



## Considering the Investor-State Dispute Settlement Provisions under the Trans-Pacific Partnership

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## **About the Author**



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## Considering the Investor-State Dispute Settlement Provisions under the Trans-Pacific Partnership

The Trans Pacific Partnership (TPP), especially the Dispute Settlement Mechanism instituted in the TPP Charter, under Chapter 9 has faced severe criticism on many fronts. So what exactly is the criticism? Since TPP hasn't come into effect as yet and hence, empirical evidence from UNCTAD (United Nations Conference on Trade and Development) and NAFTA (North American Free Trade Agreement) needs to be used to highlight certain concerns, problems, solutions etc., where necessary. The issues of increase in lawsuits, the fear that big companies will use their power to impose their will on sovereign countries by means of such lawsuits, the issue of jobs and of transparency and how such factors can play into the larger discussion on TPP, and the ISDS will be discussed in the following paragraphs.

But before that, a short description of TPP is in order. TPP seeks to create a free trade zone across the Pacific Rim. The grouping includes Brunei, Chile, New Zealand, Australia, USA, Mexico, Canada, Singapore, Malaysia, Peru, Vietnam, and Japan among its signatories. These 12 nations are home to over 800 million people (almost double that of the EU market) and are responsible for about 40 per cent of the world's' trade. The main purpose of the TPP agreement is to facilitate and integrate trade between countries by lowering trade barriers and reducing tariffs across many industries including (but not limited to) agricultural goods, pharmaceuticals, apparel, electronic goods, beauty products, automobiles and automotive parts, iron and steel and so on and so forth. In theory, the comparative advantage that different countries have in manufacturing different products will lead to a better optimization of labour, which in turn will lead to an increase in productivity and higher wages for all involved. Thus, a lowering of tariffs is expected to push all the countries involved to produce what they produce best and import other commodities from other countries which should lead to a general decrease in prices of goods and services. As long as benign legislative and administrative procedures ensure a fluid movement of the labour force from one sector to another dependant on the demands of a country's economy vis a vis its output,

the economy of a country is expected to grow with progressive trade laws in place. However, if the labour market tends to be sticky, that is, the markets themselves are slow to respond to a perceived increase (or decrease) in wages, and movement between different sectors is highly constrained, the benefits of such FTA's can be chimerical. In such circumstances, especially in countries such as India which have a huge informal sector, MNCs can come into the market and continue the exploitative practices of their competitors which will not be beneficial either to their employees or to the country. Increasing pressure from MNCs, which are essentially rent-seeking entities, can result in a race to the bottom, where Indian labour, under pressure from the Chilean, Vietnamese, Mexican etc. labourers will be forced to forego their constitutionally mandated rights (such as right to adequate lighting, drinking water etc. provided under the Factories Act, 1948<sup>1</sup>) or have to work for lower wages in order to compete internationally. We must proceed forward keeping in mind the pervasiveness of FTAs like the TPP; the above mentioned examples of comparative advantage and labour market reforms (or the lack of it) are just two ways that FTAs can affect economies. There are an endless number of permutations which can define this relationship, such as pollution, environmental hazards, even impact on the internal politics of a country and its global perception and even to this date, multilateral FTAs like NAFTA have had an impact which is unquantifiable just due to the sheer abstractness of the agreement.

Now we need to define the core obligations of the Investment Chapter contained in the TPP agreement<sup>2</sup>. First is Minimum Standard of Treatment (MST) of investment and providing a Most Favoured Nation (MFN) treatment as well. What this means is that companies from one of the TPP countries (say, Malaysia) that have set up shop in another country (Singapore), not only must the Malaysian company be accorded trade advantages (such as reduced tariffs) but also be provided the same opportunities as domestic companies ('national treatment'). MST implies that at least the minimum standard of customary international law must be applied to a case involving alien

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<sup>1</sup> [http://ncib.in/pdf/ncib\\_pdf/Labour%20Act.pdf](http://ncib.in/pdf/ncib_pdf/Labour%20Act.pdf)

<sup>2</sup> <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Investment.pdf>

investments, investors etc. Essentially this is to ensure fair and equitable treatment of foreign investments and investors and also with encouragement of multilateral ties and trade with lowering of trade barriers and import quotas. Second, the conditions under which a country can legally expropriate an investment. An expropriation must take place only for a public purpose, in accordance with the due process of law and involving a suitable, fully realizable and transferable compensation. Third, transfer of funds relating to the investment (such as transfer of profits, interest payments etc.) may be made freely subject only to emergency situations. A balance of payment crisis, or similar such economic crises may lead to temporary governmental control over flow of capital, investment related transfers and the like until the crisis is resolved. Fourth, is Performance Requirements: no country can force an investor or investment to have to export a given level of goods and services, achieve a certain level of domestic content, interfere by requesting transfer (or use) of a particular technology or other such proprietary knowledge are some examples of how governments are stopped from 'meddling' or micromanaging the affairs of a particular firm against their will. The last of the core obligations pertains to the appointment of senior managers (or any other management staff of the sort) stating that the appointment must be made without regard to the nationality as well as to ensure that the issue regarding the appointment of board members does not impair the investor's control over the investment in any way.

Now, we must build upon the general overview of the Investment Chapter provided above and focus on the basics of the ISDS mechanism contained in Chapter 9 of the TPP. First the ISDS mechanism underscores the importance of transparency in arbitral proceedings; all documents concerning the arbitration will be available to the general public. Second, is the submission of amicus curiae petitions: labour unions, stakeholders, NGOs etc. can submit briefs to the court without needing to be solicited by either party to assist the court. Non-disputing parties (such as the investor's' home government) are also allowed to make submissions to the panel on the interpretation of the Agreement. Third, an emphasis has been laid on the joint action of both (or more) parties involved in arbitration. Parties at any time can agree on the interpretation of the agreement that is binding on the tribunals. Fourth, time

limits have been put in place, where dismissal of frivolous claims has been expedited and also the time limit during which an investor can bring about a claim has been limited to 42 months from the date of actual occurrence or the knowledge of the occurrence of the alleged breach. Fifth, the disputing parties will be able to comment on the proposed rewards prior to their issuance and a mechanism can be put in place to challenge the reward (such a provision has not as of yet been put in place; there is provision for putting one in place, if the Parties agree). Lastly, the party pursuing a claim in the proceedings must waive their right to initiate parallel proceedings in a different forum (such as ICSID).

The first issue raised by detractors of the mechanism is that the ISDS (Investor State Dispute Settlement) mechanism referred to in Chapter 9 of the TPP charter will create a glut of cases between investors and countries. However, as per UNCTAD (United Nations Conference on Trade and Development) reports, so far there have only been a total of 696 investor-state disputes since 1987, when Sri Lanka was sued by AAPL. Of these 696 disputes, 442 have been concluded already and 243 are pending. Out of these 696 cases, 36.4 per cent were decided in favour of the State, 26.2 per cent in favour of the investor, and 25.8 per cent were settled mutually between the two parties<sup>3</sup>. To give a simple example: the US has been sued 17 times under NAFTA out of which they lost none; since 1993, US federal government has been sued over 700,000 times by companies in domestic courts<sup>4</sup>. According to the New York Times, there have been over 2000 trade agreements internationally with the ISDS mechanism, including 51 in the US; the relatively low number of cases arbitrated under ISDS and the information from UNCTAD tends to show that there is no prejudice shown by the arbitrators either in favour of the State or the investor when deciding such cases. Thus we can say with a reasonable amount of plausibility that international arbitration tends not to show bias towards one party or another in such cases.

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<sup>3</sup> <http://investmentpolicyhub.unctad.org/ISDS>

<sup>4</sup> [http://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?\\_r=1](http://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?_r=1)

Let us examine a few cases to try and gain a clearer picture of ISDS arbitration under UNCTAD; the first case to be looked at is that of *Metalclad vs. Mexico* in 1997<sup>5</sup>. Through its local bodies in Guadalcazar municipality of Mexico, the Mexican government was found to have expropriated the assets of the claimant, Metalclad Corporation. Allegedly, the Mexican central government had granted permission to the company, but the local government refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that the company had built in La Pedrera, on the grounds that it was an environmental hazard. In spite of a study by the Autonomous University of SLP stating that with proper engineering and operation the site was geographically suitable, the local authorities decided to deny the construction permit on environmental grounds (even though the municipal body had no such authority), which, the tribunal ruled, amounted to indirect expropriation. There are two important takeaways from this case: first is the fact that Investment Treaties require cohesion between center and state. If the central government provides certain permissions and licenses to a company which a state government revokes, then the possibility of international arbitration can develop. Secondly, similar to quite a lot of other arbitration cases, the damages awarded by the tribunal were significantly lower than what was asked for by the claimants (\$16.7 million rather than \$90 million sought) which shows the fiscal prudence practised by the arbitrators.

The second case is that of *Philip Morris vs. Australia*. The argument made by the company was that “the plain packaging legislation bars the use of intellectual property on tobacco products and packaging, transforming PML from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of PM Asia's investments in Australia<sup>6</sup>”. The government of Australia filed a counterclaim stating that plain packaging of cigarettes could in no way be termed as seizure of PML's intellectual property and that the international courts had no jurisdiction. The arbitration tribunal unanimously agreed with Australia and subsequently decided the case in Australia's favour. While this ruling has been lauded the world over for its progressive stance against

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<sup>5</sup> <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>

<sup>6</sup> <http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf>

tobacco and has opened the doors for other countries to start using plain packaging to help reducing, it would be remiss to not provide the whole picture. The ruling applies to PML and other tobacco companies which has been challenged by tobacco producing countries as well. It has been argued that the ruling is inconsistent with WTO's Agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Technical Barriers to Trade (TBT), and the General Agreement on Tariffs and Trade (GATT), to the extent that the Australian measure violates the WTO's rules on intellectual property by restricting usage of trademarks, discriminating on the basis of nationality and preventing the lawful exploitation of patent rights<sup>7</sup>. Thus, tobacco producing countries such as the Dominican Republic have argued that the law domestically impacts their indigenous industries. This shows that there isn't enough cohesion amongst different international trade bodies at the global level and that while a certain arbitration tribunal may deliver a judgment, the same judgment can be challenged in different fora over very similar circumstances. So the ISDS mechanism is not necessarily as watertight as it is made out to be, which, depending on the reader, may be a good thing or a bad thing.

Before we progress to try and establish a general view of ISDS under UNCTAD, we need to establish two quick points. First, while the above mentioned cases provide (in spite of the small sample size) an inkling of the sensible stance taken by the tribunal in the above mentioned cases, it would be remiss to not point out India's abysmal track record in dispute settlement. As of 2015, India has had to fight 17 cases, out of which it has lost 1 and settled 9 and won nil (7 are still pending). All 9 settled cases were over the India's failure to protect investor loans in the Dabhol power project in the 2003-2004 period. It is a matter of simple mathematics to conclude that a multilateral trade agreement of the likes of TPP would increase the number of cases against India, especially if India is considered a soft target by investors. Secondly, attention is drawn to India's new model BIT (Bilateral Investment Treaty)<sup>8</sup>. The new

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<sup>7</sup> <http://www.ictsd.org/bridges-news/bridges/news/ukraine-launches-wto-challenge-against-australia-cigarette-packaging-law>

<sup>8</sup> [https://mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)

BIT model text carries some novel provisions which are not found in other BITs. For example, the model text promotes transparency by having states publish or make available all rules and regulations for those that are interested. It underscores compliance with host state's laws (including natural resource conservation, human rights laws etc.) and further mandates foreign investors to voluntarily incorporate internationally-recognized standards of corporate social responsibility (CSR) in their practices and internal policies. The general view may be that does India really need to sign a multilateral trade agreement such as TPP when it could simply sign multiple BITs with these countries? While multiple BITs of the sort would certainly be chaotic and the TPP would ensure a cohesive and coordinated insofar as the establishment of a Free Trade Zone is concerned, the clauses in various chapters of TPP, especially Chapter 9, would not be ones that India would wish to follow, having not been part of the TPP negotiation process.

To revert to UNCTAD figures, owing to the narrowness in the data provided by NAFTA, out of the total damages awarded under ISDS, only 19 investors have been awarded damages between \$100 million - \$499.99 million (out of 156 investors; the first such case under UNCTAD was *Goetz vs Burundi* where the former sued the latter for \$175 million and eventually settled the case for \$3 million). Only three investors were awarded damages between \$500 million - \$999.99 million (out of 50 investors) and five investors were awarded damages over \$1 billion (out of 80 who sued for damages over a \$1 billion)<sup>9</sup>. Taking a succinct look at 2 out of these 5 investors: *Mobil vs. Venezuela* ruled in favour of the former in 2007 with \$1.6 billion awarded (against damages worth \$14.679 billion claimed), *Occidental vs Ecuador (II)* in 2006 where \$1.769 billion was awarded (against damages worth \$1 billion claimed). As with all ISDS arbitration, all such cases feature a set of three arbiters, one each from the Claimant's and the Respondent's side and one consensus Presiding arbitrator (there are also cases featuring just a sole arbitrator but given that TPP arranges for an arbitration tribunal of three, this is outside the purview of our discussion). Sorting arbitration out by sectors, the tertiary sector seems to be the most trigger friendly with 485 cases registered under UNCTAD; 139

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<sup>9</sup> <http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts>

cases fall under the “Electricity, gas, steam and air conditioning supply” economic sub-sector<sup>10</sup>. Next is the primary sector with 138 cases out of which mining and quarrying accounts for the bulk (113, with “Extraction of crude petroleum and natural gas” and “Mining of metal ores” sub-sectors contributing 57 and 32 cases respectively). The secondary sector has been responsible for 104 cases, out of which Food Products (25) have been responsible for nearly a quarter of the cases.

For the most part, the UNCTAD figures seem to underscore the issue of the tribunal’s fiscal prudence in meting out amercements and their avowedly apolitical nature (for the most part). Neither the investors nor the States seem to have been particularly favoured, and for the most part there is an emphasis on settlement between two parties rather than on arbitration. While 19 cases (between \$100 million and \$499.99 million) were settled by the tribunal, 9 other such cases were settled out of court. 3 cases where damages between \$500 million and \$999.99 million were being claimed were decided by the tribunals; 5 cases corresponding to the compensatory awards were settled out of court. Five \$1 billion cases were decided in courts and 2 were settled outside of it. This relatively healthy ratio highlights the importance assigned to investor-State cooperation in international arbitration. To revert to previous figures, out of the 442 concluded cases, 114 were settled, in which several cases (almost a quarter of the total settled cases) didn’t even require the constitution of a tribunal and the negotiations were done without the intervention of third parties<sup>11</sup>.

The fact that the ‘Discounted Cash Flow’ (DCF) method of determining damages is rarely used in such cases even when a case is awarded to the investor is very significant. To calculate the DCF, a firm’s future cash flow growth is estimated and then using the long term growth rate and the discount rate, a present value of the investment is arrived at; to put it succinctly, DCF evaluates a firm’s potential value in present day terms. While most companies prefer to use this method to evaluate their losses, most tribunals have been shown favouring a different approach, where the

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<sup>10</sup> <http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector>

<sup>11</sup> <http://investmentpolicyhub.unctad.org/ISDS?status=4>

expropriated assets (for example) are paid for by the state in question in terms of their current physical value rather than the potential future profits. Thus, ISDS has become a mean of last resort for most parties rather than a method to extort governments. The framework put in place for TPP goes even further, where, in Article 9.17 (Section 1. “In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.”), Article 9.22 (Section 7. “For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.”) and others seek to minimize the role of tribunals and direct the parties to resolve disputes in alternative fashion. Another very important factor in the discussion, and a big perceived shortfall of NAFTA was the fact that it lacked a means to challenge a tribunal decision and so all judgements made by the final were binding; this has been redressed by Section 11 of Article 9.22 (“In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.28 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.23 (Transparency of Arbitral Proceedings)”. Of course this is contingent on the creation of an appellate mechanism<sup>12</sup>.

Now we need to examine the claim that the ISDS mechanism would decrease the labour force participation rate, that such Agreements with ISDS clauses would lead to a loss of jobs. The argument made in this case would be circular; if for arguments’ sake we say that the above mentioned ISDS mechanism would shift the balance of power inexorably towards the corporations,

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<sup>12</sup> <https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.9v2g8nlkx>

wouldn't employment be the major beneficiary because the lax laws would lead to more firms (who need local employment) entering the market? Mathematically speaking, if there are more firms in the market, they would seek more employees and the demand for labour would increase, hence increasing the wage rate; of course this needn't be the case as people might not be optimally employed, for example, if there are too many engineers in a job market and not enough engineering jobs then people desperate for employment may take up factory jobs (i.e. structural unemployment subsequently leading to a mismatch in skill set and employment). This should not be mixed up with the unemployment caused by the boom and bust nature of economies today, where, for example, a car company may need more engineers during a boom when demand for automobiles goes up and supply must go up to meet the demands and then the very same engineers are laid off when demand goes down and not quite as many automobiles are needed (i.e. cyclical unemployment). This information is pertinent because under NAFTA the unemployment rate for Canada (11.2% in 1992 to 6.9% in 2015<sup>13</sup>), US (7.5% in 1992 to 5.3% in 2015<sup>14</sup>) have both seen an appreciable decrease in unemployment and Mexico (2.83% in 1992 per IMF<sup>15</sup> and 3.96% in 2015<sup>16</sup>) has seen a fractional increase. As per the NAFTA website jointly produced by the US, Canada and Mexico, the number of jobs have increased by nearly 40 million across North America<sup>17</sup> but we must keep these statistics in perspective. Firstly, it would be very difficult to prove, if it is even possible, exactly what impact NAFTA has had on the labour force of the three countries, and secondly even though it is a fact that the number of jobs has gone up, the above mentioned unemployment still remains a pertinent problem, specifically the inability to be able to categorize employment in a proper manner. Thirdly, there have been cases of jobless recoveries before and cases where, for prolonged periods, wages remain depressed or the quality of jobs remain poor; the economy is a mysterious microcosm of various permutations and combinations that are extremely difficult to diagnose and as such

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<sup>13</sup> <http://www.stats.gov.nl.ca/statistics/Labour/PDF/UnempRate.pdf>

<sup>14</sup> [http://data.bls.gov/timeseries/LNU04000000?years\\_option=all\\_years&periods\\_option=specific\\_periods&periods=Annual+Data](http://data.bls.gov/timeseries/LNU04000000?years_option=all_years&periods_option=specific_periods&periods=Annual+Data)

<sup>15</sup> <http://www.econstats.com/weo/V027.htm>

<sup>16</sup> <http://www.tradingeconomics.com/mexico/unemployment-rate>

<sup>17</sup> [http://www.naftanow.org/myths/default\\_en.asp](http://www.naftanow.org/myths/default_en.asp)

statistics must be presented with caution insofar as that if they are presented from a skewed perspective they may serve to obfuscate the issue rather than to clarify it.

Can we pinpoint the exact impact of an FTA on employment? Perhaps, but most likely not. We could for example build a model using the DMP framework (Diamond, Mortensen, Pissarides who won the Nobel Prize in 2010 for their search and unemployment model), figure out the vacancy rate (which is the ratio of the total number of vacancies to the vacancies plus number of unemployed) and then establish a relationship between the vacancies and the unemployment rate. This is called the Beveridge curve and is in fact used extensively by the Bureau of Labor Statistics (BLS) in the United States to measure unemployment in all its forms. Using this curve, we can fathom the matching efficiency (how good the matching process of fitting people with a specific skill set to a job requiring that specific skill set is), skill mismatches, frictional unemployment (the time spent by an unemployed person looking for or transitioning to another job) even the effect of government policy uncertainty and economic uncertainty on employment (for example, during a period of high unemployment, firms might keep job vacancies open for longer than usual to try and find the perfect candidate) but it will still ignore many endogenous-exogenous variables. To give an example, many firms entering taking advantage of National Treatment and MFN status may set up offices in a country and thereby lead to a rise in construction companies in charge of building these offices. They may outsource public relations to other companies in the country thereby leading to an increase in HR jobs that might not be able to be tied down exactly to the FTA in question as it is an indirect consequence of the growth of foreign firms. Thus in spite of the best of our abilities, we can only look at the raw numbers and make an estimation as to the impact of the policy, which on the whole seems to be positive. The Beveridge curve for November 2015 for the US points to a low rate of unemployment and high rate of job openings, that is, there are more vacancies currently than there are people to fill them<sup>18</sup>. There might be a substantial restructuring in lieu of the introduction of TPP but the member

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<sup>18</sup> [http://www.bls.gov/web/jolts/jlt\\_labstatgraphs.pdf](http://www.bls.gov/web/jolts/jlt_labstatgraphs.pdf)

countries are forewarned, to a certain extent, as to the changes that might occur due to the adoption of the very same.

The conclusion (which also ties into the final issue of transparency) is this: laws can be interpreted in a variety of ways, sometimes even in a way that is in exact opposition of its intention. It is up to the judiciary, or the tribunal, to interpret these laws in a responsible, timely and transparent fashion. To highlight a case which is relevant, if somewhat divorced from the purview of our discussion. This is the example of automobile deaths in China. Over 200,000 people die in traffic related deaths every year<sup>19</sup> in China and to combat that they have laws in place, such as the person driving the vehicle has to pay for the survivors' disability for life. On paper this sounds like a very progressive law but when seen in the right context, the perspective changes. As per the Business Insider<sup>20</sup> one Chinese man recently received a \$400,000 compensation for the first 23 years of his care, but the caveat is that in case of a death, the rules are very lax so much so that the compensation would typically be around \$30,000 to \$50,000; a very small price relative to how much you would have to pay otherwise. The article goes on to point Taiwan's legislature reformed Article 6 of its Civil Code, which had long restricted the ability to bring civil lawsuits on behalf of others (such as a person killed in a traffic accident). So while positive steps are being taken by the Chinese and Taiwanese legislatures, the impact of two reformist laws, the compensation for people injured in automotive accidents and Article 6, combined together go on to create an environment which is anything but healthy and progressive.

The need of the hour, in this case is to create a system where people will be able to question judgements and laws and instigate national debate on issues. For such circumstances, there needs to be a plethora of first-hand information available. The fact that Article 9.23 (Section 2: "The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements." etc.) emphasizes on the need to have public attend such hearings and for information

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<sup>19</sup> <http://www.ibtimes.com/china-traffic-deaths-more-200000-annual-fatilities-road-accidents-world-health-1910537>

<sup>20</sup> <http://www.businessinsider.com/chinese-drivers-kill-pedestrians-intentionally-2015-9?IR=T#comment-55f3b1a469bedd8a1ee329db>

pertaining to all cases be uploaded online, implies that the need to go through second-hand sources which might have their own interpretation on various issues is substantially reduced. For anyone interested in the subject of the ISDS mechanism, or the impact of foreign companies on the environment, the constitution, the citizens' well-being, is just a simple click away. Loopholes exist in every legal system for the exact reason that the net of the law needs to be wide enough to accommodate for all the fish, even if some minnows may slyly slide through the mesh. The end point is to ensure that the bigger fish aren't allowed to slip through to wreak havoc.

In conclusion I would like to highlight what might be India's biggest grouses and expectations from Chapter 9 should it choose to join the TPP; specifically, how the ISDS mechanism might affect India. First for the pros:

- 1) It ensures the reduction of time and money involved in legislation of such sort: In a country like India, where the highest court in the country has a backlog of about 31.4 million cases<sup>21</sup>. With under 16 judges per million people (compared with 100 per million in the US) we are looking at a court at its saturation point. The ISDS mechanism will ensure a fair and quick delivery of justice without needing to further burden the Supreme Court of India.
- 2) Transparency: The ISDS mechanism underscores the need to publish all documents pertaining to the hearing on the internet and also to open their doors to the general public when arbitral proceedings are being carried out. Such measures would ensure that the arbitration is being carried out in a fair manner and more importantly, the public can act as a safeguard against any perceived biases that the tribunal may indulge in.
- 3) Ensures that investors take social responsibility: The preamble to the TPP document recognizes that the countries have a right to safeguard public welfare, protect legitimate public welfare objectives such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources etc.<sup>22</sup> The argument that the preamble is not

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<sup>21</sup> <http://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases>

<sup>22</sup> <https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf>

a legally binding document and so should not be taken seriously is erroneous. The agreement between all TPP countries points to a larger shift in perspective where countries have realized that environmental sustainability, public health and other such concerns are very important and must be taken very seriously.

Next, we take a look at the cons:

- 1) The ISDS is extra-constitutional: In spite of the various benefits the proposed mechanism may provide us with, it doesn't change the fact that a country can be sued by an investor operating in its domestic market even if the government has done nothing *constitutionally* wrong. In essence it undermines the power of the existing courts by making another center of judicial power which is not answerable to the people of the country or its constitution and also creates a situation where progressive reforms and legislation can be deemed null and void for foreign investors based on the power of this mechanism.
- 2) The mechanism works for a suitably hierarchical system with sets of checks and balances: We saw in the case of Metalclad vs. Mexico, the argument was won on the basis of this issue. After receiving an NOC (No Objection Certificate) from the Mexican central government, the Metalclad investors started work on the project only to be hauled up by the local authorities and the mayor in San Luis Potosi (where the Metalclad landfill was located). The perceived discrepancies in the centre and the local authorities' stances points to an issue present in India. Discordance between centre and states, confusion over the responsibilities and functions of representatives and the breakdown over the system of checks and balances can lead to lawsuits and we need to overhaul our system if that is to be prevented.
- 3) ISDS mechanism may be hurting competition: We can argue that the ISDS mechanism is an incentive for foreign companies to invest in India but on the other hand this provides a disincentive for indigenous companies to compete with the foreign companies. Chapter 9 states that all countries will give each other MFN status and also national treatment, the playing field has been leveled, so to speak, between foreign and domestic firms.

Now, giving the former the right to challenge the government in an international tribunal will be seen as an undue advantage by the latter, who might as a result wish to leave the domestic markets to seek newer pastures abroad, where they may also be able to utilise the ISDS mechanism to their advantage.

To sum it up, I would end with a hypothetical. Given that India aspires towards being a manufacturing giant, which is natural given the high productivity and cheap labour that is in abundance in the country, is it economically feasible for India to stay out of multilateral FTAs of this sort? To answer this question we must look at FTAs through the prism of two other trade deals: RCEP (Regional Comprehensive Economic Partnership) and CEPA. RCEP, a multilateral FTA that India is a party to, covers China, South Korea, Japan, Australia New Zealand in addition to the ASEAN countries. Now a trade deal of this sort may be very helpful, reducing tariffs so that Indian goods can reach other markets, but it could be potentially harmful as well. As spoken of in the beginning, trade deals may also induce a race to the bottom, where labourers are forced to deal with lower wages and poor conditions to compete with countries that can manufacture good for cheaper. Countries such as Thailand, Vietnam and Phillipines are on a similar footing to India insofar as high productivity and cheap labour is concerned. While the opening up of markets such as the Australian market or the Japanese market is a boon, the presence of too many suppliers for a steady (or declining) demand would result in increased competition amongst the manufacturers. As per the World Bank<sup>23</sup>, India's median income is one of the lowest in the world (\$1581.5 per annum) but it doesn't lag too far behind that of Vietnam (\$2052.3 per annum), Phillipines (\$2872.5 per annum), and is higher than that of Myanmar (\$1203.8 per annum) and Cambodia (\$1084.6 per annum), countries that India would be directly competing with.

To tie this in with the CEPA (Comprehensive Economic Partnership Agreement) signed between South Korea and India in 2010, there is very little (if any) evidence to show for its efficacy, given that trade between the two countries has actually *declined* from a high of \$20.54 billion to \$15.29 billion

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<sup>23</sup> <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>

as of October 2014. Indian exports to South Korea, which was worth \$7.894 billion in 2011 is, as of October 2014, worth \$4.626 billion. While Indian exports declined between 2013-2014 by about 12.2% (from \$6.183 billion to \$4.626 billion), South Korean exports to India grew by 11.3% in the same time period<sup>24</sup>. Given that the Finance Minister has voiced his inclination to maintain the current account deficit to around 1.3%, it will be interesting to see how trade deals such as RCEP and potentially TPP will play into this scenario.

### **Image Source:**

1. <http://www.pbs.org/newshour/making-sense/column-why-the-trans-pacific-partnership-isnt-a-bum-deal>
2. [http://journal.georgetown.edu/wp-content/uploads/2015/11/Trade\\_Ministers\\_from\\_Trans-Pacific\\_TPP\\_Meeting\\_in\\_Vladivostok\\_7940097642.jpg](http://journal.georgetown.edu/wp-content/uploads/2015/11/Trade_Ministers_from_Trans-Pacific_TPP_Meeting_in_Vladivostok_7940097642.jpg)

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<sup>24</sup> <http://www.indembassy.or.kr/pages.php?id=23>

## **About the VIVEKANANDA INTERNATIONAL FOUNDATION**

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