

Are FTA's making the World Less Free? A Case Study of TPP

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Abstract

On January 23, 2017, right after assuming presidency, US President Donald Trump did good on his promise and signed the executive order that withdrew USA from the very agreement that it commenced the negotiations for: Trans Pacific Partnership (TPP). The unratified multinational trade agreement encompassed 12 countries which accounted for %40 of the world's GDP and over 800 million people. On a broader scope, TPP is often affiliated with two other trade deals; Transatlantic Trade and Investment Partnership (TTIP) and Trade in Services Agreement (TiSA) both of which in terms of content resemble a lot that of TPP. Given the fact that TTIP and TiSA are not complete and not entirely disclosed with the public, we shall be exclusively focusing on TPP. TPP has been subject to many controversies. But particularly the notion that TPP would enable corporations to sue governments in private arbitration tribunals over lost profits has drawn much attention. In this article we shall be investigating whether there is some truth to these allegations. Providing reference from the articles of the agreement, we shall be discussing the qualities of TPP's judicial reforms. But firstly, in order to introduce the reader to the subject; we will be providing with some context, to properly frame the subject, and with some information about the nature of these agreements. Secondly, we shall be addressing our main issue. In addition, we will be questioning the framework within which the agreements are officially presented. Finally, a conclusion that compromises the author's assessment of the case will be provided.

Keywords: FTA, TPP, TTIP, TiSA, Trans Pacific Partnership, free trade agreements

Introduction

When Alfred Mahan first suggested his ideas of maritime supremacy, it was a different world. However the supporters of thalassocracy today are not fewer. Mahan said that he, who dominates the seas, dominates the world. He further says that the best way to secure dominance over others at sea is either through decisive victories or blockades. Since the possibility of a decisive victory is ruled out in USA vs China case (so far), with the absence of a declaration of war, blockades are what is left. And the modern and covert way of conducting blockades is through forming coalitions and trade partnerships with targeted country's neighboring states and depriving the target of the assets of the partnership, therefore achieving relative power over the targeted party. Consequently causing the neighboring states of the targeted country to gain more power against the target which results in a relative loss of power for the target.

Starting from the late 90's, the rise of China as a global power caused the eruption of 'The Chinese Question' in the American decision maker's mind. The world's most populous country was now breaking its shell and strengthening its position economically, militarily and politically. And the US needed to reposition itself towards this newly emerging power. This need was eventually expressed by the former president Barack Obama through his "Pivot to Asia" approach. Prior to the announcement of the pivot, the former president was known with his self declaration for being the first "Pacific President" of the USA. Although not officially pronounced, this emphasis on Asia and Pacific region was obviously mainly concerned with China. The government of Philippines, a critical US ally in the region went as far openly announcing a "Pivot to China" of their own. Thus, it seemed like US was openly repositioning itself as an anti-China party and beginning to pursue ways of confinement.

Such operation of confinement naturally consists of many legs. But the most crucial of them are most likely the military and the economic ones.

It is interesting to see that the US Army's Asia – Pacific branch was exempted from the 'notorious' defense budget cuts. Though, it is quite logical to make that exemption, especially within the context of the pivot. However there is something

else that is far more interesting. For quite some time, Air Force Association¹ have been giving seminars about a new approach that they call "Air Sea Battle". The association deems that this new approach is about "warfighting in the 21st century" This new strategy puts an exclusive emphasis on the combined use of air and naval force. And "fighting in anti-access environments", "long term force deployment" and "culture change within and between services" are deemed to be vital for this new approach. More interestingly, American, Japanese and Australian air force capabilities have been performing air sea battle military exercises at US' farther-west territory, Guam Island's Anderson Air Base. It is no surprise that all of these indicators almost match with the conditions of a hypothetical war against China.

US government is probably devising other ways to contain China militarily. We believe the above-stated information is sufficient enough to draw a general picture about militarily containment. But our core issue has to do with the containment of China economically. And we will be focusing on that issue.

John J. Mearsheimer, a respected political scientist and realist who is renowned for his political predictions have foreseen in 1994(when Ukraine was considering to give up remnants of nuclear weapons from Soviet Union) that Ukraine would face certain Russian aggression without a nuclear deterrent. The invasion of Crimea and the fighting in northeastern Ukraine proves him right today.

Mearsheimer claims that US and China will eventually engage in a toe to toe conflict. Mearsheimer have predicted the construction of an anti-China camp by the initiative of the US in the Pacific region in 2004. He states that the US will try to contain China, in an attempt to deny it from becoming a regional hegemon. He also says that the US will attempt to form a balancing coalition that primarily comprises of India, Japan, Philippines, S. Korea, Vietnam, Indonesia to counter the growing Chinese strength and power projection capabilities.²

It seems that his predictions check once again. And the anti-China camp that he prophesized is being structuralized through the TPP initiative. And after our literature survey^{3,4,5} we came to understand that TPP will constitute the economic leg of China's containment. Besides, signing a trade agreement with every important nation in the Pacific region except China tells a thing or two about this "agreement".

The Agreements

Trans Pacific Partnership is a trade agreement between USA, Canada, Mexico, Peru, Chile, Japan, Vietnam, Malaysia, Brunei Darussalam, Singapore, Australia and New Zealand. The agreement was signed on 4 February 2016. After USA's withdrawal, the agreement is being renegotiated. TPP has initially started as an extension of the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP) which was between Brunei Darussalam, Chile, New Zealand and Singapore. As other countries wished to be included, the talks eventually evolved into negotiations for a separate comprehensive trade agreement. The final draft of the agreement is prepared both in English and Spanish, English version being the prevailing text in case of conflict. Ratification of the agreement requires enough states corresponding to %85 of the GDP of all signatory parties.

Transatlantic Trade and Investment Partnership is another trade agreement between USA and the European Union (Including UK, excluding Norway and Switzerland). The agreement is yet to be signed. It would not be too bold to deem it as the TPP of the Atlantic. All parties of the agreement account for nearly %60 of global GDP. TTIP shares the ISDS mechanism found in the TPP.

Trade in Services Agreement is a trade treaty between Australia, Canada, Chile, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, New Zealand Norway, Switzerland, Taiwan, USA, European Union, Paraguay, Pakistan, Turkey, Peru, Panama, Mexico, Mauritius, Costa Rica, and Colombia. It is by far the most far reaching one among all TTT's⁶. TiSA

¹ A non-profit organization with over 230 branches in US and more than 100.000 members. Considered to be one of the most influential pressure groups in the US. Its executive staff is mostly comprised of retired Us Air Force generals.

² Clash of the Titans, Brzezinski & Mearsheimer, Foreign Policy, 00157228, Jan/Feb 2005, Issue 146, Page:3

³ The Trans-Pacific Partnership(TPP): In Brief, Congressional Research Service, February 2016, R44278, Page:3

⁴ TPP's Impacts and China Strategies in Response, Zhonghe Mu, Stanford Center for International Development, January 2014, Working Paper No:490, Page:11

⁵ RCEP, TPP and China's FTA Strategies, Ronglin Li & Yang Hu, funded by UKaid

⁶ Acronym for TPP, TTIP, TiSA

emphasizes on increasing cooperation and eradicating barriers for furthering trade of services such as banking, healthcare. TISA – so far – does not contain an ISDS mechanism however it does comprise intellectual property protection provisions, almost identical to that of TPP.

Investor v. State

Through the literature survey, I have constantly found myself asking the same question: Where in the agreement says this? It was observed that almost all articles about the matter – both pro and anti-TPP ones – were lacking reasonable association of their suggestions with the articles of the agreement. This quality was observed among working papers from think tanks¹, brochures from environmental organizations² and even bar reviews³. In the pages to come, we will be trying to address the issue while not neglecting to provide such logical necessity.

In order to oversee the implementation of the agreement, TPP Chapter 27 – Administrative and Institutional Provisions says that a commission will be formed to “*consider any matter relating to the implementation or operation of this Agreement;*” the same chapter also states that the decisions of the commission will not be subject to review. Its decisions also are not to be reversed by congress, senate or any other governmental body. Although, the commission will be jointly formed by all members.

My main concern with regards to reshaping the international law has to do with the proposed arbitration system, presented by TPP. The agreement tackles this issue at Chapter 9 – Investment.

TPP deals with disputes between states and investors through the ‘Investor – State Dispute Settlement’⁴ or as it is commonly referred to ISDS.

In the occurrence of a dispute, ISDS mechanism initially offers the use of consultation and negotiation. Article 9.18:1 states:

“ In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation ...”

Should negotiations fail to resolve the issue, the agreement then enables the use of arbitration. Article 9.19:1 states:

“ If an investment dispute has not been resolved within six months of the receipt by the respondent of a written request for consultations pursuant to Article 9.18.2 (Consultation and Negotiation)

the claimant, on its own behalf, may submit to arbitration under this Section a claim:

(i) that the respondent has breached:

(A) an obligation under Section A;⁵

(B) an investment authorization; or

(C) an investment agreement; and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach;...”

The article further enables representatives of enterprises to submit to arbitration, on behalf of their enterprises.

¹ China and the TPP: Asia-Pacific Integration or Disintegration?, Adrian H. Hearn and Margaret Myers, July 2015, The Dialogue, China and Latin America Report

² Dangerous Liaisons: The New Trade Trio, Friends of the Earth International

³ Investor-state dispute settlement: the importance of an informed, fact-based debate, International Bar Association (IBA)

⁴ Trans Pacific Partnership, Feb. 4, 2016, Chapter 9 - Investment, Section B

(<https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>)

⁵ The obligations under Section A are the promises, given by signatory parties. Section A, Article 9.10 is titled: “Performance Requirements”. Articles 9.10:1 and 9.10:2 deal with the aforementioned obligations extensively. To sum up; these articles require signatory countries to refrain from imposing obligations upon investors, i.e. exporting a given level of goods or services. They also require parties to not to condition the receipt of advantages. Such as the sales of goods and services. These obligations make it very hard for states to alter anything related to the investments.

In addition, Article 9.8: Expropriation and Compensation conditions the practice of nationalization.

Article 9.19:3 states:

“At least 90 days before submitting any claim to arbitration under this section, the claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration (notice of intent).”

TPP also recognizes previous agreements on the practice of arbitration. Such as International Center for the Settlement of Investment Disputes (ICSID), the Washington D.C. based institution handles cases between sovereign countries and investors.

Article 9.19:4 states:

“The claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:

the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;

the UNCITRAL Arbitration Rules; or

if the claimant and respondent agree, any other arbitral institution or any other arbitration rules.”

The agreement further sets a time lapse limit. Article 9.21:1 states:

“No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.19.1 (Submission of a Claim to Arbitration) and knowledge that the claimant (for claims brought under Article 9.19.1(a)) or the enterprise (for claims brought under Article 9.19.1(b)) has incurred loss or damage.”

Article 9.22:1 is the governing article for the selection of arbitrators. It states:

“Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.”

Article 9.22:3 clears the role of Secretary-General in terms of the appointment of arbitrators. It states:

“If a tribunal has not been constituted within a period of 75 days after the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either the respondent or the Party of the claimant as the presiding arbitrator unless the disputing parties agree otherwise.”

Article 9.23 along with its sub-articles determines the conduct of arbitration. 9.23:1 states:

“The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under Article 9.19.4 (Submission of a Claim to Arbitration). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.”

The secrecy of arbitration tribunals have been a concern for a long time. TPP has meant to solve that issue by holding tribunals open to public. Meanwhile, it does not neglect that some of the information pronounced during the tribunal might be confidential. Article 9.24:2 states:

“The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.”

Article 9.25 states the relationship between ISDS mechanism and the international law. It states:

“Subject to paragraph 3, when a claim is submitted under Article 9.19.1(a)(i)(A) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

TPP’s ISDS mechanism is almost all about reimbursing investor’s losses. Therefore, tribunals established under TPP’s Chapter 9 mainly focuses on granting awards. Article 9.29 is specifically designed for that purpose. It states:

When a tribunal makes a final award, the tribunal may award, separately or in combination, only:

monetary damages and any applicable interest; and

restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

Article 9.29:3 addresses the issue of attorney’s fees. It states:

“A tribunal may also award costs and attorney’s fees incurred by the disputing parties in connection with the arbitral proceeding, and shall determine how and by whom those costs and attorney’s fees shall be paid, in accordance with this Section and the applicable arbitration rules.”

Following two articles confirm that ISDS tribunals are not courts.

Article 9.29:6 states:

“A tribunal shall not award punitive damages.”

Article 9.29:7 states:

“An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.”

Article 9.29.10 establishes that governments are responsible from the enforcement of ISDS awards. It states:

“Each Party shall provide for the enforcement of an award in its territory.”¹

Controversy

Particularly TPP has long been subject to controversy. Its negotiations were held in secret and it took the negotiators to agree on a final draft 5 years. It would summarize how interesting and controversial of an issue TPP really is to say that Julian Assange, Donald Trump, Bernie Sanders and John Birch Society² all agree on the same thing: TPP is bad!

Discretion

The secrecy of negotiations was first to draw the attention. The entire negotiation process held completely secret from the public. Journalist Ed Shultz, whom by the way did over 100 stories on TPP, has stated on 2017; *“I was actually on Capitol Hill, talking to some democrats who never even knew what the TPP was and this was two years ago.”³* The level of confidentiality was so high that even the congressmen were initially not allowed to review the draft. After large media coverage, situation relatively improved and few members of the congress were permitted to read the agreement text, with the condition to swear to secrecy about the content.

Florida Representative Alan Grayson told: *“I was the first member [of the House] to read it; since then, other members have read it. Aides were excluded on all counts, and I was told I couldn't discuss it or shouldn't discuss it with aides.”⁴*

¹ The word “party” is in reference to country.

² A Christian, conservative advocacy group often described as far-right

³ <https://www.youtube.com/watch?v=QMSGXg5T84E>

⁴ <https://news.vice.com/article/the-trans-pacific-partnership-could-establish-a-war-of-all-against-all>

"A number of staffers from the Trade Representative's office came, brought the document with them, and insisted on staying in the room and looking at me as I read the document."

He further commented on what he has seen: *"It would be a punch in the face to the middle class of America. But I can't tell you why."*

ISDS

The ISDS mechanism of TPP on the other hand has been in the epicenter of debates. Most of the anti-TPP material particularly focused on the notion that corporations could sue governments over lost profits.^{1,2} Many journalists, activists and environmental groups have been vocal about this, claiming that corporations could sue governments if their decisions affect businesses.

Lori Wallach, the director of Public Citizen's Global Trade Watch, told VICE News that the ISDS "would formalize the elevation of individual corporations and investors to equal status with nation states."

*"It makes a public treaty between two countries privately enforceable by any private investor or corporation... a foreign investor could challenge any government policy or action in an extrajudicial tribunal outside the domestic courts, outside the domestic law, and drag governments to face a kangaroo court staffed by three corporate private sector attorneys."*³

Framework

Former assistant secretary of treasury Paul Craig Roberts has said on TPP and TTIP: "They are not trade agreements. What they do is they make global corporations independent of the sovereignty of the nations." Particularly about the part that enables corporations to sue governments based on any alleged loss of profit through tribunals he further stated " They (the agreements) make global corporations rulers of the so called sovereign countries."

The Office of the United States Trade Representative has clearly denied the allegation that corporations could sue governments merely because they lost money as consequence of a state's action. The Office, in a Q&A session states:

" Can corporations use ISDS to initiate a dispute settlement proceeding solely because they lost profits?

*No. Our investment rules do not guarantee firms a right to future profits or to expected investment outcomes. Rather, they only provide protections for a limited and clearly specified set of rights. For instance, if a country decides to take away the property of a business without any compensation, that business can seek compensation through a neutral arbitration. Like U.S. law, the goal of impartial arbitration is to promote fairness, not to protect profit."*⁴

And as far as solely the final draft of TPP is concerned, he is right. Article 9.19:1 is the governing article for ISDS case submissions and the article – in correspondence with other articles of the section – does demand precise material breaches. Even more so, the agreement comprises of articles that impose penalties over those who make frivolous claims. However TPP also enables investors to file claims under other agreements, such as ICSID Convention or UNCITRAL Arbitration Rules. It is crucial to note that ICSID Convention (dated 1965) does allow investors to file claims like the following:

1 – Ethyl Corporation v. Canada

When Canadian government decided to ban MMT, a gasoline additive in 1997 it was challenged by an arbitration case. The government considered MMT a dangerous toxic that poses serious health risks and banned its import and transport. Manufacturer of the substance sued the Government of Canada under North American Free Trade Agreement (NAFTA), demanding \$251 million over losses and damage to its reputation. Case ended with settlement. Canadian government agreed to repeal the ban and paid \$15 million.⁵

¹ <https://www.theguardian.com/commentisfree/2014/oct/29/why-support-the-tpp-when-it-will-let-foreign-corporations-take-our-democracies-to-court>

² <https://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html>

³ <https://news.vice.com/article/the-trans-pacific-partnership-could-establish-a-war-of-all-against-all>

⁴ <https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers>

⁵ <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng>

2 – TransCanada Corporation v. United States of America

In 2016, former US President Barack Obama canceled TransCanada Corporation's 'Keystone XL' pipeline project. The project aimed to connect Canadian oil sands to American refineries but Obama administration –out of environmental concerns – put an end to it. The company sued US Government under NAFTA's arbitration provisions for \$15 billion.¹ The case has not resulted yet.

3 – Vattenfall v. Federal Republic of Germany

Vattenfall, Swedish energy company sued Germany over claims that German government imposed upon them very strict environmental protection conditions that violate some of their rights guaranteed by Energy Charter Treaty. German government –as part of implementing EU's environment laws – restricted Vattenfall's Hamburg plant's usage of water, to preserve the Elbe River and the surrounding fauna. The company sued Germany in a local court and filed an arbitration case. The court issued the verdict first and reinstated the plant's water usage rights. Arbitration case ended in settlement.² The company was allowed to use more water from the river.

After this decision of Germany's, The European Commission sued the German government saying Germany's authorization for Swedish company to use more water violates EU environmental law.

One year after the case closed, Vattenfall sued Germany again. This time over its decision to abandon the use of nuclear energy. The company is allegedly demanding €4.7 billion. Arbitration process has not yet ended.

Vattenfall case is quite a thorny one in which how law and arbitration collide with each other can be seen clearly.

But more importantly, it is obvious that 1965 ICSID Convention does allow enterprises to file claims and win them because they lose profits, arising out of states' actions. Both TPP and ICSID do not claim jurisdictional superiority over law, whether it's domestic or international. The arbitral system they propose only grant awards and do not claim to alter laws.

Corporate Involvement

Senator Elizabeth Warren (D-Mass.) voiced concerns over corporations' influence over the negotiation process and the draft itself. She said:

“ During the top-secret drafting process, 28 trade advisory committees were formed to whisper in the ear of our trade negotiators. Who sat on those committees? Eighty-five percent were senior corporation executives or industry lobbyists.”

Wikileaks supported the notion that large corporations were allowed into the negotiations.³ In a country like the US, where the metaphor “revolving door” is often used to depict the relationship between the business and the regulatory government institutions, the idea of corporations involving in the preparation of a trade agreement is not so surprising. However satisfactory evidence to prove corporate influence over the deal was missing, until a letter was surfaced.

Energy giant Chevron has sent a letter to the US Trade Representative. The letter was primarily advocating for the institution of investor-state arbitration mechanism. It has proved that the negotiation process was subject to corporate meddling. But more importantly, corporations indeed played a role in instituting the ISDS scheme within the TPP framework. The letter was originally disclosed by the US state department but was later removed due to time-out.⁴ This raises a question; are corporations trying to find a way to leave the jurisdiction of law? Where they can exercise 'pay more and win more' scheme?

Conclusion

In an economic system where the private sector constitutes the majority of the economy, it is logical for a trade agreement to favor the interests of private sector over the interests of public sector, in order to boost trade. And in that regard TPP, TTIP and TiSA are doing exactly that, prioritizing private interests over public ones. However there is a limit. Or at least,

¹ <https://www.italaw.com/cases/3823>

² <https://www.italaw.com/cases/1148>

³ <https://www.youtube.com/watch?v=Rw7PORGZQxQ>

⁴ The letter is accessible through the following link:

<http://frackingfreireland.org/wp-content/uploads/2011/09/Chevron-Request-for-strong-ISDS.pdf>

there should be one. If this process of deregulation and corporate interest prioritization goes unchecked, the inevitable result will be a system where states' sovereignty is jeopardized.

The ISDS mechanism of TPP and TTIP do not enable claimants to sue governments over lost future profits. In terms of the use of arbitration tribunals they do not propose anything new over ICSID or UNCITRAL. ICSID and UNCITRAL however, grant the right to sue over lost profits. TPP and TTIP contain ICSID and UNCITRAL and they mean to elevate the use of arbitration tribunals to global level.

Should TPP and TTIP –as the way they are – are signed and ratified; a way to circumvent law will be created. And this new way to bypass courts will not only create an alternative to the rule of law, it will disrupt the functional harmony of both national and international law and consequently cost some of the civil and public liberties that we enjoy today.

I estimate that it is correct that these agreements will further boost trade between parties therefore increase economic growth and the volume of trade of the signatory countries. But at what cost? This time it appears that these deals enable corporations to roam more freely by taking from the rights of individuals and states. Exempting certain fields of industries from certain regulations or taxes is common practice to boom the business. But diminishing government's capabilities of litigation is too far reaching of an aim for that same purpose. It is not too hard to anticipate that disarranging the rule of law in a country will eventually generate repercussions on the freedom and the rights of people. And we know –thanks to many examples– the outcome of economic systems in which people are not free and forced to labor with few incentives.

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