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TPP Issue Analysis: Investment Chapter

Countries began negotiating bilateral investment treaties (BITs) with Investor-State Dispute Settlement in the 1950s and the United States began to do so in the 1980s. The ISDS mechanism was established to provide private investors recourse against alleged expropriation, discrimination, and certain other unlawful actions by a governmental authority in the host country. The mechanism typically was included in agreements between developed countries looking to protect their citizens' investments overseas and developing countries perceived to have weak legal systems.

One commentator described the initial inclusion of ISDS in BITs as follows:

> For the first time, investors had an effective remedy for unlawful actions by host states that injured their investments that did not depend upon military action or espousal of their claim by their home state....In providing the investor with a legal remedy that did not

depend upon espousal, these BIT provisions depoliticized investment disputes. That is, they placed investment protection in the realm of law rather than politics.[1]

Today there are over 2,000 BITs in effect worldwide, with the United States party to 47 of them. Investment protections and the ISDS mechanism have also been included in bilateral and regional trade agreements over the past two decades.

ISDS has become increasingly controversial in recent years. In recent years, cases have gone beyond areas of the original use of ISDS, challenging environmental, health, and other governmental regulations. And as there has been increasing use of ISDS arbitration to bring actions against governments in nations with strong and independent judicial systems and rule of law. The expressions of concern have come from a wide range of stakeholders, including The Economist magazine, the AFL-CIO, and the CATO Institute. There have also been discussions about major changes within the European Union, including in relation to TTIP negotiations.

The views of ISDS fall into three general categories: those who feel that no changes are necessary in these provisions, pointing to the fact that the United States has never lost a dispute to date in over 30 years; those who support an ISDS mechanism with significant reforms to respond to concerns; and those who feel that there should not be an ISDS mechanism at all, questioning why investors should have any form of a private right of action, when other stakeholders -- such as exporters or labor or environmental stakeholders -- do not.

In recent years the second course has been followed and there have been changes made to ISDS provisions. After NAFTA, significant changes were included in the 2004 U.S. model BIT. There were also changes included in the "May 10th Agreement" of 2007 negotiated by House Democrats which became incorporated in subsequent FTAs with Peru, Colombia, Panama, and South Korea. Additional concerns and proposals for further reforms continued. In 2009, the U.S. Advisory Committee on International Economic Policy (ACIEP) made a number of proposals.[2] In 2013, the United Nations Conference on Trade and Development (UNCTAD) reviewed ISDS and noted a number of concerns and suggested proposals for reform.[3] The Right Track for TPP, a proposal supported by almost all Ways and Means Democrats as an alternative to TPA, included several major reforms to the investment obligations and ISDS.

The TPP text now before the Congress incorporated some of the changes discussed over the last decade but not others. For instance, the text includes new language clarifying the minimum standard of treatment provision; it appears that the capital controls annex in the TPP will provide countries with sufficient policy space to respond to financial crises without violating the terms of the TPP; it also ensures that an investor cannot use ISDS to sue a country regarding its tobacco control measures if that country does not consent to ISDS for those measures. In other areas,

[1] Vandevelde, Kenneth J., "A Brief History of International Investment Agreements," 12 U.C.-Davis Journal of International Law and Policy 157, 175 (2005).

[2] The members serving on ACIEP had a wide range of views. Thus, the report, and the individual views contained in its annex, provided a broad array of reforms to ISDS. A limited number of these proposals were reflected in the 2012 Model BIT.

[3] Of note, U.S. investment chapters already contained some of the changes suggested by UNCTAD. However, other suggested changes, such as establishing an appellate mechanism and creating a standing international investment court, are not reflected in past U.S. investment chapters or the TPP investment chapter.

such as regarding the creation of a diplomatic screening mechanism (allowing the country being sued and the home country of the investor to agree to dismiss an ISDS case) and the May 10th preambular language (clarifying that the investment obligations are not intended to provide foreign investors with greater substantive rights than US investors under US law), the TPP contains modest, if any, changes.

The following discusses the development of ISDS over the years in greater detail and evaluates the changes made in the TPP compared to the concerns expressed and the changes sought to ensure that all governments have the policy space to enact legitimate government measures to protect the public interest.

BACKGROUND

a. The Origin and Content of Modern Investment Agreements

The United States concluded its first BIT in 1982, largely modeled on European BITs that had been in place since the late 1950s. Since then, the United States has established BITs with 47 countries, and has included investment chapters (very similar to the provisions in BITs) in its FTAs. Among other things, FTA investment chapters and BITs provide the following:

- Non-Discriminatory Treatment. A host country is required to treat the investors of another party "no less favorably" than the host country's own investors or investors from third-countries;

- Expropriation. A party is required to compensate the investor of another party when a government expropriates an investment;

- Minimum Standard of Treatment. A party is required to provide a minimum standard of treatment, consistent with customary international law, including "fair and equitable treatment" and "full protection and security" for investors; and

- Investor-State Dispute Settlement. An investor has the right to submit an alleged breach of the investment provisions of the agreement to international arbitration.

b. Early Concerns Regarding NAFTA Investor-State Cases

There was widespread concern regarding the reasoning and rulings in some of the early NAFTA investor-state decisions at the end of the 1990s and the early 2000s. For example, in *Metalclad vs. Mexico*, a U.S. company purchased a hazardous waste landfill in Mexico and was issued permits to operate the landfill from the federal and state authorities. The municipal government, however, denied Metalclad a construction permit based on local concerns regarding the environmental impact of the project. The NAFTA tribunal found that the municipality breached the 'minimum standard of treatment' requirement in NAFTA by denying a construction permit for environmental reasons (rather than for things like physical construction defects), and faulted Mexico for not ensuring a "transparent" investment environment.

While many understood that the minimum standard of treatment obligation in NAFTA was based on customary international law (i.e., a legal obligation derived from a general and consistent practice of states followed by them from a sense of legal obligation), the tribunal did not examine customary international law in reaching its determination. The tribunal also found that these and other government actions constituted an indirect expropriation of the investor's investment. The tribunal noted that expropriation includes "incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state."[4]

Based on the *Metalclad* decision and other NAFTA disputes, the Senate Finance Committee summarized the situation in 2002:

> The growing number of investor-state disputes has caused concern among certain interest groups. In particular, some environmental groups see investor-state dispute settlement provisions as having a potentially chilling effect on the adoption of environmental laws and regulations.…It is argued that arbitral tribunals may interpret the concept of what constitutes a compensable 'expropriation' for purposes of an investment agreement more broadly than courts of the United States[.]...Some environmental groups point to the obligation to accord fair and equitable treatment [i.e., 'minimum standard of treatment'] to foreign investments as having a similar impact.[5]

c. <u>U.S. Negotiators Respond</u>

Stakeholders and many Members of Congress called for changes to U.S. investment texts to address these issues. As a result, in 2004, USTR and the State Department developed a new model BIT that contained several changes to past BITs and to the investment chapters of U.S. trade agreements. The following are examples of these modifications:

- <u>Indirect Expropriation</u>. Post-2004 FTA and BIT texts include an expropriation annex that:
    - restates the three key factors in the seminal U.S. Supreme Court's *Penn Central* decision pertaining to "regulatory takings" under U.S. Constitutional law (thereby helping to ensure that foreign investors will not be accorded "greater substantive rights" than U.S. investors in the United States);
    - clarifies that "the fact that an action ... has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred" (responding to criticisms of the *Metalclad* decision, described above); and

[4] *Metalclad Corporation v. the United Mexican States*, Award, para. 103, Case No. ARB(AF)/97/1 (August 30, 2000).
[5] S. Rep. 107-139 (107th Cong. 2d Sess.) 12-13.

- includes a statement that, "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

- Minimum Standard of Treatment. Parties are only obligated to provide treatment "in accordance with customary international law, including fair and equitable treatment and full protection and security." These concepts "do not require treatment in addition to or beyond that which is required by that [customary international law] standard, and do not create additional substantive rights."

- Eliminating Frivolous Claims. An arbitrator is now required to "decide as a preliminary question any objection by the respondent [government] that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made." A respondent government may be entitled to recoup reasonable costs and attorney's fees if the claim was frivolous.

- Transparency and Public Participation in Arbitral Proceedings. The new text provides that the tribunal has the authority to accept *amicus curiae* ("friend of the court") submissions from any person or entity that is not a disputing party. The text also requires that key documents (including pleadings and the award) be made available to the public.

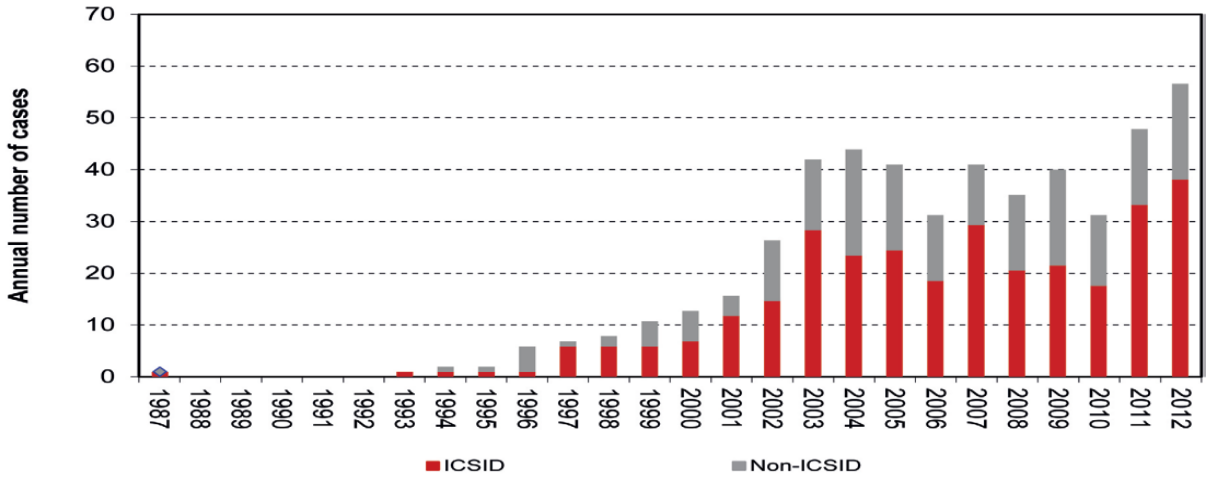
In addition, in 2007, House Democrats included in the May 10th Agreement a provision to further clarify the limits of the investment obligations. The following provision was added to the preamble of FTAs with Colombia, Panama, Peru, and South Korea:

> [F]oreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement.

The United States unveiled a new model BIT in 2012. The new model did not include the May 10th preambular language and did not amend the key obligations described above (e.g., minimum standard of treatment; expropriation), but it did include new obligations relating to other issues, such as state-owned enterprises (SOEs). The new model also amended the labor and environmental obligations in BITs. However, those changes are not relevant to TPP because the U.S. proposals for the labor and environmental chapters of TPP (a more comprehensive trade agreement, not a BIT) already encompass those obligations (e.g., a party may not waive its labor and environmental laws) and go beyond what is contemplated in the model BIT.

d. Continuing Concerns and the Recent Proliferation of ISDS Disputes

Since these changes were made, there has been a proliferation of ISDS disputes. In a June 2013 paper, the United Nations Conference on Trade and Development (UNCTAD) noted this increase in ISDS cases in recent years as the following chart demonstrates[6]:



It is important to note that this chart reflects the total number of ISDS cases, not just those involving the United States. U.S. BITs and investment chapters of trade agreements typically include more protections for legitimate government actions, and more protections against meritless ISDS claims, than other BITs and trade agreements.

UNCTAD noted concerns with the current ISDS system relating to, among other things, "a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures."[7]

As noted above, some of these cases have been particularly controversial. For example, Philip Morris has sued Australia under a Hong Kong-Australia BIT, arguing that cigarette warning labels interfere with its trademarks and constitute an indirect expropriation of its investment. A U.S. pharmaceutical company has also sued Canada, arguing that Canada's stringent patentability criteria on medicines violate the investment protections in NAFTA. Those cases have not yet been decided. Finally, earlier this year a NAFTA panel granted an award that appears to be inconsistent with the U.S. interpretation of the NAFTA investment obligations.[8]

In defense of ISDS, many have pointed out that only 17 ISDS disputes have been fully adjudicated against the United States (others were either settled or dismissed). Further, the United States prevailed in each of those cases. On the other hand, others express concerns that there is little reason to believe that the United States will not eventually lose an ISDS dispute, as

[6] The chart references "ICSID", which stands for the International Centre for Settlement of Investment Disputes. ICSID is one of the most commonly-used institutions that facilitates legal dispute resolution regarding international investment issues.
[7] "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", United Nations Conference on Trade and Development, p. 1 (June 2013).
[8] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (*Bilcon v. Canada*), Award on Jurisdiction and Liability, March 17, 2015.

numerous other developed countries with strong legal systems have. In addition, many have raised particular concern regarding the inclusion of ISDS in TPP because many more foreign investors (the TPP covers 40% of global GDP) will now be able to sue the United States through ISDS. Finally, many have questioned why investors should have a private right of action when other stakeholders – such as exporters or labor and environmental stakeholders – do not. These stakeholders are required to persuade their governments to bring a dispute; investors are not.

ANALYSIS OF TPP INVESTMENT CHAPTER

There have been a number of proposals designed to improve ISDS, including a new proposal by the European Union. The Right Track for TPP Act of 2015 contained the following suggested changes for TPP: (1) establish a new mechanism to enable TPP parties, the country being sued and the home country of the investor, to agree to dismiss an ISDS case; (2) clarify the vague 'minimum standard of treatment' obligation; (3) allow parties to adopt capital controls to prevent or mitigate financial crises; and (4) clarify that the Agreement is not intended to provide foreign investors with greater substantive rights than U.S. investors under U.S. law, consistent with the May 10th Agreement in 2007.

The following analyzes the changes requested in the Right Track for TPP Act, as well as other changes made in TPP.

I. Minimum Standard of Treatment

The "minimum standard of treatment" (MST) provision in U.S. FTAs has been included to ensure that foreign investors are provided protection from government actions that result in manifest denial of justice. The aim is to provide investors with certainty regarding a baseline of treatment that they can expect to receive in a foreign country.

However, a number of ISDS panels have interpreted the minimum standard of treatment provision in an expansive manner that has resulted in investors receiving compensation for government actions that were never intended to be covered under this provision. In order to address these concerns, the Right Track for TPP Act proposed clarifying the language of the MST provision to provide more explicit guidance to arbitrators on the following issues:

- **Customary International Law Standard**: Previous U.S. FTAs have required ISDS panels to interpret the minimum standard of treatment provision in accordance with "customary international law" – a high standard that requires an investor to prove two things: (1) that the alleged activity is in violation of a general and consistent practice of countries and (2) that this practice is done out of a sense of legal obligation. Unfortunately, ISDS panels have not consistently or rigorously applied this standard, and instead have cited the decisions of previous ISDS panels to inform their interpretation of the minimum standard of treatment provision. These interpretations have led to expansive interpretations of the provision.

  With this concern in mind, the Right Track for TPP Act provided that the TPP text should explicitly state that customary international law requires an investor to prove a general

and consistent practice of states, and that evidence for such practice cannot be based on a past panel's interpretation of the minimum standard of treatment, and that is followed based on a sense of legal obligation.

  - The TPP text does not provide further clarification on this issue.

- **Burden of Proof**: The customary international law standard described above requires the investor to prove that a country has violated the minimum standard of treatment provision. However, ISDS panels have not consistently required investors to do this. In response, the Right Track for TPP Act called for the TPP text to explicitly state that the investor bears the burden of establishing that a state has violated a principle of customary international law regarding the minimum standard of treatment of aliens.

  - This issue was addressed in the TPP. The text states: "For greater certainty, if an investor of a Party submits a claim under Section B of Chapter II (Investment), including a claim alleging that a Party breached Article II.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration."[9]

- **Arbitrary Conduct**: As noted above, the customary international standard sets a high bar for establishing a violation of the minimum standard of treatment. The classic formulation of a violation of the minimum standard of treatment cites government actions that are "shocking", "egregious", or "outrageous". Yet, ISDS panels have expanded this standard to include actions by governments that are merely "arbitrary" actions. This change has greatly expanded the scope of the provision. Indeed, some ISDS panels have considered a country misapplying its law as considered "arbitrary" conduct.

  The Right Track for the TPP Act states that the TPP text should explicitly state that, unless an investor is able to prove otherwise based on the customary international law standard, "arbitrary" conduct by a state or state actions does not violate the minimum standard of treatment.

  - The TPP text does not provide further clarification on this issue.

- **Investor's Expectations**: Similar to the provision above, ISDS panels have also found violations of the minimum standard of treatment provision where a government's actions have upset an investor's expectations. These interpretations have also expanded the scope of the provision. Thus, the Right Track for TPP Act asserted that the TPP text should explicitly state that, unless an investor is able to prove otherwise based on the customary international law standard, upsetting an investor's expectations in and of itself does not violate the minimum standard of treatment.

[9] TPP Investment Chapter, Article 9.22(7).

- This issue was addressed in the TPP. The text states: "For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[10]

  However, some have argued that this change is a step backward, arguing that an investor's expectations should not be considered an element of an MST claim. Thus, some critics are concerned that this language "implicitly recognizes that 'expectations' may in fact be relevant to establishing a violation…"[11]

Some of these changes appear to be important substantive reforms. However, many are concerned that these changes do not go far enough to reform the manner in which panels actually interpret the MST provision itself. Some panels have not interpreted the MST provision in accordance with the process outlined under customary international law, and it is unclear whether the TPP provides enough reason to believe that panels will change their method of analysis.

Also of note, the TPP will be the first U.S. trade agreement that does not exclude financial services from the scope of the minimum standard of treatment provision.[12] Numerous stakeholders and some Members of Congress have raised concerns about opening up the possibility of more challenges to U.S. financial services laws and regulations. Others have argued that if the underlying minimum standard of treatment provision is written to ensure that governments have sufficient space to regulate in the public interest, there is no need to exclude financial services – or any other sector – from its scope.

II. Diplomatic Screening Mechanism

The main concern for many opponents of ISDS is that it is being used for disputes that it was never intended to resolve. Not only has the *number* of cases soared in recent years, but the *types* of cases have greatly expanded as well.

In response to these concerns, some have proposed creating a diplomatic screening mechanism under which the country being sued and the investor's home country can agree that the dispute should not go forward under ISDS. This would ensure that cases similar to the one filed by Philip Morris against Australia could be removed from ISDS altogether.

The TPP does not contain a broad diplomatic screening mechanism. Instead, in order to address the concerns raised above, the TPP contains (i) a unilateral screening mechanism for tobacco control measures and (ii) provisions intended to strengthen the legitimacy of ISDS panels.

a. ISDS Carve-Out for Tobacco Control Measures

[10] TPP Investment Chapter, Article 9.6(4).
[11] "The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system," Lise Johnson, Lisa Sachs, Columbia Center on Sustainable Development , p. 4 (November 2015).
[12] *See* TPP Financial Services Chapter, Article 11.2(2)(b).

As noted above, a number of recent international disputes have challenged tobacco measures aimed at protecting public health, including disputes challenging Australia's plain packaging scheme for cigarettes and Uruguay's tobacco control measures. A number of public health groups are concerned about the potential of FTAs to roll back legitimate tobacco control measures. Whether or not a trade agreement like TPP will compromise or preserve a country's ability to regulate tobacco as a public health matter is a serious concern. Thus, many have asserted that TPP needs to provide that tobacco control measures should not be subject to challenges as being inconsistent with the obligations in TPP.

The TPP text includes a clear carve-out for tobacco control measures from ISDS disputes.[13] The specific provision allows any TPP Party to "deny the benefits" of the agreement (i.e., the ability to pursue a claim under ISDS) to an investor that attempts to use ISDS to challenge a tobacco control measure. The provision has a number of important features:

- The provision allows the parties to deny this benefit at any point after the agreement goes into effect or at the start of a dispute.
- The provision explicitly notes that state-to-state dispute settlement is still permitted under the agreement.
- The provision defines "tobacco control measure" in a broad manner to include a wide array of government measures that could be used to reduce the harm caused by tobacco products.
- The provision only applies to "manufactured" tobacco products, not agricultural goods like tobacco leaf.

Thus, the TPP will allow each country to prevent ISDS disputes regarding tobacco control measures from occurring.

In the view of some stakeholders, the tobacco-specific provision, however, highlights the need for a broad diplomatic screening mechanism. Tobacco is not the only area in which there are troubling ISDS disputes. A pharmaceutical company, for example, has sued Canada under NAFTA, arguing that the decisions of federal courts in Canada regarding secondary patents resulted in a violation of the minimum standard of treatment provision. There are also reports circulating about a potential dispute regarding the Obama Administration's rejection of the Keystone XL pipeline and concerns about a potential dispute concerning whether local governments allow companies to engage in "fracking" to obtain gas. Thus, while the tobacco carve-out is an important change, for some critics it also highlights the need for a more expansive reconsideration of the ISDS mechanism.

b. Legitimacy of ISDS Panels

The TPP text includes two positive, if modest, changes with respect to addressing the legitimacy of ISDS panels. First, the TPP requires parties to take into account the expertise and experience of a candidate to be an ISDS panelist.[14] Second, the TPP requires the parties to "provide guidance" on a Code of Conduct for ISDS panelists, including on ensuring compliance with

[13] TPP Exceptions and General Provisions Chapter, Article 29.5.
[14] TPP Investment Chapter, Article 9.21(5).

norms regarding the independence of judges.[15] Of note, it is unclear what the phrase "provide guidance" will actually require TPP parties to do in practice or what any future guidance will eventually be.

Interestingly, the European Union has published a proposal with a number of procedural changes to the way ISDS has typically functioned. For instance, the EU proposal would create a standing group of fifteen judges – selected by the United States and EU Commission – that would hear all ISDS disputes brought under the agreement. These judges would hear each ISDS dispute (three judges per dispute) on a rotating basis.

By contrast, under the TPP, one judge will be chosen by the investor, another by the country being sued, and the third judge will either be agreed to by the parties (the investor and the country being sued) or appointed by an independent party if agreement cannot be reached.[16] The system in TPP, which has been standard practice in most investment disputes, has led to concerns over the independence of ISDS panelists and unpredictable awards in ISDS disputes.

The EU approach, on the other hand, attempts to address the concerns raised above. Namely, the EU proposal ensures that the governments choose who will hear disputes, not investors. The proposal gives governments much more control over the system compared to the status quo where the investor chooses one of the three panelists. In fact, the EU proposal is in some ways similar to the diplomatic screening mechanism described above, as it provides governments with more influence regarding how the investment obligations are administered on an ongoing basis. Further, the awards rendered by a standing group of judges should be more consistent and questions of independence of judges should diminish as the judges are required to disclose information about their personal and professional relationships before a dispute is ever filed.

III. Capital Controls Annex

The TPP, similar to past U.S. FTAs, provides that each Party shall permit investors to freely move money in and out of each country.[17] The free flow of money is generally considered an important aspect of a free market economy, but a number of stakeholders, including the International Monetary Fund (IMF), have asserted that there needs to be common sense exceptions to rules on the free flow of money during times of economic crisis.

Along these lines, there has been a longstanding debate regarding whether an exception should be made to the obligation to allow money to flow freely in order to allow countries to prevent and mitigate financial crises. Previous U.S. FTAs have generally not included such an exception, but the WTO General Agreement on Trade in Services (GATS), the IMF Articles of Agreement, and the OECD's Capital Movements Code each address these issues. Recently, more than 250 economists, including Birdsall, Rodrik, and Stiglitz, wrote to the Administration urging "that future U.S. FTAs and BITs permit governments to deploy capital controls without being subject to investor claims, as part of a broader menu of policy options to prevent and mitigate financial crises."

[15] TPP Investment Chapter, Article 9.21(6).
[16] *See* TPP Investment Chapter, Article 9.21.
[17] TPP Investment Chapter, Article 9.8.

Members of Congress sent a letter to the Administration requesting that an annex allowing for capital controls be improved in four specific ways:

- Explicitly allow regulation of both capital inflows and outflows;
- Close the loophole for equities investments;
- Allow sufficient time for crisis prevention and mitigation; and
- Do not require capital controls to be price-based in call cases.

The final TPP text appears to successfully resolve each of these issues.[18] Thus, the TPP could be a strong step forward with regard to ensuring that U.S. trade agreements do not hamper a country's ability to respond to a financial crisis.

IV. May 10th Preamble

As noted above, the May 10th Agreement includes language affirming that foreign investors do not have greater rights than domestic investors under a trade agreement. Specifically, the preambles of U.S. FTAs with Colombia, Peru, Panama, and Korea each state:

> Agreeing that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement.[19]

This language provides guidance to an ISDS panel to ensure that the panel does not interpret the investment obligations in a manner that would give foreign investors greater rights than U.S. investors have under U.S. law. For instance, if an expropriation case is being pursued under ISDS and a similar set of facts has already been found not to be an expropriation under U.S. domestic jurisprudence, the preambular language may help to ensure that the ISDS panel would not find an expropriation in that ISDS dispute.

The TPP does not contain the May 10th preambular language.

V. Other Changes

The TPP investment chapter includes the following additional modifications to past U.S. FTAs.

- *"Reasonable Expectations" in Expropriation Claims*

When considering an investor's claim that a government has expropriated the investor's property, previous U.S. investment chapters have required ISDS panels to consider a number of factors, one of which is an investor's "reasonable expectations". The TPP investment chapter will clarify the meaning of "reasonable expectations" by adding a footnote asserting that panels should consider "whether the government provided the investor with binding written assurances

[18] *See* TPP Exceptions and General Provisions Chapter, Article 29.3.
[19] *See e.g.*, Free Trade Agreement between the United States of America and the Republic of Korea, Preamble.

and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."[20] This appears to be a modest change compared to previous U.S. FTAs.

- *"Like Circumstances" in Discrimination Claims*

The national treatment provision in U.S. investment chapters requires a panel to consider whether a country has treated a foreign investor less favorably than a domestic investor that is in "like circumstances". The TPP investment chapter contains a new footnote clarifying that analysis of like circumstances depends on the "totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[21] This provision is aimed at ensuring that ISDS panels do not find a violation of the national treatment provision because of differential treatment due to a legitimate public interest regulation or law. This appears to be a modest change.

- *Appellate Mechanism*

Many stakeholders have pushed to include an appellate mechanism for ISDS disputes. In fact, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA) explicitly directs the President to consider including "an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements."[22] Along these lines, recently-signed U.S. FTAs have included a separate annex requiring the Parties to consider establishing an appellate mechanism in the future.[23] The TPP does not contain a similar provision.

- *Public Interest Regulations*

The TPP investment chapter contains the following new provision related to the application of the investment chapter to a government's public interest measures:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[24] (emphasis added)

While this language has a broad scope (i.e., it includes self-judging language and applies to measures that are "sensitive" to broad regulatory objectives), the italicized text ("otherwise consistent with this Chapter") makes clear that this is not an exception to the obligations in the chapter. Thus, in essence, the provision only states that a Party can regulate however it chooses, as long it does not violate the obligations in the investment chapter. Thus, it will likely only provide a slight interpretive gloss in favor of protecting public interest measures.

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[20] TPP Investment Chapter, Annex 9-B, footnote 36.
[21] TPP Investment Chapter, Article 9.4, footnote 14.
[22] Bipartisan Congressional Trade Priorities and Accountability Act of 2015, section 2(b)(4)(G)(iv).
[23] *See e.g.*, Free Trade Agreement between the United States of America and the Republic of Korea, Investment Chapter, Annex 11-D.
[24] TPP Investment Chapter, Article 9.15.

- *Claims without Legal Merit*

U.S. courts are allowed to dismiss a case at a preliminary stage if the plaintiff has failed to state a claim for which the court can provide a remedy. Similarly, previous U.S. FTAs have included a provision for expedited review of claims in which an ISDS panel could not give an award in favor of the investor. The intent is to limit the amount of time and money used to litigate a claim that clearly has no chance of success.

The TPP expands this expedited review provision to allow ISDS panels to dismiss a claim early in the proceedings if the claim is "manifestly without legal merit".[25] This should provide ISDS panels with a wide scope to dismiss claims with no chance of success at an early stage of the proceedings.

- *Scope of Available Damages*

If an investor successfully argues that an investment obligation has been violated, some stakeholders have raised concerns about the scope of damages that the investor can then attempt to recoup. ISDS is intended to only allow for damages related to the *investment* that the investor has made in that country. In certain ISDS cases, however, concerns have been raised about the ability of an investor to be compensated for diminished *trade* in addition to the harm caused to the investment.

In response, the TPP includes new language intended to limit the ability of an investor to be compensated to only those damages that are a result of the damage caused by treatment of the investor in the country being sued. The language provides:

> For greater certainty, when an investor of a Party submits a claim to arbitration…it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.[26]

- *Subsidies & Investment Obligations*

Certain stakeholders have expressed concern that a government's decision to revoke or modify a subsidy could qualify as a violation of an investment obligation. In response, the TPP clarifies that revocation or modification of a subsidy by itself does not constitute a violation of the minimum standard of treatment[27] or expropriation[28] obligations.

- *Statute of Limitations*

Similar to provisions in U.S. law, U.S. investment chapters have typically provided that an investor cannot bring a claim if more than three years have elapsed since the investor knew or

[25] TPP Investment Chapter, Article 9.22(4).
[26] TPP Investment Chapter, Article 9.28(2).
[27] TPP Investment Chapter, Article 9.6(5).
[28] TPP Investment Chapter, Article 9.7(6).

should have known about the violation of the investment obligation.[29] The aim is to provide home countries with certainty that they will not be sued for activity that occurred in the distant past. It also forces investors to bring disputes within a reasonable time frame.

The TPP will lengthen this time frame to three years and six months.[30] Thus, the investor will have more leeway regarding when it could bring a claim, although it is unlikely that this provision will lead to a significantly higher number of ISDS claims.

[29] *See e.g.*, Free Trade Agreement between the United States of America and the Republic of Korea, Investment Chapter, Article 11.18(1).
[30] TPP Investment Chapter, Article 9.20(1).