

## TPP and Investor-State Dispute Settlement: An Intertwined Spectrum of Options for Investors?

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*Once ratified, Chapter 9 of the TPP (the Investment Chapter) will provide important protections to investors through the Investor-State Dispute Settlement (ISDS) system. While the Investment Chapter has triggered certain criticism, TPP members have relied for years on the ISDS system as an effective mechanism to solve disputes under pre-existing international investment agreements (IIAs). The new ISDS provisions are not revolutionary but reflect an effort by TPP members to regulate and include public concerns in the Investment Chapter.*

*There is, however, a remarkable absence in the TPP: there is no provision addressing the “coexistence” between TPP and preexisting IIAs. This absence—which very likely will result in investor-State treaty shopping—will offer alternatives to investors to bring arbitration claims under preexisting investment treaties.*

### I INTRODUCTION TPP & INVESTMENT CHAPTER

The Trans-Pacific Partnership (TPP) is a Free Trade Agreement (FTA) between the Pacific nations of Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, Vietnam, Canada, Chile, Mexico, Peru and the United States. Once ratified, TPP will become the largest trade bloc on earth, concentrating forty percent of the world's gross domestic product.

TPP provides for certain measures affecting trade in goods and services, such as removal or reduction of trade barriers and provisions related to government procurement. Importantly, companies will be covered under the Investment Chapter of the TPP,<sup>1</sup> which contains provisions designed to protect investors through the Investor-State Dispute Settlement (ISDS) system. Subject to exceptions, investors would be able to seek damages

through international arbitration against TPP members for a violation of a provision contained in the Investment Chapter.

While the ISDS mechanism in the Investment Chapter has drawn public attention, the truth is that TPP members have already relied for years on the ISDS system as an effective mechanism to solve disputes. With the exception of Mexico and Vietnam, TPP nations are also members to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),<sup>2</sup> and all are contracting parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).<sup>3</sup> Furthermore, before TPP, its members had already signed among them almost forty international investment agreements (IIAs), including Bilateral Investment Treaties (BITs), Investment Chapters of FTAs, and other investment-related instruments. With TPP members' previous experience in ISDS mechanisms, it can

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<sup>1</sup> See TPP Ch. 9: Investment.

<sup>2</sup> See List of Contracting States and other signatories of the ICSID Convention, (as of Mar. 25, 2016). Available at: <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>.

<sup>3</sup> See List of Contracting States of New York Convention, Contracting States, (as of Mar. 25, 2016). Available at: <http://www.newyorkconvention.org/list-of-contracting-states>.

be said that they agreed to include ISDS mechanisms in the TPP Investment Chapter to promote cross-border investments and improve regulatory transparency, among other aspects.

## 2 TPP INVESTMENT CHAPTER: SAME OLD, FEW SURPRISES

TPP investment chapter has not brought many surprises to the table regarding the substantive and procedural protections offered to investors. However, there are a few new features that have been inserted in the text of the agreement:

### 2.1 Substantive Protections

The substantive protections that TPP offers are the typical ones seen in other IIAs, with certain exceptions that we will analyze in this section. Specifically, TPP offers:

- (a) *A Minimum Standard of Treatment*:<sup>4</sup> According to this principle, every national investor of a TPP Member State is guaranteed to be treated in accordance with the applicable customary international law. This protection includes the right to a Fair and Equitable Treatment (“FET”) and Full Protection and Security. Historically, the FET standard has not been extensively defined in the text of IIAs. As a consequence, it had been broadly construed by arbitral tribunals as to include, for example, the protection to a *legitimate expectation* from the investor.

TPP, however, defines the FET standard narrowly—as the obligation not to deny justice and guarantee due process—in an effort to clarify and avoid disputes regarding the threshold of protection of this standard. The real novelty is that TPP’s FET has defined two new categories of mistreatment which will not be treated as a breach of the minimum standard of treatment: (i) an action by a TPP Member State that is inconsistent with the expectations of an investor, unless it includes an arbitrary or discriminatory act against the investor; and (ii) the withdrawal

or modifications to grants and subsidies by governments.<sup>5</sup>

- (b) *National Treatment and Most Favored Nation Treatment*:<sup>6</sup> Under these provisions, an investor and a covered investment are guaranteed to have a no less favorable treatment, in *like circumstances*, than that of a national investor or an investor from a non-TPP Member State. Importantly, under TPP these standards do not apply to non-conforming measures<sup>7</sup> by Member States. In other words, TPP Member States adopt a “negative-list” (or non-conforming measures) of the markets that are not fully open to foreign investors, either because there are current measures on which a Party accepts an obligation not to make its measures more restrictive in the future and to bind any future liberalisation, or measures and policies on which a Party retains full discretion in the future.
- (c) *Expropriation and Compensation*:<sup>8</sup> As other IIAs, TPP protects a covered investment from direct expropriation (through the transfer of title or seizure of property) and from indirect expropriation (through measures that have an equivalent effect) without due compensation and due process, and when the expropriation has not a public purpose. However, in an effort to reconcile Member States’ right to regulate with investors’ protections, TPP has introduced certain exclusions to the concept of expropriation. For example, a non-discriminatory regulatory action of a TPP Member State that is designed to protect “public health, welfare and the environment” does not constitute indirect expropriation.<sup>9</sup>
- (d) *Free transfer of funds*:<sup>10</sup> Under TPP, funds related to a covered investment can be transferred abroad without delay in a freely usable currency and at the market rate prevailing at the time of transfer. A Member State can delay or prevent the transfer of funds under limited exceptions and only when acting in good faith, in an equitable and non-discriminatory manner.<sup>11</sup>

Since 2004, IIA provisions have addressed the fear of States to provide them with the ability to regulate health, welfare and environment issues, and at the same time, the

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<sup>4</sup> See TPP, Art. 9.6.

<sup>5</sup> See *Ibid.*, Arts 9.6.4 and 9.6.5; See also E. Peterson, *A First Glance at the Investment Chapter of the TPP Agreement: A Familiar US Structure with a few Novel Twists* (2015).

<sup>6</sup> See TPP, Art. 9.4 and 9.5.

<sup>7</sup> See *Ibid.*, Art. 9.11.

<sup>8</sup> See *Ibid.*, Art. 9.7.

<sup>9</sup> See *Ibid.*, Annex 9-B – Expropriation.

<sup>10</sup> See *Ibid.*, Art. 9.6.

<sup>11</sup> See *Ibid.*, Annex 9-E and 9-F for an example of the limitations on the transfer of funds imposed by Chile.

fear not to be impeded or punish with less investment.<sup>12</sup> There might be a reasonable fear not to attract investment when the legal certainty in such sectors will be challenged by a broad right to regulate. That was captured, for example, in the U.S.-Chile BIT and CAFTA-DR. TPP has also taken into account recent critics on the subject and has included a provision allowing adoption, maintenance or enforcement of regulatory measures sensitive to environment, health or other regulatory objectives.<sup>13</sup>

TPP also includes a denial of benefit clause which allows a TPP Member State to deny the benefits of the Investment Chapter to investors owned or controlled by a person either of a non-TPP Member State, or that has no substantial business activities in the territory of the any TPP Member State. The TPP Member State may also deny such benefits if extending investment protections to that investment would circumvent or violate measures prohibiting transactions with that investor (i.e., in the case of sanctions). It is however unclear whether this provision will terminate the so-called *forum shopping* of investors. One could argue that in a global economy investors will be careful to structure the investment in a way that will meet the TPP threshold and therefore will grant the resulting protections.

Moreover, the Investment Chapter has been trying to codify existing public concern issues in the investment arbitration world. The best example is the inclusion of a provision in Chapter 29 by which a TPP Party may deny the benefits with respect to claims challenging a tobacco control measure if a Party has made such a reservation.<sup>14</sup> As it is well understood, the introduction of such provision is a response to the *Philip Morris* case in which the tobacco company challenged Australian cigarette packaging measures on the basis of the Australia-Hong Kong FTA.<sup>15</sup> But the text goes farther and allows a Party—that has not made such a claim at the time of the TPP’ signature—to do it *during* the proceedings.<sup>16</sup> While the provision definitely protects the right to regulate, this can

lead to an excessive unpredictability for tobacco companies.

Another recent example that has brought concern to States is the numerous cases that Spain is currently facing after revoking the subsidies to renewable energy investors in the country. Although Spain was obviously not involved in TPP negotiations, this might have been one of the causes of the limitation on the minimum standard of treatment provisions.<sup>17</sup> Although the effort made by TPP negotiators to try to codify the existing public concerns—exemplified in current case law—is laudable, it is reasonable to think that IIAs (including TPP) will never be able to foresee all situations. Therefore, TPP members’ attempt to impose extensive regulation might not be the most adequate solution and could have a negative impact on investment.

## 2.2 Investor State Dispute Settlement

While TPP had not brought many surprises to the table regarding substantive protections, some of the features of the ISDS mechanism are, to certain extent, a novelty.

Covered investors have the right of action against host States through international arbitration. TPP offers covered investors the possibility to choose among institutional—ICSID arbitration—or ad hoc arbitration proceedings under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other rules agreed by the parties.<sup>18</sup>

The TPP Investment Chapter will serve as the applicable law to the arbitration proceedings along with the applicable rules of international law. As a practical matter, in those claims that arise from an investment agreement or authorisation, the applicable law will be the law agreed by the parties.<sup>19</sup> When the agreement does not include a choice of law, the law of the respondent State (including its choice of law provisions) will apply.<sup>20</sup>

### Notes

<sup>12</sup> See M. Hodgson, *The Leaked TPP Investment Chapter Draft: Few Surprises... is that a Surprise?*, TDM 6 (2015).

<sup>13</sup> See TPP, Art. 9.15.

<sup>14</sup> See *Ibid.*, Art. 29.5.

<sup>15</sup> See J. Hepburn and E. Peterson, *Australia Prevails in Arbitration with Philips Morris over Tobacco Plain Packaging Dispute*, (2015). Available at: <https://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/>.

<sup>16</sup> See TPP, Art. 24.9 – Exceptions.

<sup>17</sup> See ICSID cases, *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case ARB/14/18; *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case ARB/14/12; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case ARB/14/11; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case ARB/14/1; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case ARB/13/36; *Antin Infrastructure Services Luxembourg S.à r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case ARB/13/31; and *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case ARB/13/30, Available at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=spain>.

<sup>18</sup> See TPP, Art. 9.18.

<sup>19</sup> See *Ibid.*, Art. 9.24.

<sup>20</sup> See *Ibid.*, Art. 9.24 (2)(b).

While TPP does not have a provision addressing its priority over other existing IIAs, TPP does address the risk of multiple proceedings under TPP and other IIAs. A claimant shall accompany its notice of arbitration with a waiver of any right to initiate or continue proceedings in national or arbitration courts.<sup>21</sup> As further discussed below in section 3, depending on the IIAs previously signed among TPP members, investors can (and should) carry out an analysis of the different mechanisms that will be available to them to better protect their interests, both from ISDS and for substantive protections.

Under TPP, investors can initiate arbitration proceedings against a Member State for the adoption of measures in violation of the treaty's investment protection. But not without limitations. In words of the U.S. Trade Representative (USTR), TPP has "in place several layers of defenses to minimise the risk that U.S. agreements could be exploited in the manner in which other agreements among other countries are susceptible."<sup>22</sup>

To further explain the "several layers of defenses" that the USTR<sup>23</sup> refers to, we will explain the different and new ISDS provisions:

- (a) *Expedited procedure for review and dismissal of frivolous claims and claims outside the tribunal's jurisdictions:* Within the first 45 days after the constitution of the tribunal, the Respondent State can file a jurisdictional objection that will suspend the proceedings on the merits and will bind the arbitrators to issue an award within 150 days from the request.<sup>24</sup>
- (b) *Full transparency in cases and public participation:* All pleadings, briefs, transcripts, decisions and awards shall be publicly available.<sup>25</sup> *Amicus curiae* briefs can be accepted by the arbitral tribunal.<sup>26</sup> A Party that is not a disputing Party but considers having an interest in the matter before the panel can also participate in the proceedings.<sup>27</sup>
- (c) *Interim review of awards and appellate mechanism:* Before issuing a final award, the parties can request to review and comment on the draft award and submit their comments back to the tribunal.<sup>28</sup> It is worth noting

that TPP members are also contemplating the possibility of constituting an appellate mechanism in the future.<sup>29</sup>

- (d) *Consolidation of claims by the tribunal and power to appoint the experts:* On request, the arbitral tribunal can join factual or legal related claims to treat them together, thus improving efficiency. While in arbitral proceedings it is for the parties to appoint experts, TPP foresees the possibility for the tribunal to appoint experts of their choice on environmental, health and safety matters.<sup>30</sup>
- (e) *Arbitrators:* After long discussions and negotiations, the parties did not agree to include a specific code of conduct for investment arbitrators. However, TPP members have contemplated the preparation of a code coming forward.

Despite the initial opposition from Australia, we must celebrate that the entire Investment Chapter is subject to ISDS. While this is a common trend for core substantive provisions of IIAs, the main novelty in TPP is the submission to ISDS of the provisions that grant a certain discriminatory behavior to TPP Member States. Provisions such as the Denial of Benefits, Non-Conforming Measures, Special Formalities and Information Requirements, and the protection of regulatory objectives, are now to be subject to ISDS. One should also applaud that—although Member States still have the possibility to do so in the future—there is no appellate mechanism in to challenge arbitral awards. An appellate mechanism would, in the authors' opinion, undermine the definitiveness and somehow speediness of arbitral proceedings.

### 3 OVERLAP WITH PREVIOUS IIAS: WILL TPP ALWAYS BE THE SOLUTION?

The ISDS system is not new for TPP members. As previously noted, TPP members have already signed among them almost forty IIAs containing similar procedural and substantive provisions as in TPP. However,

#### Notes

<sup>21</sup> See *Ibid.*, Art. 9.20.

<sup>22</sup> See USTR, *Investor-State Dispute Settlement (ISDS)*, Fact Sheets (2015). Available at: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.

<sup>23</sup> *Ibid.*

<sup>24</sup> See TPP, Art. 9.22 (5).

<sup>25</sup> See *Ibid.*, Art. 9.23.

<sup>26</sup> See *Ibid.*, Art. 9.22 (3).

<sup>27</sup> See *Ibid.*, Art. 9.28 (14).

<sup>28</sup> See *Ibid.*, Art. 9.22 (10).

<sup>29</sup> See *Ibid.*, Art. 9.22 (11).

<sup>30</sup> See *Ibid.*, Art. 9.26.

unlike other IIAs (e.g., NAFTA),<sup>31</sup> TPP does not include a provision foreseeing how these existing treaties will interact with the TPP Investment Chapter once it comes into force.

The following table shows the existing multilateral and bilateral IIAs among TPP members:

	<i>Australia</i>	<i>Brunei</i>	<i>Japan</i>	<i>Malaysia</i>	<i>New Zealand</i>	<i>Singapore</i>	<i>Vietnam</i>	<i>Canada</i>	<i>Chile</i>	<i>Mexico</i>	<i>Peru</i>	<i>U.S.</i>
Australia	x											
Brunei		x										
Japan			x									
Malaysia				x								
New Zealand					x							
Singapore						x						
Vietnam							x					
Canada								x				
Chile									x			
Mexico										x		
Peru											x	
U.S.												x

- FTAs
- BITs and other investment-related instruments

The lack of a provision in TPP addressing this situation, suggests that previously signed IIAs will then coexist with the TPP Investment Chapter. This will trigger the potential for forum shopping for certain investors. As explained above, TPP prohibits investors from bringing the same matter in parallel proceedings before courts or any other dispute settlement setting. Therefore, if a U.S. investor in Chile wants to bring an investment claim, the investor would have the choice to bring a claim under TPP or the U.S.-Chile FTA, but would not be able to initiate parallel proceedings under both treaties.

Once TPP enters into force, the so-called coexistence between IIAs would establish at least two alternative avenues for certain investors (e.g., *TPP v. U.S.-Peru FTA*). While the ISDS provisions in TPP do not show a substantial departure from other IIAs, there are a few substantive and procedural aspects that may vary. Investors should cautiously compare those aspects to determine which investment treaty better protects their interests and

better supports their claim. The TPP Investment Chapter might be seen as the last generation of IIAs, but this does not necessarily mean that TPP will always be the right choice for an investor.

The following checklist provides for steps that investors should follow as part of the deliberation process before filing an investment claim against a TPP Member State:

3.1 Relation to Preexisting IIAs

The first step for an investor is to verify whether there is any other IIA available. As the table above shows, most of these other IIAs currently exist within members at each hemisphere but only a few can be seen across the Pacific. For example, the U.S. has IIAs with each of the Western TPP members, but only with Singapore and Australia of the Eastern TPP members. Another good example is Canada, which only has IIAs with the U.S., Chile, Mexico and Peru.

Notes

<sup>31</sup> NAFTA prevails over any inconsistent provisions of other previously concluded agreements, unless otherwise specified. See NAFTA, Art. 103.



### 3.2 Side Letters

TPP might not address how its ISDS provisions would relate with preexisting IIAs, but this does not prevent TPP members from separately agreeing otherwise. TPP members can reach specific agreements on how to resolve inconsistencies between agreements or to agree the suspension of previous agreements.<sup>32</sup>

In fact, some TPP members have already exchanged letters to address the issue. To mention a few examples, Australia concluded a side letter with New Zealand in which both parties agreed not to allow ISDS proceedings against each other under TPP.<sup>33</sup> This arrangement between the two countries is consistent with their preexisting Investment Protocol, which does not provide for ISDS mechanism.<sup>34</sup> Australia also concluded side letters with Mexico, Peru and Vietnam to terminate their existing BITs upon the entry into force of TPP.<sup>35</sup> Other countries such as New Zealand and Vietnam exchanged letters relating to the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) and TPP, providing that investors are entitled to claim *the most favorable of the treatment* accorded to them.<sup>36</sup>

### 3.3 Substantial Analysis to Identify the Best Protection

Unless TPP members had separately agreed on reconciling inconsistent provisions or suspending preexisting agreements, it will be for the investor to decide which ISDS provisions will govern the dispute. Under this scenario, investors should choose the mechanism that better protect their interests, both from substantive and procedural standpoints. To this regard, investors should take into account the following:

(a) *Substantive Protections:*

- (i) *Fair and Equitable Treatment:* While at first glance TPP appears to show minor changes when compared to other FET clauses, a closer look

reveals that the TPP provision narrows the scope of its application. The text of the TPP narrows the language of *legitimate expectations* by establishing that it does not alone constitute a violation of the FET standard, even if there is loss or damage as a result of a subsidy or grant that is not issued, renewed or maintained, or that is modified or reduced.<sup>37</sup>

Considering the narrower definitions provided in the TPP's FET clause, certain investors could take advantage of broader protections provided under other IIAs, particularly those based on treaty models prior to the 2012 U.S. Model BIT.<sup>38</sup> For example, Canada-Chile FTA<sup>39</sup> provides less rigorous scope of treatment than TPP as it lacks of additional specification to arbitrary or discriminatory measures, and does not provide explicit reference to concepts such as *legitimate expectations*. Under this scenario, an arbitral tribunal under Canada-Chile FTA would be more likely to find that an investor's legitimate expectation alone amounted to a violation of the FET, than under TPP. Therefore, one should analyze the factual circumstances of each case to decide whether a potential claim is more likely to succeed under an existing IIA, as in this case the Canada-Chile FTA over TPP.

It is worth noting that the FET standard is the most frequently invoked provision in ISDS. This has ultimately led to narrow interpretations by arbitral tribunals of concepts such as *legitimate expectations*, *arbitrariness* or *denial of justice*.<sup>40</sup> Then, one could argue—leaving aside the debate on the existence of an arbitral jurisprudence—that TPP expressed definitions of these concepts should not materially alter the current FET interpretation.

- (ii) *Expropriation:* TPP has clearly reinforced protections to governments in their capacity to adopt regulatory measures. TPP acknowledges that a TPP member's decision to modify or

#### Notes

<sup>32</sup> See TPP, Art. 1.2.

<sup>33</sup> See New Zealand-Australia Side Letter: Relationship between TPP and Other Agreements. Available at: <http://tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand%20-%20Australia%20Side%20Letter%20Relationship%20between%20TPP%20and%20Other%20Agreements.pdf>.

<sup>34</sup> See Protocol on Investment to the New Zealand-Australia Closer Economic Relations Trade Agreement. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2614>.

<sup>35</sup> See Australia-Mexico: Termination of Investment Promotion and Protection Agreement; Australia-Peru: Termination of Investment Promotion and Protection Agreement; and Australia-Vietnam: Termination of Investment Promotion and Protection Agreement. Available at: <http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>.

<sup>36</sup> See New Zealand-Vietnam Side Letter: Relationship between TPP and AANZFTA. Available at: <https://www.tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand%20-%20Viet%20Nam%20Side%20Letter%20Relationship%20between%20TPP%20and%20AANZFTA.pdf>.

<sup>37</sup> TPP, Art. 9.6.4.

<sup>38</sup> 2012 U.S. Model Bilateral Investment Treaty, Art. 5.

<sup>39</sup> Canada-Chile Free Trade Agreement, Article G-05.

<sup>40</sup> See UNCTAD, *Recent Developments of in Investor-State Dispute Settlement (ISDS) No.1* (2014). Available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf); see also Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award of 11 December 2013.

reduce, or not to issue, renew or maintain a subsidy or grant, does not amount alone to an expropriation in the absence of any specific commitment or in accordance with any terms or conditions attached to the subsidy or grant.<sup>41</sup> Moreover, TPP elevates the standard for indirect expropriation by establishing that, except in “rare circumstances,” non-discriminatory regulatory actions undertaken to “protect legitimate public welfare objectives, such as public health, safety and the environment” do not amount to indirect expropriation.<sup>42</sup>

Similarly to the FET discussion, the TPP language appears less protective for investors when compared to other IIAs. For example, the expropriation provision in NAFTA<sup>43</sup> does not explicitly address the reduction on subsidies and grants. Comparing both texts, TPP appears to impose a higher standard on investors thus narrowing down the scope of discretion to arbitral tribunals. Then, an expropriation claim based on the revocation of a subsidy (similar to cases brought against Spain) could result in different outcomes under TPP or NAFTA.

(b) *Procedural Protections:*

- (i) *Submission to ISDS Mechanisms:* The possibility to submit claims to ISDS would particularly benefit investors protected under preexisting IIAs that did not provide ISDS, such as Japan-Australia Economic Partnership Agreement (“EPA”), and U.S.-Australia FTA.<sup>44</sup> Once TPP comes into effect, Japanese and U.S. investors would have the option to bring investment claims against Australia outside its domestic courts, while otherwise would not be able to do so under the previous IIAs.
- (ii) *Time Limitations:* Another important provision investors should review closely is Article 9.20 of the TPP. This clause prohibits submission of a claim if more than three years and six

months have elapsed from the date on which the investors acquired, or should have acquired, knowledge of the alleged breach. TPP provides a six months extension to investors in comparison to the 2012 U.S. Model BIT,<sup>45</sup> and important preexisting IIAs such as NAFTA.<sup>46</sup> This provision would be key for investors whose claims may have expired under other IIAs.

- (iii) *Denial of Benefits and Exceptions on Tobacco Control Measures:* Perhaps one of the most contested provisions of TPP is Article 29.5. This article provides TPP Members the option to deny certain benefits to tobacco companies.<sup>47</sup> The lack of a provision in TPP addressing the overlapping between IIAs potentially makes the exception on tobacco one of the most determining factors for investor treaty-shopping. It would be expected that an investor protected under NAFTA—and virtually all of the preexisting IIAs—will be able to challenge a tobacco control measure against a TPP member through international arbitration, while otherwise would not be able under the TPP tobacco exception.
- (iv) *Transparency:* Certainly, TPP provides greater level of transparency in ISDS proceedings when compared to some IIAs. Similarly to the 2012 U.S. Model BIT,<sup>48</sup> TPP requires disputing parties to make available to the public all pleadings, briefs, transcripts and decisions and awards in connection with the arbitral proceedings.<sup>49</sup> Some preexisting IIAs between TPP members, however, provide very limited transparency obligations. For example, the Investment Agreement by the Member States of the Association of Southeast Asian Nations (“ASEAN”) only requires disputing parties to make available to the public

## Notes

<sup>41</sup> See TPP, Art. 9.7.6.

<sup>42</sup> See *Ibid.*, Annex 9-B: Expropriation.

<sup>43</sup> NAFTA, Art. 1110.

<sup>44</sup> U.S.-Australia FTA, Art. 11.6.

<sup>45</sup> 2012 U.S. Model Bilateral Investment Treaty, Art. 26.1.

<sup>46</sup> NAFTA, Art. 1116.2.

<sup>47</sup> See TPP, Art. 29.5.

<sup>48</sup> 2012 U.S. Model Bilateral Investment Treaty, Art. 29.

<sup>49</sup> See TPP, Art. 9.23.

awards and decisions produced by the tribunal.<sup>50</sup> Other IIAs like Canada-Chile FTA do not even contain a transparency clause. As the transparency provisions in IIAs control, covered investors would then be able to choose between having more private and confidential proceedings like in commercial arbitration or having open proceedings under TPP.

It is worth noting, however, that the trend toward ISDS transparency is continuously growing.<sup>51</sup> In the absence of transparency provisions in the applicable IIA, disputing parties may agree to be bound by the procedural rules of the arbitration facility. As a result, arbitral institutions have updated their procedural rules towards more transparent and open processes.<sup>52</sup> Also, with the spreading use of technology and social networks, it is becoming increasingly harder to keep information about arbitral proceedings out of the public access, even in the absence of any transparency requirement.<sup>53</sup>

## 4 CONCLUSION

After long discussions and the current public concern regarding States' right to regulate and the alleged lack of transparency in ISDS, the inclusion of an ISDS mechanism covering the TPP investment chapter is laudable. However, the absence of a provision addressing the "coexistence" between TPP and preexisting IIAs will inevitably result in investor-state treaty shopping. While this might undermine the efforts made by TPP members in the preparation of the Investment Chapter, it is good news for certain investors who will benefit—at least in the short term—of alternative avenues to bring arbitration claims.

While the new ISDS provisions are not revolutionary, they reflect the effort by TPP members to regulate and include public concerns in the Investment Chapter. It is still to be seen whether these efforts, however, might end up limiting investors' rights, as in the case of narrowing substantive provisions' interpretations or including the denial of benefit clause in detriment of specific sectors.

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### Notes

<sup>50</sup> ASEAN Comprehensive Investment Agreement, Art. 39.

<sup>51</sup> In December 2014, the United Nations General Assembly adopted the Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention"). Sixteen States have signed the Convention, and it is pending ratification.

<sup>52</sup> In July 2014, UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration came into effect, providing for accessibility to the public of ISDS.

<sup>53</sup> See I. Laird, *International Arbitration Is Changing Shape*, (2015). Available at: <http://www.law360.com/articles/619943/international-arbitration-is-changing-shape>.