TPP es el peor acuerdo comercial, denuncia Médicos Sin Fronteras

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La protección que brinda el TPP a los medicamentos patentados limita el acceso de pacientes a tratamientos vitales, según MSF. Crédito: Kristin Palitza/IPS

NACIONES UNIDAS, 8 oct 2015 (IPS) - El Acuerdo Transpacífico de Cooperación Económica (TPP, en inglés) “pasará a la historia como el peor acuerdo comercial para el acceso a los medicamentos en los países en desarrollo”, denunció Médicos sin Fronteras (MSF) en un comunicado tras la firma del tratado el lunes 5.

El TPP es el mayor acuerdo comercial de los últimos años ya que reúne a 12 países, incluido Estados Unidos, que en conjunto representan 40 por ciento de la economía mundial.

“El impacto negativo del TPP en la salud pública será enorme, se sentirá en los años por venir y no se limitará a los actuales 12 países (signatarios), ya que es un modelo peligroso para futuros acuerdos”: Médicos sin Fronteras.
Las negociaciones del tratado, iniciadas en 2008, concluyeron con su firma en la sureña ciudad estadounidense de Atlanta. El TPP incluye una serie de medidas económicas, como la reducción de aranceles y normas para el derecho laboral, la regulación ambiental y las inversiones internacionales.

“Este acuerdo equipara el campo de juego para nuestros agricultores, ganaderos y fabricantes mediante la eliminación de más de 18.000 impuestos que diversos países aplican a nuestros productos”, declaró el presidente estadounidense Barack Obama, en un comunicado tras las negociaciones.

Obama añadió que el TPP tiene los compromisos “más sólidos” sobre trabajo y medio ambiente que cualquier otro tratado comercial de la historia.

Aunque el acuerdo aún no ha sido adoptado formalmente por los órganos legislativos de los países signatarios, ya recibió críticas por parte de numerosas organizaciones de la sociedad civil, incluida MSF, cuya principal preocupación surge de las disposiciones del TPP sobre la protección de los fármacos biológicos sujetos a la propiedad intelectual.

Por fármacos biológicos se entiende toda terapia de una fuente de origen biológica, como las vacunas, las antitoxinas y los anticuerpos monoclonales para enfermedades como el cáncer y el virus de inmunodeficiencia humana/síndrome de inmunodeficiencia adquirida (VIH/sida).

La organización de investigación Brookings Institution, con sede en Estados Unidos, señala que los fármacos biológicos son estructuralmente más complejos que otros medicamentos, lo que hace que su elaboración sea más difícil y costosa. En promedio, cuestan 22 veces más que los demás.

Debido a estos costos, las empresas utilizan el fármaco original para desarrollar “biosimilares”, o sea versiones genéricas más baratas de los productos biológicos. MSF ha declarado que esta es la “mejor manera de reducir los precios de los medicamentos y de mejorar el acceso al tratamiento”.

Por ejemplo, MSF brinda tratamiento con medicamentos genéricos a unas 300.000 personas con VIH/sida en 21 países. Estos fármacos redujeron el costo anual de la organización de 10.000 dólares a 140 dólares por cada paciente tratado.

Sin embargo, en Estados Unidos los fabricantes de fármacos biológicos tienen 12 años de exclusividad sobre la información necesaria para copiarlos. Durante ese lapso, la Administración de Alimentos y Fármacos estadounidense no puede aprobar un fármaco biosimilar que utilice los datos biológicos originales.

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Las normas que protegen esos datos varían según los países. Por ejemplo, Chile, México y Perú no regulan los datos biológicos en absoluto.

Como parte de las negociaciones del TPP, Estados Unidos intentó incluir la regla de protección de 12 años, pero al final los ministros de los distintos países signatarios acordaron un lapso mínimo obligatorio de cinco a ocho años de protección de los datos.

En consecuencia, los fármacos biosimilares no podrán ingresar al mercado de aquellos países que anteriormente no tenían restricciones al respecto. Según MSF, eso elevará los precios de los medicamentos esenciales, sostenidos por las

empresas farmacéuticas, lo que impedirá que las personas y los proveedores de salud los adquieran a un precio accesible.

MSF prevé que al menos 500 millones de personas no podrán acceder a los medicamentos una vez que el TPP entre en vigor.

“Los grandes perdedores en el TPP son los pacientes y los proveedores de tratamiento en los países en desarrollo”, denunció MSF en un comunicado.

La organización instó a los gobiernos y sus legislaturas a considerar las consecuencias.

“El impacto negativo del TPP en la salud pública será enorme, se sentirá en los años por venir y no se limitará a los actuales 12 países del TPP, ya que es un modelo peligroso para futuros acuerdos,” advirtió MSF.

Traducido por Álvaro Queiruga

TPP, Investment Agreements, and the Governance of Land

Rachel Thrasher and Timothy A. Wise

In 2009, the government of Mozambique put a moratorium on large-scale land acquisitions, a belated response to a wave of protests triggered by so-called “land grabs” by foreign investors. The moratorium, which lasted two years and restricted only land deals larger than 25,000 acres (10,000 hectares), calmed tensions while the government sought to resolve the inconsistencies between the great land giveaway and the country’s progressive land law, which recognizes farmers’ land rights even when they do not hold formal titles.

Some of those investors were from the United States, and it is a wonder that they didn’t sue the Mozambican government for limiting their expected profits. They could have under the Bilateral Investment Treaty (BIT) between the United States and Mozambique.

As U.S. trade negotiators herd their Pacific Rim counterparts toward the final text of a long-promised Trans-Pacific Partnership Agreement (TPP), the investment chapter remains a point of contention. Like the 1994 North American Free Trade Agreement (NAFTA) and most U.S. trade agreements since, the TPP text includes controversial provisions that limit the power of national governments to regulate incoming foreign investment and give investors rights to sue host governments for regulatory measures, even those taken in the public interest, that limit their expected returns. A host of BITs with a far wider range of countries, including Mozambique, contain similar provisions.

The impact of such agreements on land grabs and land governance has received scant attention until recently. As new research from the International Institute for Environment and Development (IIED) and Tufts University’s Global Development

and Environment Institute (GDAE) shows, the kinds of investment provisions in the TPP and in most BITs can severely limit a government's ability to manage its land and other natural resources in the public interest. They can also interfere with the implementation of newly adopted international guidelines on land tenure.
As GDAE's research shows, there are alternatives to such restrictive investment rules. Mozambique, for example, could withdraw from its BIT with the United States and instead draw on the less constraining investment provisions offered by the Southern African Development Community (SADC).

The Threats to Land Governance

GDAE's new background paper, "Trade Agreements and the Land," by Rachel Thrasher, Dario Bevilaqua, and Jeronim Capaldo, examines the implications of proposed agreements, such as the TPP, for regulating land grabs. Lorenzo Cotula of IIED, in his report, "Land Rights and Investment Treaties: Exploring the Interface," looks beyond land grabbing to consider other important aspects of land governance, including land redistribution. Both identify key provisions common to U.S. investment treaties that constrain land governance.

Perhaps most well known is the Investor-State Dispute Settlement (ISDS) process whereby private investors can sue states in a private arbitral tribunal – a glaring exception to the traditional sovereign immunity granted to states. Land grabs have not yet been the subject of dispute under these treaties, but other land conflicts show how they might in the future.

Beyond the onerous ISDS provisions, investment treaties universally require compensation in the case of expropriation. Traditionally, that compensation must be "prompt, adequate and effective." Countries have faced claims for expropriation in a wide variety of land-related cases – mostly in response to state efforts to correct past injustices or reform land tenure. Zimbabwe, in the wake of its fast-track land-redistribution program, Albania's privatization in the transition from socialism, and South Africa's mining legislation to benefit disadvantaged groups after apartheid all faced investor disputes claiming expropriation.

The standard for compensation in these treaties is often based on the market value of the investment and does not take into account a fair balance between interests. Indeed, in the draft TPP several negotiating countries have explicit footnotes and annexes specifying that the compensation must be at market value (Art. 11.7, Annex II-C). As Cotula points out, investors can demand such compensation even if they got the land at low prices and even if government action simply interferes with or delays their profit-making activities.

Treaties also often require that foreign investors be treated with "full protection and security." In some cases, where domestic individuals or groups have taken action against foreign investors, the countries have been on the hook for not acting with "due diligence" to protect them.

Many investment agreements also demand "fair and equitable treatment" for foreign investors. In investment jurisprudence this has come to include the "legitimate expectations" of the investor based on negotiations with governments.

Any promise of access to land and resources, or even the speedy handing over of such land, can be disputed as a violation by investors.

Sometimes, even before an investor enters the country, these investment treaties threaten land governance by extending the “right of establishment” to investors from partner countries. This means that under the TPP and most modern BITs, host countries must treat foreign investors on par with domestic investors, giving no priority to nationals even in sensitive areas such as land, minerals, and other natural resources.

These investment provisions can have a marked “chilling effect” on governments. Cotula points out, for example, that many provisions of investment treaties would conflict with efforts by a government to implement the Voluntary Guidelines on the Governance of Land Tenure (VGGT) from the FAO, now the gold standard for appropriate recognition of land rights. The guidelines call for the restitution of land to those from whom it was taken and the redistribution of land in land reform efforts. To the extent those efforts impede the profitability or expected profitability of a foreign investment, the government may find itself liable for unaffordable market-rate compensation in settlements that can include the recouping of expected profits by investors. Such agreements therefore make it more difficult for governments to implement this groundbreaking new international land tenure agreement.

Notably, many of Cotula’s recommendations involve ways that governments can protect themselves by legislating the VGGT in national law and ensuring that investment treaties recognize such obligations.

TPP – No Way Forward

The TPP is expected to be finalized in the coming months. For countries like Viet Nam, which was not previously bound by any international investment treaties, this could create large unexpected obstacles to domestic land regulation. Currently, the United States is negotiating investment treaties with what amounts to 80 percent of global GDP. Between the TPP, the TTIP, and BITs with India and China, U.S. style investment treaties are poised to become the de facto international legal regime for the treatment of foreign investors.

AS GDAE’s background paper shows, there are other investment treaty models out there. The Southern African Development Community drafted a model BIT with some of these threats to governance in mind. Its Model BIT begins by explicitly recommending that countries not extend rights to investors before establishment. Instead, countries are encouraged to admit investments in a good faith application of their laws. The model also limits ISDS provisions, recommending either that disputes should be kept between States, or at the very least, that States should be able to bring counterclaims against the investor in the same tribunal.

Expropriation is approached differently as well. Rather than a standard of non-discrimination and “prompt, adequate and effective” compensation, it acknowledges that almost all expropriations are discriminatory and suggests a “fair and adequate” standard for determining compensation. This is more in line with

other approaches looking to create an “equitable balance” between interests in deciding how much compensation is owed.
Finally, the language of “full protection and security” and “fair and equitable treatment” is downgraded such that it requires only “fair administrative treatment.” By doing this the SADC text emphasizes that this is a procedural, rather than a substantive standard and reserves the rights of states to make regulatory changes in response to important public policy.

As Cotula concludes, “Protecting the land claims of some, without also taking action to protect different and potentially competing land claims, can entrench imbalances in both legal rights and power relations. In the longer term, solutions should lie less in legal arrangements that insulate foreign investment from shortcomings in national legal systems, and more in establishing fair and effective land governance that can cater for the needs of all.”

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