THE COLATERAL DAMAGE OF FREE TRADE

Above picture: The Democratic Republic of Congo is in Central Africa. It is the second largest country in continental Africa and it is the 11th largest country in the world. It covers an area of 132,026 square miles and possesses nearly 70% of the world's mineral resources including silver, gold, and diamonds. However, the peoples in the Congo find it hard to find work enough to fulfill their daily needs. Foreign investors own almost $20 trillion worth of gold and diamond mines. The per capital GDP is only around $450 per year with a population of 75.3 million individuals. However due to corruption and political factors, there is an imbalance of infrastructure spending, a large flow of money out of the country and high unemployment. These factors contribute towards the country being one of the poorest countries in the world. (World Magacy 2015)

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This article gives a brief history of global trade. It introduces some of the fundamentals of free trade agreements and their real and perceived benefits to a counties GDP, and their ability to produce social capital. The text investigates the impacts of FTAs and discuss the origins of globalization, trade liberalization and ISDS clauses in FTAs. It looks at the side effects of these provision and gives actual example where they have failed the very societies being invested in by foreign investors. The assignment extrapolates Adam Smith's 'invisible hand' to possible scenarios that would impact the livelihoods of the world's poor and potentially devastate the values of the natural environment. It attempts to address the question; is investment in development the panacea to the world's growing population and why is there a bias towards a growing number of relative poor? It will discuss the difficulty for governments, communities and individuals to avoid the uncontrolled 'invisible hand' poised to destroying their land, the environment they rely on to live and their social structures.

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Introduction

The Australian government is an advocate for free trade and open markets, but when you dig deeper into the reality of trade liberalisation, and particularly investment agreements, there is a darker side. (Verrender, 2017)

The Australian Department of Foreign Affairs and Trade (DFAT) on their web pages has praised free trade agreements with statements like; *"more prospects for increased two-way investment, and reduced import costs for Australian businesses and consumers alike"*.

Other comments marked as 'more subtle' are in fact very subtle references to what this paper will be concentrate on. References posted include; exporters will be better able to *"**evaluation risk in business decision-making"*** and the elephant in the room, ***"address competition policy to ensure the trade and investment liberalisation achieved in FTAs is not undermined by anti-competitive practices"*. (DFAT)**

This apparently will be done by, ***"consultations allow****(ing)* ***business to inform Government of any problems that may arise with the implementation of the FTA and provides an opportunity for Government to give updates on the progress of any in-built agenda."*** **(DFAT)**

A brief history of trade

The modern history of trade and protectionism goes back to the English Navigation Act in 1381, where English merchants were restricted to import, or export accept on English ships. Additionally, parliament imposed regulations on the export of silver and gold. This was the beginning of 'mercantilism', which is designed to protect and encourage the growth of a country's industrial base.

Figure 1: Grazioli, E. (1942) - Cloth trade Brunges 14th Century

Later an export tax on the price of wool produced in England was imposed which artificially elevated wool export prices to protect the English loom industry and its workers. Meanwhile as wool exports declined, the manufacture of woollen and cloth products rose. Brunges and Antwerp (Belgium) became the centre of trade for a consortium of the English merchants called the Adventurers, who under these protectionist conditions, and backed by the King, developed the beginnings of an aggressive European trade. (Waters 1925)

The concept of globalisation emerges

In 1776, an emphasis on mercantilism was turned on its head by Adam Smith, who advocated that a reduction in trade barriers enable countries to specialize, thereby producing cheaper goods, which in turn allowed more goods to be sold.

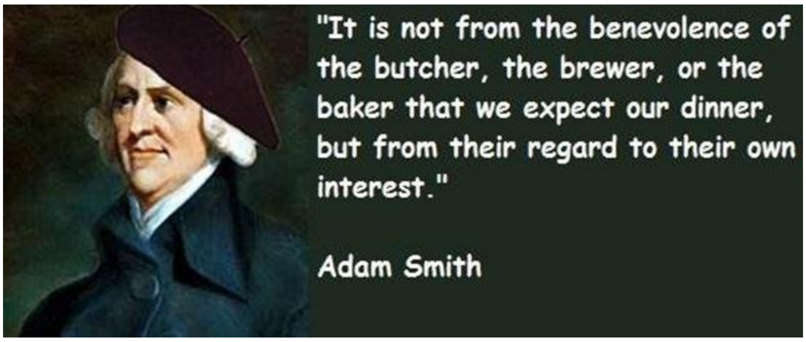

Figure 2: Picture of Adam Smith from Blog; Quinones (2016)

His main theory was that the market would take care of itself with an 'invisible hand'. He believed that an individual would always find the best price to purchase a commodity.

Although it took a few years to catch on, this idea became the foundation of the economic rationalism of today. (Smith 1776: Booth 2017)

England, along with many imperialist countries embraced freer trade, however, although their colonies and smaller countries benefited by selling their primary production and mineral commodities, the imperialist's GDPs grew proportionally larger because they had already established home grown industries through protectionist policy in the fourteenth and fifteenth centuries. It is also worth noting that imperialists like England imposed free trade policy on China demanding an uneven treaty during the opium wars 1839 to 1860. ("Opium wars Time line")

With England embracing globalisation from 1870 to 1913 and then retreating into protectionism again in 1932 it was only after the second world war, along with the United States (US) did it reopen to global free trade under the provisions of the General Agreement on Tariffs and Trade (GATT) which was established in 1948. GATT was superseded in 1995 by the World Trade Organisation (WTO). (Bad Samaritans Audiobook 2015 June 24),

Free Trade and who benefits

Liddle (2001) suggests that free trade will benefit all participating countries through an increased GDP. Free trade enables a country's trade comparative advantage to produce more cost effective products. Although poorer counties grow at a lesser rate because they have constraints on their investment capability, poorer countries may have a comparative advantage in the foreign investment cycle because they often have larger resources of land and mineral resources. However, Liddle (2001) suggests that countries in the middle may not need free trade as much to increase GDP.

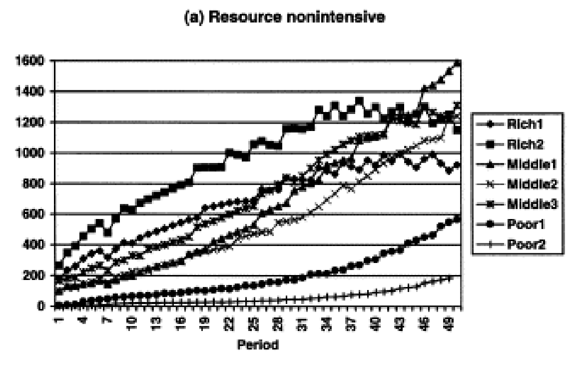

Figure 3: How all countries GDP grows under free trade but rich countries grow faster; Liddle (2001) fig.1

Poorer countries, in general, do not have as stringent environmental laws as rich countries, and as such may attract investment on the basis that less money will be needed to be invested on environmental measures and remedial work. In such counties investors can maximise profits. (Liddle 2001)

Multi-national corporations strategize to keep control

In the 1960's, in the face of former empires losing their colonies, large multi-nationals realised that they needed to find new strategies to control the trade from these former colonies. Part of the strategy was to form free trade agreements. (Gregory 2015)

The dislocating effect of free trade agreements

In 1994, the North American Free Trade Agreement (NAFTA) was established, increasing the GDP of the member countries but causing terrible disadvantage and unrest in Chiapas, a southern province of Mexico. Corn subsidies were abolished, and small farmers could no longer survive because the price of corn fell. This forced people off the land and into the cities. Their land was sold to large conglomerates with capital to mechanise.

The more educated Mexicans moved to the US gaining jobs under the NAFTA exchange and US businesses flocked to Mexico due to lower wages. As a result, US jobs were lost. Because of weaker environmental laws in Mexico, US and Canadian companies coming to Mexico had lower costs related to environmental issues. (AlternativeViewTV 2012 Feb. 28)

But this is nothing to what these so called free trade agreements demand as a way for multinationals to regain control of world markets.

Other free trade agreements

Three new trade agreements are on the drawing board lead by the US. They are the Transatlantic Trade and Investment Partnership (TTIP), essentially between Europe and the US, which has just been agreed to, the Trans-Pacific Partnership (TPP) between Asia (including Australia) and the US, and Trade in Services Agreement (TISA). The recently leaked TISA is probably the most far reaching agreement because it has 50 counties involved in its negotiations, however the US wants to expand this to the full membership of the WTO which is 160 countries.

The problem is that all these recent multi-lateral agreements and a raft of bilateral investment treaty (BIT) agreements between countries have Investor-State Dispute Settlement (ISDS) clauses. (Verheecke 2016) (See Appendix for more detail)

For example, any privatised service could be subject to this ISDS clause under TISA. This means that if a government wants to bring the service back to public ownership like Australia has done with the 'nbn' and a foreign investor has invested in the service, under the ISDS clause, the investor or company could complain and gain millions of dollars in compensation.

The difference related to this complaint is that it is heard in an international court and not by civil courts of the land. The International Centre for Settlement of Investment Disputes (ICSID) hears 62% of the complaints and is operated by a select group of private lawyers and arbitrators appointed by the World Bank who periodically change roles depending on the case. The remaining number of cases are arbitrated by other courts listed in the Appendix. (Luxenberg-Stiftung 2014; Warren 2015)

DFAT makes claims that investment risk is lower under a free trade agreement. DFAT also suggests that companies and investors have access to foreign governments to ensure that their profits are not affected by any agenda other than the Free Trade Agreement (FTA) agenda. This is all done with the investor safeguard of the ISDS. (DFAT; Erasmus University 2015 October 9)

ISDS in practice

ISDS works through an appeal process as stated above, but in practice, could work with the investor lobbying the foreign government not to do something with the threat of the invoking the ISDS process. (Erasmus University 2015 October 9)

Here we have a situation operating under a range of agreements, where elected governments will be under threat of large compensation payouts for changing legislation which in any small way affects the profitability of an investor in that country. For example, a Canadian company, Pacific Rim Mining (now called Oceanic Gold) took EL Salvador to the ICSID in 2009 under the ISDS provisions of an investment treaty between the two countries. El Salvador refused to issue an environmental permit for a mine because the company did not finish a feasibility study for the project. Fortunately, the ICSID dismissed the case and awarded El Salvador two thirds costs. But Jen Moore in Provost & Kennard (2016), Latin America program coordinator at Mining Watch Canada says the threat remains to the governments of an expensive court cases, particularly for third world countries who can little afford such cases. (Provost & Kennard 2016: Doung 2015; Beder, 2014)

DFAT seem relaxed by this in their statement that trade liberalisation in the FTA cannot be affected and that any variation on this may be considered an anti-competitive practice. This would include any changes to legislation that would affect a company's profit.

In many cases, it is a moral question. If an investor invests in good faith and the ground rules change and seed money is lost, then ISDS makes room for some compensation. But the implementation of the ISDS and the business as usual at all costs approach of companies can seriously influence progress towards better environmental standards. The case of the Swedish energy giant Vattenfall verses the city of Hamburg Germany in 2009 can demonstrate this. Under a habitat directive from the European Commission, Germany was required to increase water pollution standards. Because Hamburg had entered a contract with Vattenfall to build and operate a coal fired power plant, the company claimed that Hamburg was imposing too higher environmental restrictions on the drawing of the water from the Elbe River. (Knauer 2009; Friederici 2013)

The result was that Hamburg and Vattenfall agreed on an undisclosed settlement, but Verheecke (2016) believes that a clear reduction in environmental standards resulted.

Recently the Australian government backed by the World Health Organisation, was caught up in an ISDS case where Philip Morris challenged on new laws on plain packaging for cigarettes in Australia. (Mitchell & Studdert 2012) The challenge was under a BIT between Australia and Hong Kong related to intellectual property rights. (Italaw 2015) Although the case was dismissed it seems that private corporations can hold democratically elected governments to ransom for any policy they feel that may affect their profits.

Between 1999 and 2012 the World Banks arbitrator, the ICSID saw a fivefold increase of cases. (Fookes 2013)

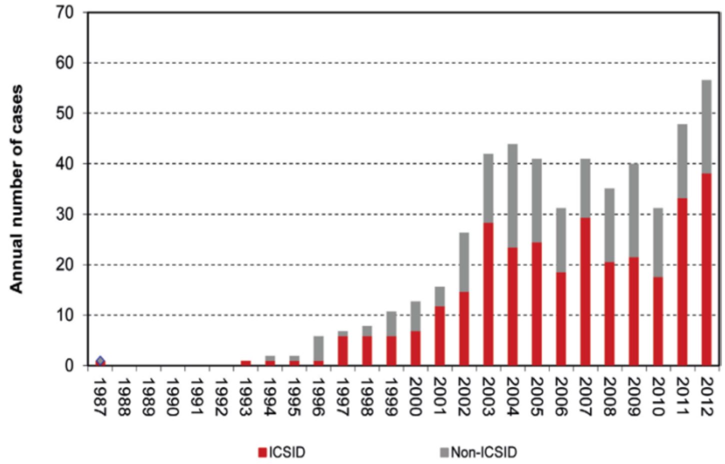

Figure 4: Increases in ISDS cases between 1987 & 2012; graph from the UN Conference on Trade and Development (Beder 2014)

Free markets and a democratically elected government's desire to provide welfare

If we remember the invisible hand of Adam Smith, we realise that the hand can bring development, or it can bring gross disadvantage. (see cover)

Baker et al (2014) have reservations about the globalisation trend in world health. They believe that, yes free markets can bring benefit to the ones that can pay but believe that ISDS and the protection of property rights will lead to the disadvantaged being left out and unable to get appropriate medicines, medicines that could be tied up with property rights. (Baker et al 2014; Faunce 2014)

The prevention of disease is also a concern. Tobacco is only one area where prevention measures could be threatened by the ISDS process and over whelming court costs. Uruguay wanted to improved public health by putting a mandatory health warning on all cigarette products. Again, Switzerland's Phillip Morris challenged and although Uruguay won, it still had to pay $2.6 million, plus more in other resources used over the 6-year case. More importantly for Phillip Morris, it deterred New Zealand, Cosa Rica and Paraguay from taking similar health measures. (Olivet 2016)

Conclusion

Verheecke (2016) believes foreign investors will take every opportunity to use these ISDS provisions in the multi-lateral trade agreements to gain compensation for both present and future profits. Profits that relate to opportunity costs even when no additional money has been invested. These Trade agreements must be thoroughly thought through to prevent opportunist companies usurping democratic processes, and to ensure that massive burdens are not piled upon poorer countries, effectively reducing their Human Development Index. (Verheecke 2016)

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Appendix

Investment-State Disputes Settlement (ISDS) explained

Disputes related to investment treaties have been conducted by international courts since 1987 but since 1993 there has been an ever-increasing number of cases.

In 1959, these investment treaties began to immerge with the bilateral investment treaty (BIT) between Germany and Pakistan. Then in 1969 a BIT was established between the Netherlands and Indonesia. This was the first treaty with an ISDS clause. In the 1990's the Energy Charter Treaty and then NAFTA were agreed to, all with standard ISDS clauses. (Verhceeke, 2016)

Other free trade agreements are underway to renegotiate the agreements to include the ISDS clause. These include a free trade Agreement (FTA) incorporating the ten ASEAN nations, plus Australia, New Zealand, Malaysia, Singapore and Thailand, and the Comprehensive Economic Trade Agreement (CETA) which presently links the European Union to Canada through a FTA.

Additional agreements (as mentioned in the text above) include the TTIP, were an ISDS process has been established and the TPP and TISA where terms are still being negotiated.

These cases are between an aggrieved investor, often a large multinational company and the government of a country.

The cases that have been run to date include:

- Foreign investor attacks on bans of chemicals
- Cases involving environmental regulations
- Patent law disputes and infringements of patent rights
- Anti-smoking laws related to perceived intellectual property rights
- Cases related to anti–discrimination law
- Cases related to price fixing of water and energy
- Reversed privatization where future unrealized profits are sued for
- Court decisions awarded by the countries court system being in dispute (Verhceeke, 2016)

The standards enforced by the ISDS courts include:

1. Protections against expropriation. In other words, money invested in infrastructure or that was likely to be invested and the profits forgone due to changes in legislation or a change from an agency being foreign owned and legislated to public ownership.

2. Fair and equitable treatment.

3. Nationalistic treatment and discrimination for foreign investors

4. Most favored nation treatment

5. Free transfer of funds guarantee (this could impact a countries tax law and tax revenue) (Verhceeke, 2016)

In most cases, any complaint can be pursued by several trade/investment treaty agreements. It is up to the complainant which one is used.

It is not so much the places where these cases can be heard but about what rules these cases follow. Each of the following organizations have rules:

1. International Centre for Settlement of Investment Disputes (ICSID). This court is part of the World Bank and was set up in 1965 to resolve legal disputes between international investors. (62% of cases) (Verhceeke, 2016)

2. Stockholm Chamber of Commerce (SCC). Established in 1917 and conducted its first case in 1993. (5% of cases) (Verhceeke, 2016)

3. Cairo Regional Centre for International Commercial Arbitration (CRCICA) was set up in 1979. CRCICA had largely adopted the UNCITRAL rules from 1976. (CRCICA 2011)

4. International Chamber of Commerce (ICC) (Based in France)

5. United Nations Commission on International Trade Law (UNCITRAL) which rules on about 28% of cases run. These courts under new amended rules in 2013 are no longer secret. (International Institute for sustainable development 2013)

What are the problems with the ISDS processes?

- Secrecy of the cases (although this has changed in 2013 under UNCITRAL rules)
- No rights for third parties (although this has changed in 2013 under UNCITRAL rules)
- No appeals process
- No independent tribunal
- Costs to public budgets and taxpayers
- Risks for public interest and the consistent enforcement of regulations put in place by democratically elected governments.
- Conflict related to national sovereignty and rule of law
  (Verhceeke, 2016)

Who can mount an ISDS case against a State?

Any foreign investor under a FTA or BIT can mount a case against a countries government. This includes any share holder of a company investing in a country. (Verhceeke, 2016)

Who wins the cases?

- 30% have been won by the proponent
- 30% have been won by the State
- 30% have been settled before a determination by the arbitrator

(Verhceeke, 2016)

When a case is won by the proponent, which group of companies are the largest recipient of compensation funds?

94.5% of funds are given as reparation to US companies with annual revenues of over $1billion. (Verhceeke, 2016)

There are only 667 cases known to be heard due to the secret proceedings of many cases. But following are some of the cases mounted under ISDS clauses by multi-national companies.

Proponent	State	Reason for the dispute
Vattenfall	City of Hamburg	The Swedish company Vattenfall sought 1.4 million Euro for compensation for environmental restrictions on the Moorburg coal fired power plant. The case was settled before a determination.
Chevron	Ecuador	An appeal by Chevron to a U.S. court was upheld and so Chevron did not have to pay $9.5 billion to indigenous peoples in reparation payments for environmental damage caused, but under the TTIP agreement the company sued the Ecuadorian government for the same amount in The Hague for allowing indigenous peoples to sue the company. (Barret 2016; Neslen 2016)
Achmea	Slovak Republic	After a Slovak court ruling against the Dutch company Achmea in 2004 reversing the decision to liberalize the Slovak health insurance market, under a BIT agreement between the Netherlands and Slovakia, the ISDS clause was activated in a Luxembourg court to seek compensation. The decision was in favor of Achmea. Slovak assets were seized to be paid to Achmea, at a later date of 22.1 million Euro. (The Slovak Spectator 2013)
Eli Lilly	Canada	Even though the decision of the highest court in Canada should be final, which essentially stated that there was no evidence that the drugs worked and therefore the patent is invalid, El Lilly challenged the decision under NAFTA. The challenge was against the Canadian patent laws and how they conflict with NAFTA. Eli Lilly lost the case. (Howse 2017)
Veolia	Egypt	The company took advantage of a BIT between Egypt and France. Its complaint was that Egypt raised the minimum wage of workers, thus reducing the profitability of the contract awarded years before. (Hunt 2016)

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