INSTITUTING INVESTMENT CLAIMS UNDER THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

LEON E. TRAKMAN

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CHAPTER 12

Instituting Investment Claims under the Trans-Pacific Partnership Agreement

*Leon E. Trakman**

What is now being negotiated as the Trans-Pacific Partnership Agreement ('TPPA') began as a strategic partnership agreement (the P4 Agreement) between Chile, New Zealand and Singapore in 2005 and Brunei in 2006.[1] In 2008, the P4 countries initiated negotiations on an investment chapter, and other countries began acceding to the agreement.

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 participate in the process. In less than three years TPP negotiations extended from Brunei, Chile, New Zealand and Singapore, to the United States, Australia, Peru, Vietnam, Malaysia, Canada and Mexico, with the possibility of Japan joining negotiations later.[2]

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1 "[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?," *B. C. Int'l & Comp. L. Rev*. 34(2011): 27, 34.

2 On the different rounds of TPPA negotiations, see "Trans Pacific Partnership Negotiations," Department of Foreign Affairs & Trade, http://www.dfat.gov.au/fta/tpp/ (see the 'News' Tab).

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There are, however, two notable aspects of the negotiations that are controversial. The first 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.[3] 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).[4] 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.[5] 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.[6]

The second aspect relates to Australia's participation in the negotiations on the Investment Chapter, with its position being that it will not agree to investor-state arbitration ('ISA') to resolve investment disputes.

See also "The Trans Pacific Partnership Agreement," *Public Knowledge*, *available at* http://tppinfo.org/2012/07/13/tpp-recap-san-diego-negotiations/. See too SICE, *available at* http://www.sice.oas.org/TPD/TPP/TPP_e.asp.

3 On China's shifting position in regards to investment arbitration, see Vivienne Bath & Luke Nottage, *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011).

4 For a Chinese perspective on respecting the TPP negotiations while noting its interest in preserving its dominant position in any investment partnership in Asia, see Cai Penghong, "The Trans-Pacific Partnership: A Chinese Perspective," Pacific Economic Cooperation Council, available at http://www.pecc.org/resources/doc_view/1752-the-trans-pacific-partnership-a-chinese-perspective-ppt.

5 On these developments, see "Signing of the Japan-China-Korea Trilateral Investment Agreement," Ministry of Foreign Affairs of Japan, May 13, 2012, http://www.mofa.go.jp/announce/announce/2012/5/0513_01.html. See too Aurelia George Mulgan, "Why Japan is Lagging on the TPP," *East Asia Forum*, May 30, 2012, http://www.eastasiaforum.org/2012/05/30/why-japan-is-lagging-on-the-tpp/.

6 *See, e.g.*, Lutz-Christian Wolff, "Pathological Foreign Investment Projects in China: Patchwork or Trendsetting by The Supreme People's Court?," *Int'l Law* 44 (2010): 1001, 1003, 1110–11 (noting China's protectionism); *see also* Wei Shen, "Case Note, Beyond the Scope of 'Investor' and 'Investment': Who can Make an Arbitration Claim under a Chinese BIT?—Some Implications from a Recent ICSID Case," *Asian Int'l Arb. J.* 6 (2010): 164, 183–85 (discussing limits placed on complainants under bilateral investment agreements with China).

A draft version of the TPP Investment Chapter was posted on June 12, 2012 on the website of Public Citizen's Global Trade Watch.[7] This paper examines that draft Investment Chapter and analyses provisions bearing on the resolution of investor-state disputes arising under the TPPA. It also briefly examines the significance of Australia's insistence on an exemption from ISA, and what this means in terms of the institutional differences between ISA and the use of domestic courts to resolve investment disputes.

1 Sources of the Investment Chapter

The draft version of the Investment Chapter of the TPPA leaked to the public in June 2012,[8] while undoubtedly authentic, is unlikely to constitute the final version of the investment chapter. This is especially so in light of the need for public consultation and the need to secure agreement from some states that are apparently pushing for amendments to the Chapter.

Given the political nature of TPP negotiations, it is difficult to predict the precise form of ISA provisions that the TPP negotiators will finally adopt. Nor is it self-evident whether they will adopt a uniform template or model ISA provisions, with variations on a country-by-country basis, or leave it to TPPA signatories to provide for investor-state disputes bilaterally. Having said that, 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 favours it strongly over the alternatives.[9]

It is likely that the model of the evolving investment chapter will extend beyond the draft. Given the dominance of the United States in negotiations, other source models will include, to varying degrees, recent BITs to which the US is a party and the 2012 US Model BIT.[10] An influential BIT source is likely to be the investment chapter in KORUS, which came into force on 15 May 2012.[11] Other recent US trade and investment agreements with Asian and

7 Available at <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>.

8 See http://tinyurl.com/tppinvestment.

9 See generally Leon E. Trakman, "The ICSID under Siege," *Cornell Int'l L. J.* 45 (2012): 603.

10 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.

11 See Peru Trade Promotion Agreement, U.S.–Peru, Apr. 12, 2006 (entered into force Feb. 1, 2009) art. 10.21 [hereinafter Peru FTA]; Free Trade Agreement, U.S.–Colombia, Nov. 22, 2006 (anticipated entry into force, 2012) art. 10.21 [hereinafter Colombia FTA];

Latin American countries, such as the US-Chile Free Trade Agreement, are also likely to influence the negotiating and drafting process.[12] However, all these BITs are limited as models for the TPP due to their bilateral character. A multilateral TPP 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, the greater the number of country-specific exemptions or qualifications, the less influential the TPPA is likely to be as an umbrella agreement.[13]

The rest of this paper analyses the provisions in the draft Chapter and recommends changes, where appropriate. Many of the provisions in the draft Chapter are included between square brackets, likely for the purpose of future negotiation or country-specific exemptions. There are also asterisk references to annexes including such exemptions. It is also likely that a number of provisions in the draft are likely to be criticized by the negotiators as well as the public. For example, 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.[14] These factors are likely to constrain the ambit of operation and application of the draft.

2 Key Definitions

This part considers the key definitions relating to the nature of an investor, a covered investment and the nature of an expropriation.

2.1 *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

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Free Trade Agreement, Korea–U.S., June 30, 2007 (Approved by Congress, Oct. 12, 2011) art. 11.21 [hereinafter KORUS FTA], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

12 On the Chile-U.S. Free Trade Agreement, see http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta.

13 See below text accompanying notes 246–250.

14 See subsection (a) below.

as by requiring that they establish their legal status as investors of a home state party to the TPPA.[15] 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 to 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 deemed to be exclusively a national of the State of his or her dominant and effective nationality].

Such a pre-establishment formula in which investor protection is extended to a pre-establishment period is likely to be controversial on the grounds that it grants foreign investors overbroad protection and that it interferes unduly with the sovereign rights of states. However, such a pre-establishment formula is common in US BITs and for that reason, may prevail in the TPPA.

The bracketed provisions in the pre-establishment formula above are also 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

15 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," *Aust. Product Liability Reporter* 22 (2011): 154, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041680.

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". However, 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 a claim. However, such investor strategies are already widely practiced and are by no means peculiar to the TPPA.

Also potentially controversial is the absence of a detailed definition of "effective nationality" in the bracketed passage above. The TPP negotiators may intend to negotiate such a definition, or alternatively, avoid defining it.

2.2 *What Constitutes an Investment?*

A particular challenge is in defining an "investment". Although wide definitions of investment are common in more recent BITs, it is arguable that such a definition should be neither over- nor under-inclusive. That challenge is complicated by different conceptions of investment in different conventions, treaties and arbitration rules. For example, Article 25(1) of the ICSID Convention does not define what constitutes an investment. However, the ICSID did not intend to abrogate responsibility to define investment to ISA tribunals on a case-by-case basis. The purpose of the ICSID drafters was rather to favor a broad definition of investment, while deferring to State parties to opt out of such provisions as a measure of state autonomy. The related purpose was to provide ICSID signatories with the flexibility to modify investment policies over time, including in relation to the definition of investment, not to conceive of it narrowly *a priori*.[16]

Other frameworks, such as the UNCITRAL Rules, the International Chamber of Commerce [ICC] and Stockholm Chamber of Commerce deal

16 Julian Davis Mortenson, "The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law," *Harv. Int'l L.J* 51 (2010): 257; E. Gaillard, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice," in *International Investment Law for the 21st century Essays in Honour of Christoph Schreuer*, eds. Christina Binder et al. (Oxford University Press, 2009), 403.

with investment differently and often in detail.[17] However, the underlying purpose of the ICSID—to provide flexibility in tailoring the definition of investment to state policy—has guided the development of modern BITs.

Certainly, some influential cases have attempted to clarify the meaning of investment, but they have not done so consistently. For example, in *Fedax N.V. v. Republic of Venezuela*,[18] 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."[19]

There are at least three different approaches to defining 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.[20] It is illustrated by the ICSID case of *CSOB v. Slovakia* in which the Tribunal construed investment "as a concept [which] should be interpreted broadly because the drafters of the Convention [the ICSID] did not impose any restrictions on its meaning".[21] In contrast, under a "strict cumulative approach", enunciated in *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*,[22] an investment is accorded a fixed meaning based on pre-determined criteria, which are then applied strictly in particular cases.[23] For example, in the *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.[24] The third, the "criteria limited in number" approach, seeks

17 See especially K. Yannaca-Small, "Definition of 'Investment': An Open-ended Search for a Balanced Approach," in *Arbitration under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford University Press, 2010), 248–50.

18 ICSID Case No. ARB/96/3, Decision on Objection to Jurisdiction, July 11, 1997; (1998) 37 ILM 1378, para. 25.

19 *Id* 43. *See also*, Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007), paras. 6.08–6.10.

20 Gaillard, *supra* note 16.

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

22 Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001; (2003) 42 ILM 609.

23 *See also*, Malaysian Historical Salvors Sdn Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, para. 70 (naming these approaches as "jurisdictional and typical characteristic approach" respectively).

24 Schreuer, *infra* note 43, at 153. On the addition of two further characteristics to the "*Salini test*", that the asset should be invested in accordance with the laws of the host state and that the asset should be a *bona fide* investment, see Phoenix Action Limited v. Czech Republic, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, at 142.

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.[25]

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 property types that can constitute an investment, consistent with the purposes of the ICSID.[26] However, it is also likely that TPPA negotiators will be sensitive to concerns among some state Parties wishing 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."[27] The definition of 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 investments and by tailoring down the breadth of an "investment" in the current draft.

At present, the draft definition of an investment is 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."

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25 See Gaillard, *supra* note 16, stating that "this approach is the most faithful both to the text and the intention of the drafters of the ICSID Convention".

26 The KORUS FTA, *supra* note 11, 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. In addition, 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.

27 *See* Nick Gallus, "The Influence of the Host State's Level Of Development on International Investment Treaty Standards of Protection," *J. World Investment & Trade* 6 (2005): 711.

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

> (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 breadth 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 in relation to those state Parties.

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".[28]

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.

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28 See Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), chs. 1–2 (discussing the foundations of investment law in contract and property and the complexity of conceptions of property).

2.3 *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 a long-standing and controversial question.[29]

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 takings.[30] The TPPA will also provide signatory countries with exemptions from such provisions in light of local requirements and on the grounds of essential national security and other national interest considerations. These exceptions will probably include specific public interest exemptions, such as to protect the environment, promote sustainable development and preserve domestic labour markets.[31]

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."[32] The reference to a "tangible or intangible interest in an investment" is wide-ranging. 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 "nationalization, compulsion of law or seizure."[33] This is unexceptional, although differences can arise, inter alia, as to the legitimacy of such actions, not only

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29 *See also* G. C. Christie, "What Constitutes a Taking of Property under International Law?," *Brit Y.B. Int'l L* 38 (1962): 307, 321–323; John Herz, "Expropriation of Foreign Property," *Am J. Int'l L.* 35 (1941): 243, 251 (discussing also the history of expropriation in international law); Patrick M. Norton, "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation," *Am J. Int'l L.* 85 (1991): 474, 493 (discussing the history of expropriation in international law).

30 On the difficulty in defining an expropriation generally, see, eg, Saluka Investments BV (Netherlands) v. Czech, Partial Award, Mar. 17, 2006, at para. 304, http://italaw.com/documents/Saluka-PartialawardFinal.pdf (arbitration under the UNCITRAL rules) (noting the "legitimate expectations"); Waste Management Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/00/3, Final Award (NAFTA), Apr. 30, 2004, at para. 98, http://italaw.com/documents/laudo_ingles.pdf; International Thunderbird Gaming Corp v. United Mexican States, Award, Jan. 26, 2006, at para. 147, http://italaw.com/documents/ThunderbirdAward.pdf (arbitration under the UNCITRAL rules); GAMI Investments, Inc. v. United Mexican States, Final Award, Nov. 15, 2004, at para. 100, http://www.state.gov/documents/organization/38789.pdf (Arbitration under the UNCITRAL Rules).

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

32 Annex 12-D.

33 Annex 12-D(2).

under law, but also according to due process requirements of "the principal legal systems of the world" identified in Article 12.6.2(a).[34]

The draft recognizes that an indirect expropriation "requires a case-by-case, fact-based inquiry".[35] However, the nature and scope of an indirect expropriation is more difficult to determine *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 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

34 Discussed below in Section VII (iv) Compensation.

35 Annex 12-C.4.

written commitment to 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 state 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 seemingly 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.

Evidently, final agreement has not been reached as to how to conceptualise indirect expropriation in a manner that allows governments to exercise their discretion in areas such as protecting the environment. Reference may be made to the 2012 US Model BIT, Article 4 of which emphasizes that expropriation and compensation are "intended to reflect customary international law" and that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[36] Annex B para. 2 provides that "[an] action or a series of actions by a Party cannot constitute an expropriation unless it

36 2012 US Model BIT art. 4(a), 4(b); Citizens' Trade Campaign, TPP draft ch. 12, op. cit., annex 12-D(1, 2, 5).

interferes with a tangible or intangible property right or property interest in an investment."[37]

Further, in the absence of a level playing field, states at different levels of development may face different levels of 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."[38]

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.[39]

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

37 Ibid., annex B, paras. 1–2.

38 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 adopt measures in conformity with" its constitutional law, "or other legislation, in order to ensure currency stability and the normal operation of domestic and foreign payments." [Annex 12.1, Transfers].

39 See *supra* note 22. On the addition of two further characteristics to the "*Salini test*", that the asset should be invested in accordance with the laws of the host state and that the asset should be a *bona fide* investment, see Phoenix Action Limited v. Czech Republic, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, at 142.

establish the fact, or "threat of serious balance of payments or external financial difficulties" to justify such action.

2.4 *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;
   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.

3 Standards of Treatment

This part focuses on the different standards of treatment accorded to foreign investors in international investment law, in particular, national treatment, most-favoured 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.

3.1 *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 favoured 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.[40] 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.[41]

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 the TPPA.

3.2 *Most Favoured Nation Treatment*

Article 12.5 deals with Most-Favoured Nation Treatment:

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party . . . (same as 12.4.1 above);

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40 The KORUS FTA provides for both national and most favored nation treatment. See *supra* note 11.

41 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 China 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.

2. Most Favoured 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 the TPPA.

3.3 *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 the 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, compliance with fair and equitable treatment as a condition of lawful expropriation may lead to concerns among developing states that they will be subject to significant compensation claims brought by foreign investors from developing countries.[42]

Related to the question of the quantum of compensation 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".[43]

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42 The problem in defining "fair and equitable" treatment of foreign investors is not peculiar to the TPP negotiations. For variations in ISA cases over its meaning, see Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award on the Merits, Nov. 13, 2000, at para. 64, http://italaw.com/documents/Maffezini-Award-English.pdf; MTD Equity Sdn Bhd & MTD Chile SA v. Chile, ICSID Case No. ARB/01/7, May 25, 2004, at para. 178, http://italaw.com/documents/MTD-Award.pdf. See generally Patrick Dumberry, "The Quest to Define 'Fair and Equitable Treatment' for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards," *J. World Inv*. 3 (2002): 657, 663. See also Directorate for Financial and Enterprise Affairs, "Fair and Equitable Treatment Standard in International Investment Law," Organisation for Economic Co-operation and Development, Working Paper No 2004/3, Sept. 2004, 11–12, *available at* http://www.oecd.org/dataoecd/22/53/33776498.pdf.

43 On the "fair and equitable" treatment standard in investment treaties, see for example, Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice," *J. World Inv. & Trade* 6 (2005): 357. *See generally* Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, 2011); Hussein Haeri, "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law," *Arb. Int'l* 27 (2011): 27; Andrew P. Tuck, "The 'Fair and Equitable Treatment' Standard Pursuant to the Investment Provisions of the U.S. Free Trade

The opposite hurdle arises if State signatories seek over-inclusive exceptions to the requirement of "fair and equitable treatment", based on defences of necessity, national security, health, safety, and the protection of the environment. This would create particular problems for ISA tribunals in dealing with these exceptions.[44] While wide defences of necessity were upheld by ISA tribunals in *LG&E v. Argentine Republic*[45] and *Continental Casualty Company v. Argentine Republic*,[46] a narrow standard was adopted, notably in relation to the "minimal standards" of treatment, in *Pope and Talbot v. Canada.*[47]

Agreements with Peru, Colombia and Panama," *Law & Bus. Rev. Am*. 16 (2010): 385; Kenneth J. Vandevelde, "A Unified Theory of Fair and Equitable Treatment," *N.Y.U. J. Int'l L. & Pol*. 43 (2010): 43.

44 *See* "Trade and Investment for Growth," Dep't for Bus. Skills & Growth, http://www.bis.gov.uk/assets/biscore/international-trade-investment-and-development/docs/t/11-717-trade-investment-for-growth.pdf (last visited June 30, 2012) (discussing the UK's defence of its international trade and investment after the 2008 recession in a White Paper presented to the Parliament in February 2011). *But see* P. Craig, *Administrative Law* (5th ed., Sweet & Maxwell 2003), 639–56; Francisco Orrego-Vicuña, "Foreign Investment Law: How Customary is Custom?," *Proc. Ann. Meeting Am. Soc'y Int'l L*. 99 (2005): 98, 99 ("[F]air and equitable treatment is not really different from the legitimate expectations doctrine as developed, for example by the English courts and also recently by the World Bank Administrative Tribunal."). *See too* Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, 2009), 152–57; *see also* Beverly McKittrick, "Submission of Phillip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement," http://www.regulations.gov/#!documentDetail;D=USTR-2009-0041-0016;oldLink=false (last visited June 19, 2012).

45 *See* ICSID Case No. ARB/02/1, paras. 2–3 (Jul. 25, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC786_En&caseId=C208.

46 ICSID Case No. ARB/03/9, para. 28 (Sep. 5, 2008); *see also* Eric David Kasenetz, "Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID," *Geo. Wash. Int'l L. Rev*. 41 (2010): 709, 721–23; Antoine Martin, "International Investment Disputes, Nationality and Corporate Veil: Some Insights from Tokios Tokelés and TSA Spectrum De Argentina," *Transnat'l Disp. Mgmt* 8 (2011): 1; José E. Alvarez & Tegan Brink, "Revisiting the Necessity Defense: Continental Casualty v. Argentina," (Int'l Law & Justice Working Paper No. 2010/3, 2010), 6–11, *available at* http://www.iilj.org/publications/documents/2010-3.Alvarez-Brink.pdf; Tarcisio Gazzini, "Necessity in International Investment Law: Some Critical Remarks on CMS v. Argentina," *J. Energy & Nat. Resources L*. 26 (2008): 450, 452–53; José Rosell, "The CMS Case: A Lesson for the Future?," *J. Int'l Arb*. 25 (2008): 493.

47 See Pope & Talbot Inc. *v*. Can., Award, part III. (Apr. 10, 2001) (UNCITRAL Award). *See also* "Pope & Talbot Inc. v. Gov't of Canada," Foreign Affairs & Int'l Trade Canada, *available at*

Article 5 of the 2012 US Model BIT provides, "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." The section explains that "the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." This appears to limit the ability of investors to rely on "fair and equitable treatment" and indirect expropriation claims, and enables host governments to defend non-discriminatory actions taken to protect the environment and public health.

The draft investment chapter of the TPPA engages this debate, but should not be expected to 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."[48] 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 these definitions of "fair and equitable treatment" and "full protection and security" will survive into later drafts is uncertain. However, in grounding fair and equitable treatment in the "minimum" or "general" standards of treatment under customary international law, the draft articles have affirmed pre-existing customary international law, presumably including 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

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http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/pope.aspx?lang=en (last visited June 19, 2012).

48 Annex 12-B defines "Customary International Law" as the Parties, "shared understandings" in regard to the standards of treatment identified in the draft chapter.

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 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.[49] 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 addition to the difficulties some developing state Parties will have in satisfying this standard, a not insignificant number of developed states will also fail to satisfy this standard. 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.

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49 See e.g. John P. Gaffney, "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System," *Am. Univ. L. Rev*. 14 (1999): 1174.

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.[50]

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 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 1105 to the "international minimum standard of treatment," Canada nevertheless won the case.[51] However, minimal standards of treatment are applied to a variety of specific defences, notably under the US and Canadian Model Investment Treaties.[52]

Negotiating parties will diverge over the boundaries of this standard, particularly given that the threshold for this standard is ordinarily quite low. However, if the US practice prevails, a single minimum standard will be delineated in the TPPA itself.[53] The likely result will be that TPP negotiators will rely

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50 *See* Loewen Grp., Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003); William Dodge, "Loewen v. United States: Trials and Errors under NAFTA Chapter 11," *DePaul L. Rev* 52 (2002): 563; Bradford K. Gathright, "A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven," *Emory L.J.* 54 (2005): 1093 (discussing the judicial review of the Loewen Chapter 11 decision).

51 *See* Patrick Dumberry, *supra* note 42. *See also* Directorate for Financial and Enterprise Affairs, "Fair and Equitable Treatment Standard in International Investment Law," *supra* note 42.

52 *See* instruments listed *supra* notes 10 & 11. See also Free Trade Agreement, Canada-Colombia, art. 831, Nov. 11, 2008 (entered into force Aug. 15, 2011); Model Canadian Foreign Investment Promotion and Protection Agreement, Article 39 (2003).

53 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," *Forum on Trade & Democracy*, *available at* http://www.forumdemocracy.net/downloads/TPP042010.pdf.

on ISA tribunals to delineate the standard over time, instead of trying to do so expressly *ab initio* by treaty.

4 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 conflicts through negotiation, and the resolution of disputes 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 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.

4.1 *Diplomatic Protection*

It is unlikely that the signatories to the TPPA will agree to formal state-to-state diplomatic intervention beyond facilitative and non-binding representations.[54] Their shared concern will be to avoid a potential floodgate of requests for diplomatic intervention from investors; 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:

54 See draft Article 12.20.4 of the TPPA.

> 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.[55]

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 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."[56] If this provision survives, influential states may try to supervise, if not police, the enforcement of awards in favour of their significant outbound investors. Whether the wording of the draft will be changed to accommodate this sensitivity remains to be seen.

4.2 *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.[57] 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 United Nations Conference on Trade and Development [UNCTAD], among others, as more collaborative, time

55 Emphasis added. Article 12:20.4.

56 Under Article 12.28.5.

57 See Micah Burch, Luke R. Nottage & Brett G. Williams, "Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century," *UNSW L. J.* 35 (2012): 1013.

and cost effective than arbitration or litigation.[58] None of this provides any clarity as to how and in particular, how long investor-state parties are expected to consult and negotiate in particular cases.[59] Requiring such negotiations or consultations under the TPPA could both protract 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.[60]

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. 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 to 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.

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58 U.N. Conference on Trade & Dev., "Investor–State Disputes: Prevention and Alternatives to Arbitration," *UNCTAD Series on International Investment Policies for Development*, at xxiii, U.N. Sales No. E.10.II.D.11 (2010), *available at* http://unctad.org/en/docs/diaeia200911_en.pdf. See also "Investor-State Disputes: Prevention and Alternatives to Arbitration II," in *Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution*, eds. Susan D. Franck and Anna Joubin-Bret, (Virginia, Lexington, Mar. 29, 2010), http://www.unctad.org/en/docs/webdiaeia20108_en.pdf. On the UNCTAD's most recent report on investor state dispute settlement, see UNCTAD, "Latest Developments in Investor-State Dispute Settlement," (IIA Issues Note No. 1, Apr. 2012), available at http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

59 See *supra* note 58. See too O Thomas Johnson, Jr. & Jonathan Gimblett, "From Gunboats to BITs: The Evolution of Modern International Investment Law," in *Yearbook on International Investment Law & Policy 2010–2011*, ed. Karl P Sauvant (Oxford University Press, 2012).

60 See, e.g., Aurélia Antonietti, "The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules," *ICSID Rev. Foreign Inv. L. J.* 21 (2006): 427; Edward Baldwin, Mark Kantor & Michael Nolan, "Limits to Enforcement of ICSID Awards," *J. Int'l Arb*. 23 (2006): 1 (discussing 'tactics' that may be employed in attempts to 'delay' or 'avoid' compliance with ICSID Awards).

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 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.[61]

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.[62]

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61 *See* August Reinisch, "How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?," *J. Int'l Disp. Settlement* 2 (2011): 115 (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 Arbitration (1985, as amended 2006). *See* "International Commercial Arbitration & Conciliation," U.N. Comm'n on Int'l Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html (last visited June 19, 2012); *see also* Leon E. Trakman, "International Investment Law," in *International Business Law*, eds. Bryan Mercurio et al. (Oxford University Press, 2010), 443–49 (arbitrating investment disputes), 427–36 (BITs, FTAs and multilateral agreements).

62 This concern is reflected in recent criticisms by some Latin American countries over the negotiating and ISA practices of foreign investor from wealthy states such as the United States. See Karsten Nowrot, "International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism," *Beitrage Zum Transnationalen Wirtschaftsrecht* 96 (2010): 5; Tor Krever, "The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model," *Harv. Int'l L. J.* 52 (2011): 287; Ignacio A Vincentelli, "The Uncertain Future of ICSID in Latin America," *L. & Bus. Rev. Am.* 16 (2010): 409; UNCTAD, "Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims" (IIA Issues Note No. 2, Dec. 2010), *available at* http://unctad.org/en/docs/webdiaeia20106_en.pdf.

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.[63] 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.[64]

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.

4.3 *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.[65] It is

63 *See* Mark Kantor, "Negotiated Settlement of Public Infrastructure Disputes," in *New Directions in International Economic Law: In Memoriam Thomas Wälde*, eds. Todd Weiler & Freya Baetens (Martinus Nijhoff Publishers, 2011).

64 *See generally* Colin B. Picker, "International Investment Law: Some Legal Cultural Insights," in *Regionalism in International Investment Law*, eds. Leon E Trakman & Nick Ranieri (Oxford University Press, 2013), ch. 6 (discussing the influence of legal cultures and traditions on investment law); Leon E. Trakman, "Legal Traditions and International Commercial Arbitration," *Am. Rev. Int'l Arb*. 17 (2006): 1, 19–20, 26–28 (noting the influence of legal traditions on international commercial arbitration).

65 See also Luke R. Nottage & Kate Miles, "'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (June 25, 2008)," in *International Arbitration in Australia*, eds. Luke Nottage & Richard Garnett (Federation

probable, too, that the TPPA will provide for a range of avenues, recognising particularly the ICSID[66] and the UNCITRAL Arbitration Rules.[67]

Draft article 12.18.3 provides that a claimant may submit a claim under "(a) the 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,[68] as well as resorting to various international and regional commercial arbitration centres.[69]

Press, 2010); also published in *J. Int'l Arb*. 26 (2009): 25; Sydney Law School Research Paper No. 08/62, *available at* http://ssrn.com/abstract=1151167.

66 See *ICSID Rules of Procedure for Arbitration Proceedings*, at 117, ICSID/15 (Apr. 2006), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; See e.g., Aurélia Antonietti, *supra* note 60 (discussing how various arbitration tribunals have resolved complex issues).

67 On the distinctive attributes of the investment arbitration under the UNCITRAL Rules, including that member states need not be parties to UNITRAL proceedings, see 2010 UNCITRAL Rules on Arbitration, *available at* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html. See too Claudia M. Gross, "Current Work of UNCITRAL on Transparency in Treaty-Based Investor-State Arbitration," *available at* http://www.oecd.org/dataoecd/14/5/46770295.pdf. *See generally* Jason W. Yackee & Jarrod Wong, "The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns," in *Yearbook on International Investment Law & Policy 2009–2010*, ed. Karl P. Sauvant (Oxford University Press, 2010) (discussing transparency in international investment arbitration); Cornel Marian, "Balancing Transparency: The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations," *Pepp. Disp. Resol. L.J*. 10 (2010): 275 (discussing transparency in international investment arbitration).

68 Of note, the UNCITRAL Model Law is widely adopted globally, including in Australia. See, e.g., *International Arbitration Act 1974* (Cth) s 16. For the text of the UNCITRAL Model Law and in particular, Article 34, see http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

69 TPPA does not list these. Examples include the International Center for Dispute Resolution of the American Arbitration Association; the International Chamber of Commerce; and the China International Economic and Trade Arbitration Commission.

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.[70]

Certainly, in the past concerns have been raised with respect to the viability of ISA as an efficient method of dispute resolution. A functional challenge to institutional ISA, such as under the ICSID, is the cost arising from the often complex nature of proceedings.[71] ISA proceedings are also perceived to be dilatory, difficult to manage, disruptive, unpredictable, and not subject to appeal.[72] 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.[73] 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.[74]

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 UNCTAD, level criticism at both investor-state arbitration and litigation on economic grounds, including the high cost of managing disputes generally.[75]

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70 Some of the 2010 amendments to the UNCITRAL rules were inspired by the rising use of the Rules in investor-State arbitrations. See, for example, UNCITRAL's website at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

71 *See* "Schedule of Fees," International Centre for Settlement of Investment Disputes (Jan. 1, 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main (indicating the cost of ICSID arbitration).

72 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.

73 *See* "Schedule of Fees," *supra* note 71; *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.

74 *See, e.g.*, Hillary French, "Capital Flows and the Environment," *Foreign Pol'y in Focus* 22 (1998): 3. ("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.

75 U.N. Conference on Trade & Dev., *supra* note 58, at xxiii; *see also* UNCTAD, *supra* note 58.

Nor are the metrics used to measure the performance costs of 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.[76] These costs and delays arise in dispute resolution in general. However, they are accentuated in ISA disputes where the economic stakes are often high, national sensitivities are in issue and damage to the reputation of states and sometimes investors exceeds the already high costs of the dispute.[77] 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.[78]

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

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76 See eg Susan D. Franck, "Rationalizing Costs in Investment Treaty Arbitration," *Wash. U. L. Rev*. 88 (2011): 769, 789, 815–16 (providing an economic rationalization of the costs of arbitration under investment treaties); Anthony Sinclair et al., "ICSID Arbitration: How Long Does It Take?," *Global Arbitration Rev*. 5(2009): 4, *available at* http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf; Hugo Perezcano, "ICSID Arbitrator Fees: Some Pratical Considerations," *Transnat'l Disp. Mgmt*. 5 (2005), *available at* http://www.transnational-dispute-management.com/article.asp?key=674.

77 *See, e.g.*, "ICSID—International Centre for Settlement of Investment Disputes," International Centre for Settlement of Investment Disputes, http://www.brettonwoodsproject.org/item.shtml?x=537853. On ICSID's figures, including that foreign investors have won 48% of ICSID/Additional Facility cases, see "The ICSID Caseload—Statistics," (Issue 2012–2), at 13, Chart 9, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics. Based on Chart 12 in the same document, ICSID appears to have issued 150 awards in the aggregate.

78 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* (Oxford University Press, 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," *Chi. J. Int'l L*. 12 (2011): 85.

Facility decisions have favoured foreign investors.[79] 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.

In addition, the draft Investment Chapter, similarly to the 2012 US Model BIT, reflects concerns that frivolous claims could be pursued to supplement the final judgment on the merits where the tribunal failed to address challenges to jurisdiction in preliminary proceedings. As a result, the TPP appears to have sought to distinguish such preliminary issues from the merits.

Article 28 of the 2012 US Model BIT provides: "Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34 [Awards].[80] Arguably, the TPP Investment Chapter will adopt this language in its final version.

Finally, draft article 12.18.3 (d) also allows the claimant and respondent to agree to resolve their dispute under "any other arbitration institution . . ., or under any other arbitration rules." Generally speaking, the key perceived strengths and weaknesses of ISA are endemic to international commercial arbitration as well. 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.[81]

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.[82] Judicial precedent is a common law

79 *See, The ICSID Caseload—Statistics*, *supra* note 77.

80 2012 Model BIT, op. cit., art. 28(4); Citizens' Trade Campaign, TPP draft ch. 12, op. cit., art. 12.22.4.

81 On the time and costs associated with international commercial arbitration, *see* Antonio Hierro, "Reducing Time and Costs in ICC International Arbitration Excess Time and Costs of Arbitration: An Incurable Disease?," *Spain Arb. Rev*. 12 (2012): 37.

82 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*, eds. Peter Muchlinski et al. (Oxford University Press, 2008), 1188 (discussing the absence of binding precedents, at least in principle, in international investment law); Andrea K. Bjorklund, "Investment Treaty

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 have to adhere to case precedent; nor is it provided for in the ICSID Convention or Rules.[83] 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 of a plethora of differently worded investment treaties.[84] 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.[85] 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.[86] 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

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Arbitral Decisions as Jurisprudence Constante," in *International Economic Law: The State and Future of the Discipline*, eds. Colin Picker et al. (Hart Publishing, 2008), 265.

83 Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators," *J. Int'l Disp. Settlement* 2 (2011): 5, 5–13, *available at* http://intl-jids.oxfordjournals.org/content/2/1/5.full. On the absence of precedent under the ICSID, *see* Trakman, "The ICSID in Perspective," TDM (Advance Publication, October 3, 2012), available at http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=463.

84 *See* Jurgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order, and Financial Crisis," *Int'l Comp. L.Q.* 59 (2010): 325, 392 (noting three different methods of interpreting investment treaties); William W. Burke-White & Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties," *Va. J. Int'l L.* 48 (2008): 307 (discussing "nuances of state intent").

85 On different conceptions of property rights, see Frank Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," *Harv. L. Rev.* 80 (1967): 1165; J. E. Penner, *The Idea of Property in Law* (Oxford University Press, 1997); Felix Cohen, "Dialogue on Private Property," *Rutgers L. Rev.* 9 (1954): 357.

86 *See generally* Luzius Wildhaber & Isabelle Wildhaber, "Recent Case Law on the Protection of Property in the European Convention on Human Rights," in *International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer*, eds. Christina Binder et al. (Oxford University Press, 2009), 657 (discussing the European Convention of Human Rights).

jurisdiction; there is no truly pervasive body of international law of property governing investment.[87]

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.

5 Australia's Objection to Investor-State Arbitration

The prospect of Australia seeking an exemption from investor-state arbitration within a TPP chapter on investment is probable at this time. In a Trade Policy Statement in April 2011,[88] 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."[89] 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 between domestic and foreign businesses."[90] As a result, it announced that it

87 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, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law* (Kluwer Law International, 2010), *see especially* ch. 4 (2010).

88 "Trading Our Way to More Jobs and Prosperity," (Gillard Government Trade Policy Statement, released by Australia's Trade Minister, Craig Emerson, Apr 2011), http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state (Hereinafter 'Policy'). For a comment on the Australian Government's Policy announced on Apr 12, 2011, see Jurgen Kurtz, "Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication," *ICSID Rev*. 27 (2012): 65; Luke Peterson, "Australia Rejects ISA Provision in Trade Agreements: Don't Trade Our Lives Away," Apr 19, 2011, http://donttradeourlivesaway.wordpress.com/2011/04/19/australia-rejects-investor-state-arbitration-provision-in-trade-agreements/; Leon E. Trakman, "Investor State Arbitration or Local Courts: Will Australia Set a New Trend?," *J. World Trade* 46 (2012): 83; Luke Nottage, "The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's 'Gillard Government Trade Policy Statement'," *Transnat'l Disp. Mgmt* 5 (2011), *available at* http://www.transnational-dispute-management.com/article.asp?key=1767. See generally, Leon E. Trakman, "Foreign Direct Investment: Hazard or Opportunity?," *Geo. Wash. Int'l L. Rev*. 41 (2009): 1.

89 See Policy, *supra* note 88.

90 *Id*.

will "discontinue" the practice of including investor-state dispute resolution procedures in trade agreements. Furthermore, "[i]f 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."[91] How significant this trade policy is in fact is the subject of a more detailed study by the author elsewhere.[92]

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.[93] The Australian Government has since implemented its new Policy in an FTA with Malaysia in May 2012 that does not include investor-state arbitration.

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.[94]

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.[95] The substantive rationale

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91 *Id.* 1–2.

92 See Trakman, "Investor State Arbitration or Local Courts," *supra* note 88; Leon E. Trakman, "Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo," *Univ. N.S.W. L.J.* 35 (2012): 979.

93 The text of the Australia–United States Free Trade Agreement is available at http://www.dfat.gov.au/fta/ausfta/index.html. See too Leon E. Trakman, "Foreign Direct Investment: An Australian Perspective," *Int'l Trade & Bus. L. Rev*. 13 (2010): 31, 79–81; Peter Drahos & David Henry, "The Free Trade Agreement between Australia and the United States," *Brit Med. J*. 328(2004): 1271.

94 See Trakman, "Foreign Direct Investment: Hazard or Opportunity?," *supra* note 88, at 48–53; Thomas Westcott, "Foreign Investment Issues in the Australia-United States Free Trade Agreement," Australian Government: The Treasury, *available at* http://www.treasury.gov.au/documents/958/pdf/06_foreign_investment_policy_ausfta.pdf.

95 On the significance of this view under the revitalized "Calvo Doctrine", see Wenhua Shan, "From 'North-South Divide' to 'Private-Public Debate': Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law," *Nw. J. Int'l. L. & Bus*. 27 (2007):

is that foreign investors should receive no better treatment than that which is accorded to local investors.[96]

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.

Thus far, TPP negotiators appear to have provided Australia with an exemption from ISA provisions in the TPPA, in a state-by-state negotiating process driven by the United States.[97] In support of this position is the 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.[98] On the other hand, the draft Investment Chapter text illustrates that the parties are not entirely in agreement over this issue. It is in no way settled, and the parties have not agreed, that Australia should be exempt from investor-state dispute settlement obligations, as requested by it.

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 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.[99] The rationale that domestic courts ought to accord no more than national treatment to foreign investors is countered by

631; Bernardo Cremades, "Resurgence of the Calvo Doctrine in Latin America," *Bus. L. Int'l* 7(2006): 53.

96 For an analysis of the view that, if investment arbitration privileges foreign investors, it undermines the national interest and democratic "promise", see David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008), chs. 2, 6. See Trakman, "Investor State Arbitration or Local Courts?" *supra* note 88.

97 *Id*.

98 At this time, Australia's unwillingness to agree to ISA under the TPP is not viewed as fatal to its involvement in TPP negotiations. *See e.g.*, "Australia to Reject Investor-State Dispute Resolution in TPPA," *Investment Treaty News*, Apr. 13, 2012, *available at* http://www.iisd.org/itn/2012/04/13/news-in-brief-7/. *See too* Jane Kelsey, "Investment Developments in the Trans-Pacific Partnership Agreement," *Investment Treaty News*, Jan. 12, 2012, http://www.iisd.org/itn/2012/01/12/investment-developments-in-the-trans-pacific-partnership-agreement/.

99 See Trakman, "The ICSID under Siege," *supra* note 9.

the argument that investment arbitrators are equally capable of subscribing to comparable standards of national treatment.[100] The supposed insularity of ISA arbitration from domestic law and procedure is also disputable on the 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 in resolving investor-state disputes. 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.[101] Countries are also readier to endorse a "rule of law" culture with which they identify than a culture with which they do not.[102]

In addition, countries that uphold the principle of absolute immunity of sovereign states pose unique problems. The most important example is China.[103] Unless specific provision is made for by agreement or waiver of immunity,

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100 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*, eds. Leon E. Trakman and Nick Ranieri (Oxford University Press, 2013), ch. 16 (forthcoming).

101 These observations are exemplified in Chapter 11 jurisprudence under the NAFTA. *See, e.g.*, Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, Award, para. 159 (Oct. 11, 2002); Loewen Grp., Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003); Dodge, "Loewen v. United States: Trials and Errors under NAFTA Chapter 11," *supra* note 50; Gathright, *supra* note 50; Dana Krueger, "The Combat Zone: Mondev International, Ltd v. United States and the Backlash against NAFTA Chapter 11," *B.U. Int'l L.J.* 21(2003): 399 (arguing that, but for a technical time bar, two tribunal decisions—*Mondev* and *Loewen*—might have prevailed over American judicial decisions). On the judicial review of the *Loewen* Chapter 11 decision, see Trakman, "Foreign Direct Investment: Hazard or Opportunity?," *supra* note 88, at 52 (discussing the judicial review of the Loewen Chapter 11 decision).

102 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: Hazard or Opportunity?," *supra* note 88.

103 See decision of Hong Kong Court of Final Appeal in *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* (FACV5/2010). See also Simon McConnell et al., "Absolute State Immunity Prevents Enforcement of Arbitral Award in Hong Kong," Singapore International Arbitration Centre <http://www.siac.org.sg/index.php?option=com_content&view=article&id=312:absolute-state-immunity&catid=56:articles&Itemid=171>.

sovereign states cannot be sued in China, nor can arbitral awards made by commercial arbitration institutions be enforced in China. Though China is not a party to the TPPA negotiations, this issue will need to be specifically addressed in the TPPA.

Ultimately, in terms of the general provisions, parties will need to 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 52 of the ICSID Convention is preferable if the party considers those grounds suitable. Beauty lies in the eyes of the beholder.

6 Conclusion

Several of the provisions of the TPPA Investment Chapter examined in this paper are likely to change in the final version. It is hoped that some of these changes may be inspired by the analysis undertaken in this paper.

At this point, 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[104] and by regulating non-conforming measures.[105] Alternatively, the TPPA may include selective country-specific reservations.

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. It is unclear whether this exemption will be permitted. If granted, it is unclear precisely how the exemption will be framed. It is likely that any conditions to participation or exemption from ISA will be dealt with generally in both the TPPA and country-specific annexes.

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.[106] '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,

104 See draft Investment Chapter Article 12–7 ("Performance Requirements").

105 *Id.*, Article 12–9 ("Non-Conforming Measures").

106 U.N. Conference on Trade & Dev., *supra* note 58. International investment claims and decisions are available at http://www.investmentclaims.com.

or conceivably, to both.[107] It is noteworthy that the UNCTAD considered conflict prevention and avoidance sufficiently important to devote a detailed study to it.[108]

Nor, too, is it persuasive to insist that ISA is inherently superior to other methods of dispute resolution, such as domestic litigation. What can be said in defence 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.[109] 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, an international investment jurisprudence does exist.[110]

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107 See Klaus Peter Berger, *II Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Kluwer, 2006), 74–8.

108 See William S. Dodge, "Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement," *Vand. J. Transnat'l L.*39 (2006): 1 (commenting on the exhaustion of local remedies).

109 On the development of international investment norms, see "OECD—Investment Committee," *Foreign Investment Review Board*, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60.

110 On such authorities, see for example, Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, *supra* note 28. But see Sornarajah, *supra* note 101.