

From Trumpisms to Protectionism

- Is TTIP Next in Line?

Joel Kuorikoski

University of Turku

Department of International Law

Lemminkäisenkatu 14-18 A

20520 Turku

Finland

email: joekuo@utu.fi

telephone: +358 50 570 7971

Abstract

This article addresses firstly Donald Trump's position on free trade in general and on specific free trade agreements such as NAFTA and TPP with the main emphasis on TTIP. It is hard to predict the actions of Trump because of his somewhat erratic character and controversial statements, but the article also presents different scenarios on how Trump may address the TTIP. Lastly the article assesses some of the consequences or effects what the TTIP might have e.g. for China, while keeping the main focus on the ISDS system and its potential alternatives. The ISDS is the most complex and burning issue of topical free trade agreements and depending on what form it takes in the future, the TTIP has the potential to set a benchmark and function as a blueprint for future free trade agreements. The article refrains from further discussing the scenario of TTIP being cancelled, because the author believes that an EU-U.S. free trade agreement is necessary and inevitable for global economic development in the near future regardless of the hindrances Trump may set on it's way.

Keywords: free trade, investment protection, TTIP, investor-state dispute settlement

1. Introduction

"A day will come when there will be no battlefields, but markets opening to commerce and minds opening to ideas."

- Victor Hugo

Seems like the world is not ready for the day Victor Hugo, a French poet in the 19th century, had described in one of his famous quotes. There are various nationalist movements and events taking place all over the world. The movements are mainly considered as far-right, or more modernly alt-right, activities, which materialize in e.g. radical and intolerant immigration policies and protectionist economic policies. Brexit fits well into the same category as the election of Donald Trump as the next president as results of this movement. In Europe there are also similar types of movements e.g. in France personified by Marine Le Pen, the President of the National Front (NF), a populist right-wing political party.

The European Union and the United States are currently negotiating the free trade agreement "Transatlantic Trade and Investment Partnership" ergo the TTIP. Or to say it more accurately, the negotiations are not (yet) cancelled, but are currently on hold according to Cecilia Malmström, the European Commissioner for Trade.¹ The reason for this were naturally the U.S. presidential elections and the uncertainty of the willingness of the new president to continue the negotiations. It is safe to say that Hillary Clinton would have been considerably more accommodating towards the TTIP of the two candidates that made it to the finish line. However, as we all now know the outcome of the elections, Donald Trump has a very different stance to free trade in general and probably the TTIP as well, although he has yet remained silent on the matter.

One of the most heated topics of debate in the TTIP has been the investment protection clause. The investor-state dispute settlement (ISDS) clause provides the investor a chance to sue the host government to investment arbitration, but not vice-versa. The investor-state dispute settlement arbitration procedures have taken fire from various fronts both in Europe and in U.S. the main critique concerning the loss of democracy and sovereignty in the ISDS arbitration procedures. For example, the decisions of the arbitral tribunals are enforced in domestic courts, which do not have the right to review the decisions on their merits, and there is no appeal mechanism. The U.S. currently have tens of investment treaties in force that continue to apply the ISDS mechanism, but

¹ <http://www.liberalforum.eu/en/news/details/interview-with-cecilia-malmstroem.html>

Donald Trump has made the first step to resign from the ISDS mechanism following the withdrawal from the Trans-Pacific Partnership. He has also called for renegotiating the North America Free Trade Agreement (NAFTA). It is easy to get the impression that Donald Trump promotes protectionism over free trade listening to his rhetoric, although he himself claims to be pro free trade.

But what will happen to the TTIP? What will happen to the ISDS? Will the negotiations be frozen for the whole presidential term of 4 years or perhaps rebranded? To the hope of TTIP supporters, Donald Trump's stance on TTIP has not been as radical as it was and is towards the Trans Pacific Partnership. The situation around the TTIP remains very much uncertain, but judging by his words and actions on TPP and NAFTA, TTIP might be the next one on the line of fire. There is little concrete information on Donald Trump's stance on ISDS as of yet, but according to his doctrine, the U.S. is going to oppose any such treaties, that threaten the sovereignty of the United States Government, which in itself sounds like something taken for granted. The ISDS apparently poses such a threat, but what actions are there to be taken?

Removing the ISDS from one treaty does not remove the problem, while the U.S. currently has ISDS clauses with 53 different countries and the cooling off periods in bilateral investment treaties are usually approximately 11 years. This means that even if Trump revoked the ISDS clauses from existing investment treaties, the U.S. would not be free from the ISDS mechanism before 2028. Another interesting nuance is that the people in Trump's cabinet are the kind of people who often benefit from the ISDS system,² which might halt Donald Trump a little bit and prevent making rushed decisions. Seemingly the EU-U.S. trade is not in the top priorities of Trump at least in the beginning of his term, which might further cause delays in deciding the next direction of TTIP.

The European Union has drafted a proposal for investment protection and resolution of investment disputes and submitted it to the United States in the end of 2015. The most significant part of the EU's new proposal is the establishment of a new permanent investment court in place of ad-hoc arbitral investment dispute tribunals. Donald Trump has yet to officially state his stance also on the proposal for the new investment court system (ICS). However, the Office of the United States Representative (USTR) continues to state on it's website that

² <http://rooseveltforward.org/bipartisan-opening-trump-trade-first-100-days/>

*"ISDS arbitration is needed because the potential for bias can be high in situations where a foreign investor is seeking to redress injury in a domestic court, especially against the government itself."*³

This article addresses firstly Donald Trump's position on free trade in general and on specific free trade agreements such as NAFTA and TPP with the main emphasis on TTIP. It is hard to predict the actions of Trump because of his somewhat erratic character and controversial statements, but the article also presents different scenarios on how Trump may address the TTIP. Lastly the article assesses some of the consequences or effects what the TTIP might have e.g. for China, while keeping the main focus on the ISDS system and its potential alternatives. The ISDS is the most complex and burning issue of topical free trade agreements and depending on what form it takes in the future, the TTIP has the potential to set a benchmark and function as a blueprint for future free trade agreements. The article refrains from further discussing the scenario of TTIP being cancelled, because the author believes that an EU-U.S. free trade agreement is necessary and inevitable for global economic development in the near future regardless of the hindrances Trump may set on it's way.

2. Donald Trump - A Free Trader or Protectionist?

One of the recurring themes of Donald Trump's presidential campaign was the criticism of free trade agreements, including those already in place such as NAFTA and those that are being negotiated, ergo TPP and TTIP. Trump's position on free trade seems thus to be very conservative and although he calls himself a free trader, his actions speak for him to rather being a protectionist, which all fits very well into his nationalist "America first" views. Given also the type of people Trump has picked to be his advisors in his cabinet⁴ it is no wonder that he is willing to repeal or renegotiate existing and prospective free trade agreements. Furthermore, Trump has consistently threatened to place huge trade tariffs on products from China and called them currency manipulators. He has also voiced his preference of bilateral investment treaties (BITs) over multilateral free trade agreements. Preferring bilateral trade deals is not exactly protectionism, but the undertone of his statements is clear and it deviates greatly from the current trend of trying to negotiate new "mega-regional" trade agreements. It is somewhat curious and awkward to think about all the resistance people from the E.U. as well as the U.S. have shown against the TTIP. Now

³ <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>

⁴ e.g. Stephen K. Bannon, a former executive chair of Breitbart News, an alt-right news site.

that Trump, who continues to receive similar resistance from the very same people that oppose TTIP, is withdrawing from various free trade agreement negotiations and wants to repeal them, the same people are suddenly yearning for TTIP as they are starting to have second thoughts.

2.1 NAFTA

As already mentioned, Donald Trump has been extremely critical of NAFTA. He has called the treaty the "worst trade agreement ever" and that if he doesn't get his way in renegotiating it he could "tear it up". Mr. Trump's rhetoric is often blunt and demotic so it is interesting to look into the realistic side of things and see if there are actual alternatives for him to go forward with his vows to the voters. Firstly, the main grounds of Trump's NAFTA criticism concern offshoring and balance-of-payments issues with Mexico, while Canada is also pushed into the mixture of Trump's residual anti-trade and anti-NAFTA policies. However, Mr Trump appears to have softened his NAFTA policies in comparison with the rhetoric heard on the campaign trails. In a meeting with Canadian Prime Minister Justin Trudeau Trump conceded that most of his problems with NAFTA have to do with Mexico rather than Canada and that eventually there may only be minor tweaks made into the agreement⁵.

But in case Trump does not get his way in the renegotiations, which he has already promised to commence by signing a presidential executive order, it is interesting to look into the actual means that the President has if he wishes to withdraw from NAFTA. Naturally NAFTA has a withdrawal provision⁶. According to the provision a Party, in this case the U.S. Government may withdraw from NAFTA six months after providing other Parties - Canada and Mexico - a written notice of withdrawal. However, giving the notice does not in itself give effect to a withdrawal. The United States Congress must also concur if the U.S. were to formally withdraw. Now on the first look it seems pretty safe that the Congress would never concur if the situation actually ever got that far, but the President does have significant powers to further frustrate NAFTA⁷, possibly even to the extent

⁵ <http://www.nbcnews.com/news/world/justin-trudeau-warns-trump-about-nafta-plan-says-it-s-n734231> "I very much take him at his word when he talks about just making a few tweaks. Because that's what we're always happy to do." - Trudeau

⁶ NAFTA Article 2205: "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties."

⁷ Johnson, Jon R., *The Art of Breaking the Deal: What President Trump Can and Can't Do About NAFTA* (January 25, 2017). C.D. Howe Institute Commentary 464, p. 2

that NAFTA could be rendered inoperative. All parties thus have to be prepared that there may be no NAFTA, which would mean that the original bilateral trade relations would enter into force.⁸ Furthermore, the Trump Administration has very clearly signalled the preference for bilateral trade talks over multilateral ones.⁹

2.2 TPP

Bashing the Trans-Pacific Partnership (TPP) was one of Trump's favorite things to do during his presidential campaign. Especially after he caught Hillary Clinton backtracking a little bit from her comments hailing the TPP as the "gold standard" of trade agreements, it was open season for Trump to go after the TPP. After his election, it didn't take long for Trump to deliver on his remarks and promises, as he signed an executive order to withdraw from the TTIP on January 23 2017¹⁰, his fourth day in office. The TPP was signed already on February 4 2016 by all 12 signatories¹¹, but it wasn't in force, as the Congress hadn't ratified it yet. Nothing changed in the sense that TPP hadn't of course taken any effect yet, but the withdrawal ended Obama's hopes of considering TPP as a major part of his legacy.

The reasons why Trump opposed the TPP so strongly mainly dealt with economic issues and national sovereignty. He called TPP a death blow for American manufacturing, eg. the car industry¹². He claimed that TPP would open up the markets for trading competitors, who could ship cheap subsidized goods into US markets, while the barriers in front of American exports would still be upheld. Furthermore, the American worker would be paired up directly against workers from e.g. Vietnam, which has one of lowest wage levels in the world.¹³ Clinton's position on TPP was not as radical, but in the end, she also seemed principally against it, so the ratification of TPP as it was would have nevertheless looked quite unlikely. Along with critics, the Trump Administration's

⁸ Ciuriak, Dan, Renegotiating NAFTA: Implications for Canada of Possible Trump Administration Policies (March 9, 2017) p. 3

⁹ USTR 2017. "The President's 2017 Trade Policy Agenda" Washington, DC: United States Trade Representative, p. 1

¹⁰ https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0

¹¹ <http://www.bbc.com/news/business-35480600>

¹² <http://www.breitbart.com/2016-presidential-race/2016/06/28/trump-challenges-media-ask-hillary-shes-willing-withdraw-tpp-first-day-office/>

¹³ Ytokazu, Gustavo, The Trans-Pacific Partnership: A New Role of the United States of America and Japan in the Asia-Pacific (February 15, 2017) p. 14-15

America First Foreign Policy,¹⁴ which promotes bilateral trade negotiations to secure American industries and protect American wages, has gained support maybe from a little surprising actors. Namely democrat Bernie Sanders has openly praised Trump for withdrawing from the TPP and openly spoken about his willingness to work with Trump on new policies to help the American workers.¹⁵

While the economic benefits or deficits of TPP may be debated back and forth and the economic effects of such mega-FTAs are almost impossible to be predicted accurately, Trump seems to have accumulated a significant following of like-minded people on the economic issues to back his withdrawal decision. But even replacing current free trade talks with bilateral ones does not solve all the independency issues Trump has talked about. While the U.S. may have more leverage in bilateral trade discussions and could control more issues with greater care, the traditional argument of independency or sovereignty issues is the ISDS system. Trump hasn't as of yet highlighted the question of ISDS, but according to current landscape of U.S. FTAs and BITs (bilateral investment treaties) on top of the position of the USTR,¹⁶ the ISDS is not going anywhere. Thus even shifting from free trade talks to bilateral trade talks, would not do anything about the often criticized problem of ISDS arbitration eating away the decision-making power of national courts. However it is still vague, whether Mr. Trump actually even sees the ISDS as a problem or not.

2.3 TTIP

So per his promises, Donald Trump has very actively resigned from Barack Obama's trade heritage. While all ongoing FTA negotiations with U.S. look grim and the TPP downright doomed, the situation of TTIP is a little bit different. Maybe a little bit surprising, but the TTIP was barely mentioned by Trump during his campaign and it wasn't discussed in the presidential debates either. To be fair, the TTIP is in a different stage than for example TPP, of which potential threats loomed closer and perhaps larger. After 15 rounds of negotiations completed by the end of Obama's presidency, the TTIP counterparts were still far from each other and there were many unsettled areas, the biggest probably being the investment protection clause. Trump's silence on TTIP cannot

¹⁴ <https://www.whitehouse.gov/america-first-foreign-policy>

¹⁵ https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/sanders-praises-trump-for-nixing-tpp-delighted-to-work-with-him-on-pro-worker-policies/?utm_term=.9bcc14307fec

¹⁶ Footnote 2

be though interpreted as a more favourable stance to it than any other FTA. Rather I view it as a disconnect and even disinterest towards nurturing EU (trade) relations. TTIP just doesn't seem to be regarded among the most pressing matters on Trump's agenda, whereas Trump took immediate initiative on NAFTA and TPP in the early days after assuming office.

To back this up, the USTR's 2017 Presidents Trade Policy Agenda and 2016 Annual Report barely mention TTIP or T-TIP. There is a very brief section in the 2016 annual report that addresses the state of EU-US trade relations. The few paragraphs briefly summarize the progress made up to date and the remaining problems. On the future of TTIP the report only says that "The Trump Administration is currently evaluating the status of these negotiations¹⁷." Reading that doesn't give a huge glimmer of hope to TTIP advocates, but in section "2. Bilateral and Regional Activities" the report states:

"Substantial negotiations on several critical issues will be required to complete the agreement during the Trump Administration".¹⁸

Now to me this kind of wording clearly gives the reader the impression that there is a will and a goal to actually complete the negotiations during the Trump administration, albeit the substantial workload. It isn't formulated as a promise, nor does the document specifically highlight the importance of carrying out the negotiations, but at least the statement gives a valid assumption that the Trump Administration will at all continue the negotiations. Given Trump's preference of bilateral trade negotiations and taking into account what is happening to NAFTA and TPP, potential resumption of the TTIP negotiations would be a minor victory for TTIP hopefuls.

But, to hold back a little bit and given Trump's erratic character, the report doesn't guarantee anything on the way or another, which is why this article presents and addresses different TTIP scenarios depending on Trump's actions and ponders a little bit about on their possible consequences on the basis of different scenarios sketched by Tereza Novotna¹⁹.

Firstly, Novotna seems to think that Donald Trump's pick of Robert Lighthizer as the next United States Trade Representative would somehow be a good thing for TTIP.

¹⁷ USTR 2017. "The President's 2017 Trade Policy Agenda" Washington, DC: United States Trade Representative, p. 136

¹⁸ Ibid. p. 151

¹⁹ Dr Tereza Novotna is an FNRS Post-Doctoral Researcher at the Institute for European Studies at Université libre de Bruxelles.

"With the Congressional hearings of Donald Trump's picks underway, including questioning of Robert Lighthizer who was chosen to be US Trade Representative (USTR) in the new administration, it could seem that free trade might survive after all. Who else than a longtime international trade attorney and deputy USTR under Reagan should naturally be inclined towards free trade?"²⁰

I have to disagree with that assumption, as Robert Lighthizer is a carefully chosen pick to be in sync with Trump himself and his administration regarding the protectionist views they share on trade. Robert Lighthizer's appointment as next US Trade Representative is actually very bad news for TTIP as Lighthizer has a reputation as a long term hardline protectionist.²¹ Lighthizer is a former deputy U.S. Trade Representative for President Reagan and in the past he has pushed for Republicans to turn away from their traditional free trade platform and instead return to the protectionist roots that helped nurse American industry against European mercantilism in the late 18th century.²²

Now that the era of Trump Administration is well underway and the TTIP is frozen, but not yet scrapped we can see that Trump didn't operate with it in the same fashion as TPP and NAFTA. Before he assumed the office, even the kind of treatment where he kills TTIP right out of the gates wouldn't have been totally outlandish. On the contrary, few would have been genuinely surprised. The withdrawal from TTIP on day one was one of the potential scenarios, but as we now know, it didn't materialize.

In the second scenario, Novotna draws up a "TTIP-light", a less comprehensive version of TTIP as it is now understood. This scenario would probably be the easiest and fastest for Trump to realize, as he has shown the green light for further cutting tariffs, but is reluctant in reaching a comprehensive agreement on regulatory issues as well. In this scenario Trump's negotiators offer the EU a lighter version of the TTIP focusing on removing the remaining and already low trade barriers. This kind of a proposition would fit Donald Trump's trade talks during his campaign, but would likely be rejected by European leaders, as not ambitious enough. It would also be a considerable let down, since the TTIP was and is still meant to be the historical and ground-breaking marquee FTA to set the stage for future FTAs all over the world. There is a distinct

²⁰ <http://blogs.lse.ac.uk/usappblog/2017/01/19/will-donald-trump-shoot-down-ttip-or-rebrand-it-as-the-trump-trade-and-investment-partnership/>

²¹ <http://economia.icaew.com/en/news/january-2017/hardline-protectionist-robert-lighthizer-to-head-us-trade-negotiations>

²² <http://foreignpolicy.com/2017/01/03/trumps-taps-protectionist-robert-lighthizer-as-his-new-trade-rep/>

possibility that Trump would go for this scenario, but the likelihood of the EU's approval to it is even smaller.²³

The third scenario pushes TTIP to the back of the queue, meaning that it is not on the forefront of Trump's trade agenda and that the negotiations will continue but on a slow pace set by the U.S. Trump's actions have already shown that TTIP is not a top priority in any way. This scenario would delay the negotiations with no real passion from either sides to complete the treaty during the Trump Administration. It would almost seem likely that this scenario is going to happen, as currently Trump probably will not flatout freeze the negotiations for the whole term, but push them aside, because he sees different matters worth more attention. Brexit has caused the U.K to depart from the E.U. and as the Trump trade agenda prefers bilateral trade agreements, Brexit could possibly catapult a BIT between the U.K and the U.S. to the upper echelon of Trump's agenda. Thus Trump would concentrate on bilateral trade deals in the near future, while leaving TTIP hanging on a thread.²⁴ Trump has actually already met with Theresa May, the Prime Minister of U.K. in the end of January 2017 to discuss, among other things, a trade deal between the U.K and the U.S, on which they agreed to start working on immediately²⁵. The scenario where TTIP is pushed to the background to wait for the U.K-U.S. BIT to be negotiated first, leaves the TTIP stalled in a frustrating situation to wait for the next U.S. President to hopefully pick it up again.

The fourth scenario is that Donald Trump takes off right where the negotiations were left by Obama and proceeds to work for a transatlantic free trade agreement. This scenario we already know is the least likely of happening, as it definitely is not happening as of right now. Even if Trump was willing to continue the TTIP talks, it could be very hard on the side of the EU to reassure Europeans, that the deal is worth it. If Trump was to suddenly change his mind and start pursuing the deal, there would be a lot convincing to do inside the EU, as the backlash was so strong against the TTIP even before Trump. So in this scenario it wouldn't be out of question that EU would blink first and the deal would crumble because of that. It sounds a little bit far-fetched maybe and while it isn't completely accurate, one could portray the TTIP as sort of a "bilateral-ish" deal. There are only two parties to the negotiations, the EU, represented by a single entity, the European Commission,

²³ <http://blogs.lse.ac.uk/usappblog/2017/01/19/will-donald-trump-shoot-down-ttip-or-rebrand-it-as-the-trump-trade-and-investment-partnership/>

²⁴ <http://blogs.lse.ac.uk/usappblog/2017/01/19/will-donald-trump-shoot-down-ttip-or-rebrand-it-as-the-trump-trade-and-investment-partnership/>

²⁵ <http://www.independent.co.uk/news/uk/politics/donald-trump-theresa-may-trade-deal-brexite-lunch-european-union-holding-hands-menu-card-a7550956.html>

which has attained its mandate from all EU member countries, and the U.S. Contrary to the TPP, there were 12 countries negotiating each on their own. The TTIP would also provide the U.S. with access to a single European market, rather than 28 different markets. Although the TTIP could in this way be seen as a sort of a bilateral trade deal, it doesn't mean that Trump views it as such. Actually it is pretty wishful thinking that he would view it as such. According to Peter Navarro, the head of Trump's new National Trade Council:

*“A big obstacle to viewing TTIP as a bilateral deal is Germany, which continues to exploit other countries in the EU as well as the US with an ‘implicit Deutsche Mark’ that is grossly undervalued,” Mr Navarro said. “The German structural imbalance in trade with the rest of the EU and the US underscores the economic heterogeneity [diversity] within the EU — ergo, this is a multilateral deal in bilateral dress.”*²⁶

Were we to believe Mr Navarro, it is all but confirmed that Trump does not buy TTIP as "bilateral". The reported animosity towards Germany showed in the first meeting between Angela Merkel, the Chancellor of Germany and Donald Trump. The meeting took place in the White House on March 17 and the atmosphere was frosty as Trump repeatedly steered the conversation to Germany's defense spending implying the vast sums of money Germany owes to NATO and the U.S..²⁷ The two held a press conference, in which at the very end Chancellor Merkel addressed TTIP and Germany's will to continue working on the deal. She also portrayed TTIP as a bilateral treaty, because of the mandate is given to a single entity, ergo the European Commission. Sadly President Trump did not reply to Merkel's remarks regarding particularly the character of TTIP as bilateral or multilateral as the press conference was concluded after Merkel's last turn to speak. Trump again repeated to be a "free trader" and a fair trader and by no means an isolationist, but he perhaps purposefully carefully chose his words around the U.S. - Germany trade relationship and did not directly address TTIP, which has been characteristic for him practically since his presidential campaign.

The fifth scenario Prof. Novotna had sketched is the rebranding of TTIP. It is a scenario where Trump at first decides to bury the TTIP negotiations as we now know them and will commence them again under a new flag and perhaps even with a new name. It could make sense for Trump to do this, if he comes to the conclusion that a comprehensive trade agreement between the EU and the U.S. is good thing after all. Taking into account the well documented ego of the U.S. president the case where a new trade agreement could be marketed as his idea under his terms could potentially

²⁶ <https://www.ft.com/content/e33022f6-1b33-3539-9f38-d47cfafd2b43>

²⁷ <http://www.reuters.com/article/us-usa-trump-germany-idUSKBN16O0FM>

be tempting for him, even if in reality it would be the same old TTIP. Such scenario could also benefit the EU as the the current brand of TTIP has already been heavily tarnished. TTIP in a new dress could be more marketable and possibly easier to present for Europeans as something better than the original TTIP implying that the flaws of it have been addressed in the new version.²⁸

As these speculations show, there is still a lot of uncertainty and the scales are considerably tilted towards TTIP's disposal, but at the same time they show that not all hope is lost. Moreover, TTIP's fate is not entirely in the hands of Trump. The GOP has the majority in Congress and already during Obama's term, it was the GOP that was even more receptive of TTIP than the Democratic party. On one hand Trump is very focused on trade with China, but it is yet to be seen, whether he is able to draw the link between the TTIP and China's economic position. In case TTIP is abandoned it could very well be China, which becomes the leader of world's trade with its upcoming trade plans lead by the RCEP.²⁹

3. Trump and ISDS

The situation of ISDS in modern FTAs is very uncertain and it varies from treaty to treaty. A vast number of BITs around the world continue to uphold traditional ISDS arbitration procedures under institutions such as the ICSID. The EU, however has come up with a new system called the Investment Court System (ICS) which surfaced from the huge critique of ISDS arbitration in the TTIP negotiations particularly in Europe. The ICS aims to cure some democracy and stability issues linked in the ISDS through a permanent investment court instead of ad-hoc arbitration and an appellate body that is currently missing from ISDS arbitration, although many argue the ICS to be ISDS in disguise. Without further touching the nuances of the ICS structure itself, as it is not the center focus of this paper, the EU has implemented the system with Canada into the CETA and is trying to incorporate it into other currently negotiated trade deals as well. The reception of the

²⁸ <http://blogs.lse.ac.uk/usappblog/2017/01/19/will-donald-trump-shoot-down-ttip-or-rebrand-it-as-the-trump-trade-and-investment-partnership/>

²⁹ The Regional Comprehensive Economic Partnership (RCEP) is a so-called mega-regional economic agreement being negotiated between the 10 ASEAN (Association of South-East Asian Nations) governments and their six FTA partners: Australia, China, India, Japan, New Zealand and South Korea.

Obama Administration on the European Commission's proposal was not particularly welcoming.³⁰ Michael Froman, the USTR at the time clearly expressed his preference of investment provisions under the US model investment agreement of 2012³¹ over the EC's ICS proposal.³² Also the Europeans have shown significant suspicions over ICS mainly because the states' exclusive right to appoint judges and the length and the costs of procedures when the appellate court is included.³³ But as the ICS is currently very far from materializing in the TTIP, if the TTIP ever materializes itself, I will turn to the question of Donald Trump's position on the investor-state dispute settlement in general.

Trump's stance on ISDS is an important and intriguing question on many levels and what makes it even more curious is his silence on it. This whole segment is based purely on speculation and aims to gather the little pieces of information that are available on the subject to form some kind of a landscape on the issue. Firstly, Trump has never publicly directly addressed ISDS. This could be due to him not thinking of it as a primary issue or simply because he doesn't want to touch it yet, although he will eventually have to. When Peter Navarro, the head of Trump's National Trade Council, was asked about Trump's position on ISDS, he stated that ISDS was a “technical, second-tier issue of these trade agreements”, which further strengthens the belief that Trump doesn't view ISDS as an urgent issue. Based on Trump's silence on ISDS and the aforementioned statements, one could also construct an argument that he doesn't really view ISDS as a bad thing, which would make sense. However, Navarro also said in the context of TPP that “The Trump Trade Doctrine also opposes any provisions in any trade deals that interfere with the sovereignty of the United States government - and ISDS clauses raise sovereignty issues.”³⁴ On a very much different note to what was said above, one could make a completely opposite interpretation. It is also possible, maybe even likely, that as the Trump camp wants to refrain from touching the ISDS for now, they settle to these uninformative generic remarks on the subject for now.

³⁰ <http://isdsblog.com/2015/11/13/the-u-s-is-sceptical-of-the-european-commissions-isds-proposal/> The U.S Trade Representative Michael Froman: “It’s not obvious to me why you would want to give companies a second bite of the apple”, referring to the appellate body that would also be established along with the ICS.

³¹ 2012 U.S. Model Bilateral Investment Treaty, Section B

³² <http://mobile.reuters.com/article/idUSKCN0SN2LH20151029>

³³ <http://isdsblog.com/2016/02/11/new-report-on-the-proposed-eu-permanent-investment-court/> For further information see e.g. European Federation for Investment Law and Arbitration (EFILA) Task Force Paper regarding the proposed International Court System (ICS)

³⁴ https://www.buzzfeed.com/chrishamby/elizabeth-warren-squares-off-against-global-super-court?utm_term=.ocN56ovZJ7#.bp7O0Mv7aG

In the context of NAFTA it is also pretty difficult to predict what happens in the renegotiations concerning investment protection.³⁵ Given Trump's background it is easier to see him as pro-investor than pro-government³⁶, which hints to the direction that he would like to uphold ISDS system as it equips the investor with far better protections than in the situation where ISDS system is repealed. In my mind it is possible that as Trump is expected to make relatively minor tweaks to NAFTA, that he would only update the investment chapter to the 2012 US Model Bilateral Investment Treaty version or he may still refrain from touching the ISDS and only renegotiate NAFTA's tariffs.

There are different indicators suggesting that Trump eventually wants to keep the ISDS in NAFTA and other treaties. Firstly, it is easy to figure he will come to the conclusion that he will need ISDS protections as a backstop for the Trump Organization overseas, which is why it is likely that in the end he will act to the benefit of his family's business concerns. Trump's pick for Secretary of State further consolidates the same assumption. Rex Tillerson, former CEO of ExxonMobil is no stranger to ISDS. Tillerson has been on the winning end of ISDS cases³⁷ and supposedly will continue to appreciate the possibility of challenging government regulation. In case NAFTA is terminated, it would mean that the U.S. - Canada free trade agreement signed in 1988 would fill the vacuum. It contains no ISDS, but interstate dispute settlement. With Mexico, the U.S. wouldn't even have that.³⁸ These considerations should raise the bar of really tearing up NAFTA pretty high even for Trump.

In general, I am of the opinion that Trump's withdrawal from TPP does not equal aversion from ISDS too, although the adversaries of ISDS or both, the free trade agreements in general and the ISDS, could easily draw that conclusion. It is understandable to think of e.g. TTIP or TPP in a way synonymous with ISDS, because the main chunk of critique concerning the TTIP in Europe has been precisely about ISDS. However, there are those who are pro free trade, but against ISDS and vice versa. This is the reason why practically no conclusions regarding ISDS can be drawn from Trump's withdrawal from TPP, as the main reason was based on his belief that TPP would have had a negative impact on U.S. economy and cost American jobs, nothing more, even though to

³⁵ See North America Free Trade Agreement Chapter 11 Investment

³⁶ <http://www.motherjones.com/environment/2017/03/trump-nafta-renegotiation-environment-trade>

³⁷ See e.g. Mobil Investments Canada Inc and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4

³⁸ <http://www.theglobeandmail.com/report-on-business/rob-commentary/trump-wont-dump-investor-rights-and-heres-why/article33649976/>

European ears the objection of e.g. TTIP sounds almost certainly objection to ISDS as well and particularly so. In Trump's case that conclusion should not be drawn.³⁹

4. Collective Thoughts

Above I have mapped and outlined several global issues that are interlinked with the TTIP and the ISDS. Brexit and the election of Trump along with right wing movements in numerous countries have been put under the umbrella of alt-right, which is characterized by among other things very stern criticism of immigration and free trade. In this way the movements around the world, which can be seen even in Finland in smaller form, are outcomes of the same trending phenomenon.

Some of the different TTIP scenarios presented above in chapter 2 can effectively be ruled out already now and others possibly in the near future. But for now there is a black cloud of uncertainty hovering around especially TTIP and NAFTA, while TPP seems to be dealt with for now. Personally I really do not (hope to) see Trump scrap TTIP the way he did with TPP. I believe Trump will eventually be too tempted to gain better access to the world's largest single market. Another thing is Trump's order of priority, which has probably been altered by Brexit. Contrary to the general critique of TTIP where the treaty itself and the ISDS are treated almost as they were synonymous, Trump's concerns seem to be more focused on the other contents of the treaty and their effects on U.S. economy and jobs. As Trump probably knows that it would be unlikely that he got to negotiate a bilateral treaty with every EU country he wanted to, he will just have to get back to the drawing board, because the European Commission currently has the mandate to negotiate investment treaties on behalf of all member states.

The ISDS seems to be a second-tier issue for Trump, who has barely given any hints himself of how he views it. In chapter 3 I have made a case for Trump not seeing it as a negative thing. An opposite opinion can too be argued, although in my mind, not as convincingly. Both the U.S. and various voices in the EU have opposed the ICS, which seems very distant in the TTIP context. The GOP and the Office of the United States Trade Representative will likely continue to promote ISDS like they have done in the past and there is reason to believe that Trump will do so too taking into account his past, his family business and the people he is choosing to be in the Trump Administration. The U.S. can still ride on the wave of never losing an ISDS case, but if the

³⁹ <https://www.law360.com/articles/884347/trump-s-tpa-exit-doesn-t-implicate-investor-state-arbitration>

opposition one day comes from the EU the story could be different. Trump has made clear he does not like to lose, which is why even he must be concerned about the ISDS in the TTIP to some extent. To end this article let's engage into one more game of speculation. After all drama of the TTIP let's say Trump suddenly starts pursuing the deal. After all the resistance of ISDS particularly from the side of Democrats let's say Trump wishes and gets to keep ISDS in the TTIP. A case is brought by an investor from the E.U. against the U.S. and the U.S. loses it. Imagine the storm.

References

- BAKER, PETER. (2017) Trump Abandons Trans-Pacific Partnership, Obama's Signature Deal. The New York Times, Access from < https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0 > Aug 29 2017
- BBC NEWS. (2017)Trans-Pacific Partnership Trade Deal Signed in Auckland. Access from < <http://www.bbc.com/news/business-35480600> > 29 Aug 2017
- CIURIAK, DAN. (2017) Renegotiating NAFTA: Implications for Canada of Possible Trump Administration Policies. Ciuriak Consulting Inc
- FINANCIAL TIMES. (2017) Trump's Top Trade Adviser Accuses Germany of Currency Exploitation. Access from < <https://www.ft.com/content/e33022f6-1b33-3539-9f38-d47cfafd2b43> > Apr 22 2017
- GRAMER, ROBBIE. (2017) Trump Taps Protectionist Robert Lighthizer as His New Trade Rep. Foreign Policy. Access from < <http://foreignpolicy.com/2017/01/03/trumps-taps-protectionist-robert-lighthizer-as-his-new-trade-rep/> > 29 Aug 2017
- HAHN, JULIA. (2016) Trump Challenges Media: Ask Pro-TPP Hillary If She'll Withdraw from TPP on First Day in Office. Breitbart News. Access from < <http://www.breitbart.com/2016-presidential-race/2016/06/28/trump-challenges-media-ask-hillary-shes-willing-withdraw-tpp-first-day-office/> >
- HAMBY, CHRIS. (2016) Elizabeth Warren Squares Off Against Global Super Court. BuzzFeed News. Access from < https://www.buzzfeed.com/chrishamby/elizabeth-warren-squares-off-against-global-super-court?utm_term=.oaOzZaZAYd#.rib4ZdZXvM > Aug 29 2017

- HAO, KAREN. (2017) One Thing Environmentalists and Trump Actually Agree On. Mother Jones. Access from < <http://www.motherjones.com/environment/2017/03/trump-nafta-renegotiation-environment-trade/> > 29 Aug 2017
- HUGHES, KRISTA & BLENKINSOP, PHILIP. (2015) U.S. Wary of EU Proposal for Investment Court in Trade Pact. Reuters. Access from < <http://www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029> > Aug 29 2017
- IRVINE, JULIA. (2017) Hardline Protectionist to Head US Trade Negotiations. Economia. Access from < <http://economia.icaew.com/en/news/january-2017/hardline-protectionist-robert-lighthizer-to-head-us-trade-negotiations> > 29 Aug 2017
- JAMIESON, ALASTAIR. (2017) Justin Trudeau Warns Trump About NAFTA Plan, Says Deal Is Good for U.S. Jobs. Access from < <https://www.nbcnews.com/news/world/justin-trudeau-warns-trump-about-nafta-plan-says-it-s-n734231> > Aug 29 2017
- JOHNSON, JON R. (2017) The Art of Breaking the Deal: What President Trump Can and Can't Do About NAFTA. C.D. Howe Institute Commentary 464
- MASON, JEFF & RINKE, ANDREAS. (2017) In First Trump-Merkel Meeting, Awkward Body Language and a Quip. Reuters. Access from < <http://www.reuters.com/article/us-usa-trump-germany-idUSKBN16O0FM> > Aug 29 2017
- MOBIL INVESTMENTS CANADA INC AND MURPHY OIL CORPORATION V. CANADA, (2007) ICSID CASE NO. ARB(AF)/07/4
- NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) 1994
- NOVOTNA, TEREZA. (2017) Will Donald Trump Shoot Down TTIP or Rebrand it as the "Trump Trade and Investment Partnership?" The London School of Economics and Political Science, US Centre. 2017 Access from < <http://blogs.lse.ac.uk/usappblog/2017/01/19/will-donald-trump-shoot-down-ttip-or-rebrand-it-as-the-trump-trade-and-investment-partnership/> > Aug 29 2017
- OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE. 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program.
- OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE. (2015) Fact sheet: Investor-State Dispute Settlement. Access from < <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> > Aug 29 2017

- SCHNEIDERMAN, DAVID. (2017) Trump Won't Dump Investor Rights - And Here's Why. The Globe and Mail. Access from < <https://beta.theglobeandmail.com/report-on-business/rob-commentary/trump-wont-dump-investor-rights-and-heres-why/article33649976/?ref=http://www.theglobeandmail.com&> > Aug 29 2017
- SIMSON, CAROLINE. (2017) Trump's TPP Exit Doesn't Implicate Investor-State Arbitration. Law360. Access from < <https://www.law360.com/articles/884347/trump-s-tpp-exit-doesn-t-implicate-investor-state-arbitration> > Apr 22 2017
- STOCKHOLM CHAMBER OF COMMERCE. (2016) New Report on the Proposed EU Permanent Investment Court. ISDS Blog. Access from < <http://isdsblog.com/2016/02/11/new-report-on-the-proposed-eu-permanent-investment-court/> > Aug 29 2017
- STOCKHOLM CHAMBER OF COMMERCE. (2015) The U.S. is Sceptical of the European Commission's Proposal. ISDS Blog. Access from < <http://isdsblog.com/2015/11/13/the-u-s-is-sceptical-of-the-european-commissions-isds-proposal/> > Aug 29 2017
- THE EUROPEAN LIBERAL FORUM. (2016) Interview With Cecilia Malmström. Access from: < <http://www.liberalforum.eu/en/news/details/interview-with-cecilia-malmstroem.html> > Aug 29, 2017
- THE WHITE HOUSE. (2017) America First Foreign Policy. Access from < <https://www.whitehouse.gov/america-first-foreign-policy> > Aug 29 2017
- TUCKER, TODD N. (2016) A Bipartisan Opening for Trump on Trade in the First 100 Days. Access from < <http://rooseveltforward.org/bipartisan-opening-trump-trade-first-100-days/> > Aug 29, 2017
- U.S. MODEL BILATERAL INVESTMENT TREATY 2012
- WATTS, JOE. (2017) Donald Trump and Theresa May Agree Immediate Talks on Post-Brexit Trade Deal. Independent. Access from < <http://www.independent.co.uk/news/uk/politics/donald-trump-theresa-may-trade-deal-brexit-lunch-european-union-holding-hands-menu-card-a7550956.html> > Aug 29 2017
- WEIGEL, DAVID. (2017) Sanders, Joined by Rust Belt Democrats, Praises Trump for Nixing TPP. The Washington Post. Access from < https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/sanders-praises-trump-for-nixing-tpp-delighted-to-work-with-him-on-pro-worker-policies/?utm_term=.9bcc14307fec >

YTOKAZU, GUSTAVO R. (2017) The Trans-Pacific Partnership: A New Role of the United States of America and Japan in the Asia-Pacific. The Social Science Research Network.
Access from < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2934300 > Aug
29 2017