World Trade Review (2017), 16: 4, 655–671
© *Raj Bhala* doi:10.1017/S1474745617000258

TPP, American National Security and Chinese SOEs

RAJ BHALA*

The University of Kansas, School of Law

Abstract: Free trade agreements (FTAs) are about far more than free trade. They are about national security. A trade deal may be ambitious in liberalizing or managing cross-border flows in goods, services, intellectual property (IP), and people, but to argue for or against an FTA solely along the axis of free versus managed trade is to miss another vital purpose – the deal can, and indeed should, advance national security. This article makes two points. First, the Trans-Pacific Partnership (TPP) exemplifies the possibility of enhancing the national security the United States, through containment of China and its ruling Chinese Communist Party (CCP). Second, the debate over the definition of state owned enterprise (SOE) is one among many illustrations in the TPP of the link between national security, trade, and containment. The 12 nations negotiating the TPP were aware of this link, and deliberated the definition of 'SOE'. The TPP excluded the Middle Kingdom from the founding members, while the founders wrote the TPP rules to bind China if it subsequently joined the deal. Chinese SOEs were of concern to them, for *bona fide* national security reasons, and so also were legitimate sovereign interests in providing goods and services through their own SOEs. The evaluation by America and its 11 TPP partners, as to which entities should be included in the scope of SOE disciplines led to a set of clear rules.

1. *Macbeth's* pedagogy

Comprised of 240 lines, Act IV, Scene 3 of *Macbeth* is the longest scene in that Shakespearean tragedy.[1] The stage is static. The discussion is about what the past teaches the characters for their future conduct. What action should they take, given what has happened? Macduff has fled from Scotland to England,

* Email: bhala@ku.edu

The author presented a draft of this article at Columbia Law School in October 2016, and an earlier version appeared as Robert Schuman Centre for Advanced Studies (SCAS) Research Paper Series, Number RSCAS 2017/03, European University Institute. The author is indebted to Merit E. Janow, Petros C. Mavroidis, Matt Waxman and the participants in that seminar for their helpful suggestions. The author also thanks his Research Assistant, Eric Witmer.

1 See Shakespeare's *Macbeth* (1606), Act IV, Scene 3, and Commentary, 133–143 (Sidney Lamb, (ed.), commentary by Christopher L. Morrow (2005)).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

where he meets Malcolm, son of the victim of regicide, Duncan. Macbeth's murderous tyranny colors the past black: not only did he have Duncan killed, but also Fleance, son of Banquo, plus all of Macduff's family. Does this past mean Macduff should grieve passively? Or, as Malcolm successfully argues, should grief be turned to revenge?

The *Trans-Pacific Partnership* (*TPP*) is the longest free trade agreement (FTA) in human history. With a core text of 30 chapters, plus 63 annexes and 61 side letters, the TPP spans 6,000 pages.[2] It is far easier (and more pleasing) to peruse Act IV, Scene 3, or even the entirety of Shakespeare's longest play, *Hamlet*, than it is to read just the core text of the TPP or the side letters. The core text (excluding chapter-specific annexes) has 506 articles, and the side letters run 231 pages. There is little in the way of stylistic grace. Unlike Shakespeare's plays, love, beauty, and even truth is not usually the concern of the TPP.

Yet, there is a crucial substantive similarity. The debate about what terms the TPP ought or ought not to contain, and whether the TPP ought or ought not to be approved, is a debate about the meaning of the past for the future, as is Act IV, Scene 3 of *Macbeth*. What do the pre-TPP free trade agreements (FTAs), such as the *North American Free Trade Agreement*, and the Uruguay Round agreements, teach families around the world about trade liberalization? From Kansas City to Kuala Lumpur, this question is being asked. The dominant voice in the public discourse is that akin to Malcolm: People, turn your grief over adjustment costs from prior trade liberalization into revenge: fight the TPP, oppose free trade.[3]

Past is not a prologue, or need not be, least of all in the modern age of globalization. Lessons for the future can inform future conduct. Caution, yes, anger, no.[4]

2 The estimate of 6,000 pages is from 'Free Exchange: A Serviceable Deal', *The Economist*, 14 November 2015, at 76, and also L. Bracken, 'House Vote on TPP Possible in May, June', 32 *International Trade Reporter (BNA)* 2097 (3 December 2015).

3 A September 2014 Pew Research Center study of 44 countries showed the voice of anger is the loudest one, especially in developed countries such as France, Italy, Japan, and the United States. See *Faith and Skepticism about Trade, Foreign Investment*, 16 September http://www.pewglobal.org/2014/09/16/faith-and-skepticism-about-trade-foreign-investment/. In the United States, only 20% and 17% think trade generates jobs and boosts wages, respectively. Across the world, just 31% of people think trade is 'very good' for their country. The figures are higher in developing countries: 66% and 55% say it increases jobs and wages, respectively, and in Vietnam, 53% say it is very good for their country. Yet, even among emerging markets, support for free trade (in terms of agreement with the proposition that trade is good for one's country) dropped between 2010 and 2014 from 84% to 77% (see ibid.). In general, it seems that the more experience a country has with trade and investment liberalization, the more developed it is, and/or the larger it is in size, the more skeptical it is of the effects of openness on employment and income.

4 In April 2014, the USTR published a single-page document of changes to federal law necessary for *TPP* compliance It listed just six minor changes, involving matters such as CBP fees and penalties, and Certificates of Origin. See United States Trade Representative, *Changes to Existing Law Required to Bring the United States into Compliance with Obligations Under the Trans-Pacific Partnership Agreement*, https://ustr.gov/sites/default/files/TPP-Changes-to-Existing-Law-Report-FINAL.PDF (1 April 2016). Critics charged the USTR with understating the effects of the TPP. See B. Flood, 'White House Releases Proposed Changes to US Law for TPP', 33 *International Trade Reporter (BNA)* (7 April 2016).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

To take omens from past trade deals as all bad, or to adopt a near-paranoid opposition to trade liberalization, is to make Macbeth's mistake. From the Three Witches' prophecies, he drew dreadful inferences. All died as a result – the worst outcome of any tragedy, one which Macbeth might have avoided with meditation, deliberation, and consultation about those prognostications and his circumstances.

Thankfully, for the TPP it is not yet Act V. It is Act I. There is time for critical analysis. This remarkable FTA has not (yet) entered into force. Its draft provisions remained classified until publication of the final text on 5 November 2015, a month after negotiations finished on 5 October.[5] Formal signing occurred on 4 February 2016, roughly coinciding with the 400th anniversary of Shakespeare's death (1616). On 12 August 2016, President Barack H. Obama sent Congress a draft *Statement of Administrative Action* (*SAA*) for the TPP.[6] Because of the unique importance of the TPP – strategically, as well as economically – this accord matters far more than other FTAs.

The TPP embodies a connection between trade and national security that is not widely appreciated. Here, too, the analogy to Shakespearean drama matters. The Acts and scenes in *Macbeth* occur in Scotland, save for Act IV, Scene 3, which occurs in England. On either side of the border, at a macro level, the play is about more than the future economic well-being of Scotland. The security of the Scottish realm is in peril, and what foreign intervention (from England) might do to advance that security is asked (and answered). Much of the drama surrounding the TPP occurs in America, but, with 11 other parties, not all of it. In the cross-border FTA theater, the macro issues at stake extend beyond economic performance to national security. Whether integration and inter-dependence can help America is an issue.

In Act I, Scene I of *Macbeth*, the Three Witches utter one of the most memorable of all Shakespearean lines: 'Fair is foul and foul is fair'. What is touted as right may be wrong. What is decried as wrong may be right. What appears to be true, may not be reality. So it is with the TPP. Time is needed to look deeply into its text, motivations, and implications to understand and evaluate it better. This article thus presents two points, both tentatively. First, the TPP may be appreciated as an exercise in containment of China through the rule of law. Second, by way of example, the drive among TPP negotiators to define 'state owned enterprise' (SOE) is one illustration of this exercise. Both points hold true whether or not China joins the TPP.

5 New Zealand Ministry of Foreign Affairs and Trade, the official TPP depositary, published the legally verified text on 26 January 2016. This version superseded the November version.

6 See *The Trans-Pacific Partnership Implementation Act, Draft Statement of Administrative Action* (12 August 2016), https://ustr.gov/sites/default/files/DRAFT-Statement-of-Administrative-Action.pdf.

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

2. China and SOEs

The TPP matters for America's strategic position as the pivot from the Middle East to Asia to counter China. Four former American Secretaries of State, representing both political parties, have pressed this argument: Henry Kissinger (Secretary to Presidents Richard M. Nixon and Gerald R. Ford from 1973 to 1977); James Baker (Secretary to President George H.W. Bush from 1989 to1992); Madeleine Albright (Secretary to President Bill Clinton from 1997 to 2001); and Colin Powell (Secretary to President George W. Bush from 2001 to 2005).[7] A fifth Secretary of State, John F. Kerry (to President Barack H. Obama from 2005 to 2009) obviously agreed:

> *[E]ither the United States of America is an Asia Pacific power, or we are no*t. And *the 'not' carries with it serious consequences … We can't talk about the rebalance to Asia one day and then sit on the sidelines the next*, and expect to possibly send a credible message to partners and to potential partners around the world.
>
> …
>
> For more than a century … consistency is exactly what leaders in Asia have come to expect from the United States – from leaders in both parties. And there are a host of good reasons for why they have come to expect that.
>
> The first is geography. The United States is one of the few nations that straddles the divide between the Eastern and Western hemispheres. Add to that the strong economic bonds that we have already developed in the region: five of our top ten trading partners are in Asia.
>
> And beyond that, you have to remember that our decades-long security alliances and history of defense cooperation with Japan, South Korea, Australia, New Zealand, and the Philippines stands out …
>
> Finally, Asia Pacific countries are major actors on … additional issues that touch on the vital national security interests of the United States, and they would be affected by us turning our back on an agreement already reached, prompted and promoted by us, led by us, which we then turn around and reverse and say, 'Sorry, we didn't mean what we said'.
>
> *… [W]hen crises arise in Asia, the impacts are felt in the United States. And that fact leads to this elementary and undeniable truth: it is in our interests to be able to have a positive influence on the course of events in Asia.*
>
> *And this second fact leads inexorably to a third. The Trans-Pacific Partnership will reinforce our status as a world leader intimately connected to the dynamic economies of the Pacific Rim, the fastest-growing economies in the world. And it will help strengthen norms and standards that are important to us – not just*

7 See C. Bolen, 'Obama Wins TPP Support from Former Top Officials', 32 *International Trade Reporter (BNA)* 1999 (19 November 2015).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

> *to other people or to everyone else in the region, but important to every citizen in the United States of America*.
>
> …
>
> [T]here can be no doubt that TPP isn't simply a stand-whole, standalone deal that just affects some trade barriers and some tariff rates. It's a lot more than that … *It enhances our national security*.
>
> …
>
> [*I*]*f we retreat from this agreement, every government in the region, every business, every labour union, every group of environmental advocates, and the commanders of every army and navy will notice*. And *they will notice it in a way that does not work for the United States of America*. It will be a *unilateral ceding of American political influence and power with grave consequences for the long term*.
>
> They're going to be asking themselves, hey, if we can't count on the United States, where else should we turn? If the principles and rules written into the TPP don't matter to the United States, why should we accept them? If America won't enter into partnership with us on economic matters, why should we look to Washington for guidance on political or security matters?
>
> The inescapable bottom line is that, *with TPP, we will be far better positioned to enhance our national security and to protect our interests in the globe's most dynamic region than we will be without this agreement*.
>
> So … *the strategic case for TPP is not just crystal clear. It could not be more vital to the national security interests and the long-term strategic goals of the United States of America*.[8]

Another distinguished bipartisan group – of eight former Secretaries of Defense – pressed the argument.

Harold Brown (1977–1981, under President Carter); Frank C. Carlucci 1987–1989, under President Reagan); William J. Perry (1994–1997, under President Clinton); William S. Cohen (1997–2001, under President Clinton); Donald H. Rumsfeld (1975–1977, under President Ford, and 2001–2006, under President Bush); Robert M. Gates (2006–2011, under President Bush); Leon E. Panetta (2011–2013, under President Obama); and Charles T. Hagel (2013–2015, under President Obama) wrote to Congress on 27 April 2016 that:

> Engagement and leadership on international trade are *fundamental to American national security*. That is a truth recognized by every president since the end of the Second World War. President Harry Truman said, 'peace, freedom, and world

8 J. F. Kerry, Secretary of State, *Remarks on the Trans-Pacific Partnership*, The Wilson Center, Washington, DC, 28 September 2016, http://www.state.gov/secretary/remarks/2016/09/262551.htm (emphasis added).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

> trade are inseparable'. President John F. Kennedy stated that, 'the success of our foreign policy depends in large measure upon the success of our foreign trade', while President Ronald Reagan noted that, 'the freer the flow of world trade, the stronger the tides for human progress and peace among nations'.
>
> … [O]ur engagement and leadership in Asia is especially critical. In fact, no region will impact American prosperity and security more in the coming century. By 2030, two-thirds of the world's middle class – more than 3 billion people – will reside in Asia. This population not only represents a critical consumer base for Made-in-America exports, but an opportunity to strengthen alliances with regional powers such as Japan and Singapore.
>
> The TPP represents a choice for the United States. It is a choice between leading the world toward a future that supports US values and interests, or standing back and allowing others – *most likely China* – to write the rules of the road for Asia in the 21st century. And let us be clear: *trade rules written by China would not promote a trading system consistent with American interests and values*.
>
> … With a trade agreement of this magnitude, there will be elements that some dislike, but the overall benefits to our economy and national security cannot be overstated.[9] …

Manifestly, their argument is that the TPP is more than just about commerce: it assists in containing China, the rise of which is dubiously peaceful. The CCP's South China Sea claims, and its values, are among the reasons (chronicled elsewhere) why China's rise is 'dubious'.[10] For now, suffice it to say China poses threats (*inter alia*) with respect to three sets of islands: Spratly Islands, Senkaku Islands, and Taiwan. China has long-standing sensitivities about the 'Three Ts': Tibet, Tiananmen Square, and Taiwan.

Suppose (implausibly) all 12 luminaries are wrong, that none has a clue about the TPP or the CCP, and each irrationally 'connects dots' between TPP rules and China. Facts are still facts, and here are two. First, of the 50 largest companies on *Fortune's* Global 500 List, 12 are SOEs.[11] Indeed, on *Forbes*' Global 2,000 biggest publicly traded companies:

> *204* … [are] majority SOEs with ownership spread across 37 different countries … *China lead*[s] *the list (70 SOEs)*, followed by India (30), Russia (9), the United Arab Emirates (9) and *Malaysia (8)*. The combined sales of the 204 SOEs amount to USD 3.6 trillion in the business year 2010–2011 … more than 10% of the aggregate sales of the 2,000 largest companies and *exceeding the 2010 Gross*

9 http://csis.org/files/publication/160428_Trans_Pacific_Partnership.pdf (writing to house speaker (Paul Ryan, Republican – Wisconsin), minority leader (Nancy Pelosi, Democrat – California), and Senate Majority and Minority Leaders (Mitch McConnell, Republican – Kentucky and Harry Reid, Democrat – Nevada, respectively).

10 See Raj Bhala, *TPP Objectively* (Durham, NC: Carolina Academic Press: 2016), 6–11.

11 See L. Bracken, TPP Seeks to Lower Tariff Barriers Faced by US Exports, Froman Says, 32 *International Trade Reporter (BNA)* 417 (26 February 2015).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

> *National Incomes (GNIs) of … the U.K., France or Germany*. The value of sales (USD 327 billion) of these SOEs is equivalent to *almost 6% of world GDP*. Their combined market value (USD 4.9 trillion) corresponds to *11% of global market capitalisation of all listed companies*.
>
> *China*, the United Arab Emirates, Russia, Indonesia, *Malaysia*, Saudi Arabia, India, Brazil, Norway and Thailand are the ten countries with the highest *Country SOE Shares* (CSS) … *Many of the countries with the highest SOE shares are also important traders. This is most notably the case for China* – the world's second largest exporter, accounting for more than 10% of world's merchandise exports in 2010, and simultaneously the country with the highest country SOE share. *This provides an indication as to why China is often mentioned in the context of possible cross-border effects of SOEs*. The seven countries following China in terms of high SOE shares (the United Arab Emirates, Russia, Indonesia, *Malaysia*, Saudi Arabia, India and Brazil) together accounted for an additional 10.4% of world trade. Thus, the eight countries with the highest SOE shares collectively account for more than 20% of world trade.[12]

The prominence of Chinese and Malaysian SOEs is particularly noteworthy. In the TPP context, SOE rules are designed to put disciplines on Chinese SOEs, should China eventually join the deal, and in the meantime on Malaysian (plus other party) SOEs.

Why might Chinese SOEs threaten American national security? Dennis Shea, Chairman, United States – China Economic Security Review Commission told Congress: Chinese SOEs are '"arms of the Chinese state" and act for strategic purposes'.[13] He and the Commission called for a ban on them buying American companies:

> Despite repeated pledges to let the market play a 'decisive role' in resource allocation, Beijing continues to use state-owned enterprises (SOEs) *as a tool to pursue social, industrial, and foreign policy objectives, offering direct and indirect subsidies and other incentives to influence business decisions and achieve state goals*. While proposed SOE reforms have made little progress incorporating market drivers into SOE activities or addressing the country's growing credit crisis, they have taken steps to strengthen state control – particularly in sectors involving the government's political or economic interests.[14]

12 P. Kowalski, M. Büge, M. Sztajerowska, and M. Egeland, 'State-Owned Enterprises: Trade Effects and Policy Implications', OECD Trade Policy Paper Number 147, TAD/TC/WP(2012)10/FINAL, 6 (22 March 2013), http://www.oecd.org/trade (emphasis added).

13 Quoted in L. Bracken, 'Hill Panel Pushes for Limits on Chinese Investments in US', *International Trade Daily (BNA)* (16 November 2016).

14 United States – China Economic Security Review Commission, 2016 Annual Report to Congress, *Executive Summary and Recommendations*, at 5, http://origin.www.uscc.gov/sites/default/files/annual_reports/Executive%20Summary%202016.pdf (hereinafter, China Commission).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

Thus, the Commission recommended amending the statute authorizing the Committee on Foreign Investment in the United States (CFIUS) to bar Chinese SOEs from US company acquisitions.[15]

3. Defining 'SOE'

If FTAs are about national security as well as trade, and if the TPP is about both containing China and trade liberalization, then what should TPP rules on SOEs say? The short answer is they should level the playing field on which SOEs and private entities compete. But, that answer begs a vital question with which TPP negotiators grappled: what is the definition of an 'SOE'? That is, what 'SOEs' should the TPP cover?

The TPP negotiating countries agreed the percentage of government ownership ought to be the key criterion delineating an 'SOE'.[16] The problem was they could not agree on a percentage figure. The United States was concerned about precedent as to both the percentage and scope issues.

Provisions in the TPP on SOEs could become a template for future RTAs, and perhaps the WTO. The GATT–WTO texts speak of SOEs operating in accordance with normal commercial considerations. Ideally, the TPP would lay out whether a matter or decision concerning, or by, an SOE affects non-SOE competitors, and then impose appropriate disciplines.[17] The United States argued TPP negotiations should deal specifically with situations such as where an SOE:[18]

(1) enjoys advantages in its home country, such as direct support, preferential financing, selective enforcement of laws, or regulatory exemptions;
(2) from one country and private business association of another country compete in that other country, or in a third country;
(3) is engaged in government procurement;
(4) is a holding company with many entities under it;
(5) gains preferential access to export credits; and
(6) benefits from exemptions in domestic bankruptcy law that allow it to continue in operation.

Such topics deserved coverage, given the prominence of SOEs in many countries.

15 China Commission, at 507, http://origin.www.uscc.gov/sites/default/files/annual_reports/Comprehensive%20List%20of%20Recommendations_1.pdf.

16 See L. Bracken, 'Ryan Reaffirms Goal of Reaching Agreement on TPP in Meetings with Singapore Officials', 32 *International Trade Reporter (BNA)* 375 (19 February 2015); L. Bracken, 'Good TPP Market Access Deal Needed to Resolve Rules Issues, Brilliant Says', 31 *International Trade Reporter (BNA)* 1975 (6 November 2014).

17 See L. Bracken, 'TPP Customs, Trade Facilitation Text is "Particularly Far Advanced", Froman Says', 31 *International Trade Reporter (BNA)* 502 (13 March 2014).

18 See L. Bracken, 'TPP Members Grapple with Japan's Entry, Ways to Speed Talks Ahead of 17th Round', 30 *International Trade Reporter (BNA)* 495 (4 April 2013).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

For example (as of March 2012), SOEs constitute 80% of the value of China's stock market, 62% of the market capitalization of the Russian stock market, and 38% of that in Brazil.[19] SOEs also play prominent roles in Malaysia, Singapore, and Vietnam.[20] SOEs accounted for 50% of the stock market capitalization in Malaysia, and 20% in Singapore.[21] In Vietnam, SOEs accounted for 38% of GDP, and 25–30% of government revenue.

Unsurprisingly, Malaysia, Singapore, and Vietnam resisted disciplines on their SOEs.[22] A poignant example is Vinatex, which is owned by the government, and is the largest apparel exporter from Vietnam. America sought disciplines on it, which would be consistent with a restrictive Textiles and Apparel Rules of Origin (T&A RoO).[23] In Japan, the Post Office is an SOE. In the United States, Fannie Mae and Freddie Mac may be considered as such. And, in some countries – Vietnam, for example – SOEs reportedly 'are used by senior Communist Party officials as a cash cow for favoured projects and sometimes as personal piggy banks'.[24]

If America had its way, then the TPP would be the first trade agreement to contain a full chapter on disciplines on SOEs. The concern about the un-level playing field they enjoyed in their domestic markets was known for decades, even when GATT was drafted in 1945–1947. However, the increased prominence of SOEs, and particularly the fact that their activities are no longer limited to their home countries, but extend into foreign markets, impelled TPP negotiators to deal with them.[25]

Doing so created controversy. Developing countries argued for generous transition periods. They needed time for their SOEs to transition toward

19 See M. Griffin, 'TPP Should Set Benchmark for Rules on State-Owned Enterprises, Forum Told', 29 *International Trade Law Reporter (BNA)* 370 (8 March 2012).

20 See L. Bracken, 'TPP Talks in Bali Focus on Environment, Intellectual Property, State-Owned Enterprises', 30 *International Trade Reporter (BNA)* 1563 (10 October 2013).

21 See L. Bracken, 'US Seeking to Limit Exceptions to Rules on SOEs', 32 *International Trade Reporter (BNA)* 1350 (30 July 2015) (citing statistics from the Organization of Economic Cooperation and Development (OECD) report, *Policy Brief on Corporate Governance of State-Owned Enterprises in Asia: Recommendations for Reform*).

22 See, e.g., D. Pruzin, 'TPP Ministers Wrap Up Meeting with No Deal or New Deadline', 30 *International Trade Reporter (BNA)* 1916 (12 December 2013) (reporting on Malaysian resistance to SOE commitments).

23 See B. Baschuk, 'High-Level Interventions Required to Resolve TPP Disagreements on Market Access Issues', 32 *International Trade Reporter (BNA)* 708 (16 April 2015).

24 D. Pilling and S. Donnan, 'Ocean's Twelve', *Financial Times*, 23 September 2013, at 9. See also M. E. Martin, *US – Vietnam Trade Relations: Issues for the 113th Congress*, Congressional Research Service 7-5700, R41550 (13 August 2014) (stating Vietnam 'remains a mixed economy with considerable government intervention'); R. Brevetti, 'CRS Says Vietnam's TPP Participation Could Complicate US Negotiating Position', 31 *International Trade Reporter (BNA)* 1575 (4 September 2014) (discussing the CRS Report).

25 See Bracken, 'TPP Members Grapple with Japan's Entry'.

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

commercial-based decision-making.[26] But, with an eye to writing rules to which China would have to adhere if it acceded to the TPP, disciplining Chinese SOEs was a priority. Thanks to 'powerful interests that stretch as high as the 25-man central committee of the Communist Party', internally catalyzed reform was stymied. Quoting Sheng Hong, Executive Director, Unirule Institute of Economics, a Beijing-based think tank, it was reported:

> China has developed a series of administrative monopolies that receive a range of advantages from central government, and benefit a powerful elite … Unirule … defines these as monopolies established by administrative departments that have access to exceptional advantages and are often protected by barriers to entry and regulating prices.
>
> And there is a 'revolving door' between the boards of directors of these companies and high levels of the governmental administration that gives them 'strong political resources', Sheng said.
>
> 'China should break the administrative monopolies', he said. 'It would make it easier to argue that it is a market economy and would be beneficial to the economy'.
>
> …
>
> [A]ccording to Unirule research published in 2012, and based on the resumes of 183 officials above vice ministerial level in 19 government ministries and commissions 56 people (30 percent) had previously worked in … SOEs.
>
> 'In addition, a resume survey of the senior executives of 123 central SOEs shows that 115 senior administrators at the 47 enterprises that disclosed this information had a background working for the government; in other words, each enterprise has an average of 2.45 people with a government background', the Unirule research found.
>
> Among the advantages these companies enjoy are the use of national land free of charge, low interest rate loans, subsidies from the government and developing rights at very low royalty levels. These advantages can add up to several trillion *yuan* per year, according to Sheng.
>
> …
>
> Nevertheless, they still significantly underperform private-sector companies, according to Unirule research. From 2001 to 2009, the average return on equity of Chinese SOEs was 8.16 percent, compared to 12.9 percent for non-state-owned companies, the research revealed. In 2009 the gap had widened to 8.18 percent for SOEs compared to 15.59 percent for private firms. And this does not take into account the substantial advantages that SOEs receive.

26 See L. Bracken, 'TPP Ministers Plan December Meeting In Singapore as Negotiations Continue', 30 *International Trade Reporter (BNA)* 1663 (31 October 2013).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

> Taking into account the rent that SOEs would pay as private enterprises, preferential financing costs, low taxes, subsidies and other factors, the average real return on equity of SOEs from 2001 to 2009 was –6.29 percent, according to Unirule. Later research showed a real return on investment in 2013 of –3.8 percent. Despite this, average wages in SOEs were 17 percent higher than in other organizations in 2008, while staff also can receive cheap housing.
>
> Although the companies are state-owned, they give little of their profits to the government. Between 1994 and 2007 SOEs gave none of their profits to the state … with the figure rising to 6 percent in 2008 and falling again to 2.2 percent in 2010. The benefits of state support are instead kept largely within the companies, which can set their own compensation levels for employees.
>
> 'The management of state-owned enterprises have the privilege to give the salary and bonuses they want, and they also have privilege to not hand on all of the profits to the nation', Sheng said. 'It is regarded by them as their benefit.'[27]

In brief, aggressive rules in the TPP would help counter the favourable treatment SOEs receive, and even have knock-on benefits of breaking up the governmental administrative monopolies that protect them, and closing the revolving door between those bodies and the SOEs.

Not all TPP parties aligned with the dark, Chinese-driven American view of SOEs. Australian health organizations feared TPP provisions on SOEs would damage state-owned public hospitals.[28] That could happen if: (1) the definition of 'SOE' was unclear, or (2) those provisions applied not only to central governments, but also to provincial ones. On the one hand, it was understandable to ensure through SOE disciplines that if SOEs compete commercially with private enterprises, they do not receive unfair advantages from their state owners. On the other hand, SOEs that exist for a public purpose, even if they have some commercial operations, should be exempt. Examples included not only Australian hospitals, but also the Australia Post and the National Broadband Network. Accordingly, these organizations championed a clear exclusion of such entities from the 'SOE' definition.

Certainly, the United States was concerned about crafting the definition of 'SOE'.[29] It needed to be broad enough to encompass activities of entities that

27 J. Butcher, 'Vested Interests Block Reform in China, Analysts Say', 33 *International Trade Reporter (BNA)* 1146 (11 August 2016).

28 See 'Australian Health Groups Concerned TPP Talks Will Impact State-Owned Hospitals', 30 *International Trade Reporter (BNA)* 1325 (22 August 2013). Those organizations were the Australian Fair Trade and Investment Network, Public Health Association of Australia, Australian Healthcare and Hospitals Association, Australian Federation of AIDS Organizations, and People's Health Movement Australia. See ibid. They sent a letter, dated 12 August 2013, to Richard Marles, Minister of Trade, Australia, detailing their concerns.

29 See R. Brevetti, 'Michaud Calls for Strong Measures in TPP To Address Power of State-Owned Enterprises', 30 *International Trade Reporter (BNA)* 1529 (3 October 2013) (discussing the views of Representative Mike Michaud (Democrat-Maine)).

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

truly are governmental or acting as agents for a government and are engaged in commercial trade. But, there had to be carefully crafted exemptions. The definition should not include universities, public utilities, or hospitals. Relatedly, SOEs ought to be subject to the same dispute settlement mechanism, and held to the same high standards of transparency, as private enterprises under the TPP. Further, perhaps some disciplines on SOEs should not apply horizontally to all SOEs. For instance, domestic public transportation services, or overseas investment, possibly should be exempt from competition rules otherwise applicable to SOEs.[30] More generally, perhaps whole service areas – like public health and transportation – should be exempt from the definition of 'SOE', or at least from disciplines on 'SOEs'. But, the United States insisted on an ambitious definition and a mandate that any SOE make employment, investment, and other decisions based on commercial considerations, not other criteria like social or national security.[31]

Also in the United States, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) had its own concerns. As with any trade agreement, the TPP galvanized labour unions around issues of wage degradation and job loss.[32] Additionally, the AFL-CIO drew a link between foreign SOEs and national security threats.[33] It called for an automatic trigger of a national security review by CFIUS for any investment of a foreign SOE in America. This trigger, said the AFL-CIO, should be built into the domestic regulatory requirement provisions of the TPP. The purpose of such a review would be not only to ensure sensitive goods or technologies do not fall into enemy hands, but also to check that a would-be foreign SOE acquirer behaves like a commercial enterprise and does not 'corner' a market in the United States.[34]

By the July 2015 Maui negotiations, the issues of defining 'SOE' had been agreed upon: roughly 50% or more government ownership.[35] The exact figure varied with the number of government officials on the Board of Directors of the enterprise: fewer government officials on the Board would mean a higher percentage threshold, whereas more government officials on the Board would mean a lower threshold. There were two reasons for the inverse relationship between (1) percentage ownership by the government and (2) government officials on the Board. First, in theory, these two variables were alternative (and complimentary) ways a government could influence SOE decision-making. Second, in practice, some TPP

30 See Bracken, 'Ryan Reaffirms Goal of Reaching Agreement on TPP in Meetings with Singapore Officials'.

31 See L. Bracken, 'Market Access, IPR, SOEs Head Up List of Agenda Items for Upcoming TPP Talks', 32 *International Trade Reporter (BNA)* 706 (16 April 2015).

32 See 'Unions Rally in Minneapolis to Protest Trans-Pacific Partnership Negotiations', 30 *International Trade Reporter (BNA)* 1326 (22 August 2013).

33 See L. Bracken, 'Labour Cites Exchange Rate Manipulation at ITC Hearing on Japan Joining TPP Talks', 30 *International Trade Reporter (BNA)* 899 (13 June 2013).

34 Ibid.

35 See Bracken, 'US Seeking to Limit Exceptions to Rules on SOEs'.

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

parties, such as Vietnam, planned partial government divestments of certain SOEs. So, if the thresholds of these SOEs fell below 50% after the initial public offerings (IPOs), but government officials still influenced SOE operations via Board membership, then the affected SOEs should be covered by the TPP.

The second issue, deciding what SOEs to cover, boiled down to the question of sector-wide exceptions. Those exceptions were dubbed 'NCMs', or 'Non-Conforming Measures' (akin to the use of the term in the context of investment, services, and financial services). Malaysia, Singapore, and Vietnam sought to exclude entire categories of SOEs from any TPP disciplines. For example, Malaysia wanted to exclude 'public transportation services'. Vietnam sought to exempt (at least for a defined transition period) 'telecommunications', 'textiles', and 'shipping'. Singapore wanted to revise commitments it had made under its 2004 FTA with the United States, in which competition law provisions applied to subsidiaries of the SOE Temasek, such as Temasek Holdings Private Ltd., but not to Temasek as a holding company.[36]

On the second issue, the American posture was radically different from (at least) Malaysia and Singapore.[37] First, the United States declared there should be no sector-wide exceptions. Rather, NCMs should be confined to SOEs that are specifically named. Second, no NCM should be permanent. Rather, it should be temporary, for a period in which the named SOE can adjust to competition from the private sector. Third, NCMs should be limited to just three types of TPP disciplines: subsidies, regulatory benefits, or government direction of decision-making. That is, a specifically named SOE could, for a brief transition period, (1) receive a subsidy, (2) enjoy special regulatory treatment (such as forbearance from duties incumbent on private sector entities), or (3) benefit from government direction. That was it. Fourth, the United States insisted on rigorous transparency rules. They were essential to ensure SOEs operated based on commercial considerations, not for governmental strategic reasons, such as gaining market share (at whatever cost) or enhancing employment (to maintain social peace or to fulfill quotas). Fifth, America wanted all disputes involving SOEs to be subject to the ISDS mechanism it championed.

That the official American position carried out the agenda of Corporate America was not in doubt. Understandably, American private sector companies sought a level playing field with Asian SOEs.[38] That it also accorded with the view of organized labour was notable. It was a rare instance in which American unions agreed with management.

Embedded in the second issue of sector-wide exemptions from the definition of 'SOEs' was a topic over which the commercially oriented American approach

36 See L. Bracken, 'Hatch Outlines Five Key Components for TPP', 32 *International Trade Reporter (BNA)* 1357 (30 July 2015).

37 See Bracken, 'US Seeking to Limit Exceptions to Rules on SOEs'.

38 Ibid.

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

rode roughshod: cultural exemptions. Some SOEs play an important role in maintaining, elaborating, and promulgating the traditions and values of a country, and advance its intellectual life and public discourse. Prominent examples are certain media outlets, such as the CBC.[39] Would the TPP require the Canadian government to privatize the country's oldest broadcast network, CBC?[40] The same question applied to the ABC. As a prominent critic of the TPP, University of Auckland Professor Jane Kelsey, a prominent TPP critic, put it:

> The reality [is] that SOEs and private firms are driven by different imperatives and obligations. SOEs are almost always state owned because they have functions *other than those that are merely commercial*, such as guaranteed access to important services, or because social, *cultural*, development and commercial functions are inextricably *intertwined* …[41]

Thus, she rightly cautioned against a draconian TPP mandate that would amount to a 'backdoor to privatization' of all SOEs.

In the end, Chapter 17, of the TPP concerning SOEs, admitted the possibility of NCMs. Parties were free to schedule them in general (Annex IV). Save for Japan and Singapore, all Parties did so. Annex IV consists of 59 pages of technical SOE reservations, or about six pages per party. Just how restrictive those NCMs are requires detailed analysis of each of them. Nevertheless (as exposed elsewhere), Chapter 17 disciplines SOEs through five vital categories of rules: (1) a national treatment; (2) a requirement of operation in accordance with 'commercial considerations', (3) a prohibition on 'commercial assistance' that causes 'adverse effects or injury'; (4) a transparency mandate; and (5) a sovereign immunity waiver.

4. Tragedy is not inevitable

Shortly after his November 2016 election to the Presidency, Donald J. Trump declared his intention to withdraw from the TPP on Day One as President.[42] (Technically, that YouTube pronouncement was off.[43] Because the TPP had not

39 The qualification that not all state-owned media qualify as cultivating an open-minded, enlightened approach to pertinent topics is obvious, when state-controlled news agencies in countries such as China or North Korea are considered.

40 See 'Canada's CBC Could Be Threatened by TPP, Journalists Warn', TeleSur, 29 September 2015, http://www.telesurtv.net/english/news/Canadas-CBC-Could-be-Threatened-by-TPP-Journalists-Warn-20150929-0003.html.

41 Quoted in 'Canada's CBC Could Be Threatened by TPP'. Professor Kelsey's concerns were based on her study, performed at the request of WikiLeaks, which in July 2015 published classified documents concerning TPP.

42 See E. Powell, 'What Trump's Vow to Quit TPP Trade Deal Means for Human Rights', *The Christian Science Monitor*, 22 November 2016, http://www.csmonitor.com/USA/Politics/2016/1122/What-Trump-s-vow-to-quit-TPP-trade-deal-means-for-human-rights?cmpid=pushEP.

43 See 'A Message from President-Elect Donald J. Trump', YouTube (21 November 2016), https://www.youtube.com/watch?v=7xX_KaStFT8.

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

taken effect, there was no treaty from which to withdraw – only a signature to pull off the page.) His reasons for 'withdrawal' were a confused protectionist admixture:

> The administration believes in *free, fair trade*', Anthony Scaramucci, a member of the presidential transition team's executive committee [and founder of the Wall Street hedge fund management firm, SkyBridge Capital LLC], said Dec. 1 [2016]. 'However, if we're going to get some contention related to trying to make those deals *fairer*, so that our goods and services can leave the United States *in the same proportion that they're coming in*, then the *cudgel of a tariff* is something that we on the administration side would be willing to impose as a sort of *negotiating chip*'.[44]

There was no underlying philosophy or definition of free, fair, or managed trade, or mercantilism, in this rhetoric. If a 'cudgel' was a negotiating tactic, then its overuse would condemn it as bluster to be ignored rather than ideas to be weighed. Rightly so, the US trade representative replied: 'Killing TPP on day one is a *huge gift to China*. There is way too much at stake for this to be killed, economically and strategically', and added there is an 'inherent tension between being tough on China [on trade issues] and killing TPP'.[45]

In response, other TPP parties doubled down on the importance of trade liberalization. For example, in its 30 November 2016 report, Australia's Joint Standing Committee on Treaties declared it 'is particularly concerned that Australia's long-term commitment to free trade, from which Australia benefits immensely, is currently at risk from a resurgence of nationalism and isolationism internationally'.[46] Both the Australian government and opposition Labour Party endorsed the report and recommended TPP ratification.[47] The report concluded, TPP 'represents the best possibility in at least 20 years to develop a *multilateral* free trade agreement'.[48] To be sure, Labour was 'disappointed that the TPP contains provisions that are well outside the core purpose of achieving fair and free trade, and that some of these provisions are not only extraneous, but risky or harmful to Australia's interests', and listed their principal objections as 'expanded monopoly rights protection for pharmaceuticals which may impose costs on health consumers or on the public health system' (claims to the contrary were 'disingenuous') and the ISDS mechanism.[49] The Green Party dissented, opposing TPP ratification and

44 Quoted in M. Jamrisko and R. Woods, 'Trump Talks of Higher Tariffs Bargaining Chip, Scaramucci Says', *International Trade Daily (BNA)* (2 December 2016) (emphasis added).

45 B. Baschuk, 'US Trade Chief Urges Trump to Reconsider TPP Withdrawal', 33 *International Trade Reporter (BNA)* 1772 (15 December 2016) (quoting Ambassador Michael Froman) (emphasis added).

46 Quoted in M. Griffin, 'Australian Politicians Reach Bipartisan Consensus on TPP', *International Trade Daily (BNA)* (30 November 2016).

47 See M. Griffin, 'Australian Panel Backs Pacific Trade Pact, Flags Concerns', 33 *International Trade Reporter (BNA)* 1742 (8 December 2016).

48 M. Griffin, 'Australian Panel Backs Pacific Trade Pact, Flags Concerns' (emphasis added).

49 Griffin, 'Australian Panel Backs Pacific Trade Pact, Flags Concerns',

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

lambasting the agreement as 'a deal cobbled together behind closed doors by big business for big business'.[50]

As another example, Vietnam continued with a breathtaking array of reforms designed for TPP ratification:

> As Donald Trump prepares to kill the … TPP, the 12-nation trade pact is helping to spur the biggest overhaul of Vietnam's economy in decades.
>
> The Communist government in Hanoi plans to push ahead with more than 30 separate pieces of legislation proposed to comply with the trade deal, including rules on labour, business, foreign trade and small-and-medium enterprises. Since a new constitution was adopted in 2013, Vietnam's lawmakers have passed more than 100 laws – a scale of change unseen since the nation introduced the market-oriented '*doi moi*' reforms in the 1980s. [In Vietnamese, '*Đoi*' means life, and '*Moi*' means 'new'. Thus, '*Đoi Moi*' connotes new life, in the sense of new attitude and hope.]
>
> …
>
> Vietnam has long been seen as one of the biggest potential winners from the TPP, with increased market access for everything from clothing to electronics to footwear. The deal also stood to complement a growing strategic relationship between the US and Vietnam, which opposes China's territorial claims in the South China Sea.
>
> Yet all isn't lost: The TPP also helped serve as an impetus for long-needed structural changes in a nation with 90 million people that's forecast to grow more than 6 percent this year – one of the fastest rates in Asia. While Vietnam first announced plans to reform its state-owned enterprises in 2011, progress has been slow, with the stakes sold often too small and many companies pulling back on plans to list on exchanges.
>
> …
>
> the TPP also has helped raise awareness among key stakeholders including state officials, employers, trade unions, workers and the general public on the implications of free trade. Vietnamese business leaders also appear keen to maintain the reform momentum generated by the TPP.
>
> Alan Pham, chief economist at Vietnam's largest fund manager VinaCapital Group, says the TPP is a kind of road map for Vietnam as it integrates further into the global economy.
>
> 'Whether we have TPP or not, Vietnam will still have to reform', Pham said. 'The trade pact is really useful for the government and for Vietnamese business to know what are the steps they will need to take to really become part of the global economy'.

50 See Ibid.

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press

> Prime Minister Nguyen Xuan Phuc said last month that Vietnam would pursue greater international integration through 12 other free trade agreements it had already signed even if the TPP falls through.
>
> 'So it'll be very good to have TPP, but if not, we still have other integration plans to go with', Phuc said.[51]

Notably, Japan ratified the TPP. Its House of Councillors (the Upper House of the National Diet (Parliament)) approved the deal on 9 December 2016, following the House of Representatives approval on 10 November 2016.[52]

Might America do well to draw inspiration from the likes of Australia, Vietnam, and Japan – two of which it had once fought bitter wars against in unison with the third – and rethink 'withdrawal' from TPP? Perhaps the answer is what Macbeth says (in Act I, Scene 7, Lines 1–7), when he ponders assassinating King Duncan of Scotland:

> If it were done, when 'tis done, then 'twere well
> It were done quickly; if the assassination
> Could trammel up [catch in a net] the consequence, and catch
> With his surcease, success: that but this blow
> Might be the be-all and the end-all. Here,
> But here, upon this bank and shoal of time,
> We'd jump [risk] the life to come.

Like killing Duncan, killing (or modifying or expanding) the TPP, is not a simple matter. Whatever move America makes in any dimension of international trade law and policy has 'consequences', some of which it neither can foresee nor steer, in the present ('this bank and shoal of time') or the future ('the life to come'). Some moves set precedents, too, as Shakespeare did in Macbeth with the first recorded use of the word 'assassination'.[53] But, even they are not necessarily the end of the matter, the 'be all and end all'.

In short, if America makes a mistake on the TPP, it is not the 'be all and end all'. That mistake might still be rectified. But like killing Duncan, the killing of the TPP could have injurious effects on the national security of the nation.

51 Ngyuen Kieu Giang, 'TPP Changing Vietnam's Economy, No Matter What Trump Does', 33 *International Trade Reporter (BNA)* 1698 (1 December 2016).

52 See House of Councillors, The National Diet of Japan, http://www.sangiin.go.jp/eng/index.htm; L. Bracken, 'Japan Ratifies Trans-Pacific Trade Pact', 33 *International Trade Reporter (BNA)* 1787 (15 December 2016).

53 See enotes, *The Be All and The End All*, https://www.enotes.com/shakespeare-quotes/all-end-all.

https://doi.org/10.1017/S1474745617000258 Published online by Cambridge University Press