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THE INTERNATIONAL LIBERAL ORDER VERSUS HUMAN RIGHTS

The election last November of the Republican standard bearer in the United States, and, before that, the victory of Brexit in the UK, has instigated a widespread exercise in hand wringing among elite circles in the West about the coming demise of the international liberal order. The US is now seen has having withdrawn from its self-assigned role as the global leader of the international liberal order as reflected in the nationalistic stances to immigration and international commerce which the new US administration has advocated (even though most of these are still in the realm of intentions). Western journalists have been moved to proclaim Angela Merkel of Germany, Xi Jinping of China and even Justin Trudeau of Canada as the new leaders of "free world" and paragons of the international liberal order.

This essay takes the view that the presumably desirable features of the international liberal order are for the most part illusory and, despite its own claims, this order is not conducive to the full realization of human rights for all – if not actually explicitly designed to operate counter progress towards achieving these standards. This essay seeks to identify the inherent features of the international liberal economic order (for which new Western champions are being sought) which undermine the rights of peoples to secure livelihoods, to have dignified lives within their own societies in which they have a respected social role and to safeguard the freedom to make economic choices. The Universal Declaration of Human Rights [6] proclaims that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

And that every human being is entitled to all the rights identified in the declaration "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In contrast, the international liberal order legitimizes and upholds categories of economic differentiation between human beings and the continuation of discriminatory policies between individuals, organizations, communities, and states. If the newly found problem is the defense of international liberal order, it is important to identify what is actually in need of defense.

The Trans Pacific Partnership as the "Gold Standard"

One of the first acts of the new US administration was the withdrawal of the United States from the Trans Pacific Partnership (TPP) agreement, as its candidate promised during the election campaign. In 2012, as US Secretary of State, Hillary Clinton, had declared the TPP as setting "the gold standard in trade agreements to open free, transparent, fair trade, the kind of environment that has the rule of law and a level playing field" [4]. This is probably the clearest statement of what an international liberal economic order is supposed to be. Candidate Hillary Clinton withdrew her endorsement of TPP during the presidential campaign, following the position of her rival, Donald Trump, and in recognition of the popularity of a rejectionist stance on the TPP.

There are many aspects of the TPP which would qualify it as the "Gold Standard" of trade agreement. For this essay, I will only elaborate on two aspects which involve the subsidization and guaranteeing of the rights of international corporations in promoting an open free, transparent, fair trade, against the human rights. The TPP rules are at a minimum, discriminatory because these create property rights and special protections for internationally active corporations versus resident populations and corporations that do not operate internationally.

The TPP versus the right to health

The name of an open free, transparent, fair trade, the TPP protects the international patents of international pharmaceutical companies to a much higher degree than even the regime under the World Trade Organization (WTO). Intellectual property is a state-created property, created theoretically for a social purpose of rewarding innovation and invention; in the case of health, the social purpose would be improvement of health outcomes in the human population. As implicit in the Universal Declaration, all human populations have equal rights to health.

The standard manner in which this publicly created property is protected is through the grant of a monopoly to the owner of the invention who can then impose the price that s/he wants for access to the invention. There are other ways to achieve the social purpose of promoting health innovation but the international liberal economic order, now in search of international champions possibly in Merkel or Trudeau, chooses this patent monopoly method. Khor [2], recognizing the impact on the 11 other countries in the TPP not including the US, finds the TPP as an "immense tragedy for public health, because most of these countries did understand that the chapter on intellectual property would have negative effects, but they accepted it as part of a bargain for getting better market access, especially to the US." These other countries have amended to their laws and regulations to comply with the TPP's provisions.

Khor (2017) asks further: "What's the point of having wonderful medicines if most people on Earth cannot get to use them? And isn't it immoral that medicines that can save your life can't be given to you because the cost is so high?" For Medecins Sans Frontieres (MSF), "The TPP represents the most far-reaching attempt to date to impose aggressive intellectual property standards that further tip the balance towards commercial interests and away from public health.... In developing countries, high prices keep life-

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saving medicines out of reach and are often a matter of life and death."

The specific problems of the TPP as the Gold Standard are analyzed in an article by McNeill and others [3] published in the *Lancet* magazine in 2016.

The TPP requires signatory to lower their standards in granting patent protection to an international company. Because they were invented elsewhere in an earlier time, some patent applications are not for genuine inventions but are only to extend the life patent (called "evergreening"). TPP (Article 18.3) *requires* countries to grant patents for at least one of the following modifications: new uses of a known product, new methods for using a known product or new processes for using a known product. If, for example, a drug that was useful for treating HIV/AIDS is found to also useful for cancer, a TPP signatory country must extend the patent period. Delays in the grant of the patent under TPP results in the extending the endpoint of the patent. The TPP requires extending the medicinal patent beyond the 20 years required by the WTO.

The TPP prohibits signatory countries from using the clinical trial data when the medicine was originally found to be safe and effective to approve the patent. This prevents TPP countries from giving patents for generic drugs to give access to cheaper versions of the drug.

In the normal course of statistical outcomes, these restrictions will raise the cost of drugs on populations living in TPP countries and shorten the lives of millions of their people.

TPP guarantees to profitability of international investors

Since the North American Free Trade Agreement (NAFTA), free trade agreements with the United States have included an "investment chapter" which sets out the obligations that host country governments have to protect investors from the United States. In these chapters, states make the promise that foreign investors will be protected from arbitrary and unfair treatment – both in terms of process and policy actions – by the host government. The current dominant form of these investment obligations exposes host countries to litigation costs and monetary penalties should their policies and actions be judged to be in violation of their investor protection obligations. The TPP is a gold standard among the ways in which investor protections are provided among the original 12 signatory countries.

The international liberal order promotes these treaties on the argument that providing strong commercial protections to foreign investors will increase the flow of investment in developing countries. The framework to protect foreign investors is imported from the commercial contractual and dispute resolution system in place among private parties. In investor protection obligations, the contractual obligations are all on the side of the host country and the liable party is a state – not a private entity – which already has built-in accountability to its own citizens. The secrecy provisions of almost all treaties can prevent government officials from publicly disclosing the country's obligations to foreign investors. The international system of dispute resolution, called the "investor-state dispute settlement" (ISDS) is extremely powerful and unique in the existing system of states. Unlike other international mechanisms, it allows private parties to sue states directly and obtain compensation. In the World Trade Organization (WTO), for example, only states can sue other states.

In accepting the investment chapter in the TPP, signatory countries accept wide ranging obligations that restrict their policy space to regulate the private sector and fulfill their human rights obligations:

— Fair and equitable treatment (FET);

— Compensation in the case of direct or indirect expropriation;

— National treatment, or treatment no less favourable than that given to domestic investors;

— Most-favoured nation (MFN) treatment, or treatment no less favourable than that given to investors from third countries;

— Freedom from so-called "performance requirements" as a condition of entry or operation. These are requirements, for example, to transfer technology, to export a certain percentage of production, to purchase inputs domestically, or to undertake research and development;

— Free transfer of capital. This provides a guarantee to investors that they can freely move assets in and out of the country;

— A blanket obligation, known as an "umbrella clause," which obliges the host state to respect any legal or contractual obligations it may have to the investor;

— The right to bring arbitration claims against host governments.

An investor that believes that that state has not fulfilled its obligations under the treaty can initiate arbitration proceedings. UNCTAD [7, p. 107] reports that as of the end of 2015 the number of "concluded cases" was 444. Of these, 36 per cent were decided in favour of respondent states; this means that in these cases all claims were either dismissed on jurisdictional grounds or on their merits. In two percent of the cases, tribunals found that there was a breach of treaty obligations but no monetary compensation was awarded to the investor Nine per cent were discontinued for reasons other than settlement. Twenty-six per cent were "settled," most likely, because the terms of the settlement often remain confidential, generating a monetary award in favour of the investor. Twenty-seven per cent of the cases were decided in favour of the investor. If one were to interpret a settlement as an outcome in favour of the investor, since the state is the bearer of all the obligations in a standard investment chapter, and sum up those decided in favour of the investor with those settled, then in 55 per cent of cases, investors prevailed in ISDS-impelled proceedings. In recent years, the outcomes of these arbitral decisions have been very expensive for sovereign states:

— 2014: Russia-Yukos $50 billion; Venezuela-Exxon $1.6 b (incl. interest);

— 2012: Ecuador-Occidental Petroleum $1.7 b (incl. interest);

— 2010: Ecuador-Chevron $0.7 b (Combined Ecuador penalties equal to 3.3% of GDP).

The gold standard dimensions of the TPP is the guarantee given to foreign investors from other TPP countries of that they will have a legal recourse should they feel that their unfettered policy space to make profits is being diminished by changes in public policy of the host country. TPP signatory countries hosting foreign investors bear the cost

of the arbitral system. There could be two kinds of costs generated by the system:

1) the fiscal costs cost of the process;

2) the perverse governance impact on regulatory policy and the business model for enterprises operating internationally.

The first kind of cost, on fiscal resources, derive from the cost of the process and the possibility that states are paying damages at the scale beyond the actual costs actually borne by investors. The chilling effect on public regulatory policy, the encouragement to international business toward a model based on exploiting the public finances of developing countries, and the corruption of the arbitration process are part of the second kind of cost.

Under the US-style investment gold standard protections enshrined in the TPP [5]:

1) the government of South Africa has had to compensate Italian investors in a mining companies losses in expected profits because the requirement to devote part of the ownership to citizens of African descent as part of the constitutionally mandated black empowerment policies;

2) the government of Egypt has been brought into a despite by French company Veolia for reducing its expected profits by raising national minimum wages after the fall of the Mubarak government;

3) the Zimbabwean government has to compensate landowners-investors for its land reform policies to fulfill its original revolutionary mandate to distribute land;

4) the Bolivian government lost a legal case to foreign investors in a water distribution project (though because of widespread protest the actual costs was much reduced when foreign investors sought to minimize the reputational damage to themselves);

5) prevented a local government in Mexico to clean up a local waste dump in case brought under the original NAFTA investment chapter. These are only a few of the cases which illustrate the chilling effect on policy and prevent host governments from fulfilling their own human rights obligations in health, environmental, public safety, wage and other social protection policies.

The International Liberal Order is Causing Globalization to Reverse

The global economy crossed a potentially troubling milestone in the last five years. The reputed two-to-one relationship that prevailed for more than a decade between world trade volume growth and world GDP growth appears to have broken down, as illustrated by the fact that trade and output have grown at around the same rate for the last three years. Thus, even before the recent political developments in the United States and the UK, the actual state of international economic integration has actually been reversing and an argument can be made that recent political developments are only playing catch-up with the failure of the international liberal order to sustain increased economic interaction among countries and populations of the world.

The nature of the TPP itself reflects the kind of retreat from the "open free, transparent, fair trade, the kind of environment that has the rule of law and a level playing field" as defined by US Secretary of State Hillary Clinton. It excludes economies with an earned reputation of international competitiveness, notably China, and thus an occasion for the mischief of trade diversion. Its estimated economic benefits are relatively minuscule, with the most generous estimate of a benefit to the United States (which among the participating countries enjoys the largest advantage) of 0.5 per cent of GDP by 2030. Another estimate [1], based on a methodology that allows employment to adjust to changes in trade, find negative effects on income and employment on participating countries.

With TPPA's potential for small and negative effects, it is necessary to identify what the possible source of interest could be on the part of the participating governments. Developed countries in the agreement, with the competitive private companies operating internationally could find the disciplines on other parties in government procurement, investor and intellectual property protection, and restrictions on state-owned enterprises (SOEs) most beneficial. What about the other countries – the developing countries such as Viet Nam and Peru – that do not have an large private sector operating internationally?

The world appears to be experiencing its second episode of a reversal of globalization. The first period ended in 1914, and led to two world wars, destruction and dislocation, millions of deaths. The first version of globalization did not prove to be sustainable and ended up destroying itself. The rules and mechanisms of the first version of globalization planted the seeds of its destruction. Even though the global economy was very productive and created great wealth for some, it was based on the subjugation of peoples through colonialism, the irresponsible devastation of natural resources, and the political domination of small elites which competed with each other. Under the rules of the first globalization, nation-states competed with each other in terms of control of territory, commercial control, and arms.

The global community vowed after World War II to learn from the lessons from these catastrophes and created institutions to prevent their recurrence, including the United Nations. National authorities were assigned the responsibility to respect, protect and fulfill individual human rights. Commensurate with these responsibilities, national authorities were assigned full sovereignty over their resources and the supervision of their private sectors.

What is at stake is an international enabling environment so that less powerful countries – not just the two or three that are dominant – can pursue their development and fulfill their human rights obligations to their citizens. The term "systemic issues" is used to point to imbalances in the international system. The term recognizes that there are serious flaws in the international system that can serve as obstacles to development.

There are two important arenas: First, is to make sure that the international system does no harm, and that it facilitates, instead of obstructs, people-oriented policies. The second is that question of good governance at the international level which comes from imbalances in power and influence.

There are many harmful features in the international system that needs fundamental reform

There is plentiful private capital being invested all around the world. However, the money is being invested in the wrong places, which severely restricts the ability of national authorities to fulfill their human rights obligations and to promote development. It is not available for long-term purposes which are what is needed for social and eco-

nomic development. Private funds are invested mainly as portfolio placements that can move out in response to even small changes in interest rates.

Regulating capital flows at the international level through concerted and cooperative country regulation is therefore an important element for international cooperation. There is a common responsibility to regulate private capital flows because any under-regulated jurisdiction can attract all the private investment and cause trouble for others, but the responsibility is differentiated because there is a great diversity in size and sophistication of financial markets.

In the systemic issue of global governance, the most well-known problem are imbalances in economic decision-making bodies such as voting weights in the IMF, in the G20, in the area of financial regulation.

These imbalances and pitfalls have to be addressed if the unfortunate and humanly costly experience of the first reversal of globalization in the 20th century is to be avoided in the 21st century.

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