Resolving Investor-State Disputes under a Transpacific Partnership Agreement

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Abstract

This paper examines the draft Investment Chapter of the TPPA, leaked to the public, in light of recent concerns regarding the viability of investor state arbitration. The intent is to comment on the possible motivations of the negotiating parties in formulating the TPP provisions thus far and, more importantly, to recommend how the parties could proceed as they work to finalize dispute settlement provisions in the TPPA.
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What Lies Ahead?

by

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“Should Canada, Mexico and ultimately Japan be brought into the negotiations, the TPP would likely surpass that of any other regional trade agreement other than the European Union in total trade value.” David Gantz, Trans-Pacific Partnership Negotiations: Progress, but no End in Sight (June 22, 2012)\(^1\)

OVERVIEW

The story of the Trans-Pacific Partnership Agreement [TPPA] is one of seemingly humble beginnings blossoming into grand expectations. The Trans-Pacific Strategic Economic Partnership Agreement, known as the P4 Agreement, was initially concluded between Chile, New Zealand and Singapore in 2005 and then with Brunei in 2006.2

What was absent from the TPPA at its inception were large scale signatory countries; and an investment chapter. What was present, however, was an ambitious accession agenda. Article 20.6 provided that: “1. This Agreement is open to accession on terms to be agreed among the Parties, by any APEC Economy or other State. The terms of such accession shall take into account the circumstances of that APEC Economy or other State, in particular with respect to timetables for liberalization.”3 Article 20.1, in turn, stipulated that, “[u]nless otherwise agreed, no later than 2 years after entry into force of this Agreement the Parties shall commence negotiations with a view to including a chapter on investment in this Agreement on a mutually advantageous basis.”4

In 2008 accession to the TPP began with a flourish as the P4 countries initiated negotiations on investment. In February 2008, the United States joined the investment and financial services negotiations and announced an interest in broader participation in the TPP. In September 2008, it entered into discussions to join TPP negotiations. In November 2008, Australia, Peru, and Vietnam expressed an interest in joining TPP negotiations. In November 2009, the United States joined in all aspects of TPP negotiations. In October 2010, Malaysia joined TPP negotiations. In November 2011, Japan, Mexico, and Canada expressed an interest in joining TPP negotiations. In June 2012, Mexico and Canada were invited to joined TPP negotiations. In less than three years TPP negotiations extended from Brunei, Chile,

2 “[T]he genesis of the TPP is clearly the P-4 Agreement. In addition to the obvious fact that all the P-4 countries are involved in the TPP negotiations, the P-4 Agreement contains the key ingredients that are being sought in the TPP: geographic diversity, a high-standards agreement, and a model for expansion.” Meredith K Lewis, The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing? 34 B. C. INT’L & COMP. L. REV. 27, 34 (2011).


4 Id.
New Zealand and Singapore, to the United States, Australia, Peru, Vietnam, Malaysia, Canada and Mexico, with the possibility of Japan joining negotiations later.5

Demonstrating the apparent enthusiasm for a TPP was a series of roundtable TPP negotiations conducted across the Pacific with as many as six a year in: Melbourne (March 2010); San Francisco (June 2010); Brunei (October 2010); Auckland (December 2010); Santiago (February 2011); Singapore (March 2011); Ho Chi Minh City (June 2011); Chicago (September 2011); Lima (October 2011); Kuala Lumpur (December 2011); Melbourne (March 2012); Dallas (May 2012); San Diego (July 2012) and Leesburg, Virginia scheduled for September 2012.6

The potential growth of the TPP as a multilateral investment agreement is significant, both in the prospective size of its membership and its economic scope as a free trade and investment regime. TPPA enthusiasts are likely to envisage it as the starting point to a new multilateral investment process to replace the multilateral investment agreement that failed at the end of the 1990s and as a template for other regions to replicate.7 However, such optimism is arguably premature, beyond the issue of the desirability and viability of a new multilateral investment agreement [MIA]. What is relevant is that global foreign direct investment has grown geometrically since 1970, exceeding USD1.5 trillion by 2012.8 Against this background, however one measures the economic significance of the TPPA, it has the potential to have an enormous impact on global investment.

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Nevertheless, there are many controversial aspects in the unfolding TPP negotiations. The first aspect relates to the participation of ten out of eleven negotiating States in a TPP investment chapter, with Australia supposedly being absent with leave. The second aspect relates to the prospect of other APEC members joining later and especially China not participating in TPP negotiations generally and in investment negotiations in particular. Linked to this are the implications arising from China’s conceivable leadership of a potentially rival regional agreement referred to as ASEAN + 3 (China, Korea and Japan), or less probably, ASEAN + 6 (China, Korea, Japan, Australia, New Zealand and India). The prospect of an ASEAN + 3 Agreement has become more likely to eventuate, possibly following the recent regional agreement concluded between China, Korea and Japan which is awaiting domestic ratification. A related concern is that, while these regional agreements will liberalize investment among their member states, they will have the opposite impact on non-member states. In particular is the concern that China may follow the direction of the Supreme People’s Court which some commentators perceive, correctly or otherwise, as protectionist.

The third controversial aspect is the significance of the non-participation by one party, Australia, to TPP negotiations in an investment chapter. The prospect of Australia seeking an

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9 On China’s shifting position in regard to investment arbitration, see VIVIENNE BATH & LUKE NOTTAGE, FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA (2011).
exemption from ISA within a TPP chapter on investment is probable at this time, following from the Australian Government’s Policy statement in April 2011 that it would no longer enter into investment treaties that provided for investor-state arbitration [ISA]. Australia’s 2011 Policy statement changes a course which Australia took in the past, since the early 1980’s when it began concluding BITs, to include ISA in its treaties, with the notable exception of the Australia-US Free Trade Agreement. The Australian Government has since implemented its new Policy in an FTA with Malaysia in May 2012 that does not include investor-state arbitration. However, its new Policy represents a negotiating challenge in bilateral investment treaty negotiations with Korea and Japan, although it is unlikely to be a deal breaker.


The issue of countries like Australia securing exemptions under the investment chapter tests the capacity of prospective investment agreements, such as the proposed TPPA, to maintain both their authority and stability if they make country specific concessions too readily. As a result, the exemption of Australia from the investment chapter as a whole is significant for reasons well beyond Australia’s global economic significance. First, such an exemption would be pervasive in excluding one country from the process of enforcing the investment chapter as a whole. Second, it could be replicated by other countries and not necessarily be limited to the investment chapter. Third, general or specific exemptions from the TPPA could lead to a two-tier regional investment agreement, heralding an assortment of BITs as signatories to the TPPA seek to limit costs and maximize on benefits arising from exemptions secured by some negotiating parties. Fourth, so long as there are exemptions from the TPPA, there is always the prospect that country specific annexes will grow, conceivably beyond workable limits. Insofar as there is long standing concern about a “spaghetti bowl” of free trade agreements, the TPPA may heighten doubts about a spaghetti bowl of BITs. More important, therefore, than Australia’s stance on ISA is the significance that its opting out of ISA can have for the TPPA as a prospective investment agreement and its sequel in a complex array of country specific annexes, exemptions and future BITs. It is in light of this that Australia’s probable exemption from ISA needs careful consideration.

This paper examines the draft Investment Chapter of the TPPA, leaked to the public, in light of recent concerns regarding the viability of investor state arbitration. The intent is to comment on the possible motivations of the negotiating parties in formulating the TPP provisions thus far and, more importantly, to recommend how the parties could proceed as they work to finalize dispute settlement provisions in the TPPA.


16 ‘Swimming in the spaghetti bowl’ is a phrase that is attributed to prominent Columbia University economist, Jagdish Bhabwati, to describe the economic effect of multiple ‘free’ trade agreements. See JAGDISH BHAGWATI, FREE TRADE TODAY (2002).

17 On the background to this Policy Statement, see Trakman, Investor State Arbitration or Local Courts, supra note 13.
I. THE PREFERENCE FOR INVESTOR-STATE ARBITRATION

The TPP negotiators’ preference for ISA over domestic courts is based neither wholly on precepts of objective rationality nor upon pervasive notions of equality among states or their investors. It is about negotiating states calculating that their foreign investors are more likely to prevail before an investment tribunal than a foreign court. Such a ‘win’ is not grounded in objective economic rationality or dispassionate altruism. More often than not, states favor institutions for dispute resolution based on the capacity of those institutions to deliver results that treat their subjects abroad according to preferred ‘home’ rather than ‘host’ state standards. It would be unrealistic to expect ‘sovereign’ states to insist otherwise. Nor are TPP negotiating states blind to the pitfalls associated with ISA, even among ardent supporters. Recent model BITs such as the US Model BIT adopted in 2012 and the Canadian Model BIT, have restricted the scope of earlier Model BITs, such as the US Model BIT of 2004. In doing so, they have implicitly limited the interpretative leeway of ISA tribunals by expanding on the scope of a regulatory expropriation, eroding the link between the fair and equitable


treatment of foreign investors and the minimum standard of justice, and modifying the national treatment standard accorded to foreign investors. \(^{21}\) Recent Model BITs include expanded subjective national security provisions and exempt measures taken by governments designed to protect domestic health, public morality, social welfare and sustainable development. \(^{22}\) ISA tribunals have accommodated these defences, \(^{23}\) demonstrating the interpretive leeway of ISA tribunals. These recent developments are also reflected in recent agreements, such as the US–Peru Free Trade Agreement \(^{24}\) and the Singapore–India Economic Cooperation Agreement. \(^{25}\) In addition, ISA tribunals have accommodated these defences, \(^{26}\) notably in the NAFTA case, *Methanex v United States of America*. \(^{27}\) They have rejected investor claims that such defences deny foreign investors “fair


\(^{26}\) A series of cases illustrate these variable conceptions of “fair and equitable” treatment. See eg the Maffezini case, supra note 23.

\(^{27}\) See Methanex Co. v. US, Final Award, (Aug. 7, 2005) (Rowley, Reisman, & Vedeer, Arbs.), available at http://www.state.gov/documents/organization/51052.pdf; see also Methanex Corporation and the United
and equitable treatment”, or that a signatory state has exceeded the limits of the “margin of appreciation” in protecting its public interests over the investment interests of foreign investors.28

Nor is Australia’s Policy against agreeing to ISA in its FTAs and BITs entirely unexpected, given its own pre-existing treaty practices, not least of all under the Australia-US Free Trade Agreement [AUSFTA] in which ISA is excluded and regional trade agreements in which ISA is restricted in its application.29 As a result, the change in Australia’s policy was not a bolt from the blue.

What is distinctive about TPP negotiations over ISA is that Australia is the only negotiating party that has resisted ISA.30 There is recent investment treaty between developed states, other than the Free Trade Agreement between Australia and the US, that excludes ISA.

II. CHALLENGES TO INVESTOR-STATE ARBITRATION

Notwithstanding the seemingly wide support for ISA among TPP negotiating states, the Australian Government is not alone in its aversion to investor-state arbitration. There is


strong ideological and functional opposition to ISA, beyond the policy of a single state. In an open letter to the TPPA negotiators, a group of influential lawyers wrote:

“As lawyers from the academy, bench and bar, legislature, public service, business and other legal communities in Asia and the Pacific Rim, we are writing to raise concerns about the Investment and Investor-State dispute arbitration provisions being considered in the on-going negotiations for a Trans-Pacific Partnership (TPP) agreement.”

They raised a number of objections. Their first objection was to the broad definition of “investment” because it did not require a foreign investor to make any contribution to the host State economy. Their second objection was to the breadth of the substantive obligations in the TPP including on grounds that they often grant foreign investors greater rights than those accorded to domestic investors under domestic law. Their third objection was to the grant of injunctive relief brought by foreign investors against host states on grounds that this would create “severe conflicts of law.” Their fourth objection was to the broad interpretation of a government “measure” as including jury decisions in private contract litigation. Their fifth objection was to the use of Most Favored Nation [MFN] provisions to avoid “the deliberate decision of governments to require investors to pursue remedies in the domestic courts of the host nation, at least initially...” Their sixth objection was to the rotating roles of lawyers as arbitrators and advocates “in a manner that would be unethical for judges.” The final objection was to the exclusion of “non-investor litigants and other affected parties” from participating in ISA proceedings, on the grounds that this was contrary to basic principles of “transparency, consistency and due process”.

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32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
Their emphatic conclusion was to call upon “all governments engaged in the TPP negotiations to follow Australia’s example by rejecting the Investor-State dispute mechanism and reasserting the integrity of our domestic legal processes.”39

In response, the Australian Chamber of Commerce and Industry, with the support by some lawyers and academics involved in international investment law, wrote to Prime Minister Gillard, urging reversion to Australia’s longstanding treaty practice of including investor-state dispute settlement on case-by-case basis.40 Their further concern was that ISA provided protections for investors from court systems of treaty partners that lacked established rule of law traditions.41

Given these divergence of views, it is appropriate to explore Australia’s position on ISA in the context of the objection by these jurists to ISA and to then consider reactions to ISA in the wider context of the TPP investment chapter as a whole.42

III. AUSTRALIA’S OBJECTION TO INVESTOR-STATE ARBITRATION

In a Trade Policy Statement in April 2011, the Australian Government enunciated that it “does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.”43 In particular, it maintained that it will not “support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate

39 Id.
43 See Policy, supra note 13.
between domestic and foreign businesses.”  As a result, it announced that it will “discontinue” the practice of including investor-state dispute resolution procedures in trade agreements. Furthermore, “If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.” How significant this trade policy is in fact is the subject of a more detailed study by the author elsewhere.

The result is that the Australian Government has sought to be excluded from any ISA provisions under the TPP. It is also expected to provide that investor-state disputes be submitted to domestic courts for resolution, not unlike the dispute resolution provisions in the Australia–US Free Trade Agreement.

Under the Australian Policy, national law should govern the rights of foreign investors, particularly foreign investors filing claims against the Australian Government; and the authority of domestic courts should prevail over other options, including resort to diplomatic channels. The jurisdictional rationale for this proposition is that investment disputes ought to be decided by the domestic courts of host states, not international tribunals. The

44 Id.
45 Id., 1-2.
46 See Trakman, Investor State Arbitration or Local Courts, supra note 13. See too Jurgen Kurtz, Australia’s Rejection of Investor-State Arbitration: Causation, Omission and Implication, 27 ICSID REV. 1 (2012). Kurtz relies on the commentary of Joseph Stiglitz to assert that “all countries engage in some discrimination” against foreign investors’, and concedes that ‘protectionism is a political temptation that is not confined to any political or legal tradition’: at 11.
substantive rationale is that foreign investors should receive no better treatment than that which is accorded to local investors.49

The equitable inference from these rationales is that, were investor-state arbitration to privilege foreign investors, it would not serve the national interest, and if it fails to service the national interest, domestic courts ought to replace it.

IV. THE SIGNIFICANCE OF A CHALLENGE TO ISA IN THE TPPA

It is evident that the United States, in driving the TPPA agenda, favors the adoption of investor-state arbitration to resolve disputes among member states.50 In contradistinction to this is not only that Australia opposes investor-state arbitration.51 In issue is the possibility of further objections to investor-state arbitration developing as the TPP negotiators seek to attract other participants. A related risk, therefore, is the domino effect of Australia’s rejection of ISA. Should one country opt out of ISA, it may encourage other states to opt out as well. The conjectured result is an irreversible two-tier system of dispute resolution that could undermine the development of an international investment regime governing the TPPA.52

Nor does it help the TPP negotiations over dispute resolution to have an open letter of opposition to ISA signed by prominent judges, lawyers, government officials and legal academics, albeit primarily not investment lawyers, opposing the negotiating parties’

49 For an analysis of the view that, if investment arbitration privileges foreign investors, it undermines the national interest and democracies “promise”, see David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise (Cambridge University Press, 2008) chs 2, 6.

49 See Trakman, Investor State Arbitration or Local Courts, supra note 13.


52 See further infra Section V.
preferred method of dispute resolution. Opposition to ISA in the TPPA also raises some important issues for its future, as well as the negotiation of bilateral investment agreements that will inevitably accompany its development.

One negotiating stance, possibly already forsaken, is for TPP negotiators to require endorsement of ISA as a precondition to participation in TPPA negotiations. An underlying rationale is that, a failure to support ISA undermines unity among negotiating countries.

The current negotiating position is that TPP negotiators will continue to provide Australia with an exemption from ISA provisions in the TPPA, in a state-by-state negotiating process driven by the United States.53 In support of this position is recognition that country specific exemptions are part and parcel of the negotiations. In further support is the apparent dispelling of a one-size-fits-all TPPA in recognition of local requirements of particular negotiating states on political, economic and social grounds.54

This current negotiating stance does not infer that exceptions to TPPA provisions will be unrestricted, or even that current negotiation concessions will prevail. Exemptions from TPP provisions on investor-state dispute resolution will depend on the kind of cost-benefit analysis that prevails at a changing negotiating table, in particular on whether the perceived benefit to the TPPA membership at large outweighs the cost of exempting one or another TPP country from ISA. It is also conceivable that, should a Liberal Government be elected in Australia in 2013, it will withdraw its objectives to ISA. It is plausible too, that the Australian Government may agree to ISA if it believes that the economic concessions it must make to other TPP countries in order to be excluded from the investment chapter outweigh the benefit of an ISA exemption. Phrased positively, the Government could use its stance on

53 Id.

ISA as a bargaining chip in a trade-off for something it may want more, such as access to the US sugar market, so long as doing so would not appear as a backflip.\footnote{This is speculative. Australia may adopt a variety of recourses, unrelated to access to US sugar markets, in possibly negotiating away its exemption from ISA.}


For the sake of argument, let us assume at this time that only Australia will not endorse ISA and that TPP negotiators will continue to exempt Australia from ISA. What are the costs and benefits of such an exemption? What direct and ancillary consequences are likely to flow from it, including in relation to other states? How might these consequences impact upon the TPPA as a whole?
V. THE COSTS AND BENEFITS OF ISA

Does the benefit of exempting Australia from investor-state arbitration outweigh the benefit of including it in the TPPA? Included in this cost benefit analysis is the political risk of other states opting out of ISA as well. This concern is supported historically, by evidence of countries withdrawing from ISA, such as administered by the ICSID, in reaction to an adverse ISA determination with nation-wide political and economic consequences. There is also evidence of states, particularly in Latin America, favoring domestic courts over international tribunals resolving claims against states, including a return to the Calvo Doctrine enunciated by Argentina many decades ago.

A further risk is that a two-tier system of ISA awards and domestic court decisions will lead to aberrant differences in ensuing TPPA ‘laws’. Such differences will highlight institutional divergences between domestic court decisions and ISA awards. They will accentuate investor forum shopping in pursuit of favorable investment decisions. They will undermine certainty, including the reasonable capacity to determine the nature and application of investment laws.

A defence of a two-tier ISA-domestic court system is that it neither undermines nor dislocates the TPPA, or the jurisprudence that evolves from it. First, ISA is an ad hoc dispute resolution process. Second, the decisions of investment tribunals bind the direct parties only, and may

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59 See generally Shan, supra note 48; Cremades, supra note 48.

60 See e.g. Rudolf Dolzer, The Notion of Investment in Recent Practice, in LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 261 (Steve Charnovitz, Debra P. Steger & Peter Van den Bossche eds., 2005); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009).
well diverge from one ISA tribunal to the next. This reasoning is, however, subject to challenge. The decisions of domestic courts as a matter of form are part of domestic investment law, whereas ISA decisions, formally at least, are part of international investment law. The inferred result is that, unlike ISA awards, decisions by national courts are not part of international investment jurisprudence. In addition, were domestic courts and investment tribunals both to decide disputes arising from the TPPA, it would lead to institutionalised differences among different legal systems in the laws and processes that are applied to the TPPA, beyond ad hoc differences of interpretation among ISA tribunals deciding particular cases.

A substantive response is that domestic law itself is a source of international investment law, even if it derives from the decisions of domestic judges. In effect, ISA tribunals can take into account the decisions of domestic courts in making awards. Domestic courts, conceivably although not necessarily, can do so as well.

This substantive response is not altogether satisfying. In issue is not only that the substantive law of investment diverges among domestic legal systems and their courts. In issue is the fact that domestic courts in common law systems at least, may be bound by precedent to apply domestic law governing investment that diverges from ISA jurisprudence, as from the investment law of other domestic legal systems. These differences may compound the perception that regional and bilateral investment treaties have produced, not only a ‘spaghetti bowl’ of disparate treaty provisions, but also an incongruent body of investment laws and decisions. The concern is that, if the TPPA is intended to level the playing field of

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62 While ISA awards are ad hoc and do not give rise to binding legal precedents, they are nevertheless part of the opinion juris of international investment law with sometimes significant persuasive authority: see Trakman, *The ICSID under Siege*, supra note 58.


64 *Id*.

investment laws among member states, that levelling would be somewhat undermined by inconsistencies in otherwise comparable issues between domestic judicial systems applying domestic investment laws and ISA awards predicated on a comparatively uniform body of investment treaty and customary law. The risk of investors choosing to bring investor-state claims under a treaty or proceeding before domestic courts is limited under a bilateral investment treaty that choose domestic courts over ISA or the converse. The risk of developing an inconsistent investment jurisprudence is that much greater under a multilateral treaty that endorses both options, albeit the latter through a litany of country-specific exemptions.

Added to these differences is the observation that national legislation and executive orders may further differentiate national from international investment jurisprudence. If domestic states have sound economic, social and political reasons to ensure that their domestic courts implement those executive or legislative orders, the prospect of distinctive domestic laws governing investor-state disputes will grow ever more likely, and ever more formidable.

A converse objection is that, in an effort to avoid a fragmented body of international investment law, an investment *ius cogens* will emerge that accentuates the advantages enjoyed by wealthy investors from developed countries over developing countries and their

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68 The suggestion is not that domestic states should forego their policy making powers including in relation to foreign direct investment. The suggestion is only that, if domestic states do so disparately and inconsistently, there would be no place left for international investment law. The nature and operation of foreign direct investment would depend on the nuanced proclamations of a myriad of domestic states. See further Leon E. Trakman & M. Sornarajah, *A Polemic: The Case For and Against Investment Liberalization*, in *REGIONALISM IN INTERNATIONAL INVESTMENT LAW*, Appendix (Leon E. Trakman & Nick Ranieri eds., 2013) (forthcoming).
investors. Given the institutional roots of ISA in textual methods of interpreting BITs, there is a real risk of some ISA tribunals discounting the corrective justice claims made by developing countries. Their assumption will be that, unless the text of the TPPA expressly permits a developing state to restrict market access to foreign investors, an ISA tribunal ought not to impute a ‘contextualized’ meaning based on historical disadvantage into that text.

One response is that developing countries will either decline to conclude BITs or FTAs with developed countries such as under the TPPA, or more probably, they will conclude such treaties in the somewhat adventitious hope of avoiding investor-state disputes. Serious problems inevitably arise when such hopes are disappointed.

These objections relate less to irredeemable flaws in ISA than to limitations in the treaty making powers of developing countries under the TPP or any other bilateral or multilateral investment treaty. Even if treaty literalism sometimes impedes ISA proceedings, that does not in itself provide unqualified support for the contemplated alternative, namely, resort to domestic courts. Indeed, a preference for domestic litigation to resolve ISA disputes may protract more than it remedies deficiencies in ISA. The perception among some developing states is that the courts of wealthy developed states will rely on common or civil law traditions that, historically, were insulated from the plight of developing countries, and remain so today. The perceived harm is that the domestic courts in developed states that not apply ‘their’ laws will discriminate against investors from developing states by failing to address the historical disadvantages of investors from developing states and the absence of a level investor playing-field today.

The choice of domestic litigation over ISA, or the converse, is contingent on the values the proponents of each ascribe to their preference. The proposition that domestic courts are subject to tried and tested domestic rules of evidence and procedure is offset by the fact that ISA arbitration such as under the ICSID is guided by rules of procedure that seek to ensure that arbitration procedures are clear in nature and that an ICSID arbitrator’s failure to apply

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them fairly can lead to annulment for non-compliance. The rationale that domestic courts ought to accord no more than national treatment to foreign investors is countered by the argument that investment arbitrators are equally capable of subscribing to comparable standards of national treatment. The supposed insularity of ISA arbitration from domestic law and procedure is also disputable on grounds that ISA arbitrators cannot summarily disregard domestic law if an FTA such as the TPPA treats that domestic law as the applicable law.

Nor are domestic judicial systems invariably reliable to resolve investor-state disputes. Approximately 76% of the cases in which investment treaty awards were rendered up to June 2006 involved states that fell at or below Number 50 on Transparency International’s 2008 Corruption Perception Index. The clear inference is that foreign investors are unlikely to trust all domestic courts equally, or indeed, at all. The political reality is that, in exercising preferences, countries are also more likely to trust the domestic courts of other countries with which they share common social and economic traditions than those with which they do not. Countries are also readier to endorse a “rule of law” culture with which they identify than a culture with which they do not.

71 See Trakman, The ICSID Under Siege, supra note 58.

72 This proposition is complicated, particularly by the fact that different national legal systems have incorporated investment law differently. See M. Sornarajah, The Case against an International Investment Regime, in REGIONALISM IN INTERNATIONAL INVESTMENT LAW, ch.16 (Leon E. Trakman and Nick Ranieri eds., 2013) (forthcoming).


Ultimately, parties must make a choice. An appeal to a domestic court is desirable if the party seeks a final determination on jurisdictional and substantive grounds and considers that country’s domestic court reliable. An annulment procedure on narrow jurisdictional grounds under article 75 of the ICSID Convention is preferable if the party considers those grounds suitable. Beauty lies in the eyes of the beholder.

One may well conclude that, as a practical solution, TPP negotiating countries should simply be left to decide whether or not to engage in negotiations and if so, whether to seek country-specific exemptions under it or through bilateral treaty negotiations suppletive to the TPPA. That would be consistent with state practice, such as the choice of domestic courts over ISA in resolving investor-state disputes under the AUSFTA.76

Opposition to ISA or for that matter, to domestic courts deciding investor-state disputes is not exceptional. The UNCTAD found resort to both ISA and domestic courts unduly costly, dilatory and as attenuating conflict.77 Nor was the UNCTAD’s preference for conflict prevention and avoidance measures over both ISA and domestic courts itself exceptional in light of the sometimes intractable differences between state and foreign investor interests.78

Finally, past examples of opposition to ISA should not be overstated. Latin American countries that have opted out of ISA, namely, Ecuador, Bolivia and Venezuela, do not have as attractive and transparent an investment environment as does Australia and are therefore not fitting comparisons. The risk of investors shopping for ISA or domestic litigation is inevitable under any investment treaty; that risk is also offset by the prospects that a

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75 The United States-Australia Free Trade Agreement empowers domestic courts in each signatory state to resolve investor-state disputes, rather than rely on investor-state arbitration. One of the rationales for this position was that the United States and Australia share a common “rule of law” tradition. See Trakman, Foreign Direct Investment, supra note 13.

76 See NAFTA Chapter 20, Article 2020 which specifically so provides. See LEON E. TRAKMAN, DISPUTE SETTLEMENT UNDER THE NAFTA: MANUAL AND SOURCEBOOK (1997).


78 Id.
concluded TPPA will make some foreign investment destinations, like Vietnam, particularly
attractive. Nevertheless, TPP negotiators need to be cognizant of concerns especially among
developing states, that principles of investment law that are incorporated into the TPPA
selectively privilege developed states with established “rule of law” traditions over
developing states.79 At an extreme, the concern is that, whereas international human rights are
based on universal norms of fair treatment, the jurisprudence surrounding the “fair and
equitable” treatment of foreign investors is unduly grounded in self-serving norms directed at
the market efficiency of capital flows.80 The worry is that the TPPA ought not to unduly
embody a model of economic rationalism by which wealthy transnational corporations
pontificate profit-maximizing outcomes that ultimately favor them over developing states and
their citizenry.81 Coupled with these concerns is disquiet, not limited to developing countries,
about negotiators crafting reservations and exceptions in investment treaties to service their
national security, public health, labor, and environmental safety interests.82 A related concern
is that newer forms of defenses in the BITs of some Asian countries will find their way into

79 See Ibrahim F. I. Shihata, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID
and MIGA, in Investing with Confidence: Understanding Political Risk Management in the 21st
Century 2–35 (Kevin W. Lu et al. eds., 2009) (discussing old world views); Susan D. Franck, Foreign Direct
Investment, Investment Treaty Arbitration, and the Rule of Law, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J.
337 (2007) (analyzing different views of the rule of law).

80 See Moshe Hirsch, The Interaction between International Investment Law and Human Rights Treaties: A
Sociological Perspective, in Multi-Sourced Equivalent Norms in International Law 211–14 (Tomer
Broude & Yuval Shany eds., 2011); Sara L. Seck, Conceptualizing the Home State Duty to Protect Human
Rights, in Corporate Social and Human Rights Responsibilities: Global Legal and Management
Perspectives 34 (Karin Buhmann et al. eds., 2011).

81 See U.N. Secretary-General, Protect, Respect, and Remedy: A Framework for Business and Human Rights:
(discussing alleged human rights abuses by transnational corporations). See generally Rachel J. Anderson,
Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations, 88 DENV. U. L.
REV. 183 (2010); LORENZO COTULA, HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A

82 On such criticism, see M. Sornarajah, Evolution or Revolution in International Investment Arbitration? The
Descent into Normlessness, in Evolution in Investment Treaty Law and Arbitration, ch. 27 (Chester
Brown & Kate Miles eds., 2011).
the TPPA, limiting investment protection to investments “approved in writing” or made in “accordance with the laws and regulations from time to time in being”. These stipulations would empower signatory countries to deny foreign investor rights by withholding written approval to such investments, or by changing laws and regulations that deny protection previously granted to foreign investors. Added to these concerns is the prospect of the TPPA adopting a wide defense of necessity, couched as the national interest, as a bulwark upon which states can defend against investor claims of unjust expropriation. A formal way to resolve the dilemma between domestic courts and ISA is to hold that domestic litigation ought to prevail over ISA as a principle of state sovereignty. However, that principle alone is hardly supportable when states repeatedly surrender their sovereignty under both customary international and treaty law to international institutions. Nor is it credible to respond that a multilateral investment accord like the prospective TPPA amounts at least to the sum total of sovereignty surrendered by signatory nation states. The contrary may be true. The result

83 On such clauses in BITs, see, e.g., Yaung Chi Oo Trading Pte Ltd. v. Gov’t of the Union of Myan., 42 I.L.M. 540, 551 (2003); 5 ICSID Rep. 483 (2000); Philippe Gruslin v. Malaysia, ICSID Case No. ARB/94/1 (Apr. 24, 1996).

84 See Fraport AG Frankfurt Airport Serv. Worldwide v. Rep. of the Phil., ICSID Case No. ARB/03/25 (Aug. 16, 2007) (providing such phraseology in an investment agreement with the Philippines).

may be “sovereignty by subtraction,” which arguably is one reason why states failed to arrive at a multilateral investment accord in the first place.

ISA is not an elixir of perfection that ought to be perpetuated as of right. Like all institutions, it has its beauty spots and warts. What can be said is that a shift towards domestic courts resolving investment disputes is one alternative dispute resolution option to arbitration under the TPP. Were that choice to be based solely on the perceived quality of decision-making, one could attribute particular normative qualities to the effective and fair use of judicial or arbitral processes in discrete cases arising out of a TPPA. However, ascribing normative values to decision-making processes is unavoidably subjective. Specifically, an assessment of the economic rationale favoring domestic litigation over ISA reflects self-interested propositions, such as the perceived benefit of one’s foreign investors succeeding before a foreign court compared to before an ISA tribunal. Moreover, the political reality is that, in exercising preferences, countries negotiating the TPPA are more likely to trust the domestic courts of other countries with which they share common social and economic traditions than those with which they do not. Countries are also readier to endorse a “rule of law” culture with which they identify than a culture with which they do not.

Given these imponderables, the result may be that the choice between some form of investor-state arbitration and litigation before domestic courts should be pragmatically determined on the basis of pre-existing experience, including prior cases. However, it is too early to arrive


88 On these observations are exemplified in relation to Chapter 11 [Investment] of the NAFTA, see supra note 74.

89 The United States-Australia Free Trade Agreement empowers domestic courts in each signatory state to resolve investor-state disputes, rather than rely on investor-state arbitration. One of the rationales for this position was that the United States and Australia share a common “rule of law” tradition. See Leon E. Trakman, Foreign Direct Investment: Hazard or Opportunity, supra note 13.
at a pragmatic conclusion about domestic judges deciding investment cases, except to acknowledge a shift to domestic courts deciding investment disputes which began decades ago in Latin America with the once disavowed and now resurrected *Calvo Doctrine*.  

Whatever the institution adopted to resolve investor-state disputes, not limited to litigation or arbitration, the imponderable is in determining how the rule of law should be defined, applied, and enforced in relation to such disputes.  

These are delicate issues for TPP negotiators from both developed and developing countries which will be addressed below.

**VI. MODELLING A TPPA INVESTMENT CHAPTER**

Given the political nature of TPP negotiations, it is difficult to predict the precise form of ISA provisions that TPP negotiators may finally adopt. Nor is it self-evident whether they will adopt a uniform template or model ISA provision, with variations on a country-by-country basis, or leave it to TPPA signatories to provide for investor-state disputes bilaterally. Having so stated, it is most likely that the TPPA will provide expressly for ISA. It is already the dominant method of redressing investor-state disputes; and the United States Trade Representative favors it strongly over the alternatives.

However, it is also reasonable to speculate that some negotiating countries will have a strong interest in ensuring that, if ISA is included in the final TPPA, it will be tempered in both nature and effect. Their concern, including but not limited to developing countries, will be to discourage the overuse of costly and potentially disruptive ISA disputes as they envisage

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90 *See supra* note 58. *(discussing the Calvo doctrine).*


92 *See generally* Trakman, *The ICSID under Siege*, *supra* note 58.
them. That view is complemented by the suggestion that the investment chapter in the TPP should not be iron cast, but subject to careful negotiation and modification in light of past experience with ISA and concerns about its structure and content within developed and developing countries alike. If that speculation is correct, ISA provisions in the final TPPA are likely to include pre-existing experience with ISA, such as prior BITs and also reactions to those treaties among TPP negotiating parties. At the same time, it is important not to overstate the extent to which investors invoke ISA by treaty. Given the multitude of BITs that are currently in existence and their disparate ISA clauses there are a limited number of ISA claims against states brought in fact. The raw figures of the ICSID, the largest ISA service provider, beat out this observation. On the one hand, the ICSID caseload has grown geometrically, from a single case in 1972 to approximately 10 cases in 1990, to 38 new cases filed so far in 2012 alone. On the other hand, the absolute number of ICSID cases on ISA is limited compared to international commercial arbitration cases, with 1,435 claims filed with the China International Economic and Trade Arbitration Commission [CIETAC], 994 cases filed with the International Center for Dispute Resolution [ICDR] of the American Arbitration Association [AAA] and 795 cases filed with the International Chamber of Commerce [ICC].

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93 The costs of ISA are identified less with the direct costs of ISA such as ICSID proceedings, than with attorney’s costs, often including contingency fees, and the expenses associated with an ICSID dispute. On ICSID costs, see http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Memorandum

94 On such costs, see above Section V.

95 See UNCTAD, Latest Developments in Investor-State Dispute Settlement (IIA Issues Note No. 1, Mar. 2011) 2, available at http://unctad.org/en/Docs/webdiaeia20113_en.pdf. Given the confidentiality of some ISA proceedings, it is difficult to determine accurately the number of ISA arbitrations that are dealt with by particular arbitration associations. Subject to this limitation, the UNCTAD Study lists the number of know treaty based ISA conducted before the following arbitration associations at the time of the Study: ICSID (245 cases); UNCITRAL (109 cases), SCC (19 cases); ICC (6 cases); ad hoc (4 cases); Cairo Regional Centre for International Commercial Arbitration (1 case). On the ICSID caseload, see The ICSID Caseload – Statistics, INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics;

96 See The ICSID Caseload, supra note 95.

97 ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION (2012).
The ICSID statistics also demonstrated that 61% of the cases filed were decided by arbitration tribunal. 39% were settled or otherwise discontinued. States and investors each won ICSID disputes approximately half of the time. ICSID tribunals dismissed 53% of the cases, primarily on jurisdictional grounds, while upholding 46% of investor claims in whole or part.\footnote{Id.}

\section*{i. Sources of a TPPA Investment Chapter}

In considering a possible final version of an investment chapter, I have paid attention to a copy of a TPP investment chapter, posted on 12 June 2012 on the website of Public Citizen’s Global Trade Watch.\footnote{See http://tinyurl.com/tppinvestment.} That draft, while undoubtedly authentic, is unlikely to constitute a final version of the investment chapter, given the need for some public consultation and to secure agreement from some states that are apparently pushing for amendments to the Chapter.

The tentativeness of the draft chapter is apparent from both its form and substance. As to form, many of its provisions are included between square brackets, for the purpose of future negotiation or country-specific exemptions. There are also asterisk references to annexes including such exemptions. As to substance, a number of provisions in the draft are likely to be criticized. The scope of an “investment” in the draft is particularly wide. The negotiators may need to negotiate further limits on the regulatory authority of state Parties. They may also need to limit the liberal standards of protection that are accorded to investors from home Party states investing in host Party states.\footnote{See subsection (a) below.} These factors are likely to constrain the ambit of operation and application of the draft.

It is also likely that the model of the evolving investment chapter will extend beyond the draft. Given the US’s dominance in negotiations, other models will include, to varying degrees,
recent BITs to which the US is a party and the 2012 US Model BIT.\footnote{On the 2012 US Model BIT, see United States Trade Representative, 2012 U.S. Model Bilateral Investment Agreement, available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.} An influential BIT is likely to be the US-South Korea Free Trade Agreement which came into force on May 15, 2012.\footnote{See KORUS FTA, supra note 24, art 11.21; Peru FTA, supra note 24, art 10.21; Colombia FTA, supra note 24, art 10.21.} Other recent US trade and investment agreements with Asian and Latin American countries, such as the US-Chile Free Trade Agreement, are also likely to influence the negotiating and drafting process.\footnote{On the Chile-U.S. Free Trade Agreement, see http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta.} However, all these BITs are limited by their bilateral character. A multilateral investment chapter, whether negotiated on a country-by-country basis or not, must accommodate the diverse interests of a plurality of state Parties. Some of these accommodations are achievable through country specific annexes that leave the substance of the TPPA intact. However, as will be argued later, the greater the number of country-specific exemptions or qualifications, the less influential the TPPA is likely to be as an umbrella agreement.\footnote{See below text accompanying notes 246-250.} 

Finally and controversially, the TPPA is being “fast-tracked,” for finalization by the end of 2012 and for adoption in 2013.\footnote{For the assertion that the intention of the TPP negotiators is to seek passage of the Treaty by the end of 2012, see Lori Wallach and Todd Tucker, Public Citizen’s Global Trade Watch, Public Interest Analysis of Leaked Trans-Pacific Partnership (TPP) Investment Text, PUBLIC CITIZEN’S GLOBAL TRADE WATCH, available at http://www.citizen.org/documents/Leaked-TPP-Investment-Analysis.pdf. In their analysis of the leaked draft, Wallach and Tucker accuse the TPP negotiators, particular USDR of having already determined the text of the Investment Chapter, in private consultation with select corporate groups but without public consultation. In effect, through secret talks, the “negotiators [of the TPP] have already agreed to many radical terms granting expansive new rights and privileges for foreign investors and their private corporate enforcement through extra-judicial ‘investor-state’ tribunals.”} These timelines are optimistic. The accession of new parties to TPP negotiations may well require revisions and delays as the price of expanding TPPA membership.\footnote{This proposition notwithstanding, there is no explicit provision in the terms of reference governing the TPPA which precludes revisions to accommodate new or prospective negotiating parties. See TPP Article 20.6.} This view is qualified by assertions by TPP negotiators that provisions
which are already agreed to by TPP negotiating Parties will not be modified to accommodate newer Parties. ¹⁰⁷

VII.  KEY DEFINITIONS

The first part of this section considers the key definitions relating to the nature of an investor and a covered investment and the nature of an expropriation. The second part evaluates standards of treatment under a TPPA. The third part considers different dispute avoidance and relation alternatives under a TPPA.

i.  Who is an Investor?

Parties to TPP negotiations are likely to seek clarification as to the nature of an “investor” and an “investment”. First, it is likely that they will want to impose restrictions on foreign investors bringing ISA claims against host states, such as by requiring that they establish their legal status as investors of a home state party to the TPPA. ¹⁰⁸ Draft Article 12.3.1: Scope and Coverage, states: “This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments; and (c) [with respect of Articles 12.7 (Performance Requirements) [and 12.15 (Investment and Environment)], all investments in the territory of the Party.]”. Draft Article 12.2, in turn, defines an “Investor of a Party” as:

a Party, or a national or enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; [provided, however, that a natural person] who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality; [provided, however, that a natural person who is a national of more than one Party shall be

Arguably, given the nature of a multi-party investment agreement, such changes are more likely to eventuate than the contrary. See further above, Section VI.

¹⁰⁸ This is a growing concern, not limited to developing countries, that wealthy investors, particularly multinationals, can readily locate themselves in forums of convenience from which they lodge ISA proceedings against host state. That was raised in the current ISA case brought by Philip Morris against Australia under the Australia Hong Kong Free Trade Agreement. See e.g. Luke R. Nottage, Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice after Philip Morris Asia v Australia, 22 AUST. PRODUCT LIABILITY REPORTER 154 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041680.
deemed to be exclusively a national of the State of his or her dominant and effective nationality].

The bracketed provisions above are likely to be controversial in part because of actual or potential tension among negotiating Parties over who can bring an ISA claim against a host state Party. If the draft definition of an “investor” prevails, it is likely that country specific exemptions may limit its scope of application, notably to contain adventitious investors from lodging claims against a TPP state Party. This problem could arise from the potentially overbroad provision in the draft chapter treating a Party “that attempts to make, is making, or has made an investment in the territory of another Party” as an investor. In particular, concern will arise over investors whose investments are historical, and over the open-endedness of an “attempt to make an investment”. Investor forum shopping is already an issue in international investment law. Overly ready access to a jurisdiction may exacerbate that process.

An offsetting response is that investors will mount ISA claims selectively against TPPA host states even if the TPPA adopts a narrow definition of “investor” This empowerment of investors is potentially overstated insofar as different state Parties to the TPPA are likely to seek exemptions for certain kinds of investors and investments through country specific annexes. If such exclusions eventuate, foreign investors may still forum shop taking account of such country-specific exemptions and seeking the seemingly most vulnerable forum in which to make claim. However, such investor strategies are widely practices already and are by no means peculiar to the TPPA.

ii. What is an Investment?

A particular challenge is in defining an investment that is neither over- nor under-inclusive. That challenge is complicated by different conceptions of an investment in different conventions, treaties and arbitration rules. For example, Article 25(1) of the ICSID Convention does not define an investment.109 Others, such as the UNCITRAL, International Chamber of Commerce [ICC] and Stockholm Chamber of Commerce deal with an

investment differently.\textsuperscript{110} Some influential cases clarify the meaning of an investment, but not consistently so. For example, in \textit{Fedax N.V. v Republic of Venezuela},\textsuperscript{111} the ISA tribunal ascribed to an investment “a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development.”\textsuperscript{112}

However, there are at least three different approaches to defining an investment in arbitral practice. Under a “liberal approach”, an investment should be determined flexibly, to avoid restricting its meaning. This method is also deemed appropriate in light of Article 25(1) of the ICSID Convention.\textsuperscript{113} It is illustrated by the ICSID case of \textit{CSOB v Slovakia} in which the Tribunal construed an “investment as a concept [which] should be interpreted broadly because the drafters of the Convention [ICSID] did not impose any restrictions on its meaning”.\textsuperscript{114} In contrast, under a “strict cumulative approach”, enunciated in \textit{Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco},\textsuperscript{115} an investment is accorded a fixed meaning based on pre-determined criteria which are then applied strictly in particular cases.\textsuperscript{116} For example, in the \textit{Salini} case, the Tribunal identified four characteristics in an investment: a substantial contribution, certain duration, an element of risk and a significant contribution to the economic development.\textsuperscript{117} The third, the “criteria limited in number”


\textsuperscript{111} ICSID Case No. ARB/96/3, Decision on Objection to Jurisdiction, July 11, 1997; (1998) 37 ILM 1378, ¶ 25.


\textsuperscript{113} Gaillard, \textit{supra} note 109.

\textsuperscript{114} Czechoslovenska obchodny Banka, A.S. v. Slovakia, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, at 64.


\textsuperscript{116} \textit{See also}, Malaysian Historical Salvors Sdn Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 70 (naming these approaches as “jurisdictional and typical characteristic approach” respectively).

\textsuperscript{117} Schreuer, \textit{infra} note 134, 153. On the addition of two further characteristics to the “\textit{Salini test}”, that the asset should be invested in accordance with the laws of the host state and that the asset should be a \textit{bona fide} investment, see Phoenix Action Limited v. Czech Republic, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, at 142.
approach, seeks to unify the first two approaches into a viable alternative by including both objectively restricted and non-restrictive requirements. The approach focuses primarily on contribution, risk and, duration, but excludes “the contribution to the economic development of the host state”, significantly because the ICSID does not include economic development as a criterion in determining an investment.  

Given these observations, it is appropriate to determine which approach the TPPA is likely to adopt. The TPPA is likely to define “investment” expansively and flexibly, as well as to include an illustrative list of kinds of property that can constitute an investment. However, it is also likely that TPPA negotiators will be sensitive to concerns among state Parties to restrict the scope of an “investment” in response to national interests, including the stages of economic development of state Parties, not unlike restrictions on an “investor.”  

The definition of an investment is also likely to be subject to specified criteria that aim to avoid a floodgate of ISA claims against developing states in particular. The tension between a liberal and a stricter cumulative approach towards an investment is likely to be redressed in part through country specific exclusions of particular kinds of investments and by tailoring down the breadth of an “investment” in the current draft.

At present the draft definition of an investment is particularly broad. Article 12.2 includes as an actionable investment: “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”

This breadth of an “investment” is attenuated by the variety of forms of investments, including:

118 See Gaillard, supra note 109, stating that “this approach is the most faithful both to the text and the intention of the drafters of the ICSID Convention”.

119 The KORUS FTA, supra note 24, art 11.28 defines the types of investments that are protected broadly as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk,” and includes a series of examples.

120 KORUS protects not only the investors of the home country, but also a business entity that is incorporated in the host State whose shareholders or members are nationals of the home country. In adopting this position, South Korea and the U.S avoided the ongoing debate in international investment arbitration as to whether to allow companies incorporated in the host State to be claimants in investment arbitrations against the host State.
(a) an enterprise; (b) shares, stock and other forms of equity participation in an enterprise; (c) bonds debentures, [other debt instrument:] and loans [but does not include a debt Instrument of a Party or of a state enterprise]; (c) debt securities and loans…. ; (d) futures, options and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts; [there is no (f) in the draft]; (g) intellectual property rights [which are conferred pursuant to domestic laws of each Party]; (h) licences, authorizations, permits and similar rights conferred pursuant to domestic law; and (i) other tangible or intangible, movable or immovable property…

The breath of an “investment” is also evident in the plethora of categories of investment. It includes “an enterprise” which has potentially expansive meaning. It incorporates speculative investments, such as “futures, options and other derivatives” which may give rise to concerns that inbound investors will invoke them too readily and that host states may have difficulty regulating them effectively. In contrast, these kinds of investments may survive because they are not selectively used and some state Parties may assume, correctly or otherwise, that they have limited application.

The draft also provides a wide range of intellectual property protections to investors, in respect of which country specific exemptions may be insufficient to redress this concern. Concessions to the expansive list of intellectual property rights of investors may be limited across-the-board or more likely, by piecemeal country-specific exemptions. A common denominator concern will be that the US provides far more extensive intellectual property protections than most other TPP negotiating parties, which will be a reason to attempt to reframe the provision to accommodate non-US investor interests. Finally, debate may arise over limits imposed upon states due to the expansive protection accorded to “tangible or intangible….property”.

A noteworthy observation, highlighting these concerns is the extent of square bracketed information included in the definition of an “investment”. If the bracketed information is intended to scope the extent of issues still to be resolved by TPP negotiators, some hard-bargaining lies ahead.

iii. What is an Expropriation?

A particularly telling issue for TPP negotiators is in determining what constitutes a legitimate “government taking”. How to define an expropriation, narrowly or broadly, is long-standing; and resolution is still controversial.122

The TPPA will probably, but not assuredly, include criteria that delineate when an expropriation is permitted. That determination will reflect compromise over the permissible boundaries of an indirect expropriation or other government taking.123 The TPPA will also provide signatory countries with exemptions from such provisions in light of local requirements and on grounds of essential national security and related national interest grounds. These exceptions will probably include specific public interest exemptions, such as to protect the environment, promote sustainable development and preserve domestic labour markets.124

The draft Investment Chapter confirms that an expropriation occurs when a state Party “interferes with a tangible or intangible or property interest in an investment.”125 The reference to a “tangible or intangible interest in an investment” is expansive. An “interest” is wider than a “property right”; and intangible property is potentially expansive as well. The draft also states that “an expropriation may be either direct or indirect.” A direct expropriation occurs when a state takes an investor’s property outright, including by

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124 See below discussion of Annex 12-D-5.

125 Annex 12-D.
nationalization, compulsion of law or seizure.”\textsuperscript{126} This is unexceptional, although differences can arise, inter alia, as to the legitimacy of such actions, not only under law, but according to due process requirements of “the principal legal systems of the world” identified in Article 12.6.2(a).\textsuperscript{127}

The draft recognizes that an indirect expropriation “requires a case-by-case, fact-based inquiry”.\textsuperscript{128} However, the nature and scope of an indirect expropriation is more difficult to determine \textit{a priori} than a direct expropriation, while tribunals can give it an overbroad or unduly narrow scope of application. A difficult issue is to determine when an indirect expropriation has occurred, including its key components and the gravity of its effects. It is in these respects that the draft is most challenging. Annex 12-D 2(b) draws a parallel between a direct and an indirect expropriation, stressing that an indirect expropriation constitutes the taking of property “in a manner equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor’s property, although the means used fall short of those specified [with respect to a direct expropriation]”. This is a plausible distinction, although by itself, it does not provide indicators by which to recognize the nature and effect of an indirect expropriation. However, Annex 12-C. 4(a) elaborates by considering “among other factors (i) the economic impact of the government action, although… an adverse effect, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.” In addition, Annex 12-D.3 addresses the severity of an indirect expropriation by providing that the deprivation arising from the state’s action “…must be (a) either severe or for an indefinite period; or (b) disproportionate to the public purpose.” These tests, arguably, are as coherent as they reasonably can be, subject to the realization that the nature and impact of an indirect expropriation that differs from case to case inevitably gives rise to different conceptions relating to the reasonableness of state action, including the justification for the means used, and its effect upon a particular investor or class of investors. In implicitly recognizing this difficulty, the draft attempts to provide a probabilistic response to an indirect expropriation, namely, in relation to the deprivation of property that is discriminatory in nature and effect. Annex 12-D.4 maintains that “[a] deprivation of property shall be particularly likely to

\textsuperscript{126} Annex 12-D(2).
\textsuperscript{127} Discussed below in Section VII (iv) Compensation.
\textsuperscript{128} Annex 12-C.4.
constitute indirect expropriation where it is either: (a) discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or (b) in breach of the state’s prior binding written commitment the investor, whether by contract, license or other legal document.” This qualification is understandable but also limited. In particular, it does not deal with a government taking that, while not discriminatory, nevertheless has an adverse effect upon an investor of a state Party. The fact that the host states expropriates from both its own subjects and foreign investors based on a questionable public interest, does not legitimate the indirect expropriation of property from the inbound investor. The “national treatment” standard was not so intended.

The draft attempts to deal with this issue in two presumably competing versions of Annex 12-D-5. In one version it states that: “Except in rare circumstances in which paragraph [12-D,]4 applies, such measures taken in the exercise of a state’s regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.] In the other version of 12-D 5, it states: “Non-discriminatory regulatory actions by a Party that are designated and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriation]” The first version of 12-D-5 focuses on whether the government’s action is “reasonably justified”. The second version concentrates on its intention, in designing and applying the expropriation to achieve legitimate public welfare objectives. However, both provide potentially wide scope for Party states to confiscate, nationalize or otherwise take or seize property on wide grounds of “public health, safety and the environment”.

The key issue, overall, is not that the Annexes provide governments with wider powers to expropriate, which they do. The key issue lies in the divergent capacity of states to demonstrate the legitimacy or reasonableness of their actions. In the absence of a level playing field, states at different levels of development may have difficulty in justifying their actions. They may lack the economic or sociological data to demonstrate the nature of the economic, social or environmental threat, such as the full impact of a foreign investment upon public health or sustainable development. Such studies as they may present in arbitration may also be subject to intense scrutiny by experts employed by foreign investors to challenge government studies on grounds that they are unreliable or otherwise deficient.
There is no perfect solution to these dilemmas. One plausible option is to provide country-specific exemptions. For example, the draft does specify in Annex 12-E that, “notwithstanding the obligations under Article 12.12 (expropriation and compensation), where Brunei, Malaysia or Singapore is the expropriating Party, any measure of expropriation relating to land shall be for a purpose and upon payment of compensation in accordance with the applicable domestic legislation of the expropriating Party.” Another option is for the draft to make reference to further criteria in considering the nature of an expropriation, namely, by taking account of the level of development of the state Party, including its particular development needs and capacity to address them through direct and indirect acts of expropriation, consistent with the strict test of “investment” adopted in the Salini case. A further option is to devise across-the-board exemptions on issues about which the state Parties can agree. For example, Article XX.3 on Measures to Safeguard the Balance of Payments provides: “Nothing in this Article shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures with regard to transfers or payments for current account transactions if there is serious balance of payments or external financial difficulties [or threats thereof].” The provision does not give state Parties a blanket authorization to adopt temporary safeguard measures; they must be able to establish the fact, or “threat of serious balance of payments or external financial difficulties” to justify such action.

iv Compensation

What makes the alternative constructions of an “expropriation” difficult are the draft provisions for compensation. Article 12.12 provides for “Expropriation and Compensation” thus:

1. No party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except
   a. For a public purpose;
   b. In a non-discriminatory manner;

129 Annex 12-1 Transfers. A further country-specific exemption is applied to Chile: “Chile reserves the right of the Central Bank of Chile to maintain or adapt measures in conformity with” its constitutional law, “or other legislation, in order to ensure currently stability and the normal operation of domestic and foreign payments.” [Annex 12.1, Transfers].

130 See supra note 117.
c. On payment of prompt, adequate and effective compensation; and
d. In accordance with due process of law.

2. Compensation shall
   a. Be paid without delay;
   b. Be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place;
   c. Not reflect any change in value occurring because the intended expropriation had become known earlier; and
   d. Be fully realizable and freely transferable.

The key problem with Article 12.12 is in sub-section 1 (c) and (d) and 2 (a). Not only is “adequate and effective compensation” difficult to explicate, it is virtually certain to constitute “full” compensation, namely, being “equivalent to the fair market value of the expropriated investment immediately before the expropriation took place”. It is onerous for emerging and developed state Parties to comply with due process requirements which, as elsewhere in the draft chapter, may comport well with some of the principal legal systems of the world, but certainly not all. The result is that for some emerging and developing state Parties, the choice will be either not to expropriate at all, regardless of whether it causes significant public harm domestically, or to do so at their economic and political peril. If they cannot satisfy the draft requirements that are ancillary to an expropriation, however extensive their rights to expropriate may otherwise be, they will be captive to well financed foreign investors who may resist expropriation, or failing that, claim lost profits that the affected state simply cannot afford. Avoiding expropriation, or capitulating, to foreign investors may be the emerging or developing state Party’s most realistic option.

VIII. STANDARDS OF TREATMENT

This section focuses on the different standards of treatment accorded to foreign investors in international investment law, in particular, national treatment, most-favored nation treatment, and fair and equitable treatment. It considers these standards, first, in customary international and treaty law and second, in relation to the TPP process.
i. National Treatment

Standards of protection accorded to foreign investors are likely to include national treatment by which foreign investors receive comparable treatment to domestic investors, and most favored nation treatment by which the host State is required to grant to nationals of the other party treatment not less favorable than it grants to investors of other countries. However, the boundaries of such national and most favored nation treatment may be contentious. Qualifications to such treatment may also be included in the country annexes.

Article 12.4.1 of the draft Investment Chapter provides for “National Treatment”: “Each party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” There is nothing exceptional about such treatment, although the exceptions and qualifications discussed in the sections below are crucial in determining the substantive nature and scope of a “national treatment” standard under a TPPA.

i. Most Favored Nation Treatment

Article 12.5 deals with Most-Favored Nation Treatment:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party … as 12.4.1 above
2. Most Favored Nation Treatment in respect of covered investments as well

This provision is also unremarkable. As in the case of national treatment, its substantive scope is best considered in light of exemptions to, or qualifications in its application such as under a TPPA.

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131 The KORUS FTA provides for both national and most favored nation treatment. See supra note 102.
132 It is notable that China accords national treatment to foreign investors in its Model BIT, but often does not include that standard in its BITs. One response is that it is resistant to the national treatment of foreign investors in practice. A completely different response is that it extends more than national treatment to many foreign investors.
ii. Fair and Equitable Treatment

The TPPA will likely provide for the fair and equitable treatment of a foreign investor in the event of an expropriation. This standard is particularly important, as it works closely with provisions on expropriation that will be embodied in a TPPA, as in other investment treaties.

The language used to define or describe fair and equitable treatment can vary from treaty to treaty, as well as in customary international investment law. As a result, qualifying language may circumscribe it significantly, such as in response to concerns in developing state Parties to limit compensation claims by foreign investors from developed and other developing countries.\(^\text{133}\)

A particular challenge is whether this standard will be qualified under the TPPA beyond requiring that states pay “prompt, fair and effective” compensation for an expropriation. Related to this question is whether TPP negotiators would be willing to create country-specific exemptions to acknowledge that some states lack the resources to compensate foreign investors “fully”.\(^\text{134}\) The opposite hurdle arises if negotiators devise over-inclusive exceptions to the standard, such as based on defences of necessity, national security, health, safety, and the protection of the environment that, in effect, negate the “fair and equitable”

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treatment to foreign investors. This is a particular problem given that existing ISA jurisprudence has dealt inconsistently with these issues. 135 While wide defenses of necessity were upheld by ISA tribunals in LG&E v. Argentine Republic136 and Continental Casualty Company v. Argentine Republic,137 a narrow standard was adopted, notably in relation to the “minimal standards” of treatment, in Pope and Talbot v. Canada.138

The draft investment chapter of the TPPA engages this debate, but does not resolve it. Article 12.6.1 provides for the “Minimum Standard of Treatment”, in “accordance with customary


international law” including “fair and equitable treatment and full protection and security.”¹³⁹ Article 12.6.2 elucidates that the concept of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required…” by the “[minimum] standard of treatment of aliens as the [minimum] [general] standard of treatment to be afforded to covered investments”. Article 12.6.2 then adds:

a. “Fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

b. “full protection and security” requires each Party to provide the level of police protection required under customary international law.

Whether this definition of “fair and equitable treatment” and “full protection and security” will survive into later drafts is uncertain. However, in grounding fair and equitable treatment on the “minimum” or “general” standards of treatment under customary international law, the draft articles have affirmed pre-existing customary international law, including presumably the defences that states can invoke to deny that they have violated that standard. This observation is somewhat affirmed by the stipulation that states are not required to accord foreign investors of TPPA state Parties with treatment “in addition to or beyond that minimum standard”. In effect, these provisions lower the threshold that both developed and developing states are required to meet to demonstrate that they are not acting unfairly or inequitably towards investors of another state Party.

However, this inference of an expansive “fair and equitable” treatment standard accorded to foreign investors is somewhat offset by the provision that such treatment accords with the principle of due process embodied “in the principal legal systems of the world.” Establishing “the principle of due process embodied in the principal legal systems of the world” is challenging in two key respects. First, it is unclear which systems “the principal legal systems of the world” include. If they include common and civil law systems, they refer primarily to substantive systems of law, as distinct from their procedural application which varies significantly from jurisdiction to jurisdiction. The fact that the legal systems of both China and Japan are grounded in the German Civil Code relates primarily to their adoption of

¹³⁹ Annex 12-B defines “Customary International Law” as the Parties “shared understandings” in regard to the standards of treatment identified in the draft Chapter.
German private law, rather than German public law which includes principles of due process and rules of natural justice. Second, even disregarding this distinction between private and public law, it is difficult to determine coherently the content of due process “in the principal legal systems of the world”, unless the intention is to inculcate an international standard of due process, such as enunciated by the International Court of Justice. 140 If this is so, it is questionable why the draft does not so state more explicitly, other than through its broad reliance on customary international law. Identifying what is “unfair” or “inequitable” for foreign investors according to comparative, as distinct from an international standard of due process is illusive at best, and potentially difficult for some developed and developing states alike to satisfy.

The ultimate limitation in the draft article, however, is the adoption of a standard of due process that is undoubtedly somewhat higher than the standard of many countries whose courts do not apply due process as it is conceived in the legal systems of many developed countries. The further problem is that, in not recognising the difficulty some state Parties will have in satisfying this standard, a not insignificant number of developing states will fail to satisfy this standard as well. For some, a summary expropriation of an investment without prior notice to a foreign investor is deemed necessary in the national interest. For others, that expropriation will offend the dictates of natural justice.

Nor will creating country-specific exemptions or qualifications necessarily have significant political mileage, given that few developing states would openly acknowledge that their standards of due process fall short of internationally mandated norms. Developed state Parties would also not want their legal systems challenged for violating due process, as critics have identified arose from the Loewen case in the United States. 141

A possible way out of this impasse is for a revised draft to subscribe to the principal legal systems of the world, while also taking account of the different stages of legal development of state Parties to the TPPA, including in regard to due process of law.

A final observation is the correlation which the draft draws between fair and equitable treatment and “Minimum Standard of Treatment”, in “accordance with customary


141 See supra note 74.
international law”. The problem with a minimal standard of treatment under customary international law relates, less to attempts to define it, than to apply it in particular cases. For example, in the NAFTA case of *Pope and Talbot v Canada*, even though the UNCITRAL tribunal concluded that it was not limited under NAFTA Article 1005 to the “international minimum standard of treatment,” Canada nevertheless won the case. However, minimal standards of treatment are applied to a variety of specific defenses, notably under the US and Canadian Model Investment Treaties.

Negotiating parties will diverge over the boundaries of this standard, particularly given that the threshold for this standard is ordinarily quite low. However, if US practice prevails, a single minimum standard will be delineated in the TPPA itself. The likely result will be that TPP negotiators will rely on ISA tribunals to delineate the standard over time, instead of trying to do so expressly *ab initio* by treaty.

**IX. MODELLING DISPUTE MANAGEMENT UNDER THE TPPA**

This section considers three broad methods of dispute management applicable to the TPPA. The first is state-to-state dispute management of investor-state disputes, notably through the diplomatic assistance which TPPA home states provide to outbound investors in other TPPA countries. The second is the prevention and avoidance of conflict through negotiation, and the resolution of conflict through third party facilitation, such as conciliation or mediation. The third is the appointment of third parties to resolve investor-state disputes, in particular by resort to arbitration. Particular attention is given to the different kinds of arbitration, notably international commercial arbitration and investor-state arbitration.

Three challenges evolve out of this analysis for consideration in subsequent sections. The first is to challenge the presupposition that ISA is incompatible with the other methods of dispute prevention, avoidance and resolution identified above. The second is to challenge the

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142 See Dumberry, *supra* note 133; see also Directorate for Financial and Enterprise Affairs, *supra* note 133, at 11–12.

143 See *infra* notes 191 & 218.

144 For concerns expressed about the definition of investment, government requirements for an expropriation, and the minimum standards of treatment of investors, see *Trans-Pacific Partnership Negotiations*, *supra* note 50.
proposition that resort to domestic courts, is determinative as a method of resolving investor-state disputes. The third is to evaluate how different dispute management options -- dispute prevention, avoidance and resolution -- operate in the intense political context of TPPA negotiations and their sequel. These three challenges are evaluated below in light of Section B: Investor-State Dispute Settlement, in the draft TPPA.

i Diplomatic Protection

It is unlikely that signatories to the TPPA will agree to formal state-to-state diplomatic intervention beyond facilitative and non-binding representations. Their shared concern will be to avoid a potential floodgate of requests for diplomatic intervention from investors from home states; and to avoid alienating TPPA partner host states. As a result, the TPPA investment chapter is unlikely to provide for express diplomatic measures pursuant to which investors can rely on home and host states to resolve investor-state disputes. However, the TPPA is likely to provide for state-to-state negotiations in the event of a dispute between states; and such a dispute could conceivably encompass investor-state disputes. The approach adopted in the draft investment chapter reflects this approach, at least in part. It stipulates:

No party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and another Party shall have consented to submit or have submitted to arbitration under Article 12.19 [Consultation and Negotiation], unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of a dispute

The draft denies diplomatic protection to investors in host states that are parties to the TPPA once ISA proceedings have been instituted. Instead, it permits states to engage in “informal diplomatic exchanges”. However, the prohibition is not hermetically sealed. For example, a home state presumably can intervene to protect its own interests if it can render them distinct from the interests of its outbound investors. The draft, arguably, also permits home state to

145 See draft Article 12.20.4 of the TPPA.
146 The draft also provides for conflicts between state parties to the TPPA
147 Emphasis added. Article 12:20.4
intervene on the potentially broad ground that a host state party to the TPPA “has failed to abide by and comply with the award rendered in such a [ISA] dispute.” If this provision survives, influential states may try to supervise, if not police, the enforcement of awards in favor of their significant outbound investors. Whether the wording of the draft will be changed to accommodate this sensitivity remains to be seen.

ii. Consultations and Negotiations

The TPPA is likely to require that investor-state parties should first attempt to resolve their disputes amicably through consultations and negotiations and possibly, mediation or conciliation.\(^\text{148}\) This is reflected only in part in the draft. Article 12.17.1 Consultation and Negotiation, provides: “1. In the event of an investment dispute between a Party and an investor of another Party… the [parties to the dispute] shall [should] initially seek to resolve the dispute through consultations and negotiation, which may include the use of non-binding, third-party procedures, such as good offices, conciliation and mediation.” Such dispute avoidance and resolution measures are likely to prevail in the final draft, conceivably in a modified form. Such measures are also widely endorsed internationally, by the UNCTAD, among others, as more collaborative, time and cost effective than both arbitration and litigation.\(^\text{149}\) None of this provides any clarity as to how and in particular, how long investor-state parties are expected to consult and negotiate in general as in particular cases.\(^\text{150}\) Requiring such negotiations or consultations under the TPPA could both delay and increase the costs of conflict, added to the delay and costs of ensuing arbitration or litigation.


Negotiations and consultation may also reinforce the power of wealthy investors or dominant states who invoke it, not to resolve a dispute in good faith, but to force the other party into submission under the threat of protracted ISA. At the same time, investor-state disputes are often settled through negotiation, or by mediation, before or during arbitration, as is evidenced on the ICSID website.151

Negotiation and conciliation are invariably options available to states and investors, regardless of whether they are provided for by TPPA treaty or contract. In addition, such measures do not preclude parties from resorting to either arbitration or litigation should negotiation or conciliation fail. In addition, bilateral investment agreements and investor-state contracts which provide for, or even mandate conflict avoidance options, invite lip-service to such options as much as the serious pursuit of them by one or both parties of them. Going through the motions of conflict avoidance, intent on arbitrating or litigating is ultimately costly and dilatory for at least one party to such machinations.

Nevertheless, the institutional adoption of dispute prevention and avoidance mechanisms is a way in which investor-state parties can ameliorate their differences before they grow into conflicts. Should states endorse dispute avoidance measures under the TPPA, as the UNCTAD proposes, it could lead to the wider endorsement of dispute avoidance options and it could promote innovation in reconciling differences between states and foreign investors. Such adoption could redress the effect of high cost and often complex ISA proceedings and it could also encourage local, regional, and global institutions to adopt innovative processes to prevent or avoid disputes. In particular, states could be relied on to incorporate negotiation or conciliation into their post-TPPA BITs as requirements prior to investors initiating arbitration or litigation proceedings. Furthermore, states could also construct restrictive dispute resolution clauses in those BITs including by requiring mandatory mediation.152

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152 See August Reinisch, How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties? 2 J. INT’L DISP. SETTLEMENT 115 (2011) (discussing the restrictive construction of investment agreements). Such adoptions may be comparable to states acceding to international conventions, such as the UNCITRAL’s Model Law on International Commercial Conciliation (2002) and the Model Law on International Commercial
Interestingly, the draft TPPA chapter does not mandate conciliation or mediation proceedings. Again, mandatory mediation might concern developing countries that well financed investors could protract mediation proceedings while concurrently continuing their disputed investment practices in the host country. If mandatory mediation is adopted by the TPPA, it should prescribe reasonable timelines and good faith requirements, to limit these risks to both state parties and investors. 

While it is ordinarily preferable to avoid investor-state conflicts rather than resort to litigation or arbitration, there is no assurance that negotiation, conciliation, mediation, or some other variant of managed conflict prevention will avoid or resolve conflicts in investment disputes with states. Indeed, a systemic problem is that investment disputes often arise between arms-length as distinct from informal investor-state relationships. Specifically, investors interact impersonally with government bureaucracies, and informal methods of dispute avoidance often are ill suited to resolving disputes that are levered up to legal departments within those bureaucracies. This absence of a pre-existing culture of cooperation between states and foreign investors, especially when investors are ill attuned to cultural dynamics within the forum, makes dispute avoidance measures harder to implement.


See Mark Kantor, Negotiated Settlement of Public Infrastructure Disputes, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE (Todd Weiler & Freya Baetens, eds., 2011)

See generally Colin B. Picker, International Investment Law: Some Legal Cultural Insights, in INTERNATIONAL INVESTMENT LAW, in Trakman and Ranieri, supra note 58, ch. 6 (discussing the influence of legal cultures and traditions on investment law); Leon E. Trakman, Legal Traditions and International
At their best, these dispute prevention and avoidance mechanisms may discourage parties from resorting to fractious, costly, and disruptive arbitration or litigation. At their worst, however, they may protract investor-state conflict, delay dispute resolution, and increase its costs. Institutionalized dispute resolution options that are incorporated into bilateral investment treaties may avert litigation or arbitration, or they may simply delay it. Conciliation may fail because one party objects to the appointment of a facilitator; or, on appointment, that facilitator may fail to secure investor-state cooperation in managing a conflict, such as by a party declining to allow consultation with non-governmental agencies.

iii. Submitting a Claim to Arbitration

The TPPA is virtually certain to provide expressly for ISA, including conceivably detailed ISA provisions, stipulations for the choice of institutions before which to bring ISA claims, and the terms and conditions governing ISA.\(^{156}\) It is probable, too, that the TPPA will provide for a range of avenues, recognising particularly the ICSID\(^{157}\) and the UNCITRAL Arbitration Rules.\(^{158}\) Draft article 12.18.3 provides that a claimant may submit a claim under (a) the

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ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention; (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; (c) under the UNCITRAL Arbitration Rules; or (d) if the claimant and respondent agree, to any other arbitration institution…, or under any other arbitration rules.” This wide choice of arbitration institutions in the draft is likely to prevail, particularly given the consensual nature of arbitration in general and the likelihood that different disputing parties will opt for different arbitral options varying from institutional arbitration under the ICSID to ad hoc arbitration under the UNCITRAL, 159 as well as resorting to various international and regional commercial arbitration centres. 160 It is noteworthy, too, that comparatively recent amendments to arbitration rules, notably, the UNCITRAL Rules 2010 were influenced somewhat by the perceived needs of investor-state arbitration.161

In practice either state or investor parties, or both, may diverge over submitting an investment dispute to international commercial arbitration. Developing countries may resist this option on grounds that it is secretive, unduly costly and favors developed states. A related concern may be that it will imbed the commercial interests of investors at the expense of the public policy interests of host states.162

These concerns have some foundation. A functional challenge to institutional ISA, such as the ICSID, is the cost arising from the often complex nature of proceedings. 163 ISA

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160 On the non-exhaustive lists of such associations in the draft investment chapter of the TPPA, see text around supra note 97.


proceedings are also perceived to be dilatory, difficult to manage, disruptive, unpredictable, and not subject to appeal.164 Coupled with these challenges is the observation that low-income TPP parties may lack the resources to bear the legal fees and related costs of defending claims from well-resourced transnational investors.165 Moreover, these countries also lack the econometric data to verify the adverse impact of foreign investment upon their local economies, such as upon the environment.166

Nor are cost hurdles limited to developing states negotiating the TPP and their investors. Studies on conflict resolution in international investor-state arbitration, including by the United Nations Conference on Trade and Development [UNCTAD], level criticism at both investor-state arbitration and litigation on economic grounds, including the high cost of managing disputes generally.167

Nor are the metrics used to measure the performance costs of commercial or investment arbitration reliable in predicting costs and time in prospective cases. This is due, in part, to unanticipated costs, such as disruption costs and delays arising from a challenge to an arbitrator, the absence or illness of a party or arbitrator, managing third party interventions, and enforcing an award.168 These costs and delays arise in dispute resolution in general.

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main (indicating the cost of ICSID arbitration).

164 On the absence of an appeal in ICSID arbitration, see Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53 (1), Apr. 2006, ICSID/15 (“The award … shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”). The most significant remedy under the ICSID is the annulment of an award under Article 53.

165 See Schedule of Fees, supra note 163; see also, Memorandum on the Fees and Expenses of ICSID Arbitrators, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (July 6, 2005), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Memorandum

166 See, e.g., Hillary French, Capital Flows and the Environment, 22 FOREIGN POL’Y IN FOCUS 3 (1998) (“As investors search the globe for the highest returns, they are often drawn to places endowed with bountiful natural resources but are handicapped by weak or ineffective environmental laws.”); See also Disadvantages of Foreign Direct Investment, ECONOMIC WATCH (June 30, 2010), http://www.economywatch.com/foreign-direct-investment/disadvantages.html

167 U.N. CONFERENCE ON TRADE & DEV., supra note 77, at xxiii; see also UNCTAD, supra note 95.

However, they are accentuated in ISA disputes in which the economic stakes are often high, national sensitivities are in issue and damage to the reputation of states and sometimes investors exceed the already high costs of the dispute. 169 Public interest interveners sometimes can help to clarify at least some social costs of adverse ISA determinations, usually to the host state. However, these groups can do so only if they are privy to cost data, only if they can afford to petition to be heard, only if their petitions are granted, and only if their evidence is credible and material.170

Even the proposition that developing states are comparatively disadvantaged on average to foreign investors is subject to some dispute. Given that developing states are more often subject to ISA claims than developed states, the statistics do not suggest that foreign investors overwhelmingly prevail in ISA disputes. Recent ICSID statistics indicate that 48% of ICSID/Additional Facility decisions have favored foreign investors.171 However, more information would be required to make a more informed assessment based on specific factors contributing to the success or failure of investor claims in general.

These problems associated with ISA are comparable in significant measure to investor-state parties resorting to international commercial arbitration. It is difficult for direct parties to

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Based on Chart 12 in the same document, ICSID appears to have issued 150 awards in the aggregate.

170 The precise extent to which these costs inhibit participation by public interest groups is speculative, except that they seldom have deep pockets comparable to international corporate parties to state-investor disputes. See Aguas del Tunari, S.A. v. Bolivia, ICSID Case No. ARB/02/3. See generally, STAVROS BREKOULAKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION (2011) (discussing third parties in international commercial arbitration); Eric De Brabandere, NGOs and the “Public Interest”: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes, 12 CHI. J. INT’L L. 85 (2011).

commercial arbitration reliably to predict costs and delays in proceedings \textit{a priori}. Nor are the metrics available to measure the time and cost efficiency of such proceeding always helpful. They are generalized at best, in part because of the confidentiality of private commercial arbitration and in part due to efforts of arbitration institutions to market their centres to prospective users.\footnote{See Leon E. Trakman, \textit{ Arbitrating Options: Turning a Morass into a Panacea}, 41 UNSW L.J. 292 (2008).}

Coupled with this is the difficulty that direct parties to an investor-state dispute may have in agreeing on the model and institution of international commercial arbitration to adopt, such as over whether to submit a dispute to the Rules of the International Chamber of Commerce, the International Center for Dispute Resolution of the American Arbitration Association [ICDR], or the Australian, Singapore, Malaysian or Hong Kong International Arbitration Centres, among others.\footnote{See Kyriaki Noussia, \textit{CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION} 37–41 (2010; Leon E. Trakman, \textit{Confidentiality in International Commercial Arbitration}, 18 ARB. INT’L 1 (2002).}

All other factors being constant, American parties may prefer to submit disputes to the ICDR with its headquarters in New York. European parties may prefer resort to the ICC with its headquarters in Paris. Asian and Latin American countries may want to use the arbitration services of centres in their regions. These obstacles to the use of international commercial arbitration do not rule out such resort in either principle or practice. However, they do make compromising over the choice of different arbitration centres and their applicable rules more difficult.

Nor are stereotypical images of international commercial arbitration particularly useful. On the one hand, international commercial arbitration is depicted as a sophisticated, commercial focused, private, expert, expeditious and cost effective method of resolving investment disputes. On the other hand, it is conceived as costly and dilatory, not least of all due to counsel and arbitrator fees, the location of commercial arbitration centres in expensive cities, and the costs of securing expert evidence and of arbitrators conducting site visits to gather evidence and hear testimony.\footnote{On the time and costs associated with international commercial arbitration, see Antonio Hierro, \textit{Reducing Time and Costs in ICC International Arbitration Excess Time and Costs of Arbitration: An Incurable Disease?}, 12 SPAIN ARB. REV. 37 (2012).}

In essence, the key perceived strengths and weaknesses of ISA are endemic to international commercial arbitration as well. Both can, but need not be unduly costly, attenuate delays, and
over-emphasize commercial interests at the expense of public policy considerations. These costs are likely to depend, too, on the fractiousness of the dispute, the quantum involved, and the capacity of one party – whether an investor or state -- to rack up costs as a means of unsettling, or pressuring, another into submission.

A response to these concerns is to hold that the suitability of the kind of arbitration to adopt is not an issue for the TPPA, but one that is best left to the direct parties. They can elect among alternative arbitration options, venues and the choice of arbitrators based on such factors as the reputation of the centre, its location, its rules governing the appointment of arbitrators, the conduct of proceedings, and the enforceability of awards. They can choose the arbitrators based on their commercial and public interest experience. They can challenge the appointment of those arbitrators on procedural due process grounds, varying from incompetence to the denial of natural justice. They can decline to consent to third party interventions, if permitted, inter alia, to avoid delay and disruption of proceedings.

What neither ISA nor international commercial arbitration can be are replicas of common law litigation. It is unrealistic to expect arbitrators to adhere to a system resembling judicial precedent. Judicial precedent is a common law concept. It is not part of civil law. It is not part of the customary legal systems of Africa, Asia or South America. It is not imbedded in international law. Indeed, the International Court of Justice does not adhere to case precedent. Investment awards therefore can only be expected to bind the disputing parties. One also cannot expect arbitrators to develop a uniform body of international treaty law out

175 On the relationship between ISA and international commercial arbitration, see Leon E. Trakman, A Plural Account of the Transnational Law Merchant, 2(3) TRANSNAT’L LEGAL THEORY 309, 335 (2011).
176 On the perceived costs of investment arbitration, see above Section V.
177 On the consensual nature of international arbitration generally, see See generally ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION (2012).
178 The binding force of arbitral awards, including investor-state arbitration is a contentious topic. See, e.g., Christoph Schreuer & Matthew Weiniger, A Doctrine of Precedent?, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188 (Peter Muchlinski et al. eds., 2008) (discussing the absence of binding precedents, at least in principle, in international investment law); Andrea K. Bjorklund, Investment Treaty Arbitral Decisions as Jurisprudence Constante, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin Picker et al. eds., 2008).

http://law.bepress.com/unswwp-flrps12/46
of a plethora of differently worded investment treaties.\textsuperscript{180} Further undermining the prospects of arbitrators reaching uniform investment awards is the realization that international investment law focuses on the expropriation of property, while the law of property varies from jurisdiction to jurisdiction.\textsuperscript{181} Not only are investment arbitrators called upon to interpret complex property concepts, they also must reach decisions based on divergent conceptions of property in otherwise similar cases.\textsuperscript{182} Further undermining the prospects of investment arbitrators reaching uniform awards is the realization that international investment law focuses on the expropriation of property. Not only does the law of property vary from jurisdiction to jurisdiction; there is no truly pervasive body of international law of property governing investment.\textsuperscript{183} Not only are investment arbitrators called upon to interpret complex property concepts, they must reach decisions based on divergent conceptions of property in otherwise similar cases.\textsuperscript{184}

What one can expect of the TPPA is, not the disregard of these realities, but a coherent body of investment provisions that balance the public and private attributes of ISA in a coherent and ultimately, fair, manner.

\textbf{iv. Confidentiality of Proceedings}

The TPPA is likely to provide for the nature and conduct of ISA proceedings, including public hearings, varying degrees of confidential hearings, the consent of direct parties to a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{180} See Kurtz, \textit{supra} note 65, at 392 (noting three different methods of interpreting investment treaties); Burke-White & von Staden, \textit{supra} note 65 (discussing “nuances of state intent”).
\item \textsuperscript{183} On different conceptions of property rights in international investment law, see, for example, Salini Costruttori SpA v. Morocco, Decision on Jurisdiction (July 23, 2001); 42 I.L.M. 609 (2003); see also Monique Sasson, \textit{Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law}, see especially ch. 4 (2010).
\item \textsuperscript{184} See Wildhaber & Wildhaber, \textit{supra} note 182.
\end{itemize}
\end{footnotesize}
dispute to admit third parties to ISA proceedings, as well as in publishing proceedings and awards. If the TPP negotiators accept the virtue of public participation in ISA proceedings and the publication of awards, they must balance the need to preserve the confidences of the direct parties to ISA against the public need for transparent hearings and awards. 185 If they are to allow for public participation in proceedings, they need to circumscribe the requirement for party consent even though it inheres in private arbitration generally. 186 If they are to preserve the confidential information of the disputing parties, they need to establish a process by which to verify claims of confidentiality, as well as objections to them. 187 If they are to accept that investor-state arbitration is necessarily public in character, they cannot take their guidance from international commercial arbitration which is almost invariably private. 188

The draft Chapter deals with some of these issues, leaving the most controversial undecided, between the proverbial square brackets.

The draft authorizes the Tribunal to “accept and consider amicus curiae submissions” and in brackets that “the Tribunal shall provide the parties with an opportunity to respond to such written submissions.” 189 This is affirmed in article 12.22bis, also between square brackets,

185 It is potentially difficult for an investment tribunal to determine, when admitting third party briefs or testimony, whether, when and how confidential information may arise subsequently during the course of deliberations. This factor is a significant reason for tribunals to constrain the participation of third parties a priori, or to exclude such participation ex posteriori if and when confidentiality is raised by direct parties to the dispute. See Katia Fach Gómez, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest, 35 FORDHAM INT’L L.J. 510 (2012).


187 See supra note 185.


189 Article 12-22.3.
providing that, “after consultation with the disputing parties”, the Tribunal “may allow” a third party to file such submissions “within the scope of the dispute”.

Article 12.23.1 provides for Transparency of Proceedings. Providing that the Tribunal “shall” “promptly” “make them [documentation filed by the Parties] available to the public.”

Article 12.23.2 stipulates that “The Tribunal shall [subject to the consent of the disputing parties] conduct hearings open to the public.

Article 12.23.4 and 5 provide for information that is protected from public disclosure. Article 12.23.4 limits such information to “any sensitive factual information that is not available in the public domain”. Article 12.23.5(a) requires that a party seeking such protection shall so “clearly designate,” while Article 12.23.5(d) empowers the tribunal to decide any objection to that designation.

Finally, Article 12.22.9, while not entirely clear, provides that the arbitration award “shall be confidential to the disputing parties.”

The various issues of confidentiality relating to TPPA arbitration are likely to be controversial. Tensions already exist that ISA proceedings sometimes are unduly secretive and ought to be public as of right, given the public nature of investor-state disputes. The TPPA draft avoids reaching a definitive decision on public proceedings, placing between square brackets “subject to the consent of the disputing parties”. The bracketed information makes all the difference.

Existing practice, especially under the NAFTA, favors public hearings and awards and the admission of amicus curiae briefs. If the TPP negotiating parties follow the direction of the NAFTA Free Trade Commission and the NAFTA Parties, they may insist on the transparency of ISA proceedings and the publication of ISA. This is reflected in the draft TPP

investment chapter providing that the tribunal may admit *amicus curiae* briefs and need only “consult with” the disputing parties in so deciding. More recent investment agreements, such as the Korea-US Free Trade Agreement and some model bilateral investment agreements also provide for the admission of amicus briefs. However, these agreements highlight three criteria to guide a tribunal in making such a decision: “(a) the appropriateness of the subject matter of the case, (b) the suitability of a given non[-]party to act as amicus curiae in that case, and (c) the procedure by which the amicus submission is made and considered.”

These criteria, in the main, provide a reasonable basis upon which investor-state arbitrators can choose whether and how to admit “non-parties” to assume *amicus curiae* roles. There is also significant movement globally notably in discussions before the UNCITRAL towards more transparent hearings, the admission of amicus curiae briefs and the publication of ISA awards.

The TPPA draft also addresses sensitive issues, such as the protection of confidential information of disputing parties. In particular, the public nature of TPP proceedings justifies that information is properly designated as being in the public domain, or ought to be so available. A difficult qualification relates to the protection of information that is confidential

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in fact, that satisfies a threshold of confidentiality and that is properly protected from disclosure by the other disputing party. The further requirement is that information that is falsely construed as being confidential be disclosed. The draft addresses these concerns in significant measure. In particular: “The tribunal shall [subject to the consent of the disputing parties] conduct hearings open to the public…” 193 The disputing party who designates the information as private “shall so advise the tribunal.” 194 “The tribunal shall make appropriate arrangements to protect the information from disclosure” which “may include closing the hearing for the duration of any discussion of protected information.” 195 The disputing party who claims such protection “shall clearly designate the information at the time it is submitted to the tribunal” 196 and “submit a redacted version” for disclosure. 197 If the tribunal determines that the information was not properly designated as confidential, the disputing party submitting it may “withdraw all or part of it” or “re-submit complete and redacted information.” 198 These provisions, by and large, are appropriate.

The problem lies in restrictions in the rules of ISA institutions which sometimes limit the discretion of tribunals to hold public hearings, admit third parties to proceedings, and publish proceedings and awards. The related problem is that these restrictions are perpetuated when a treaty is silent on an issue, or fails to deal with it fully. The default rules are then the rules of the arbitration institution.

For example, Rule 37 of the ICSID’s Rules of Procedure, revised in 2006, 199 like the TPPA draft, provides that an ISA tribunal may admit the brief of a non-disputing party, after consulting the direct parties, to address “a matter within the scope of the dispute.” 200 The tribunal’s discretion is also limited. Rule 37(2), requiring the tribunal to consider whether (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party

193 Article 12.23.2.
194 Id.
195 Id
196 Article 12.23.5 (a) & (b).
197 Article 12.23.5(c).
198 Article 12.23.5(d)
199 See ICSID RULES, supra note 157, at 117.
200 Id. Rule 37(2)(a)(c).
submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.\textsuperscript{201}

Even if an ICSID tribunal allows third parties to participate in proceedings under Rule 37, it still does provide that those proceedings are “public”, in the sense of conducting hearings in public.\textsuperscript{202} In addition, an ICSID tribunal may limit both the kind and extent of third party participation, varying from participating at a particular stage during proceedings, to having a limited function such as presenting a brief, stipulating arguments, and responding to questions. An ISA tribunal may also admit evidence by a third party, but decline to provide it with the full record of proceedings. For example, it can deny requested information on grounds that the third party has failed to justify why it should receive that information, on the grounds that it is already publicly available, or that it is privileged.\textsuperscript{203} Furthermore, even if a tribunal provides a third party with requested information, it may still prohibit that party from making public disclosures. The result is that, despite third parties participating in ICSID proceedings, the proceedings may still be shrouded from public gaze.\textsuperscript{204}

Finally, Rule 37’s requirement that a third party not “disrupt the proceeding” or “unduly burden or unfairly prejudice either party”\textsuperscript{205} is an understandable reason for a tribunal not to admit third parties to proceedings, not least of all to avoid a subsequent annulment procedure. Requiring a tribunal to decide at the outset whether admitting that third party will cause “undue” prejudice or unfairness to a disputing party is often difficult for a tribunal to

\textsuperscript{201}Id.

\textsuperscript{202}ICSID tribunals began to admit third party interventions in 2007, after the ICSID’s new rules came into force. See eg. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (Feb. 2, 2007); Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19 (Feb. 12, 2007).

\textsuperscript{203}See Glamis Gold, Ltd. v. U.S., Award, 106, 121 (June 8, 2009) available at http://www.state.gov/s/l/c10986.htm (Arbitration under the UNCITRAL Arbitration Rules); see also Suez v. Arg., ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶ 24 (May 19, 2005) (denying third party access to documentation); Biwater Gauff (Tanz.) Ltd. v. Tanz., ICSID Case No. ARB/05/22, Procedural Order concerning a petition for Amicus Curiae Status, at 30 (Feb. 2, 2007).

\textsuperscript{204}This is implicit in the fact that tribunals, with the consent of the direct parties to the dispute, may grant third parties intervenor status for only limited purposes and insofar as those parties have access to confidential information, require them to maintain confidentiality. See ICSID RULES, supra note 157, Rule 37.

\textsuperscript{205}Id.
determine confidently and at an early stage of proceedings. Whether admitting a third party will disrupt ensuing proceedings is equally speculative.

Given these risks, an investment tribunal has a number of reasons not to admit a third party to proceedings under Rule 37 of the ICSID Rules, if not in the interests of the disputing parties, then in its own interests. The core problem lies in Rule 37 itself. Specifically, in granting qualified arbitral discretion, it exposes the tribunal to subsequent attack for failing to comply with those qualifications. Adding to this concern is Rule 37’s description of third parties as “non-disputing parties.”206 A practical inference for a tribunal to draw from this is that, if third parties are not “disputing parties,” they should not participate in proceedings.

If the TPP negotiators are to avoid these problems, they may need to stipulate more explicitly for the conduct of ISA, including public hearings, the admission of third parties to proceedings and the publication of proceedings and awards. The ICSID has its own Rules governing such matters. However, it is also subject to the applicable treaty, here the TPPA.

None of these issues are easily resolved. A controversial issue that could arise is whether ISA tribunals should have the authority to require third parties to participate in proceedings. First, such third parties may have a direct interest in proceedings, but be unwilling to participate.207 Second, if a third party is entitled to file an amicus brief or otherwise participate in proceedings, it is reasonable that in limited circumstances they could be required to do so.208

The inevitable challenge for the TPP negotiators will be in negotiating the extent of transparency to require, when to stipulate for the consent of the disputing parties, or only for the tribunal to consult them. These issues underlie current debates around ISA and consensus is still lacking.209

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206 Id, at 22.
208 The author has no authority for this statement except for the logic that, if third parties can intervene on demonstrating a public interest, they can be required to participate on grounds that they have a public interest that is material to an arbitration.
209 See eg Brabandere, supra note 170; Blackaby, supra note 207 (discussing public interest in investment arbitration).
v. Remedies

The final TPPA chapter on investment is likely to provide for ISA remedies. These will include the responsibility of an ISA tribunal to make substantive findings on whether a respondent state has wrongfully expropriated or otherwise violates the rights of a foreign investor under the TPPA. The TPPA is also likely to provide a range of remedies, including reasonable, adequate, or fair compensation for an expropriation or other taking, among others. Draft Article 12.28.1(a) provides only for monetary damages and any applicable interest; and 1(b) the restitution of property. However, “the respondent may pay monetary damages and any applicable interest in lieu of restitution.” Sub-section 3 elaborates that “A tribunal may not award punitive damages.” In addition, a disputing party may seek enforcement of an award under the [ICSID Convention], the New York Convention [or the Inter-American Convention].

Regarding the costs of arbitration, Article 12.28, paragraph 11 states:

a. The costs of arbitration shall be borne equally by the disputing parties unless the tribunal decides otherwise; and

b. The prevailing ICSID rate for arbitrators shall apply

Paragraph 12 permits the disputing parties to “establish rules relating to expense incurred by the tribunal, including arbitrator’s remuneration.”

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X. SUMMARY

In the final layout of the investment chapter, much will depend on how strenuously states present sovereignty arguments to defend their domestic interests and the extent to which such arguments are likely to influence the nature of the ISA provisions identified above.211

Negotiating differences over ISA provisions may revolve, to some degree, around differences between capital importer and capital exporter countries, which may diverge in part from the historical distinction between developed and developing countries.212 In general, capital exporters are likely to favor more extensive protection for their foreign investors, while still seeking protections from foreign investors domestically. Capital importers are likely to focus more on protecting domestic markets from foreign investors. Further tensions will inevitably revolve around differences in levels of development among countries, including the perception that developing countries require public interest protections to preserve their sometimes vulnerable economies, particularly in light of their historical disadvantages vis a vis multinational and other foreign investors.213 The likely result will be a compromise based on the recognition that some traditional capital importers are becoming capital exporters, while other capital exporters are evolving into capital importers. It is noteworthy that the United States is increasingly becoming a capital importer, with an interest in protecting its domestic markets from foreign investment especially in recessionary times. However, at the same time, the US is currently seeking to increase capital imports through its SelectUSA

211 On tension over the meaning of an expropriation, see Christie, supra note 122; Herz, supra note 122; Norton, supra note 122.

212 See e.g., Nottage & Miles, supra note 156 (maintaining that this distinction was a significant factor in Australia resisting the inclusion of investor-state dispute resolution in the Australia-United States Free Trade Agreement).

program. In the unlikely event that China becomes a party to TPP negotiations it is also likely to negotiate for greater protection for its exporters, given its ever-growing status as a capital exporter. Global Investment politics has the capacity to build unlikely alliances.

In response to these dynamics, the final TPPA investment chapter may include further protections for capital importers in general beyond the current draft and more probably, will do so along country specific lines. Country specific exceptions will focus on protecting vulnerable and/or interventionist sectors of the domestic economy of member states, such as dairy and lamb in the United States and agriculture generally among developing countries.

It is unrealistic to expect negotiations on ISA to take place on a completely level playing field, given the significantly different bargaining power of the prospective signatories. Should countries like Japan enter negotiations to become a party to the TPPA that will likely also give rise to further negotiating challenges, especially with respect to issues upon which the existing parties have reached tentative agreement. The reality is that, with less than half of the members of APEC signed onto TPP negotiations, attracting further members may well

214 JOSEPH STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY (2010) (providing an account of these recessionary forces and their global consequences).

215 China is a clear example of a capital importer that is increasingly a capital exporter. See e.g. Vivienne Bath, The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China, in FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 68 (Vivienne Bath & Luke Nottage eds., 2011); TED PLAFKER, DOING BUSINESS IN CHINA: HOW TO PROFIT IN THE WORLD'S FASTEST GROWING MARKET (2007); DOING BUSINESS WITH CHINA (Li Yong & Jonathan Reuvid eds., 2006).

216 See e.g., Gantz, supra note 1; Lewis, supra note 2.

217 The current view is that Japan, historically reluctant to conclude investment treaties is increasingly likely to enter into such negotiations, particularly following the collapse of the Multilateral Investment Agreement [MIA] in 1999. See Shotaro Hamamoto, A Passive Player in International Investment Law: Especially Japanese, in Bath and Nottage, supra note 9, ch. 4; Luke Nottage & Shotaro Hamamoto, Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution, 5 TRANSNAT'L DISP. MGMT (2011), also available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724999. Added to this prospect is the fact that Japan has recently agreed to a China-Korea-Japan Agreement and is perceived to not intend to enter into a potentially competitive agreement at this time. See e.g., Signing of the Japan-China-Korea Trilateral Investment Agreement, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, May 13, 2012,

require making concessions including on issues upon which existing negotiating parties have already compromised. However, if the US dominates negotiations and tries to accommodate its domestic constituencies, the TPPA may increasingly include provisions that replicate the US Model BIT.

The US’s other influences may include an expanded definition of “investment” to placate US outbound investors; safeguards for domestic markets directed at appeasing “tea party” Republicans and isolationism among some Democrats. Other developments may include expanded grounds for regulating FDI, coupled with boundaries placed around a legitimate expropriation. An effort may be made to raise minimal standards of treatment for foreign investors while taking account of different levels of development of negotiating parties. However, the US has traditionally adopted a single minimal standard of treatment which may prevail in TPP negotiations. A particular uncertainty is whether Romney will defeat Obama as President in 2013 and whether a change in the US executive will lead USTR to modify its TPP negotiating strategy, beyond the developments identified above.

XI. EXEMPTIONS FROM ISA

In rejecting investor-state arbitration, Australia to date has adopted a stance that no other developed state has followed and none other appears to have endorsed in TPP negotiations yet. Australia’s position is bold. As noted above, it is supported by a number of leading jurists in multiple common law jurisdictions. However Australia’s close economic partner, New Zealand, may fall short of following Australia’s lead, although that is not certain.

218 On the 2012 US Model BIT, see supra note 101.
219 See e.g. the KORUS FTA, supra note 24, defining the minimal standard of treatment, defined as the same standard of treatment required under customary international law, including fair and equitable treatment of investors.
220 See above Section II.
221 The fact that the jurists who have publicly opposed ISA in the TPPA include a significant number of New Zealand jurists might suggest that New Zealand is more likely to oppose ISA. However, there are a number of contrary indications. New Zealand does not have an FTA or BIT with the US and would undoubtedly wish to have one, not least of all to have access to the large US market for its agricultural goods. Were New Zealand to
At its best, the attempt by Australia to negotiate an exemption from ISA in TPP negotiations is in the national interest. It protects Australia from the volatility and the high cost of investor-state arbitration in which multinational companies like Philip Morris are able to lodge challenges to Australia’s domestic public policies under one or another free trade or investment treaty.222 Australia also has good reason to try to protect its public interests from aggressive foreign investors and to preserve the integrity of its local laws.223 Central to Australia’s resistance to agreeing to ISA in TPP negotiations are its concerns about public health and the environment, since reaffirmed with the initiation of the ISA case brought against it by Philip Morris under the Australia-Hong Kong Free Trade Agreement.224 The setback for Philip Morris to date is in losing its constitutional challenge to Australia’s “right” to require the plain packaging of cigarettes, in the High Court of Australia, although Philip
Morris has threatened to appeal to the World Trade Organization. 225

However, there are four key impediments to a country like Australia achieving these very objectives by rejecting investor-state arbitration in TPP negotiations. First, Australia’s reliance on domestic courts to resolve conflicts with inbound investors like Philip Morris does not provide the public policy protection a Government in its position is likely seeking. Foreign investors may well mount expensive claims against Australia before domestic courts, 226 here as elsewhere, as they would through investor-state arbitration. Second, Australia’s insistence that it not be subject to investor-state arbitration in the TPPA may isolate it from other negotiating states that adopt ISA, however reluctantly a few may be to do so. Third, Australia’s rejection of investor state arbitration may well expose Australian investors abroad to foreign courts of host states whose procedures fall short of the standards of transparency not only of Australian courts, but also of investor-state arbitration tribunals.227 It is noteworthy that approximately 76% of the cases in which investment treaty awards were rendered up to June 2006 involved states that fell on or below Number 50 on the Transparency scale of the 2008 International Corruption Perception Index. That number increased to 84% when cases involving the US and Canada were excluded. Over 69% of the cases involved states that fell at or below Number 70 on that Index.228 The World Bank’s Worldwide Governance Indicator [WGI] also indicated that 68% of those States were in the bottom 60% of its Index for the “rule of law.” 229 The inference is that foreign investors have good reason not to trust all domestic courts equally to apply the “rule of law”, or in some cases, at all. States that conclude BITs with a state whose domestic courts fall short on the Transparency or WGI Index to resolve investor-state disputes place their investors at risk.


227 See Trakman, supra note 63.

228 See Kantor, supra note 73.

The fourth and final reason as to why the rejection of ISA under the TPP fails to protect Australia’s national interests is based on the existence of preferable alternatives. Australia can try to negotiate bilateral caps on treaty protection to foreign investors set at Australia’s domestic substantive law standards; or it could try to negotiate for broader general exceptions or exclusions of entire measures with existing or new treaty partners. In both cases, such action would provide at least some protection to Australia’s outbound investors. A tentative conclusion is that the choice of domestic litigation over investor-state arbitration is neither compelling in itself, nor according to benchmark indicators of trustworthiness that are imputed to a significant number of domestic courts. As a result, the virtue of domestic litigation is contingent, not only on the value preferences of those who subscribe to it, but on the trust placed in national courts in discrete jurisdictions. If a choice is made between domestic courts applying allegedly comparable standards of transparency and ISA, a domestic appeals process is ordinarily more robust than an ISA annulment procedure.\textsuperscript{230} For example, annulment under Article 75 of the ICSID Convention is ordinarily limited to jurisdictional grounds. An appeal of a domestic court is ordinarily both jurisdictional and substantive.\textsuperscript{231}

However, significant benefits of resort to domestic courts are offset by benefits arising under ISA. The proposition that appropriate domestic courts apply tried and tested domestic rules of evidence and procedure to disputes is offset by the fact that ISA, such as under the ICSID, is guided by rules of procedure that seek to ensure that arbitration procedures are clear in nature; and that an ICSID arbitrator’s failure to apply them fairly can lead to annulment for non-compliance.\textsuperscript{232} The rationale that domestic courts ought to accord no more than national treatment to foreign investors is countered by the argument that investment treaties may...


\textsuperscript{231} While presented as an advantage, some TPP countries are likely to resist substantive review, not only under the TPP, but due to resistance to substantive review in administrative law more generally.

\textsuperscript{232} On the ICSID, see supra notes 4 & 33.
require ISA tribunals to subscribe to well established international standards of national
treatment. The supposed insularity of ISA arbitration from domestic law and procedure is
also disputable on grounds that ISA arbitrators cannot summarily disregard domestic law.
A foreign investor that wins an ISA dispute, but cannot enforce it before a domestic court that
denies such enforcement, ultimately wins nothing of substance.

If choices between ISA and domestic courts are to be made, beauty will lie in the eyes of the
beholder. However, careful research into whether domestic courts operate on a level playing
field including by enforcing ISA awards, will help to provide a clearer view.

What is apparent is that if Australia remains adamant in seeking an exemption from investor-
state arbitration in the TPPA, it may well remain as a negotiating party. The opportunity to
participate in possibly the second largest global investment treaty after the European Union is
too good to bypass. However, over the longer term, Australia may find itself in a lonely
place at the end of a long table of contrary minded states; and Australia’s outbound investors
may be exposed to the domestic courts of negotiating states that do not have the ‘rule of law’
traditions to which Australia subscribes.

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233 This proposition is complicated, particularly by the fact that investment law is incorporated differently into
different national legal systems. See especially Sornarajah, supra note 72.

234 See e.g. Schreuer, supra note 134, at 357.

235 On difficulties arising in the recognition and enforcement of transnational arbitration, see Stevens, supra note
66; International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules 95–

236 For such a study, see Simon Butt, Foreign Investment in Indonesia: The Problem of Legal Uncertainty, in
Bath and Nottage, supra note 9. See too Simon Butt, Luke Nottage and Brett William, Renegotiating
Indonesian Investments in the Shadow of International Treaty Law (Apr. 2, 2012),

237 See e.g., Investor-State Arbitration Not Deal Breaker for TPP Negotiations, CHAPMAN TRIPP, May 11, 2012,
http://www.chapmattripp.com/publications/Pages/Investor-state-arbitration-not-deal-breaker-for-TPP-
negotiations.aspx.
XII. RECOMMENDATIONS

The recommendations below are made in light of the draft investment chapter of the TPPA and BITs that develop in light of it. They also respond to positive developments in ICSID investor-state arbitration in recent years. In particular, investment treaties traditionally often included scant detail about dispute resolution including investor-state arbitration. More recent treaties, starting with Chapter 11 of the NAFTA, have included reservations and exclusions. They have defined an “expropriation”, “most-favored nation” and “national” treatment, concepts that were largely undefined in earlier investment treaties. A greater proportion of ISA in recent years is also settled or otherwise discontinued. Dispute avoidance, arguably, is also being used, less as an instrument to secure pre-disclosure and increasingly in a genuine attempt by investor-state parties to resolve disputes. In addition, a body of international investment jurisprudence is developing around such concepts as “most-favored nation” and “national” treatment; a regulatory expropriation, “local content” requirements and “fair and equitable” treatment.238

First, the TPPA investment chapter should ideally provide for standing panels to interpret TPPA rules as they apply to often complex investor-state arbitration cases. Standing panels can provide greater consistency in the application of the TPPA. They can also help to redress the conflicting interpretation of the TPPA by ISA tribunals.

Second, the TPPA could provide more explicitly for negotiation and failing that, mandatory mediation within specified time periods between disputing parties prior to them initiating ISA. This recommendation is consistent with the recommendations of the UNCTAD.239 It also reaffirms the importance in principle of encouraging cooperation between investor-state parties, especially given that ISA is usually costly and time consuming, and can have devastating economic consequences for investors and drastic social and economic impacts for host TPPA states. A key consideration in providing for mandatory mediation is to avoid costly and protracted negotiation proceedings that lead to further costly and protracted ISA. A key purpose is to limit the risk of premature, opportunistic, and pernicious action by adventitious investors against host states or by host states in responding to such claims. A


239 U.N. CONFERENCE ON TRADE & DEV., supra note 77, at xvii–xix, xxiii.
further means of addressing that purpose is for the TPP to provide that arbitration tribunals should take account of bad faith in the conduct of negotiations or conciliation by one or both parties prior to arbitration.

Third, the draft provisions of the TPPA recognise public interests beyond the commercial interests of investor claimants. This is consistent with the public and commercial nature of investor-state arbitration. It also distinguishes ISA from the private and commercial character of international commercial arbitration.

Fourth, the TPPA could define expropriation more restrictively, including by distinguishing between the regulation of an investment and a direct or indirect expropriation.

Fifth, the draft TPPA provisions try to ensure that arbitration proceedings are transparent, subject to preserving confidential information in the public or commercial interests of one or both parties. These efforts at greater transparency need to be clearly expressed to ensure that they are properly applied by ISA tribunals. They should encompass: public access to information on the initiation of investor-state arbitration; requiring that investors inform their home states that they have initiated investor-state arbitration against a host state; and requiring publication of reasons for admitting or denying admission to proceedings by third parties, whether in whole or part. Amici curiae briefs should also be more readily available, but also along with social, economic, and environmental impact reports of foreign investor and host state action. Finally, arbitration awards should be publicly available, subject to the exclusion of the confidential information recommended above.

Sixth, the TPPA could provide guidelines to govern conflicts of interest and duties of disclosure by arbitrators and to redress the perception that a small number of arbitrators are repeatedly subject to challenges. There are well established conflict of interest and disclosure guidelines upon which to draw, such as the guidelines adopted by the International Bar Association. The TPPA could ideally require a challenge committee appointed under rules of ISA institutions such as the ICSID to decide any challenges to an arbitrator. Such a

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240 See also Daphna Kapeliuk, Collegial Games: Analyzing the Effect of Panel Composition on Outcome In Investment Arbitration, 31 REV. LITIG. 267 (2012).

challenge should not be decided by arbitrators sitting on the same tribunal as the challenged arbitrator.\textsuperscript{242}

Seventh, the TPPA could provide interim measures to inhibit host states from initiating regulations that unreasonably interfere with claims brought by foreign investors, and to impede foreign investors from unreasonably interfering with the enactment of public interest regulations in those states. For example, interim measures would be appropriate were the Australian Government to implement fast track tobacco legislation directed at undermining an arbitration claim initiated against it by Philip Morris. Conversely, interim measures would be appropriate to discourage claimants, such as Philip Morris, from protracting investment arbitration in order to inhibit the enactment of public health regulations by host states, like Australia.

Eighth, the TPPA could provide for constraints on legal costs and expedited ISA proceedings. Cost reducing measures could redress, among others, the use of contingency fees; placing a cap on the hourly fees charged by arbitrators; and providing guidelines on the award and allocation of arbitral costs.\textsuperscript{243}

Ninth, the TPPA rules should require parties to register their claims and counterclaims within prescribed time limits; to clarify their availability in advance of hearings; and to be available prior to and directly after hearings, such as a day before and a day after hearings.

Tenth, the TPPA could stipulate for ISA appeals to be heard by an appellate body with jurisdiction beyond annulment proceedings and including expanded grounds of appeal. Such an appellate body can also help render ISA jurisprudence under the TPPA more consistent.\textsuperscript{244}

Finally, the TPPA may need a process for the ongoing scrutiny of these and other proposals, including facilitative measures by which to implement them.

\textsuperscript{242} The draft investment chapter does provide for challenges to the competence of the tribunal, in Article 12.22 (d).

\textsuperscript{243} The draft investment chapter provides for expenses in Article 12.28.11, and sets the fees of arbitrators at the ICSID rate in Article 12.28.12.

\textsuperscript{244} See id.
CONCLUSION

The TPPA is in its early stage of development. Only half of its potential membership has sought entry or has been formally invited to participate. It is likely that, with each round of negotiations, the framework of the TPPA will change as participating governments return with responses from their domestic constituencies and as newer entrants attempt, probably unsuccessfully in most cases, to reframe negotiations in their interests. At this stage, it is difficult to anticipate how negotiations will impact on the nature of an already stratified body of international investment law and practice. It is also difficult to identify the extent to which the TPPA will serve as an umbrella agreement on investment, mushrooming into a series of BITs that may diverge both *inter se* and from the TPPA itself. It may be that such mushrooming of BITs may not eventuate, but that the TPPA will address issues systematically such as by imposing uniform performance requirements\(^245\) and by regulating non-conforming measures.\(^246\) Alternatively, the TPPA may include selective country-specific reservations. What is likely is that the United States will have a significant influence over the general and country-specific investment provisions of the TPPA, conceivably drawing from Chapter 11 of the NAFTA, developments under the CAFTA\(^247\) and provisions in the US Model BITs, among other instruments. However, the United States may well be cautious not to over-orchestrate the investment chapter. In particular, it faces significant internal hurdles, not least of all from anti-NAFTA Democrats allied with isolationist ‘tea party’ Republicans, along with divisions across its business sectors. One issue, not limited to the US, is concern about granting privileges to foreign investors at the perceived expense of national constituencies.\(^248\) It is also conceivable that the liberalization of the TPPA may be further

\(^{245}\) See draft Investment Chapter Article 12-7 (“Performance Requirements”).

\(^{246}\) Id, Article 12-9 (“Non-Conforming Measures”).

\(^{247}\) *Dominican Republic – Central American Free Trade Agreement*, signed Aug. 5, 2004 (entered into force Aug. 2, 2005 (United States), Mar. 1, 2006 (El Salvador), Apr. 1, 2006 (Honduras and Nicaragua), July 1, 2006 (Guatemala), Mar. 1, 2007 (Dominican Republic), Jan. 1, 2009 (Costa Rica)).


What is reasonable to infer at this time is that the TPPA will provide for investor-state arbitration from which only Australia will seek exemption. What appears likely too is that this exemption will be permitted, although precisely how it will be framed remains unclear. What is probable, too, is that the TPPA will include country annexes based on negotiated exemptions and exclusions for individual countries on a host of matters, not limited to exemptions for ISA.

In the author’s view, any conditions to participation or exemption from ISA will be dealt with generally in both the TPPA and country-specific annexes. This will be seen to limit collateral damage arising from the TPPA being seen to endorse a two-tier approach to dispute resolution. It will also avoid the TPPA attempting to constrain the manner in which an individual state may choose to frame an alternative method of dispute resolution to ISA. In this manner, the TPPA may respect the sovereignty of exempted states like Australia to delineate their preferred dispute resolution options in bilateral or other negotiations with TPPA members.\footnote{Sovereignty remains a primary tool used by states to justify the protection of domestic interests from foreign investors. See *e.g.* REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW, Part Four (Wenhua Shan et al. eds., 2008) (providing commentary on the complexity of sovereignty in international investment law); Stumberg, *supra* note 86, at 503–04, 523–25 (discussing sovereignty). See also INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY (Meredith Koskky Lewis & Susy Frankel eds., 2010); ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990); JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS, ch. 18 (2000); Michael Reisman, *International Arbitration and Sovereignty*, 18 ARB. INT’L (LCIA) 231 (2002); OPPENHEIM’S INTERNATIONAL LAW (Sir Robert Jennings & Sir Arthur Watts eds., 1992) 927.}

More important than the purported exemption of one country from ISA is the prospect that negotiating states will seek a range of qualifications in the application of the TPPA’s investment chapter to them. The more diffuse are these qualifications, the more complex and also the more diluted the TPPA is likely to become. If the TPPA embraces high sounding...
requirements for state Parties which are followed by numerous country-specific exemptions, it may lose its legitimacy as an agreement. If it spurns a host of BITs between and among its TPPA Party signatories, it may lose its cogency as an umbrella Agreement. In effect, the BITs that evolve out of the TPPA may become more important to their signatories than the investment chapter in the TPPA itself.

Given the multitude of BITs currently in existence, the case is stronger for a pervasive TPP investment chapter with minimal country-specific exemptions that might fragment it. Inasmuch as ISA awards are reported and analysed, they can contribute to a more cohesive body of TPP investment law than has the jurisprudence of divergent domestic legal systems and their courts.

Regarding dispute resolution in particular, the choice of TPP Parties is not solely between ISA and litigation. Conflict preventive and avoidance measures sometimes are preferable to both. ‘Multi-tiered’ dispute resolution agreements can allow parties to agree upon a tiered process, varying from negotiating in good faith, to mediation, and failing both, to arbitration or litigation, or conceivably, to both. It is noteworthy that the UNCTAD considered conflict prevention and avoidance sufficiently important to devote a detailed study to it.

Nor, too, is it persuasive to insist that ISA is inherently superior to, say, litigation because arbitrators are investment specialists, while domestic judges operate as courts of general jurisdiction. Neither resort to ISA under the TPP nor to litigation under any exemption or side-agreements ensures equitable and transparent procedures or sound substantive determinations. Evidence of an unjust expropriation is both legally and factually informed: it calls for good judgment, along with investment expertise. It raises difficult questions of law,

251 On this tension between national and international investment law, see Trakman and Sornarajah, supra note 68. See too, Sornarajah, supra note 72.


not least of all about the nature of an ‘investor’ and an ‘investment’ in respect of which states diverge, not only inter se, but in their own perspectives of it as well.255

What can be said in defense of ISA under the TPP is that, while it does not lead to judicial precedent as common lawyers conceive of it, reliance on ISA is more stabilizing than reliance on a plethora of different local laws and procedures that domestic courts apply to foreign investment.256 However fragmented different standards of treatment accorded to foreign investors may be under customary international law and however difficult it may be to


identify cohesive principles out of *ad hoc* and sometimes unpublished arbitration awards, a international investment jurisprudence does exist.\textsuperscript{257}

\textsuperscript{257} On such authorities, see for example, Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2008) But see Sornarajah, *supra* note 72.