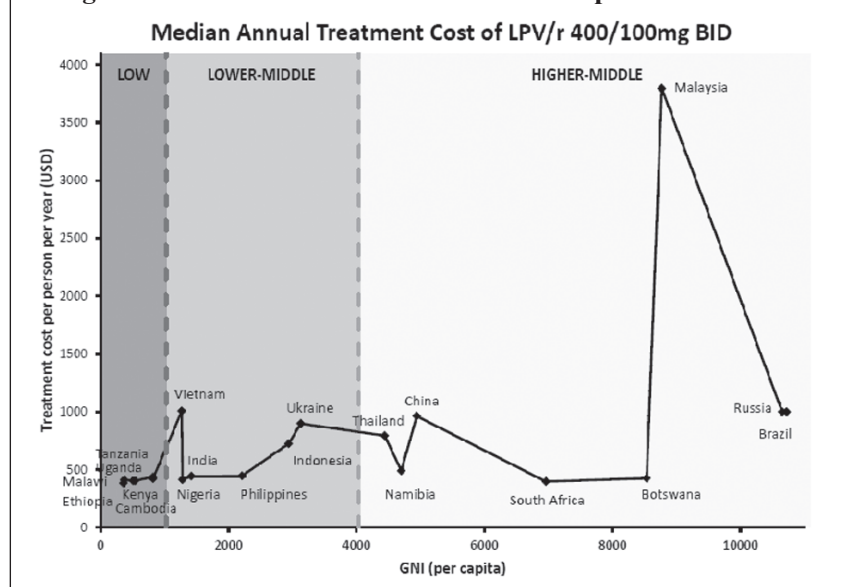
(a) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis*, for a period of at least eight years from the date of first marketing approval of that product in that Party; or, alternatively,

(b) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection:

(i) through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis*, for a period of at least five years from the date of first marketing approval of that product in that Party,

(ii) through other measures; and

Figure 1: Median annual treatment cost of lopinavir/ritonavir



(iii) recognising that market circumstances also contribute to effective market protection to deliver a comparable outcome in the market....'

The Malaysian law does *not* have biologics exclusivity and will have to be amended to incorporate this. What does this mean for the average cancer patient in Malaysia? It means that a period of exclusivity can be imposed on their already expensive medication, keeping the cheaper generic versions out of their hands for an additional 5-8 years. The Malaysian AIDS Council is especially concerned in regard to the treatment for liver cancer and leukaemia which disproportionately affect key affected populations under our purview.

While many argue that biologics exclusivity and patent extensions are necessary to promote innovation, data indicates that pharmaceutical companies are no longer innovating, and are instead using strong intellectual property provisions to profit from 'merely minor variations' to existing drugs. Cynthia Ho, Professor of Intellectual

Property Law at Loyola University Chicago, described in a 2015 article this 'innovation crisis' affecting pharmaceutical companies.

In a September 2015 op-ed, Rahman and Quigley discuss the example of India which has a flexible intellectual property system that has come under attack for being too weak – but at the same time is rapidly innovating. Medecins Sans Frontieres' Chase Perfect elaborates: 'India's current intellectual property model is under attack not because it has failed, but because it has succeeded.' India's system enables access to generic medications while ensuring that real innovation occurs, not merely minor variations of old drugs. Hence the argument of innovation fails. The release of the TPP text confirms that Malaysian patients will wait longer to access more affordable generic drugs. ♦

The above is the text of a press release issued by the Malaysian AIDS Council on 5 November 2015 and prepared by Fiza Rahman, Policy Manager at the Council.

Figure 2: Generic versus innovator prices in commonly prescribed medicines in palliative care

Medication Name	Type of Medicine	Strength	Innovator Price (RM)	Generic Price (RM)	Price Difference
Fluconazole	Antifungal	150 mg	28.60	1.76	16.25 times
Ranitidine	Gastroprotectant	150 mg	2.90	0.97	3.00 times
Omeprazole	Gastroprotectant	20 mg	11.76	2.14	5.50 times

TPP – a threat to financial and economic stability

By obliging signatory states to open up and deregulate their financial sectors, the TPP will increase the risk of another financial crisis like the 2007-08 global crisis, warns a US-based public interest advocacy group.

ALTHOUGH the Trans-Pacific Partnership (TPP) is the first US trade deal to be negotiated since the 2008 financial crisis that spurred a global recession, it would impose on TPP signatory countries the pre-crisis model of extreme financial deregulation that is widely understood to have spurred the crisis.

After nearly six years of negotiations under conditions of extreme secrecy, the Obama administration has only now released the text of the controversial deal after it has been finalised and it is too late to make any needed changes. The financial services and investment chapters of the TPP provide stark warnings about the dangers of 'trade' negotiations occurring without press, public or policymaker oversight.

- Unlike past pacts, the TPP would empower financial firms to use extrajudicial tribunals to challenge financial stability measures that do not conform to their 'expectations'. The TPP's financial services chapter 'reads in' investment chapter provisions that would grant multinational banks and other foreign financial service firms expansive new substantive and procedural rights and privileges not available to US firms under domestic law to attack our financial stability measures.

For the first time in any US trade pact, the TPP would grant foreign firms new rights to attack US financial regulatory policies in extrajudicial investor-state dispute settlement (ISDS) tribunals using the broadest claim: the guaranteed 'minimum standard of treatment' (MST) for foreign investors. MST is the basis for almost all successful ISDS challenges of government policies under existing pacts. Past US trade pacts allowed



Financial market traders at work. The TPP would impose the model of extreme financial deregulation widely understood to have spurred the 2008 financial crisis.

ISDS challenges of financial regulatory policies, but limited the substantive investor rights that applied to the financial services chapter, and thus the basis for such attacks. The TPP explicitly grants foreign investors new rights (Article 11.2.2) to launch attacks on financial policies using the extremely elastic MST standard that ISDS tribunals regularly interpret to require compensation if a change in policy undermines an investor's expectations.

- Despite the pivotal role that new financial products, such as toxic derivatives, played in fuelling the financial crisis, the TPP would impose obligations on TPP countries to allow new financial products and services to enter their economies if permitted in other TPP countries (Article 11.7).

- The TPP constrains signatory governments' ability to ban risky fi-

ancial products, including those not yet invented, via rules designating a regulatory ban to be a 'zero quota' limiting market access and thus prohibited (Article 11.5). TPP rules also would jeopardise efforts to keep banks from becoming 'too big to fail' and to firewall the spread of risk between financial activities.

- The TPP would be the first US pact to empower some of the world's largest financial firms to launch ISDS claims against US financial policies. The TPP would greatly expand US liability for ISDS attacks because currently these firms cannot resort to extrajudicial tribunals to demand taxpayer compensation for US financial regulations.

Among the top banks in the world based in TPP countries are: Mitsubishi UFJ, Mizuho, ANZ, Commonwealth Bank of Australia, Westpac, National

Australia Bank, Bank of Tokyo, Sumitomo, Royal Bank of Canada, and Toronto Dominion. These multinational firms own dozens of subsidiaries across the United States, any one of which could serve as the basis for an ISDS challenge against US financial regulations if the TPP were to take effect.

Under current US pacts, none of the world's 30 largest banks may bypass domestic courts, go before extrajudicial tribunals of three private lawyers, and demand taxpayer compensation for US financial policies. The TPP would allow foreign firms to challenge policies that apply to domestic and foreign firms alike and that have been reviewed and affirmed by US courts.

And not only foreign financial firms but foreign subsidiaries of US firms operating in TPP nations could demand taxpayer compensation for financial regulations and government regulatory actions. The TPP would newly empower US banks, four of which rank among the world's 30 largest, to launch ISDS claims against domestic financial regulations in TPP countries that do not already have an ISDS-enforced pact with the United States (Australia, Brunei, Japan, Malaysia, New Zealand and Vietnam).

- A provision touted as a 'prudential filter' would fail to effectively safeguard financial policies from ISDS challenges under the TPP.

The provision (Article 11.11.1) states that if a foreign investor uses ISDS to challenge a government's financial measure, and if the government invokes a highly contested provision for defending prudential measures, financial authorities from the challenged government and from the firm's home government, rather than the ISDS tribunal, will aim to determine whether the prudential defence applies (Article 11.22). But if those officials cannot agree within 120 days, meaning officials from the challenging corporation's home country opt not to shut down their investor's claims, the decision goes back to the ISDS tribunal.

- The use of capital controls and other macro-prudential financial poli-

cies that regulate capital flows to promote financial stability are forbidden and subject to compensation demands by foreign corporations. Like past US free trade agreements, the TPP text requires that governments 'shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory' (Article 9.8). This obligation restricts the use of capital controls or financial transaction taxes, even as the International Monetary Fund, many prominent economists and world leaders have shifted from opposing capital controls to endorsing them as a tool for preventing or mitigating financial crises.

Strong concerns about the TPP's ban on the use of such policies resulted in inclusion of a new 'temporary safeguard' provision (Article 29.3) despite years of US opposition. But unfortunately, the language that was ultimately agreed would not adequately protect governments' ability to regulate speculative, destabilising capital flows.

Capital controls are forbidden and subject to compensation demands by foreign corporations.

The safeguard is subject to a litany of constraining conditions, largely replicating the narrow terms in Article XII ('Restrictions to Safeguard the Balance of Payments') of the World Trade Organisation (WTO)'s General Agreement on Trade in Services (GATS). But the TPP provision adds two further constraints: capital controls are subject to ISDS challenges as indirect expropriations. Thus, while the temporary safeguard may permit a TPP country to enact a capital control for a limited amount of time, the country may also be required to compensate a foreign investor if the capital control results in a significant reduction in the value of an investment. There is no comparable obligation to com-

pensate private investors in the GATS. And in the TPP capital controls 'shall not apply to payments or transfers relating to foreign direct investment', a significant limitation. As a result, Chile, which has in place policies that allow long-term limits on capital flows, had to negotiate for a separate carve-out of its policies so as to be able to preserve them.

- The US, unlike most other TPP countries, has chosen to subject sovereign debt restructuring to ISDS challenges. An annex in the investment chapter seeks to ensure that disputes related to sovereign debt and sovereign debt restructuring are not subject to the full range of investment chapter disciplines (Annex 9-G). But a footnote states that the partial safeguards for sovereign debt restructuring 'do not apply to Singapore or the United States'. That is, were Singapore or the United States to negotiate a restructuring of its sovereign debt that applied equally to domestic and foreign investors, foreign investors alone would be empowered under the TPP to challenge the non-discriminatory restructuring before an ISDS tribunal, claiming violations of any of the broad substantive foreign investor rights provided by the TPP investment chapter.

These deregulatory rules were written under the advisement of Wall Street firms before the financial crisis. Some are included in one of the most extreme WTO agreements to which most TPP nations are not signatories. Rather than update these terms to reflect the post-crisis consensus on the importance of robust financial regulation, the TPP would expose an even wider array of financial stability measures to challenge as violations of the 1990s-era rules. With few exceptions, TPP governments have bound existing and future financial policies to these deregulatory rules, curtailing their policy space to respond to emerging financial products and risks if the deal takes effect. ♦

The above is extracted from the 'Initial Analysis of Key TPP Chapters' document published on the Public Citizen website (www.citizen.org). Public Citizen is a US-based public interest advocacy organisation.

The TPP: Treaty making, parliamentary democracy, regulatory sovereignty and the rule of law

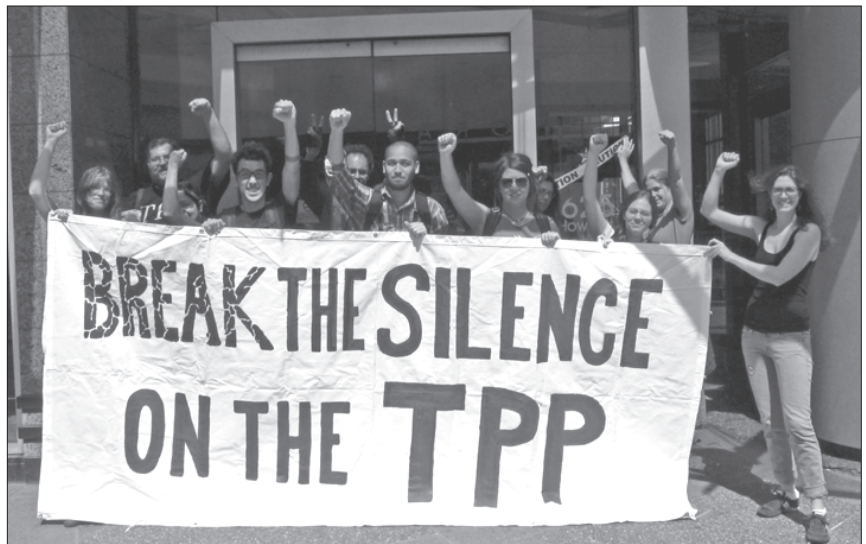
In this comprehensive survey of the TPP and the road ahead, *Jane Kelsey* highlights not only the deep inroads the proposed treaty has made into democratic rights and national sovereignty, but also how its enforcement will reflect the vastly unequal economic power of its parties.

NEGOTIATIONS for a Trans-Pacific Partnership (TPP) Agreement were concluded in Atlanta, USA on 5 October 2015, and the text was released on 5 November 2015. There are 12 negotiating countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

The TPP has 30 chapters and many annexes, with parties also adopting bilateral side-letters. They are expected to sign the agreement on 4 February 2016 in New Zealand, which is the formal depositary for the TPP. Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement. The TPP will come into force within two years if all original signatories notify that they have completed their domestic processes, or after two years and 60 days if at least six, including the US and Japan and several other larger countries, have done so.

Access to information

Following the announcement on 5 October that the negotiations were concluded, governments released their own account of the agreement and its implications. The text itself was released one month later, subject to legal verification (scrubbing), along with various side-letters. No other formal documentation from the negotiations has been made public. In



At the start of the TPP negotiations, the parties had agreed to an unprecedented pact to keep an extraordinary range of information secret. Picture shows demonstrators protesting the lack of transparency during the negotiations.

March 2010 at the start of the TPP negotiations, the parties had agreed to an unprecedented pact to keep an extraordinary range of information secret:

‘First, all participants agree that the negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, is provided and will be held in confidence, unless each participant involved in a communication subsequently agrees to its release. This means that the documents may be provided only to (1) government officials or (2) persons outside government who partici-

pate in that government’s domestic consultation process and who have a need to review or be advised of the information in these documents. Anyone given access to the documents will be alerted that they cannot share the documents with people not authorised to see them. All participants plan to hold these documents in confidence for four years after entry into force of the Trans Pacific Partnership Agreement, or if no agreement enters into force, for four years after the last round of negotiations. ...’

This effectively shields a comprehensive pool of information from public scrutiny until at least one election cycle after the agreement comes into force (which is likely to be at least

two years after signing).

[Subsequently, a similar pact has been agreed in the negotiations for a Trade in Services Agreement (TISA), with confidentiality applying for five years after the agreement comes into force.]

In addition to concerns about democracy and accountability, the availability of a negotiating record (or *travaux préparatoires*) is crucial for interpreting the text. The official depositary presumably holds the authentic negotiating record, although there is no reference to one in the agreement. If there is no single authentic record, each country will rely on its own version, creating more uncertainty and contention. That is problematic for countries with limited capacity or that joined midway through the negotiations, and for non-negotiating countries that accede to an agreement they had no role in negotiating. It also means people outside government who have a concern about proper interpretation will not have access to the negotiating and background documents for around six years, if at all.

Status of the TPP

In signing the TPP, a government is indicating its intention for the state to be bound by the terms of the treaty. But it does not become binding on that state until it has completed its necessary domestic processes and the provisions set down in Article 30.5 for entry into force of the agreement have been satisfied.

There are three different ways the TPP could come into force and bind some or all of the signatories:

1. If all original signatories complete their domestic processes to approve the agreement coming into force and notify the depositary in writing within two years of signing, the TPP comes into force 60 days after the last country notifies.

2. If not all original signatories have notified completion of their processes after two years, but at least six have done so, and they account for at least 85% of the combined GDP of the original signatories (as of

2013), the TPP would come into force after 60 days (that means two years plus 60 days after signing).

3. If two years pass without the second option being met, the agreement comes into force 60 days after the date when six or more parties comprising 85% of GDP have notified.

This formula means the US and Japan must be originating parties. Just two additional larger countries (Canada, Australia, Mexico) would be enough to meet the threshold of 85% of shared GDP. Poor and small countries are virtually irrelevant.

The formula raises a conundrum in relation to US certification that other TPP countries have implemented the US understanding of those countries' obligations (see following article). The agreement cannot come into force for any country until the US notifies the TPP Commission (see below) that its domestic processes have been completed. Article 30.5 assumes a single notification by each signatory. However, US practice has been to certify compliance by other parties to a plurilateral agreement bilaterally and differentially. Presumably this was discussed during the negotiations, but there is nothing in the text to indicate whether that would be permitted. If the US cannot notify the Commission until it has completed certification for all signatories, and the agreement cannot come into force until it provides that notification, the process could take a long time and the pressure on other countries from US certification would be intense. Requiring single and full certification by the US would also contradict the intention of the provision that the agreement can come into force for only some parties.

Becoming parties to the TPP

There are incentives for being in the first tranche of parties, and potential penalties for not being one. Any original signatory who is not in that first group must give notice that it intends to become a party, to those who are. However, its acceptance is not automatic. The TPP Commission

(made up of all the existing parties) needs to agree. The text is not explicit that the Commission or any one of its members may require further concessions, probably by side-letters, but that is implicit. The US has particular leverage because the President will need to go back to Congress for approval. Assuming the country is accepted, the agreement comes into force for it after 30 days, unless all agree to a different date.

A signatory country's later entry also raises questions about phase-in periods, especially for tariff cuts that are implemented over time. There is a presumption that an original signatory who joins later must immediately implement all the tariff cuts it would have made to that date if it was in the first tranche, unless another country wants to delay its own reciprocal cuts to the new party (Annex 2-D).

Any other member of the Asia-Pacific Economic Cooperation (APEC) forum is automatically allowed to seek to join the TPP, but there needs to be consensus for any non-APEC country to even begin the process. Any country wanting to join must be prepared to accept not only the terms of an agreement they had no role in negotiating, but also any additional terms that existing parties require of them (Article 30.4.1). This accession process is presumably confidential and could take a very long time.

The process will be similar to countries joining the World Trade Organisation (WTO) and to when Japan, Mexico and Canada joined the TPP negotiations. The country will have to negotiate bilaterally with each of the existing members and get that approval – which means they can be required to make more extensive commitments than existing members, which may include rules that are not in the TPP. A working group of all TPP parties who want to participate must then agree on the accession. Just one existing party can block the establishment of a working group for a non-APEC country (Article 30.4.3*bis*). The working group reports to the TPP Commission in writing, setting out any terms and conditions. The group

decides by positive consensus or the lack of a written objection by a group member within seven days. The Commission still needs to adopt the working group recommendations.

Most of the terms agreed bilaterally will end up being shared across all the parties, but the TPP already sets the precedent for different market access between parties and side-letters setting out special bilateral arrangements.

Trans-Pacific Partnership Commission

There is no formal institution created to oversee the agreement. Instead, a TPP Commission is established, comprising all the parties to the agreement at the level of ministers or senior officials. The Commission will be the vehicle through which the TPP members meet yearly. The chairing of meetings will rotate among the parties, although New Zealand will presumably continue to be the official depositary.

The Commission is the vehicle through which the TPP becomes a 'living agreement', with functions to:

- consider any matter relating to implementation or operation of the agreement;
- review within three years and at least every five years after that the 'economic relationship and partnership' among the parties;
- consider any proposal for amendment or modification;
- supervise the committees and working groups;
- establish model procedural rules for arbitral tribunals;
- consider how to enhance trade and investment between the parties;
- review the roster of panel chairs for state-state disputes;
- decide whether an original signatory can join the agreement;
- change institutional arrangements;
- consider changes to schedules on tariffs, rules of origin or government procurement;
- consult with non-government actors (including corporate interests) on a matter within its responsibility;

and

- seek to resolve disputes over interpretation and application of the agreement and issue interpretations of provisions.

All decisions of bodies established under the TPP are by consensus unless the text or the parties say otherwise (Article 27.3). This takes the form of 'negative consensus', requiring no objection from any party present at a meeting. If one country is absent and would have objected, it is bound by the decision of the others. There is no provision for proxies. In situations where the Commission's functions require an actual consensus, that is deemed to exist if a party that dissents during the discussion does not table an objection in writing within five days.

Countries that have transition periods must report their plans and progress towards implementation at each meeting (Article 27.7). Where a transition period is less than three years, a written report must be tabled six months before it expires; for more than three years, reports must be annual after the first three years, and six months before the period expires. Any other party can ask for more information about progress and must be provided with it promptly. At the end of the transition period, the country must report on what it has done. If a country fails to meet these requirements, that automatically goes on the agenda for the next Commission meeting, or a special meeting can be called to discuss it.

Amendments and withdrawal

Any changes to the text (including general or country-specific annexes, such as rules on foreign investment, appendices and footnotes) must have the consent of all the other parties (Article 27.7), which will involve their domestic processes. Again, the US Congress would need to approve. If an amendment is approved, it comes into force 60 days after all parties have notified their approval, or otherwise if agreed.

As with most treaties, any party can withdraw from the whole agree-

ment by giving written notice to the depositary and other parties (Article 30.6). Withdrawal takes effect after six months unless the parties agree otherwise. Recently, South Africa, Indonesia and a number of other countries have begun withdrawing from standalone bilateral investment treaties, which are the equivalent of the investment chapter of the TPP. Doing so in the TPP would mean terminating participation in the entire agreement. It is not possible to withdraw from just one chapter or rule, such as on intellectual property on medicines, investor-state dispute settlement or state-owned enterprises. That would be an amendment that requires the consent of the other parties.

Complete withdrawal from the TPP would be unprecedented and bring with it reputational and diplomatic ramifications, with threatened or actual investor flight and strike and credit ratings downgrades. Other states in the TPP and beyond would be likely to express a lack of confidence to enter into future treaties with that country.

There is a complex web of existing bilateral and regional agreements among the negotiating parties to the TPP, and all are also members of the WTO. Some of those agreements have different, and conflicting, terms and obligations from the TPP, and frequent vague wording makes their compatibility more uncertain.

Normally in international law the later agreement between the same parties that involves the same subject matter supersedes the prior agreement, to the extent that they are not compatible. The TPP says they are meant to co-exist and both continue to apply (Article 1.2). Significantly, it is terms that are more favourable to commercial interests – not to the right to regulate, or social and environmental objectives – that prevail. The relevant parties are meant to consult where there is a perceived inconsistency.

Where a dispute could arise equally under the TPP and another agreement involving the disputing parties (including the WTO), the com-

plainant can choose which dispute forum to use, but that decision is final (Article 28.4).

External influence over domestic decisions

The TPP rules constrain the actions of states, not private individuals. Some public entities, such as central banks, are excluded when performing specific functions. The ‘right to regulate’ appears as rhetoric in the preamble and in several places throughout the text of the agreement. But the TPP is the antithesis of that right, because its very purpose is to constrain governments’ future actions. In addition to requiring that a government’s laws, policies and practices comply with substantive rules in the TPP, the agreement imposes many procedural obligations. A feature of the ‘behind the border’ reach of the TPP is its focus on the processes and commercial orientation of domestic decision-making in the name of ‘transparency’ and ‘regulatory coherence’. Cumulatively these can be both intrusive and burdensome, and provide the means for states and investors from other TPP countries to build an evidence portfolio to use, if necessary, in an eventual dispute.

The generic rules on transparency (Chapter 26) cover public disclosure of existing and proposed measures and prior consultation with other parties and interested persons, but are largely exhortatory. There is a stronger obligation to maintain independent tribunals or procedures for prompt review and, if necessary, correction of administrative action covered by the agreement.

Individual chapters impose more specific and onerous transparency requirements that give foreign states and commercial interests more opportunities to influence government decisions. These apply to export licensing procedures, sanitary and phytosanitary measures, technical barriers to trade, cross-border services, financial services and investment, telecommunications, competition policy and intellectual property. The chapter on state-owned enter-

prises has particularly onerous requirements to respond to requests for information that do not require the party making the request to meet any objective and challengeable test.

Domestic decision-making processes and priorities are also targeted in Chapter 25 on ‘Regulatory Coherence’. Each government can decide the scope of regulatory measures covered by the chapter, but they must be ‘significant’, and be published within a year. Governments promise to use ‘good regulatory practices’ in relation to those measures to promote trade and investment, economic growth and employment.

The regulatory coherence chapter is much less directive than the version leaked in 2011, which would have realigned governments’ institutional arrangements and imposed presumptions of light-handed and least-burdensome regulation. After a backlash from developing-country governments, the final chapter affirms the sovereign right of governments to set their regulatory priorities, but then ‘encourages’ them to use regulatory impact assessments and facilitate inter-agency coordination when creating and reviewing regulation. The chapter is not enforceable per se, although investors could cite the expectations it creates when challenging a government measure.

Beyond the TPP Commission and the dispute processes, virtually every chapter creates a specific committee to consider matters arising under the chapter and, in some cases, to review implementation and compliance.

In addition to the potential for the Commission to revisit aspects of the TPP, several specific rules and matters of coverage are flagged for further negotiations. Significantly, the rules on new-generation biologics medicines, which were the subject of a controversy that was eventually resolved by providing two options, will be renegotiated after 10 years. The regulatory coherence chapter is to be reviewed every five years in light of developments in ‘good regulatory practices’. There are inbuilt negotiations for sub-central government coverage in the chapters on state-owned

enterprises and government procurement. Some chapter-specific committees may decide on future negotiations (as with government procurement).

State-state enforcement

A party to the TPP can dispute an interpretation or application of the agreement by another party or enforce the rules where it considers they have been breached, unless the chapter or rule is specifically excluded from enforcement.

In addition to enforcing the rules, a party can bring a dispute if it believes that benefits it expected from the TPP have been ‘nullified or impaired’ by the actions of another party, even if the rules were not broken. This possibility creates uncertainty where the text is vague, as often occurs with compromise solutions to a contested issue, and opens the door to pressure and the ‘chilling effect’ where a government is threatened with a dispute if it proceeds with a proposed action. Lack of public access to the negotiating history, or *travaux préparatoires*, will make it difficult for policy advocates outside government to anticipate or advise on interpretations. Nullification and impairment applies only to certain chapters, and significantly not those on investment and intellectual property.

Notable exclusions from state-state enforcement are the Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices, and the competition policy and regulatory coherence chapters. Governments are still required to comply with those rules and will be held to account by the TPP Commission and any subject-specific committees. Non-compliance could still form the basis for a nullification and impairment complaint.

State-state dispute process

The framework for state-state disputes is standard for free trade agreements (FTAs): it begins with consultations, and availability of ‘good offices’, followed by requests to establish an arbitral panel. Each step has a

time limit (although similar timelines are increasingly deviated from in the WTO).

Each party to a dispute chooses an arbitrator from a list of experts in law, international trade or matters covered by the agreement that has been submitted by the various TPP parties. The disputing parties, and failing that their panellists, are meant to agree on a chair. The arbitrators must have appropriate expertise where a dispute involves the labour, environment or anti-corruption chapters, but there is no similar requirement for a health-related dispute. Special arrangements apply for some financial services and investment disputes.

Where the same matter could be enforced through the WTO or another FTA involving the parties, the complainant can choose the forum, but that choice is final. The panels are only required to refer to WTO jurisprudence where the rule has been imported from the WTO, such as the general exceptions. Changes to the wording of WTO provisions and other agreements mean there is no clear jurisprudence, adding to legal uncertainty. Where there is a minority decision, the identity of the dissenting panellist is not disclosed.

Other parties that claim a 'substantial interest' can seek to join the dispute as an interested party. Non-state actors with an interest, whether a corporation or non-government organisation, can ask the panel to consider accepting written submissions to help evaluate the submissions and arguments – by implication limited to the issues being pleaded. Panels can also call on experts where the parties agree.

Hearings will be in public and will be held in the country of the party, unless the parties to the dispute agree otherwise. This is a major advance as it will make it easier for locals to monitor. Parties must also make 'best efforts' to publish submissions as soon as possible, but no later than the final panel report (i.e., when it is over). The right to protect confidential information could undermine this new openness.

The rules of procedure are re-

quired to include a code of conduct for arbitrators, but that does not have to be ready until the TPP comes into force, meaning it is not part of the text that is subject to domestic approval. A panellist who breaches the code can only be removed if both parties agree.

There is no appeal.

Compliance and enforcement

The objective of enforcement is that a party found in breach of its obligations will revoke the impugned law, policy, decision or action.

There is a drawn-out process for resolving a standoff if a losing respondent fails to implement the panel's decision (Article 28.19). Ultimately, there are two options: (i) paying temporary monetary compensation so long as the breach continues; and (ii) sanctions by the withdrawal of benefits equivalent to the loss the other party faces from the breach. These sanctions should target the same subject matter as the breach (e.g., agriculture), and only where that is not practicable can there be resort to a different subject matter (e.g., Internet services or investment). There are limits on using withdrawal of intellectual property and financial services concessions for a breach involving goods. This retaliation can have serious impacts, especially on poor and small countries, so the aggrieved party has to consider the breach is serious and is meant to consider the economic consequences.

However, enforcement will reflect the vastly unequal economic power of the different TPP parties, as both complainants and respondents. Some novel moves are presumably meant to mitigate the impact of sanctions on poor countries. If a party plans to suspend benefits against another party, they can agree to a short-term (12 months) compromise where the country in breach pays half the assessed economic loss, in instalments, into a fund that can be used for 'initiatives to facilitate trade between the parties' including further reducing 'unreasonable trade barriers'. This will do little to address the power asymmetries, especially when

a rich country is in breach.

Investor-state dispute settlement (ISDS)

Investors from a TPP country have new, more extensive rights in the investment and financial services chapters, and the controversial power to enforce these special entitlements through international arbitration using ad hoc tribunals from which there is no appeal. The ISDS process is also made available for a dispute on an investment contract involving natural resources, various public services and infrastructure, and for a dispute over an authorisation to invest.

Section B of the investment chapter, which provides for ISDS, attempts to address some problematic practices of investors and arbitral tribunals. There is a 3.5-year time limit on bringing a claim from when the action complained of should have been known. Challenges that a dispute manifestly lacks merit are to be heard expeditiously. Investors must waive the right to pursue a legal dispute on the same measure in another legal forum, or to invoke more favourable procedural rules in other investment treaties using the most-favoured-nation rule. The burden of proof is explicitly placed on investors for alleged breaches of the minimum standard of treatment. The TPP Commission can issue a binding interpretation of a provision, or a non-conforming measure listed in a party's investment annex; however, the parties may not agree, and even though this is said to bind investment tribunals they have disregarded parties' interpretations in past disputes under other investment treaties (e.g., *Railways Development Corporation v Republic of Guatemala*, ICSID case no. ARB/07/23, award 29 June 2012). Special rules apply to interpreting exceptions relied on as defences to a dispute on financial investments.

None of this addresses the fundamental objection that ISDS lacks the characteristics of a credible and independent legal process and effectively subordinates national judicial processes as the appropriate legal fo-

rum for a privileged class of foreign investors. Investment tribunals are still ad hoc, with the ‘judges’ selected by the parties. Consideration of the proposed code of conduct for arbitrators is not required until the agreement comes into force, so it is impossible to assess whether it will even attempt to address the conflicts of interest that arise when practising investment lawyers also act as arbitrators. Decisions of domestic courts can be challenged under ISDS, and domestic appeal processes bypassed. There is no system of precedent and no appeal.

Other countries are recognising the need to address these concerns at a more fundamental level. The European Union has proposed replacing ISDS with an investment court, including in the Transatlantic Trade and

Investment Partnership it is negotiating with the US. South Africa has proposed domestic legislation that would substitute for ISDS commitments from which it is withdrawing. India is developing a new, more balanced model investment treaty. The TPP is not only a missed opportunity, but one that places regulatory sovereignty and the integrity of the rule of law at greater risk. ♦

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US Congressional process for the TPP¹

THE US’s Bipartisan Congressional Trade Priorities and Accountability Bill (otherwise known as the Fast Track or Trade Promotion Authority legislation) required the President to give 90 days’ notice of intention to sign the TPP. That notice was given on 5 November 2015, the same day the text was released.

The notification of intention to sign also triggered a 30-day period for reports on the TPP from 28 trade advisory committees, including 16 industry trade advisory committees, whose 600 members are overwhelmingly drawn from the corporate sector.²

The International Trade Commission (ITC) is a US government body, one of whose tasks is to prepare economic analyses of international trade agreements to be provided to Congress alongside the implementing legislation. The assessment includes the estimated impact on US GDP, exports and imports, employment, and the production, employment and competitive position of industries likely to be significantly affected by the agreement. Section 105(c) of the Fast

Track law says the ITC must deliver its report to the President and Congress 105 days after the President signs the TPP, although it could do so before.

Fast Track

Fast Track or Trade Promotion Authority was signed into law in June 2015. The Bill delegates to the US President the right to sign and enter into a trade agreement before Congress approves the contents of the pact. It then guarantees both houses of Congress – the House of Representatives and the Senate – will vote on the legislation to implement the agreement within 90 days of submission of the implementing legislation. Under Fast Track, that legislation circumvents normal Congressional committee review/amendment processes and is also not subject to any floor amendments. Both houses of Congress are restricted to a ‘yes’ or ‘no’ vote. Debate in each chamber is limited to 20 hours and Congress must complete the process within 90 legislative days.

In return for the surrender of some Congressional control over trade, which constitutionally belongs to the House of Representatives, the Fast Track bill contained a long list of substantive and procedural requirements for the TPP. Most of the procedural requirements are binding; the substantive content may become a matter of contest. There are already signs of discontent on both sides of Congress.

The administration of President Barack Obama needs a majority in each chamber. In 2014 the first attempt to move the Fast Track legislation in the Senate failed, as it needed a super-majority in the initial vote. After legislative manoeuvring and deal-making, the second vote succeeded by a single vote. The Fast Track legislation itself was then blocked on a first attempt in the House of Representatives. After further deal-making and legislative manoeuvring, it passed narrowly by a 218-208 majority in the House and 60-38 vote in the Senate. The Democratic Party President relied on Republican votes. Only 28 Democrats supported the bill in the House. If five House votes shift, the TPP will not pass, and there are warnings that could well happen.

Congressional vote on implementing legislation

Once the TPP is signed, there is no specified date on which the implementing legislation must be tabled in Congress. Technically, the final legal text and a draft statement of administrative action must be submitted to Congress 30 days before the legislation and statement of administrative action is submitted to Congress. Normally the administration would wait until the ITC report is completed to present the bill, but that is not strictly required.

The timing will be tactical – the administration will not want to present the legislation unless they know it will pass. It could be extremely fast if the votes are there, or if the deal does not enjoy majority support it could be delayed more than four years, as with the US-Korea FTA. If all corners were

cut, the bill could be submitted shortly after the President signs the TPP in early February 2016. But that would be during the election campaign when all members of the House are up for re-election and can be held accountable by the electorate. Any moves to satisfy what the Republicans demand are likely to lose Democrat votes and vice versa.

As soon as the text became available, Democrats on key Congressional committees began consulting with constituents to assess it against core policies, including the May 2007 bipartisan deal they brokered with then President George W Bush for the FTAs with Peru, Colombia, Panama and South Korea. This focuses on labour, environment and medicines.

Republican support is likely to become more difficult in an election year. Influential members of Congress, including the Republican chair of the Senate Finance Committee Orrin Hatch, say the agreement does not live up to the requirements of the Fast Track law and have called for renegotiation of provisions, especially on biologics medicines and the option to exclude tobacco from investor-state dispute settlement (ISDS).

Alternatively, the implementing bill could be tabled during the 'lame duck' period between the outgoing Obama administration and the incoming new president and members of Congress. Doing so would be politically difficult, especially if the incoming president opposed the deal, which is the current position of the entire Democratic slate of candidates and several prominent Republican candidates. If a candidate who opposes the TPP is elected, there will be much pressure to not hold a vote so as to preserve the opportunity to seek more concessions through renegotiation in the next administration.

If the implementing legislation has not been passed, it is possible that a new president might decide, or be prevailed upon, to seek to reopen aspects of the text. The FTAs with Panama, Colombia and South Korea that were negotiated and signed by President Bush were not voted on during the Bush administration. They then

languished for several years while the Obama administration negotiated an additional 'Labour Action Plan' with the Colombian government and required the Korean government to make a series of further concessions on automobiles and agriculture. It was only after those additional concessions were secured that Congress voted to approve those agreements.

A change in the political balance across both houses of Congress in either political direction could also affect the outcome of the vote.

US certification of another party's compliance

In addition, the new administration could use the certification process to secure changes to other parties' commitments and domestic laws that are favourable to the US.

Certification is a legally binding obligation on the US President, set out in Section 4(a) §1 and §2 of the Fast Track legislation: 'Prior to exchanging notes providing for the entry into force of a trade agreement, the United States Trade Representative shall consult closely and on a timely basis with Members of Congress and [relevant committees] ... and keep them fully apprised of the measures a trading partner has taken to comply with those provisions of the agreement that are to take effect on the date that the agreement enters into force.'

US government officials will transmit a list of the changes to the other country's domestic laws and policies that the US government requires before it will allow the TPP to go into force. They will then monitor compliance and pressure the government of the trading-partner country to alter its laws and policies until they satisfy the US view of the changes required.

The US use of certification in the past has been controversial as it involves foreign interference in sovereign lawmaking processes. Examples of US certification practices are available on www.tppnocertification.org. In many instances the US has focused on intellectual property laws, especially affecting medicines. In Austral-

ia's case the US insisted that further amendments to copyright laws be passed before it would certify compliance under the Australia-US FTA. In May 2015 current and former legislators from TPP countries sent an open letter to their political leaders calling on them to resist such pressures.

Members of Congress have already indicated they will call for side-letters or proof that the other country has complied with US demands in areas of medicines, especially biologics, the tobacco exception from ISDS, dairy, and currency controls. A Japanese official has suggested side-letters as a creative way to address objections from US lawmakers without renegotiating the formal text.

The other parties cannot effectively constrain certification, as it is a unilateral US process. However, the formula for bringing the agreement into force raises some uncertainties about how certification may work in practice.

Under the TPP the US President must provide formal written notification that the US has satisfied its domestic approval processes before the agreement can come into force (Article 30.5). That will not occur until the US certifies that the other parties have altered their domestic laws and policies to satisfy US expectations of what is needed to comply with the TPP. This is distinct from the US's domestic process of passing the implementing legislation. The formula adopted in the TPP means the US must be an original party to the agreement. Until the US certifies another party's compliance, the US process will not have been completed for that party. It is unclear from the TPP text whether the US could deliver partial notification in relation to only some parties, but the US is expected to argue so. – *Jane Kelsey* ♦

Endnotes

- 1 See, generally, Public Citizen, 'TPP Vote Calendar', <https://www.citizen.org/documents/TPP-vote-calendar.pdf>
- 2 'The Insider List', <https://sojo.net/articles/insider-list>

‘I helped create ISIS’

A former US Marine who served in Iraq in 2003-05 explains how much ISIS is the product of the accumulated wrongs and horrific crimes committed by the US against the Iraqi people during its genocidal military campaign in that country.

Vincent Emanuele

FOR the last several years, people around the world have asked, ‘Where did ISIS come from?’ Explanations vary but largely focus on geopolitical (US hegemony), religious (Sunni-Shia), ideological (Wahhabism) or ecological (climate refugees) origins. Many commentators and even former military officials correctly suggest that the war in Iraq is primarily responsible for unleashing the forces we now know as ISIS/ISIL/Daesh/etc. Here hopefully I can add some useful reflections and anecdotes.

Mesopotamian nightmares

When I was stationed in Iraq with the 1st Battalion, 7th Marines, in 2003-05, I didn’t know what the repercussions of the war would be, but I knew there would be a reckoning. That retribution, otherwise known as blowback, is currently being experienced around the world (Iraq, Afghanistan, Yemen, Libya, Egypt, Lebanon, Syria, France, Tunisia, California, and so on), with no end in sight.

Back then, I routinely saw and participated in obscenities. Of course, the wickedness of the war was never properly recognised in the West. Without question, antiwar organisations attempted to articulate the horrors of the war in Iraq, but the mainstream media, academia and political-corporate forces in the West never allowed for a serious examination of the greatest war crime of the 21st century.

As we patrolled the vast region of Iraq’s Al-Anbar Province, throwing MRE (Meal Ready to Eat) trash out of our vehicles, I never contemplated how we would be remembered in history books; I simply wanted to make some extra room in my



Many commentators and former military officials suggest that the war in Iraq is primarily responsible for unleashing the forces we now know as ISIS.

Humvee. Years later, sitting in a Western Civilisation history course at university, listening to my professor talk about the cradle of civilisation, I thought of MRE garbage on the floor of the Mesopotamian desert.

Examining recent events in Syria and Iraq, I can’t help but think of the small kids my fellow Marines would pelt with Skittles from those MRE packages. Candies weren’t the only objects thrown at the children: water bottles filled with urine, rocks, debris and various other items were thrown as well. I often wonder how many members of ISIS and various other terrorist organisations recall such events.

Moreover, I think about the hundreds of prisoners we took captive and tortured in makeshift detention facilities staffed by teenagers from Tennessee, New York and Oregon. I never had the misfortune of working in the detention facility, but I remember the stories. I vividly remember the Marines telling me about punching, slapping, kicking, elbowing, kneeing and head-butting Iraqis. I remember the tales of sexual torture: forcing Iraqi men to perform sexual acts on each

other while Marines held knives against their testicles, sometimes sodomising them with batons.

However, before those abominations could take place, those of us in infantry units had the pleasure of rounding up Iraqis during night raids, zip-tying their hands, black-bagging their heads and throwing them in the back of Humvees and trucks while their wives and kids collapsed to their knees and wailed. Sometimes, we would pick them up during the day. Most of the time they wouldn’t resist. Some of them would hold hands while Marines would butt-stroke the prisoners in the face. Once they arrived at the detention facility, they would be held for days, weeks and even months at a time. Their families were never notified. And when they were released, we would drive them from the FOB (Forward Operating Base) to the middle of the desert and release them several miles from their homes.

After we cut their zip-ties and took the black bags off their heads, several of our more deranged Marines would fire rounds from their AR-15s into the air or ground, scaring the recently released captives. Always for



US soldiers in Iraq. The mainstream media, academia and political-corporate forces in the West never allowed for a serious examination of the war in Iraq, 'the greatest war crime of the 21st century'.

laughs. Most Iraqis would run, still crying from their long ordeal at the detention facility, hoping some level of freedom awaited them on the outside. Who knows how long they survived? After all, no one cared.

We do know of one former US prisoner who survived though: Abu Bakr al-Baghdadi, the leader of ISIS.

Amazingly, the ability to dehumanise the Iraqi people reached a crescendo after the bullets and explosions concluded, as many Marines spent their spare time taking pictures of the dead, often mutilating their corpses for fun or poking their bloated bodies with sticks for some cheap laughs. Because iPhones weren't available at the time, several Marines came to Iraq with digital cameras. Those cameras contain an untold history of the war

in Iraq, a history the West hopes the world forgets. That history and those cameras also contain footage of wanton massacres and numerous other war crimes, realities the Iraqis don't have the pleasure of forgetting.

Unfortunately, I could recall countless horrific anecdotes from my time in Iraq. Innocent people were not only routinely rounded up, tortured and imprisoned, they were also incinerated by the hundreds of thousands, some studies suggest by the millions.

Only the Iraqis understand the pure evil that's been waged on their nation. They remember the West's role in the eight-year war between Iraq and Iran; they remember Clinton's sanctions in the 1990s, policies which resulted in the deaths of well over 500,000 people, largely

women and children. Then, 2003 came and the West finished the job.

Today, Iraq is an utterly devastated nation. The people are poisoned and maimed, and the natural environment is toxic from bombs laced with depleted uranium. After 14 years of the War on Terror, one thing is clear: the West is great at fomenting barbarism and creating failed states.

Living with ghosts

The warm and glassy eyes of young Iraqi children perpetually haunt me, as they should. The faces of those I've killed, or at least those whose bodies were close enough to examine, will never escape my thoughts. My nightmares and daily reflections remind me of where ISIS comes from and why exactly they hate us. That hate, understandable yet regrettable, will be directed at the West for years and decades to come. How could it be otherwise?

Again, the scale of destruction the West has inflicted in the Middle East is absolutely unimaginable to the vast majority of people living in the developed world. This point can never be overstated as Westerners consistently and naively ask, 'Why do they hate us?'

In the end, wars, revolutions and counterrevolutions take place and subsequent generations live with the results: civilisations, societies, cultures, nations and individuals survive or perish. That's how history works. In the future, how the West deals with terrorism will largely depend on whether or not the West continues their terroristic behaviour. The obvious way to prevent future ISIS-style organisations from forming is to oppose Western militarism in all its dreadful forms: CIA coups, proxy wars, drone strikes, counterinsurgency campaigns, economic warfare, etc.

Meanwhile, those of us who directly participated in the genocidal military campaign in Iraq will live with the ghosts of war. ♦

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An Iraqi man with his son at a centre for prisoners of war captured by the US army near Najaf, Iraq, March 2003. Many of the prisoners held in US detention facilities in Iraq were subjected to torture.

NATO is harbouring the Islamic State

While the NATO countries led by the US profess to wage an uncompromising war against ISIS, one of this military pact's key members, Turkey, and some of its major Arab allies such as Saudi Arabia, Qatar, the UAE and Kuwait have been providing material assistance to the terrorist group. *Nafeez Ahmed* explains.

'We stand alongside Turkey in its efforts in protecting its national security and fighting against terrorism. France and Turkey are on the same side within the framework of the international coalition against the terrorist group ISIS.' – Statement by French Foreign Ministry, July 2015

THE 13 November Paris massacre will be remembered, like 9/11, as a defining moment in world history.

The murder of 129 people and the injury of 352 more by 'Islamic State' (ISIS) acolytes striking multiple targets simultaneously in the heart of Europe, mark a major sea-change in the terror threat. For the first time, a Mumbai-style attack has occurred on Western soil – the worst attack on Europe in decades. As such, it has triggered a seemingly commensurate response from France: the declaration of a nationwide state of emergency, the likes of which have not been seen since the 1961 Algerian war. ISIS has followed up with threats to attack Washington and New York.

Meanwhile, French President Francois Hollande wants European Union leaders to suspend the Schengen Agreement on open borders to allow dramatic restrictions on freedom of movement across Europe. He also demands the EU-wide adoption of the Passenger Name Records (PNR) system allowing intelligence services to meticulously track the travel patterns of Europeans, along with an extension of the state of emergency to at least three months.

Under the extension, French police can now block any website, put people under house arrest without trial, search homes without a warrant, and prevent suspects from meeting

others deemed a threat.

'We know that more attacks are being prepared, not just against France but also against other European countries,' said the French Prime Minister Manuel Valls. 'We are going to live with this terrorist threat for a long time.'

Hollande plans to strengthen the powers of police and security services under new anti-terror legislation, and to pursue amendments to the constitution that would permanently enshrine the state of emergency into French politics. 'We need an appropriate tool we can use without having to resort to the state of emergency,' he explained.

Parallel with martial law at home, Hollande was quick to accelerate military action abroad, launching 30 airstrikes on over a dozen Islamic State targets in its de facto capital, Raqqa.

France's defiant promise, according to Hollande, is to 'destroy' ISIS.

The ripple effect from the attacks in terms of the impact on Western societies is likely to be permanent. In much the same way that 9/11 saw the birth of a new era of perpetual war in the Muslim world, the 13/11 Paris attacks are already giving rise to a brave new phase in that perpetual war: a new age of Constant Vigilance, in which citizens are vital accessories to the police state, enacted in the name of defending a democracy eroded by the very act of defending it through Constant Vigilance.

Mass surveillance at home and endless military projection abroad are the twin sides of the same coin of national security, which must simply be maximised as much as possible.

'France is at war,' Hollande told

the French parliament at the Palace of Versailles. 'We're not engaged in a war of civilisations, because these assassins do not represent any. We are in a war against jihadist terrorism which is threatening the whole world.'

The friend of our enemy is our friend

Conspicuously missing from President Hollande's decisive declaration of war, however, was any mention of the biggest elephant in the room: state sponsorship.

Syrian passports discovered near the bodies of two of the suspected Paris attackers, according to police sources, were fake, and likely forged in Turkey.

Earlier this year, the Turkish daily *Meydan* reported, citing an Uighur source, that more than 100,000 fake Turkish passports had been given to ISIS. The figure, according to the US Army's Foreign Studies Military Office (FSMO), is likely exaggerated, but corroborated 'by Uighurs captured with Turkish passports in Thailand and Malaysia'.

Further corroboration came from a Sky News Arabia report by correspondent Stuart Ramsey, which revealed that the Turkish government was certifying passports of foreign militants crossing the Turkey-Syria border to join ISIS. The passports, obtained from Kurdish fighters, had the official exit stamp of Turkish border control, indicating the ISIS militants had entered Syria with full knowledge of Turkish authorities.

The dilemma facing the administration of Turkish President Recep Tayyip Erdogan is summed up by the FSMO: 'If the country cracks down

on illegal passports and militants transiting the country, the militants may target Turkey for attack. However, if Turkey allows the current course to continue, its diplomatic relations with other countries and internal political situation will sour.'

This barely scratches the surface. A senior Western official familiar with a large cache of intelligence obtained this summer from a major raid on an ISIS safehouse told the *Guardian* that 'direct dealings between Turkish officials and ranking ISIS members [were] now "undeniable".'

The same official confirmed that Turkey, a longstanding member of NATO, is not just supporting ISIS, but also other jihadist groups, including Ahrar al-Sham and Jabhat al-Nusra, al-Qaeda's affiliate in Syria. 'The distinctions they draw [with other opposition groups] are thin indeed,' said the official. 'There is no doubt at all that they militarily cooperate with both.'

In a rare insight into this brazen state sponsorship of ISIS, a year ago *Newsweek* reported the testimony of a former ISIS communications technician, who had travelled to Syria to fight the regime of President Bashar al-Assad. The former ISIS fighter told *Newsweek* that Turkey was allowing ISIS trucks from Raqqa to cross the 'border, through Turkey and then back across the border to attack Syrian Kurds in the city of Serekaniye in northern Syria in February'. ISIS militants would freely travel 'through Turkey in a convoy of trucks,' and stop 'at safehouses along the way'.

The former ISIS communications technician also admitted that he would routinely 'connect ISIS field captains and commanders from Syria with people in Turkey on innumerable occasions', adding that 'the people they talked to were Turkish officials ... ISIS commanders told us to fear nothing at all because there was full cooperation with the Turks'.

In January, authenticated official documents of the Turkish military were leaked online showing that Turkey's intelligence services had been caught in Adana by military officers transporting missiles, mortars and



Iraqi security forces and allied forces search for Islamic State fighters at an oil refinery north of Baghdad. Senior political and intelligence sources in Turkey and Iraq confirm that Turkish authorities have actively facilitated ISIS oil sales through the country.

anti-aircraft ammunition via truck 'to the al-Qaeda terror organisation' in Syria.

According to other ISIS suspects facing trial in Turkey, the Turkish national military intelligence organisation (MIT) had begun smuggling arms, including NATO weapons, to jihadist groups in Syria as early as 2011.

The allegations have been corroborated by a prosecutor and court testimony of Turkish military police officers, who confirmed that Turkish intelligence was delivering arms to Syrian jihadists from 2013 to 2014.

Documents leaked in September 2014 showed that Saudi Prince Bandar bin Sultan had financed weapons shipments to ISIS through Turkey. Arms delivered by a clandestine plane from Germany in the Etimesgut airport in Turkey were split into three containers, two of which were dispatched to ISIS.

A report by the Turkish Statistics Institute confirmed that the government had provided at least \$1 million in arms to Syrian rebels within that period, contradicting official denials. Weapons included grenades, heavy artillery, anti-aircraft guns, firearms, ammunition, hunting rifles and other weapons – but the Institute declined to identify the specific groups receiving the shipments.

Information of that nature emerged separately. Just two months ago, Turkish police raided a news outlet that published revelations on how the local customs director had

approved weapons shipments from Turkey to ISIS.

Turkey has also played a key role in facilitating the lifeblood of ISIS' expansion: black market oil sales. Senior political and intelligence sources in Turkey and Iraq confirm that Turkish authorities have actively facilitated ISIS oil sales through the country.

Last summer, Mehmet Ali Ediboglu, an MP from the main opposition, the Republican People's Party, estimated the quantity of ISIS oil sales in Turkey at about \$800 million – that was over a year ago. By now, this implies that Turkey has facilitated over \$1 billion worth of black market ISIS oil sales to date.

There is no 'self-sustaining economy' for ISIS, contrary to the fantasies of the *Washington Post* and *Financial Times* in their recent faux investigations, according to Martin Chulov of the *Guardian*: '... tankers carrying crude drawn from makeshift refineries still make it to the [Turkey-Syria] border. One ISIS member says the organisation remains a long way from establishing a self-sustaining economy across the area of Syria and Iraq it controls. "They need the Turks. I know of a lot of cooperation and it scares me," he said. "I don't see how Turkey can attack the organisation too hard. There are shared interests."'

Senior officials of Turkey's ruling Justice and Development Party (AKP) have conceded the extent of the government's support for ISIS.

The liberal Turkish daily *Taraf*

quoted an AKP founder, Dengir Mir Mehmet Firat, admitting: 'In order to weaken the developments in Rojova [Kurdish province in Syria] the government gave concessions and arms to extreme religious groups ... the government was helping the wounded. The Minister of Health said something such as, it's a human obligation to care for the ISIS wounded.'

The paper also reported that ISIS militants routinely receive medical treatment in hospitals in southeast Turkey – including ISIS leader Abu Bakr al-Baghdadi's right-hand man.

Writing in *Hurriyet Daily News*, journalist Ahu Ozyurt described his 'shock' at learning of the pro-ISIS 'feelings of the AKP's heavyweights' in Ankara and beyond, including 'words of admiration for ISIL from some high-level civil servants even in Sanliurfa. "They are like us, fighting against seven great powers in the War of Independence," one said. "Rather than the PKK [Kurdistan Workers Party] on the other side, I would rather have ISIL as a neighbour," said another.'

Meanwhile, NATO leaders feign outrage and learned liberal pundits continue to scratch their heads in bewilderment as to ISIS' extraordinary resilience and inexorable expansion.

Unsurprisingly, then, Turkey's anti-ISIS bombing raids have largely been token gestures. Under cover of fighting ISIS, Turkey has largely used the opportunity to bomb the Kurdish forces of the Democratic Union Party (YPG) in Syria and the PKK in Turkey and Iraq. Yet those forces are widely recognised to be the most effective fighting ISIS on the ground.

Meanwhile, Turkey has gone to pains to thwart almost every US effort to counter ISIS. When this summer, 54 graduates of the Pentagon's \$500 million 'moderate' Syrian rebel train-and-equip programme were kidnapped by Jabhat al-Nusra – al-Qaeda's arm in Syria – it was due to a tip-off from Turkish intelligence.

The Turkish double-game was confirmed by multiple rebel sources to McClatchy news service, but denied by a Pentagon spokesman who said, reassuringly: 'Turkey is a NATO

ally, close friend of the United States and an important partner in the international coalition.'

Nevermind that Turkey has facilitated about \$1 billion in ISIS oil sales.

According to a US-trained Division 30 officer with access to information on the incident, Turkey was trying 'to leverage the incident into an expanded role in the north for the Islamists in Nusra and Ahrar' and to persuade the United States to 'speed up the training of rebels'.

As Professor David Graeber of the London School of Economics pointed out: 'Had Turkey placed the same kind of absolute blockade on ISIS territories as they did on Kurdish-held parts of Syria ... that blood-stained "caliphate" would long since have collapsed – and arguably, the Paris attacks may never have happened. And if Turkey were to do the same today, ISIS would probably collapse in a matter of months. Yet, has a single western leader called on Erdogan to do this?'

Some officials have spoken up about the paradox, but to no avail. Last year, Claudia Roth, deputy speaker of the German parliament, expressed shock that NATO is allowing Turkey to harbour an ISIS camp in Istanbul, facilitate weapons transfers to Islamist militants through its borders, and tacitly support ISIS oil sales.

Nothing happened.

Instead, Turkey has been amply rewarded for its alliance with the very same terror-state that wrought the Paris massacre on 13 November. Just a month earlier, German Chancellor Angela Merkel offered to fast-track Turkey's bid to join the EU, permitting visa-free travel to Europe for Turks.

No doubt this would be great news for the security of Europe's borders.

State sponsorship

It is not just Turkey. Senior political and intelligence sources in the Kurdish Regional Government (KRG) in Iraq have confirmed the complicity of high-level KRG offi-

cials in facilitating ISIS oil sales, for personal profit and to sustain the government's flagging revenues.

Despite a formal parliamentary inquiry corroborating the allegations, there have been no arrests, no charges, no prosecutions. The KRG 'middlemen' and other government officials facilitating these sales continue their activities unimpeded.

In his testimony before the Senate Armed Services Committee in September 2014, General Martin Dempsey, then chairman of the US Joint Chiefs of Staff, was asked by Senator Lindsay Graham whether he knew of 'any major Arab ally that embraces ISIL'. General Dempsey replied: 'I know major Arab allies who fund them.'

In other words, the most senior US military official at the time had confirmed that ISIS was being funded by the very same 'major Arab allies' that had just joined the US-led anti-ISIS coalition.

These allies include Saudi Arabia, Qatar, the UAE and Kuwait in particular – which for the last four years at least have funnelled billions of dollars largely to extremist rebels in Syria. No wonder that their anti-ISIS airstrikes, already minuscule, have now declined almost to zero as they focus instead on bombing Shi'a Houthis in Yemen, which, incidentally, is paving the way for the rise of ISIS there.

Porous links between some Free Syrian Army (FSA) rebels and Islamist militant groups like al-Nusra, Ahrar al-Sham and ISIS have enabled prolific weapons transfers from 'moderate' to Islamist militants.

The consistent transfers of CIA-Gulf-Turkish arms supplies to ISIS have been documented through analysis of weapons serial numbers by the UK-based Conflict Armament Research (CAR), whose database on the illicit weapons trade is funded by the EU and Swiss Federal Department of Foreign Affairs.

'Islamic State forces have captured significant quantities of US-manufactured small arms and have employed them on the battlefield,' a CAR report found in September 2014.

'M79 90 mm anti-tank rockets captured from IS forces in Syria are identical to M79 rockets transferred by Saudi Arabia to forces operating under the "Free Syrian Army" umbrella in 2013.'

German journalist Jurgen Todenhof, who spent 10 days inside the Islamic State, reported last year that ISIS is being 'indirectly' armed by the West: 'They buy the weapons that we give to the Free Syrian Army, so they get Western weapons – they get French weapons ... I saw German weapons, I saw American weapons.'

ISIS, in other words, is state-sponsored – indeed, sponsored by purportedly Western-friendly regimes in the Muslim world who are integral to the anti-ISIS coalition.

Which then begs the question as to why Hollande and other Western leaders expressing their determination to 'destroy' ISIS using all means necessary, would prefer to avoid the most significant factor of all: the material infrastructure of ISIS' emergence in the context of ongoing Gulf and Turkish state support for Islamist militancy in the region.

There are many explanations, but one perhaps stands out: the West's abject dependence on terror-toting Muslim regimes, largely to maintain access to Middle East, Mediterranean and Central Asian oil and gas resources.

Pipelines

Much of the strategy currently at play was candidly described in a 2008 US Army-funded RAND report, 'Unfolding the Future of the Long War'. The report noted that 'the economies of the industrialised states will continue to rely heavily on oil, thus making it a strategically important resource'. As most oil will be produced in the Middle East, the US has 'motive for maintaining stability in and good relations with Middle Eastern states'. It just so happens that those states support Islamist terrorism:

'The geographic area of proven oil reserves coincides with the power base of much of the Salafi-jihadist network. This creates a linkage be-

tween oil supplies and the long war that is not easily broken or simply characterised ... For the foreseeable future, world oil production growth and total output will be dominated by Persian Gulf resources ... The region will therefore remain a strategic priority, and this priority will interact strongly with that of prosecuting the long war.'

Declassified government documents clarify beyond all doubt that a primary motivation for the 2003 Iraq War, preparations for which had begun straight after 9/11, was installing a permanent US military presence in the Persian Gulf to secure access to the region's oil and gas.

The obsession over black gold did not end with Iraq, though – and is not exclusive to the West.

'Most of the foreign belligerents in the war in Syria are gas-exporting countries with interests in one of the two competing pipeline projects that seek to cross Syrian territory to deliver either Qatari or Iranian gas to Europe,' wrote Professor Mitchell Orenstein of the Davis Center for Russian and Eurasian Studies at Harvard University, in *Foreign Affairs*, the journal of Washington DC's Council on Foreign Relations.

In 2009, Qatar had proposed to build a pipeline to send its gas northwest via Saudi Arabia, Jordan and Syria to Turkey. But Assad 'refused to sign the plan', reports Orenstein. 'Russia, which did not want to see its position in European gas markets undermined, put him under intense pressure not to.'

Russia's Gazprom sells 80% of its gas to Europe. So in 2010, Russia put its weight behind 'an alternative Iran-Iraq-Syria pipeline that would pump Iranian gas from the same field out via Syrian ports such as Latakia and under the Mediterranean'. The project would allow Moscow 'to control gas imports to Europe from Iran, the Caspian Sea region, and Central Asia'.

Then in July 2011, a \$10 billion Iran-Iraq-Syria pipeline deal was announced, and a preliminary agreement duly signed by Assad.

Later that year, the US, the UK,

France and Israel were ramping up covert assistance to rebel factions in Syria to elicit the 'collapse' of Assad's regime 'from within'.

'The United States ... supports the Qatari pipeline as a way to balance Iran and diversify Europe's gas supplies away from Russia,' explained Orenstein in *Foreign Affairs*.

An article in the *Armed Forces Journal* published last year by Major Rob Taylor, an instructor at the US Army's Command and General Staff College, Fort Leavenworth, thus offered scathing criticism of conventional media accounts of the Syrian conflict that ignore the pipeline question:

'Any review of the current conflict in Syria that neglects the geopolitical economics of the region is incomplete ... Viewed through a geopolitical and economic lens, the conflict in Syria is not a civil war, but the result of larger international players positioning themselves on the geopolitical chessboard in preparation for the opening of the pipeline ... Assad's pipeline decision, which could seal the natural gas advantage for the three Shi'a states, also demonstrates Russia's links to Syrian petroleum and the region through Assad. Saudi Arabia and Qatar, as well as al-Qaeda and other groups, are manoeuvring to depose Assad and capitalise on their hoped-for Sunni conquest in Damascus. By doing this, they hope to gain a share of control over the "new" Syrian government, and a share in the pipeline wealth.'

The pipelines would access not just gas in the Iran-Qatari field, but also potentially newly discovered offshore gas resources in the Eastern Mediterranean – encompassing the offshore territories of Israel, Palestine, Cyprus, Turkey, Egypt, Syria and Lebanon. The area has been estimated to hold as much as 1.7 billion barrels of oil and up to 122 trillion cubic feet of natural gas, which geologists believe could be just a third of the total quantities of undiscovered fossil fuels in the Levant.

A December 2014 report by the US Army War College's Strategic Studies Institute, authored by a former

UK Ministry of Defence research director, noted that Syria specifically holds significant offshore oil and gas potential. It noted: 'Once the Syria conflict is resolved, prospects for Syrian offshore production – provided commercial resources are found – are high.'

Assad's brutality and illegitimacy is beyond question – but until he had demonstrated his unwillingness to break with Russia and Iran, especially over their proposed pipeline project, US policy towards Assad had been ambivalent.

State Department cables obtained by WikiLeaks reveal that US policy had wavered between financing Syrian opposition groups to facilitate 'regime change', and using the threat of regime change to induce 'behaviour reform'. President Barack Obama's preference for the latter resulted in US officials, including Secretary of State John Kerry, shamelessly courting Assad in the hopes of prying him away from Iran, opening up the Syrian economy to US investors, and aligning the regime with US-Israeli regional designs.

Even when the 2011 Arab Spring protests resulted in Assad's security forces brutalising peaceful civilian demonstrators, both Kerry and then Secretary of State Hillary Clinton insisted that he was a 'reformer' – which he took as a green light to respond to further protests with massacres.

Assad's decision to side with Russia and Iran, and his endorsement of their favoured pipeline project, were key factors in the US decision to move against him.

Europe's dance with the devil

Turkey plays a key role in the US-Qatar-Saudi-backed route designed to circumvent Russia and Iran, as an intended gas hub for exports to European markets. It is only one of many potential pipeline routes involving Turkey.

'Turkey is key to gas supply diversification of the entire European Union. It would be a huge mistake to stall energy cooperation any further,' urged David Koranyi, director of the

Atlantic Council's Eurasian Energy Futures initiative and a former national security adviser to the Prime Minister of Hungary.

Koranyi noted that both recent 'major gas discoveries in the Eastern Mediterranean' and 'gas supplies from Northern Iraq' could be 'sourced to supply the Turkish market and transported beyond to Europe'.

Given Europe's dependence on Russia for about a quarter of its gas, the imperative to minimise this dependence and reduce the EU's vulnerability to supply outages has become an urgent strategic priority. The priority fits into longstanding efforts by the US to wean Central and Eastern Europe out of the orbit of Russian power.

Turkey is pivotal to the US-EU vision for a new energy map: 'The EU would gain a reliable alternative supply route to further diversify its imports from Russia. Turkey, as a hub, would benefit from transit fees and other energy-generated revenues. As additional supplies of gas may become available for export over the next five to 10 years in the wider region, Turkey is the natural route via which these could be shipped to Europe.'

A report last year by Anglia Ruskin University's Global Sustainability Institute (GSI) warned that Europe faced a looming energy crisis, particularly the UK, France and Italy, due to 'critical shortages of natural resources'. 'Coal, oil and gas resources in Europe are running down and we need alternatives,' said GSI's Professor Victoria Andersen.

She also recommended a rapid shift to renewables, but most European leaders apparently have other ideas – namely, shifting to a network of pipelines that would transport oil and gas from the Middle East, the Eastern Mediterranean and Central Asia to Europe: via our loving friend, Erdogan's Turkey.

Nevermind that under Erdogan, Turkey is the leading sponsor of the barbaric 'Islamic State'.

We must not ask unpatriotic questions about Western foreign policy, or NATO for that matter.

We must not wonder about the pointless spectacle of airstrikes and Stazi-like police powers, given our shameless affair with Erdogan's terror regime, which funds and arms our very own enemy.

We must not question the motives of our elected leaders, who, despite sitting on this information for years, still lie to us, flagrantly, even now, before the blood of 129 French citizens has even dried, pretending that they intend to 'destroy' a band of psychopathic murdering scum, armed and funded from within the heart of NATO.

No, no, no. Life goes on. Business-as-usual must continue. Citizens must keep faith in the wisdom of The Security State.

The US must insist on relying on Turkish intelligence to vet and train 'moderate' rebels in Syria, and the EU must insist on extensive counter-terrorism cooperation with Erdogan's regime, while fast-tracking the ISIS godfather's accession into the union.

But fear not: Hollande is still intent on 'destroying' ISIS. Just like Obama and Cameron – and Erdogan.

It's just that some red lines simply cannot be crossed. ♦

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The above article was first published by INSURGE Intelligence, a crowd-funded investigative journalism project (medium.com/insurge-intelligence).

The new contours of Latin America's right

Recent electoral successes by right-wing parties in Argentina and Venezuela have raised the question of whether the decade-long ascendancy of left-leaning parties in Latin America is coming to an end. While the issue of whether the 'pink tide' is being reversed is still in the balance, what is clear is that in its attempt to claw back power, the right has switched tactics to mobilise support. As *Gustavo Fuchs* explains in this following piece written before the left's recent electoral setbacks, the right is shifting its rhetoric to the more appealing language of 'justice', 'human rights' and 'anti-corruption' rather than the neoliberal staple of 'slashing public spending', 'reducing taxes' and 'privatisation'.



Opposition leader Mauricio Macri celebrates after winning the Argentine presidential election in November. Right-wing forces are gaining momentum across Latin America.

IT has been over a decade since a new wave of left-leaning governments won presidential elections throughout Latin America, on the tailend of post-Cold War triumphalism and the so-called end of ideologies.

The progress made by these governments in transforming their countries is indisputable – although some would say that, as of now, even more should have been done – and the popularity of these leaders has remained strong through the years. As the Belgian political theorist Chantal Mouffe recently told the teleSUR Latin American television network, one of the right's biggest challenges is to oust governments through democratic elections, although they haven't been very successful at it.

Nevertheless, right-wing forces are gaining momentum across the re-

gion, attempting diverse tactics to delegitimise, destabilise or overthrow progressive governments in countries such as Brazil, Argentina, Ecuador, Venezuela and even Chile. They are also shifting their rhetoric. The right has understood that in Latin America promoting the privatisation of state-owned assets and calling for lower taxes are no longer platforms that move voters. They are learning their lessons.

Understanding how their tactics have changed is key to recognising the new contours of Latin America's right.

Right-wing tactics to take power

Three distinguishable tactics have characterised the right's strategy

throughout this period of time. The first – as a natural backlash to the progressive regional gains – is the right's attempt to delegitimise the electoral triumphs of the left, accompanied by a challenge to democratic institutionalism.

With the help of the US government, the Venezuelan opposition confronted President Hugo Chavez as early as 1999, after less than a year in office, rallying against a new constitution and deeming it illegitimate since before its birth, and despite the constituent assembly that drafted it and its passage in a nationwide popular vote. In the following years the opposition would continue to reject electoral results, despite the elections being consistently recognised internationally as free and fair.

In Bolivia, the far right organised independence referendums in four provinces that led to violent clashes as early as 2008, two years after Evo Morales took office. These regions argued that they did not recognise the legitimacy of the Bolivian Electoral Tribunal.

A second tactic can be identified by the radicalisation of the right and steps towards destabilisation. As the progressive governments solidified important transformations, the right's desperation has led them to openly call for, and attempt, coups d'état.

From the 2002 coup against Venezuela's Chavez to the coup against Honduran President Manuel Zelaya

and the parliamentary coup that ousted Paraguayan President Fernando Lugo in 2012, extreme levels of polarisation have accompanied these tactics and periods.

In Brazil, Congress is using its powers to frustrate the government of President Dilma Rousseff, as the right-wing opposition continues to call for the president's impeachment.

We are now seeing a third tactic in which the right is altering its rhetoric to assimilate to what they would rather avoid: that the electorate wants a strong state that will intervene in favour of its citizens' well-being, including the passage of social programmes and poverty alleviation programmes, very much like the welfare state that predominated in Europe throughout the 1960s and 1970s.

Instead of questioning the legitimacy of governments and institutions, and instead of promoting individual rights (for example, taxes, privatisations and freedom of the press), the right has shifted its rhetoric to collective issues that appeal to a much larger audience.

Shifting right-wing rhetoric, mobilisations and lobbying

Let's take, for example, the case of Leopoldo Lopez and the Venezuelan opposition. Despite the politician's personal history and the violent credentials of those who surround him, his case is not presented as being about the political leader himself, but about justice, human rights and what is portrayed as a corrupt judicial system.

In Brazil, calls for the impeachment of President Rousseff are usually accompanied by the notion that corruption has increased during the Worker's Party governments and that the fight is not against Dilma but against a corrupt party that wants to continue to govern, regardless of whether this may or may not be true.

In Ecuador, the opposition and the mainstream media led thousands to believe that the government's proposed inherited wealth tax was going to affect all of the population and not only the richest few. These groups



Opposition demonstrators at a protest in Caracas. By moving people to the streets, the right seeks to legitimise itself as a serious political force in an attempt to regain public trust after years of being tagged as anti-democratic and traditional.

quickly shifted their attention from the tax to a proposed government reform that would eliminate term limits on elected officials. In other words, the opposition focused their struggle on supposedly defending democracy. Their battle gained the legitimacy of incorporating those who they had marginalised in the past, when they were joined by a sector of the indigent movement, giving a fresh appearance of something new.

Perhaps the most striking example can be seen in Argentina. After Attorney Alberto Nisman died, the opposition leader and Buenos Aires Mayor Mauricio Macri renamed a metro stop after the AMIA Jewish Centre which was bombed in 1994. He decorated the station with a mural and called for truth and justice. Nisman had been the chief investigator of the bombing of the Jewish centre. When he was found dead in his home in January, the right wing attempted to pin the blame on President Cristina Fernandez, saying that he had been bumped off because he had found incriminating evidence against powerful people in her government.

However, Macri's call for 'truth and justice' was selective. That same slogan had been a demand of Argentine human rights groups since the last right-wing military dictatorship, which forcefully disappeared thousands of Argentinians in the 1970s and 1980s. When a law was put forward for approval in Congress to investigate businesses linked to the dictatorship, Macri's party voted against it without giving any explanation.

Mobilisations are also part of this new strategy. As the Chilean political scientist Cristobal Rovira explains, demonstrations have become a growing element in the right's agenda, specifically to block reforms that don't cohere with their ideological principles.

By moving hundreds to the streets, the right seeks to legitimise itself as a serious political force, in an attempt to regain public trust after years of being tagged as anti-democratic and traditional. The last time some of these right-wing groups and individuals took to the streets was in the 1970s, when they marched in support of the right-wing military dictatorships and against the dangers of communism.

Political lobbying, through think-tanks and other organisations, is also playing a role in exerting pressure on the left governments. As Rovira points out, these groups are increasingly involved in shaping public policy nationally and internationally.

In countries such as Argentina and El Salvador, right-wing forces from within the judicial system have also taken part in the efforts to block progressive governments.

'After they lost the elections, they called for a coup d'état. But the Salvadoran army is now much more institutionalised,' explained Salvadoran lawmaker Nidia Diaz in an interview with teleSUR, referring to the army's place as a legitimate institution in El Salvador's democracy. 'It is not the same armed forces that used to stage coups.'

'When this strategy failed, they began looking for a way to destabilise. And they found a powerful ally in the Constitutional Court, which now blocks everything related to government funding to asphyxiate the government,' she added.

A similar case occurred when the Argentine Congress and Senate approved a landmark media law in 2009. Due to a ruling by a local court in Mendoza, the law could not be fully implemented until 2012.

All of these efforts have counted on consistent backing from highly concentrated media outlets that hold historical prestige in each country.

Colombia's Juan Manuel Santos

Maybe the best example of the future of Latin America's right is Colombian President Juan Manuel Santos. The former defence minister swiftly launched a historic peace process to end an armed conflict with the FARC guerrilla group. Peace talks were made possible with the cooperation of nations such as Cuba and Venezuela, giving him international recognition and popularity.

However, internally, Santos has embraced Tony Blair's 'Third Way', which, as the British political theorist Alex Callinicos has documented, promotes a benign view of neoliberal capitalism under the attractive ideal of a new political option that is neither left nor right.

Santos has maintained diplomacy as a guiding principle for his relations with Colombia's two left-leaning neighbours Ecuador and Venezuela. But within the country little has changed for human rights activists, union leaders and left-wing politicians, who are still victims of selective murder.

Santos' domestic policies have not turned back from the neoliberal programme of his predecessors. During his government, concessions to foreign investors have been the rule, as the government has given away Colombia's mines and oilfields.

This does not mean that all of the right has moved uniformly towards these new strategies. Instead, the fragmentation of right-wing parties and

movements has led them to try different coexisting strategies.

This is why, for example, former Colombian president and now Senator Alvaro Uribe continues to oppose the Santos administration and is constantly featured in mainstream media calling for confrontation as the solution.

'What we have seen from former president Uribe is an attitude of confrontation, of permanent attack against peace in Colombia,' Colombian Senator Ivan Cepeda told teleSUR.

Despite Uribe's outrageous allegations, he is not considered an isolated player in Colombian politics. In fact, President Santos has reached out to Uribe, seeking to neutralise the political strength of his former ally.

Venezuelan opposition

In Venezuela, the international media's attempt to whitewash Leopoldo Lopez through a dichotomous 'good versus evil' narrative has been stained by political murders and paramilitary links inside Lopez's Popular Will party.

It is no coincidence that Henrique Capriles, the former presidential candidate of the opposition coalition, has backed away from marches in favour of Lopez. The opposition Movement of Democratic Unity (MUD) has made deals with the government while respecting the country's constitution, and Lopez is not happy about it.

Lopez was jailed after he and the opposition leader and former National Assembly member Maria Corina Machado launched a campaign dubbed 'The Exit' to oust President Nicolas Maduro. The campaign led to increasingly violent demonstrations. Capriles stayed away from his long-time ally and criticised him for creating unreal expectations.

Capriles' 2013 presidential campaign was characterised by his use of clothing similar to that of the late president Chavez (wearing a jumpsuit, a hat with the Venezuelan flag, etc.) and the promise of maintaining social welfare programmes initiated during the Chavez era.

Challenging the neoliberal legacy

The political discourse has certainly moved towards the left, though it hasn't necessarily translated into a cultural change in the population.

This can help explain why the right is turning once again to the benevolent rhetoric that presents 'capitalism with a human face'. Rarely has a right-wing candidate over the last five years argued that social welfare programmes should be cut or that state companies should be privatised.

Right-wing campaigns are now focusing on corruption, human rights, security and other issues that affect society as a whole, and in which the left has failed to deliver long-term solutions.

Of course, 10 or 15 years of left-leaning governments will not solve the problems that decades of neoliberal policies caused. But the average citizen is looking for the quickest solution to his or her problems, and the Latin American right has no time to lose.

'Neoliberalism is not only a set of economic policies in action through the mindset of financial speculation, but it is also a cultural guideline, revolutionary in the sense that it has penetrated global society,' explains Argentine philosopher Ricardo Forster.

The task ahead for progressive movements and parties in Latin America is, more than ever, to win the battle of ideas, to create a notion of commonly shared ideals and values in society, to fight back against the cultural legacy of the neoliberal experiments in the region.

As Bolivian Vice President Alvaro Garcia Linera explains, 'there cannot be a rise to power ... without a previous transformation of the cultural parameters [in society].'

Although a lot has improved over these years, deeply rooted neoliberal values will always surface in times of crisis and the left's success will depend on challenging and dismantling the premises on which they are based. ♦

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Myanmar: The morning after

After leading her party, the National League for Democracy, to a resounding victory in Myanmar's historic November elections, Aung San Suu Kyi is now confronted with the more formidable challenge of negotiating the treacherous terrain to civilian rule. *Tom Fawthrop* considers the difficulties ahead.

CHEERING multitudes engulfed the streets of Yangon and many other towns. To the surprise of many, the election was relatively free and fair. Nobel laureate Aung San Suu Kyi had led her party, the National League for Democracy (NLD), to a crushing victory over the ruling Union Solidarity and Development Party (USDP), a party created by the military junta that ruled Myanmar from 1962 to 2011.

Nobody should have doubted the resilience of the Myanmar people, who have seen their democratic hopes dashed so many times. In 1988 a 'People Power uprising' peacefully took over the capital for a few days but was later mowed down with bullets by the military. In the 1990 elections, when the opposition won some 80% of all seats, the military simply ignored the results and jailed many of the new parliamentarians. In 2007 the 'Saffron uprising' led by Buddhist monks defied the military and was ruthlessly put down, with many monks jailed, tortured or killed.

One extraordinary example of the Myanmar passion for democratic rights was the case, reported by *The Irrawaddy* magazine, of a 94-year-old man who fell gravely ill just prior to the recent election. 'He was taken to hospital. He was unconscious and rushed to intensive care. Luckily, he regained consciousness and, as soon as he opened his eyes, he told relatives he still wanted to vote. His family rushed to organise it and he voted for the NLD.'

His vote counted and contributed to the final election tally, which saw the NLD winning a stunning 77% of seats contested. The ruling, military-aligned USDP led by outgoing president and retired general Thein Sein garnered only 10% of the elected seats. (In addition, the military has a reserved bloc of seats that make up



Supporters celebrate the National League for Democracy's landslide electoral victory.

25% of the total parliamentary seats.)

Most of the ruling party's candidates were retired generals and colonels and many were shocked by the results. They had splashed money and enticements on the voters. They had expected to make it to parliament, with some in line for ministerial jobs. As it turned out, many rural people had kept their voting intentions secret to avoid intimidation.

Although the military leaders have since 2011 adopted a softer, reformist image in order to get Western sanctions lifted, the electorate clearly saw the vote as a referendum on military rule over five decades. The people have delivered a damning verdict on the past, with great expectations for the future. They expect that the charismatic Aung San Suu Kyi will somehow bring about a better life for a nation so rich in natural resources but so poor in education, health and living standards for the vast majority.

A reality check

Far from the cheering crowds in downtown Yangon, the euphoric fe-

ver of democracy in the air and the sweeping triumph over military-backed candidates, however, an ugly reality tainted this election and provided an ominous portent of the shape of things to come in a country where military power remains deeply entrenched.

While the armed forces did not directly interfere with the election process in most polling places, in the more remote Shan state in the mountainous north, no election took place. The army launched a dry season offensive against the ethnic Shan State Army – North with aerial attacks in spite of the ongoing peace process and the general election. This was a flagrant violation of the military's pledge to respect the election process.

Some 40% of Myanmar's population is made up of ethnic groups who comprise the majority of citizens in Shan, Kachin and Karen states. Rebel armies have been resisting army suppression ever since the 1962 military coup and demanding a federal-style democratic state.

The jubilant voters in Yangon,

Tom Fawthrop

Mandalay and most of the country probably had no idea that in the faraway north, Shan township Mong Nawng and its 6,000 inhabitants were subjected to shelling. It was scarcely reported in the country's media. But it was a timely reminder for ethnic groups that if President Thein Sein could not control the military, what chance will Aung San Suu Kyi's new government have of clipping its wings and restoring a semblance of civilian authority over the armed forces?

The election was also held amid a climate of anti-Muslim prejudice. Members of the predominantly Muslim Rohingya community were mostly barred from voting as they were not considered full citizens. Many Muslim candidates were disqualified by the election commission on dubious grounds; of those who were allowed to stand, none got elected. The blatant discrimination against 5% of the population was not challenged by the NLD, which quietly dropped its would-be Muslim candidates.

Military power and what the NLD is up against

In spite of the stunning electoral defeat for the ruling party, the military has a formidable second line of defence: the 2008 constitution crafted and drafted by the military junta, with a series of clauses that guarantee the armed forces supremacy over any elected government and parliament.

One clause blocks The Lady – as NLD leader Suu Kyi is popularly known – from becoming president, on the grounds that she was married to a British citizen and has two sons with British passports.

The most powerful bureaucracies – home affairs, border affairs and military affairs – will remain under military control, and the armed forces budget will remain above civilian scrutiny, regardless of which party controls the government.

Paul Chambers, a Chiang Mai University expert on the military in South-East Asia, observed, 'This will now become a power-sharing arrangement but the NLD government will

be a superficial entity, the military will have control over its own affairs, insulated from any civilian intrusions whatsoever.'

This means that when the NLD establishes a government in 2016, it will be some kind of hybrid creature, with the new ministers from the democratic forces held in check by a cabinet that will include three Trojan horses in the ministries of defence, home affairs and border and immigration, all run by the military.

It is widely expected that the generals will resist any effort to curb military spending – estimated at about 40% of Myanmar's total budget – or loosen the military establishment's grip on their lucrative chunk of the economy.

The military also expects to insulate from any attempt at civilian control, decision-making and ultimate authority over government efforts to make peace with ethnic rebel groups waging long-running struggles for autonomy and ethnic rights.

Suu Kyi speaks of cooperation with the military and reconciliation with her enemies. But she will be dealing with the same generals who were humiliated after the 1990 elections, proceeded to ignore the landslide win for the opposition and jailed many of the new MPs. The Lady herself was subjected to 15 years of house arrest.

The military does not need to carry out another crude putsch to cling on to power this time around. Instead they can use the 2008 constitution as a fig leaf of dubious legality to keep themselves in the driving seat, while paying lip service to the opposition's triumph at the ballot box.

The constitution is designed to be impregnable to change without the military's consent. A quarter of seats in parliament are reserved for military officers, when more than 75% of votes in the legislature are needed to approve amendments to the constitution. A vaguely worded clause also empowers the military to reimpose military rule if it judges the country to be on the verge of disorder. 'It's a coup mechanism in waiting,' according to Phil Robertson, the deputy di-

rector of Human Rights Watch's Asia division.

Is Myanmar firmly on a transition to democracy in 2016?

The Myanmar military, growing weary of Western sanctions and pariah status in the world, clearly navigated a change of course and strategy to stay in power with the appointment of retired general Thein Sein as president in 2011.

Many political prisoners were released, press freedom was pledged and a new media flourished. Myanmar started a dialogue with Western governments, the World Bank and the International Monetary Fund (IMF), and moved out of its previous orbit of China and Asean dependency.

Hotels have been deluged with Western businessmen and corporations eyeing a new frontier for investment and profit. Tourism has flourished.

And now more or less free and fair elections have taken place under the watchful eye of hundreds of international election observers.

This narrative has created a school of observers who believe the changes in Myanmar are irreversible and that democracy is surely on the way.

Nicholas Farrelly, director of the Myanmar Research Centre at the Australian National University and co-founder of the New Mandala website, commented in upbeat terms: 'A government elected by the people has a much better chance of writing a new chapter in the country's history. That chapter starts right now, as people wake to the realisation that the old order has been replaced by something new, yet tentative and ready for creative contributions.'

That the old order has been reshaped and decorated with the trappings and appearances of democracy is clear, but other observers would hotly dispute that this adds up to the claim that 'the old order has been replaced'.

By comparison, the break with the old order was far more decisive

in the Philippines after Marcos fled the country, and in Indonesia when Suharto was forced to resign (see box). In both cases grassroots mobilisation inflicted decisive defeats on their regimes, which has definitely not occurred in the case of Myanmar.

Paul Chambers argues that the military order and domination over politics and security remain completely intact in spite of the landslide vote at the ballot box. 'There are many tactics. Time is on the Tatmadaw's [military] side in all of this. If the economy tanks or civilian administration is criticised in any way, then the Tatmadaw-USDP can make gains. But again, the constitution is still favouring the longevity of power for the military as well as their insulation from civilian supremacy.'

Aung San Suu Kyi knows full well that she has no choice but to co-operate with the unelected military bloc inside parliament and has little chance of enacting any legislation and reforms without some tacit agreement with the army chief. Pitted against the highly organised military, The Lady is armed with a huge mandate, but minimal resources to back up her dream of bringing back democracy.

The NLD would be scarcely recognised outside the country as a political party. It lacks a credible team of advisers and deputies to Suu Kyi. It lacks policy agendas, an organisational apparatus or an ideology. It is held together by hostility to the regime and pop-star attachment to Suu Kyi. Inside the party a broad church of views and debate have been strongly discouraged by her autocratic style. Opposition critics have been swiftly purged.

Suu Kyi's supporters expect so much from her new administration, but relatively few fully grasp the mammoth scale of the task ahead in a country lacking a strong educated and well-trained middle class.

If Suu Kyi and the NLD government are thwarted by the military and unable to bring about benefits for the landless poor and millions of unemployed and address a host of other problems, the military, the USDP and their business partners may

Regional perspective on the military in politics

LONG years of dictatorship underpinned by military power in the Philippines during the regime of Ferdinand Marcos and in Indonesia under Suharto to provide some indication and precedents of the rocky road ahead for Myanmar in attempting a transition to civilian rule.

In 1986 'People Power' stopped the tanks of the Marcos regime. A few days later the Marcos family fled into exile. Corazon Aquino was installed as president with the firm pledge of restoring the democracy that had existed back in the 1960s prior to martial law.

Her new democratic government soon came under attack from a series of attempted coups during her five-year term (1986-91), coups that were led by military officers loyal to the ousted regime. Since that time another military coup brought an abrupt end to the tenure of President Joseph Estrada.

However, did the Aquino presidency make civilian supremacy clear beyond legal challenge? After Aquino was sworn in, the Philippines adopted a new constitution restoring democracy but with one ambiguous clause that also recognised the military as 'the protector of the people and the state'.

That clause has been widely interpreted by senior Philippine military officers as granting the armed forces the power to intervene and oust a democratically elected president if the leader 'threatens the very existence of our people, our country and our institutions'.

In Indonesia military ideology and training runs far deeper than the ambiguities of a constitution. The student-led demonstrations that brought about the downfall of Suharto in 1998 ushered in a new era of free and fair elections. But the power and ideological leanings of the military and security agencies, which had kept the dictator-

ship in place since the 1965 coup, have remained a formidable obstacle to any reform of the armed forces and the achievement of civilian supremacy.

Indonesia is a country that closely parallels Myanmar in many respects. The militaries of both nations are inheritors of the legacies of Japanese occupation and are obsessed with law, order and discipline, and there are intelligence agencies dedicated to regime survival.

The military junta led by General Than Shwe that ruled Myanmar until 2011 regarded Indonesia as a useful model and based the creation of its own ruling party the USDP on General Suharto's Golkar party.

In both countries the military ideology asserted a dual function. Beyond defending the country from external enemies, the armed forces defined themselves as the guardians of the national security state and, in addition, they took over key positions in government and administration of the respective countries.

The Indonesian armed forces and the Myanmar military have both been the subject of investigations into torture, massacres of civilians and alleged crimes against humanity.

Jakarta's generals have long established immunity for themselves over the 1965 anti-communist bloodbath, the atrocities orchestrated in East Timor and other acts of brutal repression. Myanmar's 2008 constitution guarantees the military a similar immunity from prosecution to counter current human rights investigations into the allegedly genocidal treatment of the Rohingya, atrocities instigated against numerous Muslim communities and war crimes perpetrated against civilian populations in Karen, Kachin and Shan states. — Tom Fawthrop ♦

have a second chance at the ballot box, and sooner than expected. In such uncharted territory, it is a highly optimistic act of faith to talk about an irreversible transition away from military rule. ♦

Tom Fawthrop, a specialist in South-East Asia, has reported on Myanmar under the rule of the military

junta and the changes underway since, as well as the Indonesian military occupation of East Timor prior to independence. He is also the director of the new film Saving the Salween documenting the opposition of ethnic groups to a vast hydropower dam programme along one of South-East Asia's longest rivers that provides sustenance and livelihoods to almost 10 million people. His stories have been published by, among others, the Melbourne Age, The Economist, DPA news agency and the South China Morning Post.

UK government breaking the law supplying arms to Saudi Arabia, say leading lawyers

As Britain continues to supply weapons and related items to Saudi Arabia for the prosecution of the Arab kingdom's murderous military campaign against Yemen, a group of legal experts have warned that Britain's action is in breach of national, EU and international law.

THE UK government is breaking national, EU and international law and policy by supplying weapons to Saudi Arabia in the context of its military intervention and bombing campaign in Yemen, according to an analysis by eminent international law experts commissioned by Amnesty International UK and Saferworld, both members of the Control Arms coalition.

The lawyers, Professor Philippe Sands QC, Professor Andrew Clapham and Blinne Ni Ghraígh of Matrix Chambers, conclude in their comprehensive legal opinion that, on the basis of the information available, the UK government is acting in breach of its obligations arising under the Arms Trade Treaty, the EU Common Position on Arms Exports and the UK's Consolidated Criteria on arms exports by continuing to authorise transfers of weapons and related items to Saudi Arabia within the scope of those instruments, capable of being used in Yemen.

They conclude that 'any authorisation by the UK of the transfer of weapons and related items to Saudi Arabia ... in circumstances where such weapons are capable of being used in the conflict in Yemen, including to support its blockade of Yemeni territory, and in circumstances where their end-use is not restricted, would constitute a breach by the UK of its obligations under domestic, European and international law.'

They also conclude that the UK government can properly be deemed to have 'actual knowledge ... of the use by Saudi Arabia of weapons, including UK-supplied weapons, in attacks directed against civilians and civilian objects, in violation of international law', since at least May 2015.



The UK is seen as fuelling the conflict in Yemen through illegal arms sales to Saudi Arabia. Picture shows people carrying the body of a child uncovered from under the rubble of houses destroyed by Saudi airstrikes in Sanaa, Yemen.

The UK government asserts that it is not taking an active part in the military campaign in Yemen. However, the UK has issued more than 100 licences for arms exports to Saudi Arabia since the state began bombing Yemen in March 2015. That includes more than £1.75 billion worth of combat aircraft and bombs for the use of the Royal Saudi Air Force.

In 2013, British Prime Minister David Cameron hailed the Arms Trade Treaty as a landmark agreement that would 'save lives and ease the immense human suffering caused by armed conflict around the world.' He said Britain should be proud of the role it had played in securing an agreement that would make the world safer for all.

'The UK has fuelled this appalling conflict through reckless arms sales which break its own laws and the global Arms Trade Treaty it once championed,' said Kate Allen, Amnesty International UK Director.

'This legal opinion confirms our long-held view that the continued sale of arms from the UK to Saudi Arabia

is illegal, immoral and indefensible.

'Thousands of civilians have been killed in Saudi Arabia-led airstrikes, and there's a real risk that misery was "Made in Britain".'

'The UK government must halt these arms sales immediately.'

Saferworld Executive Director Paul Murphy said: 'UK government policy on Yemen is in disarray. The UK gives aid to help the victims of war while illegally supplying weapons that cause their misery.'

'If the UK seriously wants to sit "at the heart of the rules-based international order" as claimed in the recent National Security Strategy and Strategic Defence and Security Review, it must itself abide by the rules to which it has signed up.'

'It's time the government acted as a peace broker, rather than an arms broker. The first step would be to suspend further licences and transfers of weapons to the Saudi Arabia-led coalition.'

'With the start this week of peace talks, the UK government should help turn the ceasefire into a permanent

peace by stopping its support to one side of the conflict.'

Although the focus of their opinion was on the UK government's legal obligations regarding the authorisation regime for weapons transfers to Saudi Arabia, the lawyers underscored that all sides to the conflict in Yemen are accused of serious breaches of international law.

The conflict in Yemen has turned the country into one of the world's worst humanitarian crises. Civilian targets including hospitals, schools, markets, grain warehouses, ports and a displaced persons camp have been hit in airstrikes by Saudi Arabia-led coalition forces. Since the conflict escalated in mid-March 2015, more than 5,800 people have been killed and tens of thousands wounded. Two-and-a-half million have been forced to flee their homes. More than 80% of the population (21 million people) are in need of humanitarian aid, including two million children at risk of malnutrition.

All sides in the conflict are responsible for causing the humanitarian crisis in Yemen. The UK is not alone in sending arms to and supporting parties to the conflict. Several other countries have also supplied arms to the Saudi Arabia-led coalition now fighting in Yemen, with supplies to the Huthis shrouded in secrecy.

The agencies called on the government to immediately take the following steps:

- Immediately suspend arms transfers and military support to Saudi Arabia and its coalition partners which could be used to commit or facilitate further serious violations of international human rights and humanitarian law in Yemen.
- Carry out a thorough and independent investigation into UK arms transfers and reported war crimes in Yemen.
- Make every possible diplomatic effort to help bring the conflict to an end.
- Continue to push for an end to the de facto blockade so that vital humanitarian and commercial supplies enter Yemen and reach those most in need.
- Fully implement the provisions of the Arms Trade Treaty, and encourage all other arms exporters to do the same. – *Amnesty International* ♦

Unpacking the Issue of Counterfeit Medicines

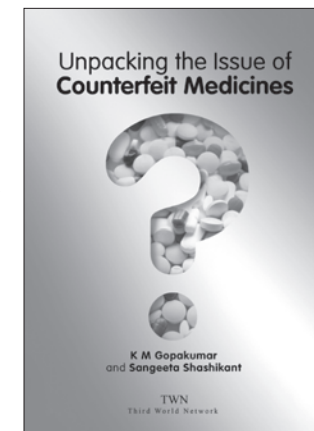
K M Gopakumar & Sangeeta Shashikant

Numerous anti-counterfeiting initiatives driven by an intellectual property enforcement agenda have emerged in international organisations.

The World Health Organisation has also accelerated action against 'counterfeit medicines', through the International Medical Product Anti-Counterfeit Taskforce (IMPACT). The WHO's approach has resulted in concerns that legitimate generic medicines may get caught up in the web of definitions and enforcement of 'counterfeit products', with adverse consequences for access to medicine as well as legitimate trade.

This book discusses the background to the issue of 'counterfeit medicines' in the WHO as well as the problems of using the term 'counterfeit' (in connection with intellectual property rights violations) to refer to products with compromised quality, safety and efficacy issues against a background of anti-counterfeiting initiatives in the context of IP enforcement aggressively being pushed by businesses and governments of the Organisation for Economic Cooperation and Development (OECD).

The book also discusses origins of the IMPACT



ISBN: 978-967-5412-23-3 72pp

accountability, links to IP enforcement, and the creation of barriers to trade in, and access to, Taskforce pertaining to legitimacy, transparency, affordable generic medicines.

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Time stands still for the mothers of Mexico's disappeared

The mothers of Mexico's disappeared have become some of the most important voices denouncing the Mexican state's role in perpetuating femicide and other forms of violence in the country.

HELD just four days after the one-year anniversary of the Ayotzinapa disappearances, the International Forum on Disappearances in Mexico, which took place in Mexico City on 29 September-1 October, was attended by at least 300 people. Social organisations and the Autonomous Metropolitan University Campus Xochimilco brought together families of disappeared persons, human rights activists, government officials, academics, journalists and students for three days of presentations and discussion around the crisis of disappearances in Mexico. Among the participants were dozens of mothers of some of the over 26,000 people who have disappeared in Mexico since 2006.

The mothers listened and discussed the issues presented by government officials and civil society organisations. The mothers of Mexico's disappeared have become experts on the topic of state violence as they search for their children on their own. In the face of chronic government apathy, inefficiency and even attacks, the mothers have built a community of mutual support and autonomous organising. They have become the leaders of grassroots organisation against a criminal state responsible for the disappearances of their children and thousands of others.

Here are some of their stories.

Adela Alvarado Valdes and Moni's story

Adela Alvarado Valdes was one of the first mothers to arrive at the Mexico City forum. She wore a button with a picture of her daughter, Moni. Alvarado Valdes explained that she tries her best to attend events such as this, in addition to protests for

Nidia Bautista



Norma Andrade is one of the founding members of May Our Daughters Return Home, an association of mothers whose daughters have been victims of femicide in Ciudad Juarez, Mexico. She is seen here with a photograph of her daughter Lilia Alejandra Garcia Andrade, who was disappeared in February 2001 and whose body was later found with signs of physical and sexual assault.

Mexico's disappeared, because many mothers, 'for lack of funds or emotional strength', are unable to participate. 'I'm here because they can't be,' she says.

A professional clown for over 34 years, Alvarado Valdes is the mother of Monica Alejandrina Ramirez Alvarado, a psychology student who disappeared 11 years ago.

Monica disappeared on Tuesday, 14 December 2004, on her way to the FES Iztacala, a university in northern Mexico City. She left her home in Ecatepec, in the State of Mexico (now one of the most dangerous states for

women in terms of rates of gender violence), heading to the campus to turn in an assignment. At six that night, Alvarado Valdes received a call from one of her daughter's classmates saying that Monica had never arrived at school.

Alvarado Valdes's 11-year search has been marked by emotional abuse at the hands of government investigators, death threats from local police, and a complete uprooting of their family life.

According to Alvarado Valdes, those first days were marked by indescribable anguish. 'I wanted desperately to find my daughter because I felt that I could no longer live without her,' she says.

Initially the family searched local hospitals and distributed missing-person flyers, printed with the help of the Support Center for Missing and Absent Persons (CAPEA).

Four days after Monica's disappearance, her family received a menacing text message from the supposed kidnappers. The message said that Monica was being held captive and demanded a 250,000 peso (about \$15,000) ransom for her safe return. The alleged kidnappers ordered the family to deliver the money; if not, they would cut the woman into pieces. Desperate, Alvarado Valdes and her family approached both a private investigator and the Federal Investigation Agency (AFI) for help returning Monica safely home.

The private investigator helped them track Monica's cellphone activity and found that a series of phone calls were made to a man named Jesus Martin Contreras Hernandez, one of Monica's classmates, after her disappearance. The investigator who was helping Alvarado Valdes unravel the

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mystery over Monica's disappearance quit when he realised AFI was involved, since at that time it was illegal to be a private investigator in Mexico.

AFI was a federal government investigation agency created by the Attorney General's Office in 2001 to replace the notoriously corrupt Federal Judicial Police. The agency was in charge of investigating federal crimes such as kidnapping and drug trafficking. Though it was restructured in 2009 and renamed the Ministerial Federal Police, it was known for being highly effective at finding missing persons, according to Alvarado Valdes. But in the search for Monica, the agency only brought emotional stress to the family.

In the beginning, AFI agreed to help the family find their daughter and even installed equipment in their house to train them to negotiate with the kidnappers. The agency prepared Alvarado Valdes's husband to carry out the negotiation, instructing the family to cut off all communication with extended family and friends. But the AFI investigator's attitude soon changed, says Alvarado Valdes. 'He grew apathetic and very unhelpful. He basically kidnapped us in our own house and tormented us with irrelevant information and false leads ... [He] ridiculed our suffering,' Alvarado Valdes explained.

Meanwhile, threats continued: the family would receive two more text messages from the kidnappers. But when Monica's father left voice messages saying he was ready to negotiate and begging the kidnappers not to hurt his daughter, nobody ever called back.

Shortly thereafter, the AFI investigator began to remove the surveillance equipment he had installed in Alvarado Valdes's house to track the kidnappers' communication. When the family complained, they were informed that their case had been closed. Frustrated, they went to the capital with the phone logs the private investigator had obtained.

Finally, in 2005, a year after Monica's kidnapping, the government investigator in the Attorney General's

Office ordered the arrests of Jesus Martin Contreras Hernandez, Marlon Gaona, the son of a local police officer, and one other man. All were members of two local gangs, 'Los Cruces' and 'Los Gaona'. The three men were sentenced to 21 years in prison for kidnapping. They haven't admitted to the whereabouts of Monica and to this day Alvarado Valdes and her family do not know what happened to their daughter. What's more, Alvarado Valdes and her family were soon forced to move out of the Ecatepec municipality after the local police made threats against them for raising awareness about these crimes in their neighbourhood.

After enduring 11 years of uncertainty, stress and emotional violence, Alvarado Valdes said that she has been able to stay strong because of the community with her professional and activist families. She and her co-workers have held marathon clown fairs in the Zocalo plaza and participated in events throughout the country to raise awareness about the disappearance of Monica and others. And as a staunch activist for disappeared persons, Alvarado Valdes has forged friendships and relationships with other mothers.

'It's been 11 years since Monica disappeared and I refuse to forget about her. We didn't lose a dog, a car or a bicycle but rather a human being, my daughter, and I can't abandon her. I don't think we families can ever abandon our disappeared loved ones to their fate,' Alvarado Valdes said. 'Unfortunately, over the years we have learned that this crisis has worsened because the government and mafias profit from disappearances.'

Despite years of hardship, Alvarado Valdes remains determined to obtain justice for Monica and help other families do the same. Her traumatic experience with AFI helped her develop an acute awareness of the costs of government inaction and complicity in these cases.

'We've succeeded in sentencing those three men. But we couldn't achieve more than that. You can't do more because the government protects

these criminals. When I get together with other families, with my friends and fellow victims, we all realise that our own government is contributing to this terrible crisis,' she concluded.

Norma Andrade and the long battle for justice for disappeared women

As one of the founding members of May Our Daughters Return Home, a Mexican non-profit association of mothers whose daughters have been victims of femicide in Ciudad Juarez, Chihuahua, Norma Andrade is very familiar with the emotional hardships, difficulties and violence many mothers and families face in the search for their missing children. Andrade's daughter, Lilia Alejandra Garcia Andrade, was disappeared on 14 February 2001, in Ciudad Juarez. Seven days later Lilia's body was found wrapped in a blanket, with signs of physical and sexual assault.

Since then Andrade has become a fearless activist in Ciudad Juarez and has led the organisation of mothers for over 14 years in the hope of getting the murderers of their daughters arrested and convicted.

To date Andrade's unrelenting activism has led to two attacks on her life. On 2 December 2011, Andrade was shot and wounded in her home in Ciudad Juarez by an unknown assailant. Shortly afterwards, she moved to Mexico City for her safety. However, two months later, Andrade was again attacked by an unknown assailant outside her residence in the neighbourhood of Coyoacan while she was taking her granddaughter to school. The attacker slashed Andrade in the face with a knife.

Since 2008, and especially after the second attack on Norma's life, international human rights and women's groups including the Inter-American Commission on Human Rights and the Nobel Women's Initiative have called for immediate and effective protection for Norma Andrade and her family.

Despite these attacks and other threats against her life, Andrade has continued to organise in Ciudad

Juarez for justice for victims of femicide. In a country where attention to femicides is minimal and where there are very few advances in investigations due to corruption and a lack of political will, Andrade is an activist and mother who has taken it upon herself to learn how to overcome bureaucratic barriers and apathy, on behalf of disappeared women and their families. She has accompanied and advised families to investigate disappearances, promoted occupational therapy for grief-stricken families, lobbied to change laws under the Penal Code of the State of Chihuahua that allow this and other violence to continue, and she has become an international spokesperson against the violation of women's human rights in Mexico.

More recently, she joined the Task Force for Human Rights and Social Justice to organise workshops for middle- and high-school girls in Ciudad Juarez centred on preventing disappearances. The workshops focus on telling the stories of how three young girls disappeared and aim to teach young girls how to identify, prevent and denounce potential kidnappers.

'I found my daughter murdered 14 years ago, and that's the same amount of time that I've been organising,' Andrade explained. 'I've learnt a lot along the way. I knew nothing about law but I now know how to ground my demands and the rights that we are seeking.'

'When we say we have the right to life, we know which clause in the constitution guarantees that right. I can't say that a femicide gets 60 years of prison time for their crime if I don't know the penal code and now I know the definition of femicide,' she said. 'I know what femicide means – we've learnt all this along the way, through organising.'

According to Andrade, there is still much to do in order to prevent crimes against women and attain justice. When Mexico and the entire world learnt of the disappearances of 43 teachers' college students from Ayotzinapa last September, Andrade pointed to the case of Navajo Creek in Chihuahua, where the remains of 80 people have been uncovered in the last

two years, most of them women, apparently victims of sex trafficking. 'Eighty remains have been identified at Navajo Creek. Almost double the 43. And it's worth asking ourselves why 43 moves people and not 80.'

While she acknowledges that there is indifference towards the disappearances of poor women, Andrade believes that people have to come together in the search for justice for all the disappeared persons of Mexico, from the Ayotzinapa 43 to the victims of femicide. 'What I think is fundamental is unity. Unity between states, unity between mothers, because what unites us is the same pain. Even when the missing are men, the pain felt over the loss of a son is the same pain felt as the result of the loss of a daughter.'

A national crisis

What ties mothers like Alvarado Valdes and Andrade together isn't just the pain of losing a child but the indignation towards a government that has permitted impunity, corruption and violence to take the lives of thousands of Mexicans. It is a shared pain and indignation that has declared the state as the prime suspect for the disappearances and murders of Monica, Lilia and thousands more unnamed victims.

The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, visited Mexico in October and issued a stark assessment of the state of human rights in the country. He met with President Enrique Peña Nieto, other government officials, and with NGOs and civil society. What the High Commissioner found is a reality that many mothers of disappeared persons in Mexico are all too familiar with.

Al Hussein concluded that at least 151,233 people were killed between December 2006 and August 2015 in Mexico. Additionally, at least 26,000 have gone missing – although activist and non-governmental organisations like Services and Consulting for Peace (SERAPAZ) say the real figure is much higher.

The official figure of 'people not found' in Mexico since 2006 has fluctuated under the administration of

Peña Nieto. The contradictory figures released by the Mexican government, and the information labyrinth that investigators and human rights activists must navigate to track disappearances, get to the core of Mexico's human rights crisis. The ineptitude and reluctance with which the Mexican government has approached the disappearances crisis reflects a structural problem in Mexico. It is a state policy to use impunity, corruption and ineffectual judicial mechanisms and investigations to sustain violence and terror – to sustain, or ignore, the human rights crisis of disappearances.

The US government is also complicit in Mexico's human rights crisis. Under the Merida Initiative, the US has invested more than \$2 billion since 2006 to militarise Mexico under the pretext of fighting drug cartels. It has thus funded the security forces largely responsible for these human rights abuses. Instead of mitigating violence, it has heightened it to unbearable levels.

In a press conference, Al Hussein explained that his visit to Mexico was 'sobering with regard to the daily realities for millions of people here in Mexico'. According to the High Commissioner, 'it is neither myself, my office, the UN, nor state officials who can declare enough is being done or has been done. It is only the people who can do this, especially the most disadvantaged, the victims or families of victims of crime who have the credibility to pass judgment.'

The mothers of Mexico's disappeared have echoed these sentiments. At the conclusion of the International Forum on Disappearances in Mexico, Andrade called out the Mexican government as responsible for her and thousands of other mothers' suffering. 'What must unite us is this pain, a united front against our common enemy, which is the state, our real enemy, even more than any criminal group involved in these cases.' ♦

Nidia Bautista is the managing director for the CIP Americas Program and writes about student protest, transborder social movements and gender issues in Latin America. This article is reproduced from NACLA.org, the website of the North American Congress on Latin America. An earlier, extended version first appeared on the CIP Americas website (www.cipamericas.org).

Seizing public space

Politically relevant street art has a long tradition in Latin America. In recent years, it has increasingly become mainstream. Its great strength is that it triggers public debate, which is precisely the intention of the artist creating it.

Sebastian Vargas

IN Latin America, artists and activists have found a way to make controversial issues public for all to see – even in restrictive political environments and even for the illiterate. They use street art. Wall paintings called ‘murales’ mark the public space in many parts of Latin America.

‘In a wall painting, the message is crucial, but it needs to be well painted,’ says 42-year-old Dardo M, a well-known muralista from Buenos Aires. Street art is intended for public consumption, not for perusal in a gallery or living room. Dardo M speaks of an artist’s attempt to communicate with the observer and put across a specific message. In his eyes, wall paintings are an art form as well as a form of communication.

Since prehistoric times, human beings have painted on walls to convey mythical or ritual messages. The pictures in the Altamira cave in Spain are a striking example. In the first century AD, early Christians painted on walls in catacombs to communicate with one another. Only Christians understood the messages; Roman persecutors could not decipher them. Those wall paintings are the earliest known antecedents of the street art and graffiti we know today, and just as today, they had secret codes and a social function.

Mexican pioneers

In the past century, Diego Rivera, Clemente Orozco and David Siqueiros revived street art in Mexico. In the early 1920s, they founded the Movimiento Muralista Mexicano (the Mexican street art movement) and set out to make art for the people. The movement identified with the Mexican Revolution of 1910, in which intellectuals joined forces with workers and farmers. They sought to revitalise the indigenous culture that had

been brutally suppressed since colonial times, and they wanted to create a modern state.

Paola Maurizio, professor of art history in Buenos Aires, says that ‘the muralists were formally trained artists breaking free from formality’. They were inspired by indigenous and folk art as well as by 19th-century Italian frescoes. With wall paintings, the Movimiento Muralista Mexicano opened a new channel for public communication. The large-format murals reflected elements of Mexican culture and impressed the largely illiterate rural people, Maurizio says. After centuries of white domination, they finally saw themselves depicted on walls as protagonists of history.

During the Great Depression after 1929, the Movimiento’s approach to aesthetics and ideology spread to the US and beyond. The mural art movement had been confined to Latin America: Colombia, Venezuela, Peru, Chile, Bolivia, Brazil, Uruguay and Argentina. But during the devastating economic crisis which exacerbated social inequality in the US, its anti-authoritarian approach was increasingly adopted. Later, in the 1960s, leftist students did so in Europe, and street art found its way to the US again by that circuitous route. In the 1970s, graffiti art, a successor of muralismo, emerged in New York and Philadelphia and then spread around the world.

Art for everyone

Graffiti tends mostly to be text, not images. The inscriptions get their significance from the social context and serve a social function. Walls are not painted just for decoration; graffiti makes statements and expresses

protest. Graffiti sprayer Santiago Amrein, 28, from Buenos Aires claims that anyone who paints on a public building without permission commits a political act by seizing public space. ‘That’s what I like best about street art,’ he adds. ‘We are trying to democratise art.’

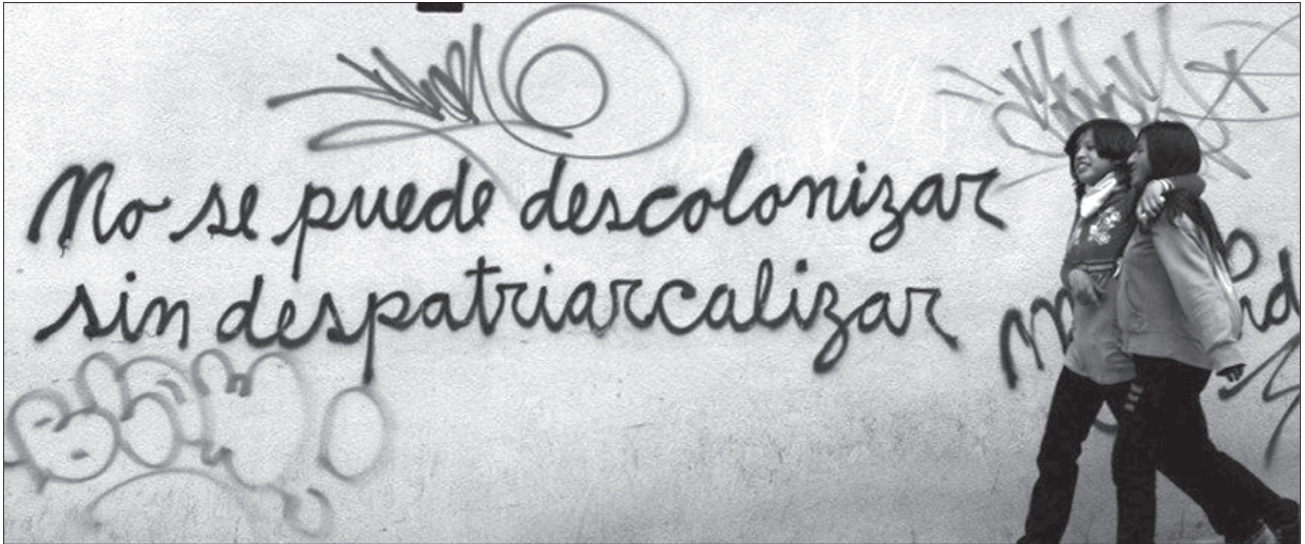
‘Street art’ is a very broad term and covers diverse forms of expression alongside wall painting and graffiti. Stencil graffiti, which makes text or images easy to reproduce, is increasingly popular, ‘tags’ – stylised signatures – are very widespread, and digital art forms are now emerging, such as video mapping and digital graffiti, which are stored on a tablet, PC or mobile phone and broadcast via social media.

Argentine artist Natalia Rizzo points out that a muralista planning a wall painting needs to take account of the dimensions of the building and the routes of passers-by. ‘Passers-by will only stop for a closer look if the work awakens their interest. Otherwise, they just walk past,’ the 34-year-old says.

In recent years, street art has increasingly become mainstream. Graffiti has been institutionalised by galleries and even ‘confined’ in museums. Major brands and companies use street art techniques and even commission street artists for advertising campaigns. At the same time, there is still a strain of revolutionary political street art that opposes commercialisation. The Bolivian anarcho-feminist artists’ collective Mujeres Creando is one example.

Feminist messages

Mujeres Creando have been active for more than 20 years at various levels, engaging in political activism, artistic activity and feminist empowerment. The artists use graffiti as a



The Bolivian artists' collective Mujeres Creando use graffiti as a form of expression, spraying walls and buildings in La Paz with aphorisms such as 'There can be no decolonisation without depatriarchalisation' (pic).

form of expression, spraying walls and buildings in La Paz with aphorisms such as 'Eva is not made from the rib of Evo' or 'Pachamama [Earth Mother], you and I both know that abortion has always been around', 'Women who unite don't need to put up with violence' or 'There can be no decolonisation without depatriarchalisation'. In 1993, the collective used graffiti to call for an election boycott in protest over widespread vote-buying ahead of the presidential election.

Mujeres Creando denounce racism and violence at various levels – from state agencies, family and sexual relations through to institutional settings. Their public criticism of patriarchal violence and the abuse of authority has influenced social movements across Bolivia. Mujeres Creando staged a major event at the 31st Biennial de Sao Paulo in September 2014. The group created an installation called 'Space to Abort' at the modern art exhibition, featuring giant uteruses onto which short films were projected.

In Sao Paulo, a special form of graffiti known as 'Pixo' or 'Pichacao' is found at every turn. The young artists, the pichadores, compete to spray their tags on the city's tallest buildings, in places that they reach by free-climbing or with the support of ropes. Juneca, a 28-year-old ex-pichador, declares: 'If it was legal, no one would bother. We are part of the periphery,

of the marginalised community, and we say very clearly: I exist, I'm here, and I want you to see me.'

This extreme artists' movement is made up largely of very young people, many of them teenagers. It uses creative means to represent marginalised sections of the city's people. Jannis Seidaris, a German graphic designer, writes: 'Pichacao consists of tagging in a distinctive, cryptic style inspired by runic and Gothic script and the logos of many nineties rock bands. Poverty and isolation enabled the style to survive without being influenced by Western graffiti or basic typographical rules.' In the past, Pixo was an expression of punk or resistance against military dictatorship; today its motto is 'Down with the dictatorship of the mainstream'.

Controversial art event

Wall paintings have an influence not just on the art world but, more importantly, on the social environment. The city of San Miguel de Tucuman, the capital of one of the poorest provinces in Argentina with the highest child malnutrition rate in the country, was shocked by an art event in early 2015: a series of stick-on graffiti images of hanged children with four balloons appeared on walls in the city, triggering a public and media debate. The art event was entitled 'Felices los niños' (Happy Chil-

dren) – a reference to a Catholic foundation of the same name whose director, Padre Julio Grassi, is serving a jail sentence for child abuse.

The art event criticised not only the Catholic Church but also the state, which supports the foundation. It also referred to child labour during the lemon and strawberry harvest in the province. Artist Sofia Jatib, who initiated the event, recalls: 'Everyone was shocked by the image. But it is so hypocritical to portray childhood as innocent.' She considers that idea an authoritarian dream.

Many of the wall paintings can still be seen in Tucuman today. Despite the negative press, people are open to the artists' message. Domestic helper Ana Maria, 55, says: 'I don't find the images disturbing. What I find much more disturbing is hearing people say that slum-dwellers should be slain before they grow up. It's a remark I hear often because the children of the poor in this society are worth nothing.' Raul Lopez, a car mechanic in Tucuman, believes that the press may be outraged by the horrific images of the art event but 'the politicians in this province don't give a fig when children die.'

The great strength of wall painting is that it triggers public debate. And that is precisely the intention. ♦

Sebastian Vargas is a journalist living in Buenos Aires. This article is reproduced from D+C (Development and Cooperation) (Issue 11-12/2015).

Why the world can't stand by as Burundi becomes a failed state

As Burundi descends into a whirlpool of violence, *Patrick Muthengi Maluki* contends that in the absence of intervention by the international community, a full-scale civil war seems likely.

THE unfolding human tragedy in Burundi needs urgent intervention from the international community before it is too late. The seemingly hands-off attitude by the East African Community, African Union and even the United Nations raises many questions.

The crisis has been characterised by sporadic violence, assassinations, intimidation and the grouping of militias along ethnic lines. The situation is eerily reminiscent of the start of the 1993-2006 civil war in which an estimated 300,000 people died. The underlying issues of ethnic balance of power, corruption and poor governance linked to that conflict appear to be re-emerging.

The current crisis began in April with multi-ethnic protests by the opposition and civil society against President Pierre Nkurunziza's decision to vie for a third term.

Ethnic balance of power

In Burundi, ethnic balance of power seems to be the major threat to stability. The two dominant ethnic groups, Hutu and Tutsi, have had altercations since the precolonial era. Their squabbling became more serious in the aftermath of Burundi's independence in 1962. The ethnic conflict culminated in the genocidal violence of 1993-2006 that killed more than 300,000 people.

The 1998 Arusha Peace and Reconciliation Agreement, specifically Article 7, made efforts to diminish the ethnic cleavage. But the tragedy of the peace effort was that it was anchored on power sharing among ethnic elites. This was done without consideration for genuine justice and reconciliation across Burundi's ethnic society. Nor with an eye on the establish-



A soldier fires a rifle during a protest in the Burundian capital Bujumbura. Rising militarisation is a clear indication of Burundi's possible descent into the club of failed states.

ment of strong governance institutions.

The 'quick fix' nature of the Arusha Peace and Reconciliation Agreement seems to have come back to haunt Burundi. Ethnic protests threaten to tear the country apart, leading it to the path of a failed state.

There has been a mass exodus of Burundians to neighbouring countries since the new violence. This has been driven by negative ethnicity – described as people fighting for their rights by destroying the rights of others – especially among the elites. The UN refugee agency estimates that by November more than 200,000 people had fled Burundi in anticipation of ethnic conflict.

An outbreak of a full-scale civil war seems inevitable.

Bad governance and corruption by the Nkurunziza regime also threaten the survival of Burundi as a state. The ripple effects of these have seen a rise in poverty and unemployment, especially among the youth who con-

stitute the majority of Burundi's population of 11.2 million.

The large population of disenfranchised young people makes them vulnerable targets for recruitment into militias. This is evident in the high number who have aligned themselves with key actors across the political divide. The buildup of youth militia, leading to a highly militarised society, has created a tinderbox. All it requires is a spark to set off civil war that will consume Burundi's state and national fabric.

Militarisation and ethnic militias

Rising militarisation, especially among youths allied to rival Hutu and Tutsi ethnic groups, is a clear indication of Burundi's possible descent into the club of failed states.

The central government is weak and has little control over the country. It faces clear challenges in providing public services and is riddled

with widespread corruption and criminality. Refugee numbers are climbing as more people flee their homes and the economy is in sharp decline.

Intimidation is on the rise and ethnic militia groups are retreating to their ethnic strongholds. Targeted assassinations across the political spectrum are increasing in the capital Bujumbura, akin to the initial stages of the 1993 civil war.

The most notorious case of militia hemmed along ethnic lines is the Hutu-dominated and pro-government militia, the Imbonerakure. It has continuously waged a campaign of intimidation against Tutsis.

The militarisation of ethnic groups indicates a clear pattern of a failing state incapable of using state institutions, such as the police and other security forces, to maintain law and order. The division of the military along ethnic lines, which led to the aborted coup, is another symptom of gradual decline in the state's capabilities.

Why neighbours aren't helping

There is no easy solution to the dangerous crisis in Burundi. The East African Community, which should be the obvious arbiter, doesn't seem to be suited to resolving the crisis.

Kenya is busy with its own International Criminal Court cases and seems not to have time for the crisis.



The Hutu-dominated and pro-government Imbonerakure militia has waged a campaign of intimidation against Tutsis. Picture shows anti-government protesters surrounding a man accused of being a member of the Imbonerakure.

In Tanzania, President John Magufuli is new and needs time to establish his government.

For his part, President Paul Kagame of Rwanda has overtly declared that Nkurunziza's regime is targeting minority Tutsi groups in Burundi. He has threatened to intervene if the crisis turns genocidal to protect Tutsis.

Ugandan President Yoweri Museveni – who is the current mediator – is facing stiff competition from the opposition in elections slated for January 2016 and may have no time for Burundi. Museveni, just like Nkurunziza, has been accused by the Ugandan opposition of manipulating the constitution to extend his stay in power. Hence, in the eyes of Burundian opposition, he lacks credibility to re-

solve a crisis sparked by his counterpart's machinations to cling to power.

Way forward

Any attempt to resolve the crisis and find a long-term solution must tackle political, constitutional, economic and social problems in Burundi. For instance, the trigger issue in the recent conflict was the ambiguities in the interpretation of the Arusha Peace and Reconciliation Agreement and the country's 2005 constitution.

Hence the Burundian peace process, while addressing the current political and constitutional crises, should also take into account the economic, ethnic and social issues behind the conflict.

In the meantime, the UN should send a Chapter 7 peacekeeping mission to Burundi. Such missions apply to volatile 'post-conflict settings where the State is unable to maintain security and public order'.

This would enable it to be given a mandate to use force to stop the killings by both the opposition and the government. After this, the African Union must lead in creating an inclusive political dispensation acceptable to all parties. ♦

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Refugees fleeing the conflict in Burundi board a speedboat to reach a ship on Lake Tanganyika, Tanzania. There has been a mass exodus of Burundians to neighbouring countries since the new violence.

As the world agonises over the plight of the refugees who are now streaming into Europe, the following poem by Palestine's poet laureate reminds us that Palestinians are still refugees.

I come from there

Mahmoud Darwish (1942-2008)

I come from there and I have memories
 Born as mortals are, I have a mother
 And a house with many windows,
 I have brothers, friends,
 And a prison cell with a cold window.
 Mine is the wave, snatched by sea-gulls,
 I have my own view,
 And an extra blade of grass.
 Mine is the moon at the far edge of the words,
 And the bounty of birds,
 And the immortal olive tree.
 I walked this land before the swords
 Turned its living body into a laden table.

I come from there. I render the sky unto her mother
 When the sky weeps for her mother.
 And I weep to make myself known
 To a returning cloud.
 I learnt all the words worthy of the court of blood
 So that I could break the rule.
 I learnt all the words and broke them up
 To make a single word: Homeland.....