The Evolution of Investor-State Arbitration in the Trans-Pacific Partnership Agreement

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I.
INTRODUCTION: INVESTMENT IN THE TPP

After years of negotiation, the twelve Pacific Rim nations negotiating the Trans-Pacific Partnership ("TPP") agreement reached a final accord on October 5th, 2015.[1] One month later, on November 5, 2015, the negotiating parties

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1. Andrew Rosenthal, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in*

simultaneously released the text of the TPP, and President Obama notified Congress of his intent to sign.[2] If ratified by all the negotiating parties, the TPP would be the largest regional trade accord in history, covering roughly forty percent of the global economy by binding together the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam, with the potential to incorporate additional states should the original members approve of any additions.[3] Across thirty chapters, the TPP agreement phases out thousands of import tariffs, establishes uniform intellectual property rules, enforces standards for labor conditions and environmental protection, and, among other provisions, regulates both the state treatment of foreign direct investment and the arbitration of disputes arising therefrom.[4]

One of the most significant criticisms of the TPP concerns the investor-state arbitration mechanism that the TPP's investment chapter retains from the North American Free Trade Agreement ("NAFTA"), the Dominican Republic-Central American Free Trade Agreement ("CAFTA"), and many of the United States' bilateral investment treaties ("BITs").[5] Despite the widespread criticism of investor-state arbitration in domestic political discourse and opposition from certain negotiating partners, the U.S. has successfully argued for the inclusion of an investor-state arbitration mechanism in all but one post-NAFTA free trade agreement and investment treaty.[6] The TPP maintains this feature of U.S.-

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Congress, N.Y. TIMES, October 5, 2015,

http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html.

2. IAN F. FERGUSSON, MARK A. MCMINIMY, BROCK R. WILLIAMS, CONG. RESEARCH SERV., R44278 THE TRANS-PACIFIC PARTNERSHIP (TPP): IN BRIEF (2015).

3. IAN F. FERGUSSON, MARK A. MCMINIMY, BROCK R. WILLIAMS, CONG. RESEARCH SERV., R42694 THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS (2015).

4. *Id*. at i.

5. *Id*. at 36-37; *see also*, Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST, February 25, 2015.

6. United States-Australia Free Trade Agreement, U.S.-Austl., art. 11.16, May 18, 2004, 43 I.L.M. 1248, https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text. But, even in the United States-Australia Free Trade Agreement, "the U.S. continued to press hard for the inclusion of investor-state dispute provisions [in the final round of negotiations in Washington in January 2004]. Australia expressed its equally strong opposition, on the grounds that their inclusion would be 'unacceptable' (confidential interview 2004). Ultimately, however, the U.S. backed down, and agreed to the Australian proposal that the legal systems in both countries were 'robust' enough to ensure that investors should find sufficient protection through domestic courts." A. Capling & K. R. Nossal, *Blowback: Investor-State Dispute Mechanisms in International Trade Agreements*, 19 GOVERNANCE 151, 160 (2006). Despite Australia's intense objection to investor-state arbitration in the bilateral free trade agreement, US investors can now bring claims against Australia under the TPP. *Compare*, Julian Assange, Secret Trans-Pacific Partnership Agreement (TPP) – Investment Chapter, note 29, WikiLeaks (March 25, 2015), https://wikileaks.org/tpp-investment/ (hereinafter "WikiLeaks Investment Chapter") *with* Trans-Pacific Partnership Agreement, art. 9, Nov. 5, 2015, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (hereinafter "TPP"). The WikiLeaks Investment Chapter exempted Australia from provisions governing the settlement of investor-state disputes, while the investment chapter in the finalized TPP contains no such exemptions.

negotiated agreements covering investment and contains additional provisions related to nondiscriminatory treatment of foreign investment, the minimum standard of treatment owed foreign investors, standards for expropriation, prohibitions on performance requirements, and, of course, procedures for investor-state arbitration.[7]

Commentators, however, accurately note that the parties negotiating international investment agreements have adopted an increasingly state-friendly perspective.[8] As historically capital-exporting nations have become capital importers, these states developed an awareness of the threat investor-state arbitration poses to states under agreements that include other developed parties.[9] The historically capital-exporting states, and the U.S. in particular, are still the strongest proponents of investor-state arbitration in investment agreements. However, the breakdown of the dichotomy between capital-exporting and capital-importing states has left the traditional capital-exporters increasingly wary of subjecting their own regulations, judicial decisions, and governmental actions to international arbitral tribunals.[10] This development in capital-exporters' concerns has not destroyed the arbitration mechanism in international investment agreements, with Australia as the notable exception, and even they eventually acceded to the TPP's investment chapter.[11] Instead, this development led states to include additional restrictions on the rights and remedies available to investors under investment agreements negotiated in a post-NAFTA world.[12]

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7. TPP, *supra* note 6, art. 9.

8. *See*, e.g., Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 366 (2003) (noting that "[t]he past decade, however, has seen a noticeable sea change in outlook. Congress has enacted trade legislation giving evidence of an intention to restrict arbitration in investment treaties. And open criticism of investment arbitration has been voiced by significant elements of the media."); *see also*, Beth Simmons, *Bargaining Over BITs, Arbitrating Awards*, 66 WORLD POLITICS 12, 13 (2014) ("While investment treaties may indeed have facilitated some capital imports, researchers have neglected the other side of the coin: pushback from public actors who increasingly view the investment regime as currently constituted as not in their interest.").

9. *See*, Gilbert Gagne & Jean-Frederic Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. OF INT'L ECON. L. 357, 367 (2006) ("Having learned from the NAFTA experience, the U.S. government has concluded FTAs that, as we will see in the next sections, provide, from the start, substantive and procedural safeguards for US authorities.").

10. *See*, Alvarez and Park, *supra* note 8, at 370 (arguing that, "[a]s Americans and Canadians began to understand the host state perspective, praise for arbitration's neutrality began to have competition in the form of complaints about infringement of national sovereignty and democracy.").

11. *See supra* note 6.

12. For an evaluation of the evolution in US investment agreements before CAFTA, see, for example, James E. Mendenhall, *The Evolving US Position on International Investment Protection*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES V: THE REGIONALIZATION OF INTERNATIONAL INVESTMENT TREATY ARRANGEMENTS, 249, 250-52 (N. Jansen Calamita and Mavluda Sattorova, eds., 2015). For evaluations of the evolution in US investment agreements from NAFTA to DR-CAFTA, see, for example, Stephen Schwebel, *The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law*, *in* JUSTICE IN INTERNATIONAL LAW: FURTHER SELECTED WRITINGS, 152, 155-6 (2011); Amy K. Anderson,

The adoption of state-friendly provisions that expand the basis upon which respondents can justify governmental measures as legitimate regulations occurred—and continues to occur with the TPP—in a gradual and responsive rather than proactive manner.[13] States negotiated many of the substantive and procedural developments in investment treaties and free trade agreements in response to particular arbitral decisions that the negotiating states view as restrictions on legitimate government regulations in favor of expansive interpretations of investor rights and protections.[14]

This Article evaluates the ways in which the TPP's investment chapter marks an evolution from the major U.S.-negotiated investment agreements of the 2000s, particularly DR-CAFTA, in the agreements' treatment of investor protections and regulation.[15] This Article argues that the TPP continues the largely responsive evolution in international investment treaties and agreements by examining the TPP's departures from the United States' most recent

Individual Rights and Investor Protections in a Trade Regime: NAFTA and CAFTA, 63 WASH. & LEE L. REV. 1057 (2006); David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement*, 19 AM U. INT'L L. REV. 679 (2003); Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. OF INT'L ARB. 383 (2004); Matthias Lehmann, *Options for Dispute Resolution Under the Investment Chapters of NAFTA and CAFTA*, 16 AM. REV. INT'L ARB. 387 (2005); Michael Muse-Fisher, *CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 495 (2006).

13. The gradual evolution in investment treaties is primarily from the perspective of traditional capital-exporting states. For more on the responses to investment treaties on the part of traditionally capital importing states, see Suzanne Spears, *Making Way for the Public Interest in International Investment Agreements*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, 271, 273 (Chester Brown & Kate Miles eds., 2012) (arguing that "[a]t one extreme, a number of countries in Latin America have responded [to concerns about the potential for investment law to place undue constraints on sovereign regulatory power] by denouncing or insisting on the renegotiation of some of the their IIAs. . . . Countries in Southern and Eastern Africa have been more moderate in their response – rather than rejecting the IIA and investor state dispute-resolution regime, they have adopted a comprehensive investment promotion treaty among themselves, with different provisions from traditional IIAs."); *see also* M. Sornarajah, *The Descent into Normlessness*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 631, 640 (Chester Brown & Kate Miles eds., 2012) (arguing "that many States which have been at the wrong end of the stick have withdrawn or are contemplating withdrawal.").

14. Nathalie Bernasconi-Osterwalder, *How the Investment Chapter of the Trans-Pacific Partnership Falls Short*, INT'L INST. FOR SUSTAINABLE DEV. (Nov. 6, 2015), http://www.iisd.org/commentary/how-investment-chapter-trans-pacific-partnership-falls-short (claiming "the TPP investment chapter is an example of governments playing 'catch-me-if-you-can,' with new formulations that respond to recent cases where arbitrators have ruled against government measures that were largely perceived as legitimate or unchallengable as an international violation."); *see*, also, Gilbert Gagne & Jean-Frederic Morin, *supra* note 10, at 359 (arguing "[t]he changes in [US-negotiated investment agreements] must be seen as the result of a learning process from the US administration, rather than the consequences of new political powers or economic interests. It is a reaction to claims filed by foreign investors under NAFTA Chapter 11, several of these perceived as 'frivolous' by the American government, that the new features of recent US FTAs and the revised model BIT aim to reach a better balance between the protection of investment and the protection of state sovereignty.").

15. *See supra* note 13 and accompanying text.

investment treaties and agreements in light of the arbitral decisions driving those changes.[16] The TPP is best understood as a geographical extension or harmonization of the investor-state arbitration regime codified in the United States' existing free trade agreements, with some additional clarifications intended to constrain the rights and remedies available to investors, rather than a significant revision of the international investment framework for investment protection and arbitration that the United States has developed.[17] For many of the negotiating states, this geographical extension of treaty coverage to protect investments may be the TPP's most significant legacy.[18]

Despite these efforts to strengthen the basis upon which governments can regulate without fear of losing costly arbitrations, a closer examination of the TPP's modifications to previous U.S.-negotiated investment agreements reveals the rather modest curtailment of investor protections. The next section of this Article will examine the new provisions in the TPP that seek to guide arbitral tribunals' determinations of the treatment that host states must provide for investors. These modifications are primarily expressed through additional interpretative guidance seeking to clarify the fundamental obligations states owe investors under most investment agreements: national treatment, most-favored nation treatment, minimum standard of treatment, and expropriation. The third section then evaluates modifications more directly targeted at prohibiting specific types of claims and strategies that investors have employed in investment arbitration. The fourth section both addresses the areas in which the TPP expands investor protections and explores continuities with past U.S.-negotiated investment agreements.

Throughout, this Article argues that the TPP's moderate changes to past U.S.-negotiated investment agreements demonstrate a gradual evolution in investment treaties largely in response to specific arbitral decisions and their progeny, rather than a broader reorientation of the United States' global investment regime.

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16. *See, e.g.*, Gilbert Gagne & Jean-Frederic Morin, *supra* note 10, at 382 (arguing that, "[a]bove all, such changes are intended to lessen the possibilities of a replication of the claims under NAFTA where the investor-state provisions have been perceived by NAFTA members as being abused by foreign investors.").

17. Julien Chaisse, *The Regulation of Investment in the TPP: Towards a Defining International Agreement for the Asia-Pacific Region*, *in* INVESTMENT TREATY LAW CURRENT ISSUES: VOLUME V: THE REGIONALIZATION OF INTERNATIONAL INVESTMENT TREATY ARRANGEMENTS, 103, 104-05 (N. Jansen Calamita & Mavluda Sattorova, eds., 2015) ("[E]mphasizing that the TPP is a vital test from the perspective of innovations in investment rule making for two main reasons. Firstly, the TPP will essentially draw on US rule-making and investment litigation practices rather than on the existing Asian PTAS . . . . it also implies the US-inspired investment rule-making is about to achieve global status. Secondly, the TPP must be understood in the context of US investment rule-making and more broadly US foreign policy.").

18. *Id.* at 134 (demonstrating that "[f]rom a quantitative point of view, Brunei, Canada, Japan, Peru, Mexico and the US are the countries that benefit the most from the investment negotiations since the TPP fills a gap in the geographical coverage of the IIAs."); *see also* IAN F. FERGUSSON, MARK A. MCMINIMY, BROCK R. WILLIAMS, *supra* note 2, at 2.

II.
NEW PROVISIONS AND MODIFICATIONS IN THE TPP

The investment chapter in the TPP governs obligations host-states owe foreign investors, practices for determining breaches of those obligations, and mechanisms through which investors and states resolve disputes. The TPP's investment chapter closely resembles the draft 2012 U.S. Model BIT and only grew closer to the draft 2012 U.S. Model BIT during the final year of negotiations after WikiLeaks leaked a working version of the TPP's investment chapter.[19] The similarities between the TPP's investment chapter and the 2012 U.S. Model BIT demonstrate the amount of leverage the U.S. had in the negotiating process as well as the extent of convergence within the United States' international investment regime.[20]

The negotiating states adopted language that reformulates or clarifies the standards of treatment used to establish violations of a host-state's obligations to constrain arbitral tribunals from expansively interpreting the rights states must afford investors under the TPP.[21] This interpretative language often begins with "[f]or greater certainty" and exists to guide tribunals in their interpretation towards an already-existing understanding between the negotiating parties rather than to fundamentally alter the host-states' obligations under the investment agreement.[22] Rather than create an explicit and broad exception for state regulation that could destabilize the existing international framework of investment agreements, the TPP employs the aforementioned interpretative assistance to frame arbitral tribunals' interpretations of the treaty text. By refining existing obligations, the TPP also helps produce a consistent jurisprudence of international investment law by harmonizing the interpretation of the investor-protections across investment agreements.[23] This approach towards negotiating future investment agreements indicates a faith in the foundation of the existing international investment regime.

Commentators dispute whether such additional host-state friendly modifications are either necessary to optimize the wealth producing flow of

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19. *Cf*. WikiLeaks Investment Chapter, *supra* note 6, *with* TPP, *supra* note 6. *See also* Douglas Thompson, *TPP Made Public at Law*, GLOBAL ARBITRATION REV., (Nov. 5, 2015), http://globalarbitrationreview.com/news/article/34308/tpp-made-public-last/ (arguing that, "[i]f anything, the final text has been observed to be closer to the US Model BIT than a draft version that was leaked in March. Certain language that had been marked for possible omission in the draft has been restored, albeit with minor changes.").

20. Julien Chaisse, *supra* note 18, at 104; *see also*, Douglas Thompson, *supra* note 20 (arguing, "[a]s was widely predicted, the text's investment chapter follows that of the 2012 US Model bilateral investment treaty."). For arguments on the convergence in international investment agreements, see Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 152 (2012).

21. Spears, *supra* note 13, at 275.

22. *See, e.g.*, TPP, *supra* note 6, art. 9.5(4).

23. *See* Stephen Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 561 (2009).

investment or adequate to protect legitimate state regulations.[24] Despite this disagreement, the TPP's investment chapter exists within a broader trend of parties' "attempting to rein in investor protection provisions and instead protect host states' rights to adopt laws and policies to promote public welfare" when negotiating investment agreements.[25] This Article argues that critics of state-friendly modifications have exaggerated the effect of those modifications on investor protection in the United States' investment treaties,[26] just as critics of investor-state arbitration have overstated the threat arbitration poses to legitimate regulations.[27] Advocates for investment arbitration claim that newer, U.S.-negotiated investment agreements have "shrunk, sometimes dramatically, virtually every right originally accorded to foreign investors while at the same time increasing, sometimes vastly, the discretion accorded host states."[28] These claims are simultaneously too pessimistic concerning the impact of modifications primarily intended to clarify existing obligations and too optimistic concerning the long-term durability of the international investment regime in the face of significant domestic challenges in both developed and developing nations absent some concessions to the state's right to regulate for public welfare.[29]

Indeed, the political pressures against investor-state arbitration following the collapse of the traditional distinction between capital-exporting and capital-importing states after NAFTA led some commentators to note the durability of

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24. Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 GEO. J. INT'L L. 363, 368 (2014) (arguing that, "'[i]t is less clear that investment treaty arbitration favors claimant-investors. Previous empirical scholarship demonstrates that the win rate for claimant-investors remains relatively low.' The United States has never lost a case. So why rewrite the rules in a more host-state-friendly manner?").

25. Meredith Wilenksy, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures under the Trans-Pacific Partnership*, 45 ENVTL. L. REV. 10683, 10697 (2015).

26. Spears, *supra* note 13, at 295 (arguing "just because [newer investment agreements] direct tribunals to engage in balancing and place some non-investment policy objectives on the same normative plane as investment policy objectives, new generation IIAs should not be seen as more analytically decisive than they actually are with regard to host States' regulatory interests."). For overly pessimistic accounts of the new provisions in the TPP constraining investor protections, see Alex Lawson, *TPP Investment Text Raises Questions About Old Accords*, LAW360, (Nov. 9, 2015), http://www.law360.com/articles/724308/tpp-investment-text-raises-questions-about-old-accords (quoting "[i]f I am an investor, I really prefer Chapter 11 of the NAFTA over Chapter 9 of the TPP because there are fewer ways the government can avoid having to pay."); Donald Robertson, *Trade Deals: ISDS in the Newly Signed TPP*, GLOBAL ARBITRATION REV., (Nov. 11, 2015), http://globalarbitrationreview.com/journal/article/34267/trade-deals-isds-newly-signed-tpp/ (arguing "[t]he unfortunate modern habit of seeking to 'write' the exception has the ability to stultify the development of general principles of law and create loopholes that progressively need to be filled by further prolix drafting.").

27. For criticisms, see, *e.g.*, Lise Johnson & Lisa Sachs, *The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System*, 'COLUM. CTR. ON SUSTAINABLE INV. POL'Y PAPER (2015).

28. José Enrique Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 235 (2011).

29. *See* Sornarajah, *supra* note 13.

the arbitration mechanism depends upon its adaption in response to political realities:

> If investment arbitration is to fulfill its promise, however, some mechanism must be found to promote greater sensitivity to vital host state interests. Otherwise, investor/government arbitration may fall prey to public pressure arising from a backlash against investor victories in some of the more visible NAFTA arbitrations. In the larger picture, arbitration's wisdom may have to accommodate political reality.[30]

The requirement that arbitration accommodate a political backlash in response to particular arbitral decisions or even merely defeated claims brought against the states that historically most strongly supported investor-state arbitration—particularly the United States—finds expression in the TPP's state-friendly modifications of past investment agreements.[31] This gradual retreat from the more investor-friendly provisions in earlier investment agreements is not unique to the negotiation of the TPP.[32] The free trade agreements negotiated after NAFTA left no doubt that the United States intended to weaken investor protection, even in agreements such as the United States-Chile FTA, where the likelihood of claims brought against the United States by Chilean investors is minimal relative to the risks for American investors abroad.[33] Nonetheless, as section III will demonstrate, the TPP maintains the fundamental protections states must afford investors.

A. Changes Reducing Investor Protections

1. Like Circumstances and Governmental Regulation

TPP 9.4, note 14	For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives

30. Aguilar Alvarez & Park, *supra* note 8, at 399.

31. *See, e.g.*, *infra* Section II.B(1).

32. *See supra*, note 13.

33. Gantz, *supra* note 13, at 767 ("While it may quell some of the NAFTA, Chapter 11 critics who are concerned about the United States as respondent host government, it is at least a partial retreat from the high level of protection afforded to investors in the past under the more traditional U.S. and other bilateral investment treaties and under NAFTA, Chapter 11."); *see also*, Ling Ling He & Razeen Sappideen, *Investor-State Arbitration: The Roadmap from the Multilateral Agreement on Investment to the Trans-Pacific Partnership Agreement*, 40 FED. L. REV. 207, 226 (2012) (claiming, "these changes reflect a policy shift by States, whereby the rights of foreign investors are to be balanced against national public policy based interests and legislation.").

The TPP's first substantive point of diversion from previous U.S.-negotiated investment agreements, including the draft 2012 U.S. Model BIT, is an interpretative footnote intended to clarify the negotiating parties' understanding of "like circumstances." This footnote assists tribunals attempting to determine whether a government has provided treatment that fulfills the National Treatment obligations under Article 9.4 and Most-Favored-Nation Treatment obligations under Article 9.5. The National Treatment article requires each Party accord to investors and investments of another Party "treatment no less favorable than that it accords, in like circumstances," to its own investors or investments in its territory of its own investors "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[34] The Most-Favored-Nation article establishes identical obligations relative to investors and the investments of any other Party or non-Party.[35]

Arbitral tribunals have adopted very different interpretations of "like circumstances," specifically invoking varied understandings of a "like investor" for the purposes of non-discrimination.[36] The TPP's footnote that clarifies "like circumstances" provides more general interpretive assistance than many other recent investment agreements that go to greater lengths to specify the factors evaluated in the "totality of circumstances."[37] Unlike the 2015 Draft Norwegian

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34. TPP, *supra* note 6, art. 9.4(1-2).

35. *Id*. art. 9.5(1-2).

36. *See* Spears, *supra* note 13, at 285 (arguing, "[t]hus, for example, the tribunal in *Occidental v. Ecuador* provoked alarm when it adopted a very broad definition of 'like' investor, comparing the treatment accorded to a foreign oil company with the treatment accorded to exporters in general, rather than with the treatment of domestic oil companies. Other tribunals have adopted more tailored definitions of 'like'. . .In the case of *Parkerings v. Lithuania*, for example, the tribunal held that no discrimination had occurred when a foreign investor's car-parking project was treated differently from a domestic investor's project, because the foreign investor's project was with a section of Vilnius designated by UNESCO as a World Cultural Heritage site."); *see also*, Susan D. Franck, *Occidental Exploration & Production Co. v. Republic of Ecuador. Final Award. London Court of International Arbitration Administered Case No. UN 3467*, 99 AM. J. INT'L L. 675 (2005).

37. *Cf*. Draft 2015 Draft Norwegian Model BIT, art. IV, note 1, https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf (specifying that "a measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, human rights, labour rights, safety, and the environment, although having a different effect on an investment or investor of another Party, is not inconsistent with national treatment and most favoured nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment."). *See also*, Common Market for Eastern and Southern Africa Common Investment Area Agreement, art. 17(2), May 23, 2007, http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf (specifying that references to 'like circumstances' "requires an overall examination on a case by case basis of all the circumstances of an investment including, inter alia: (a) its effects on third persons and the local community; (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment, (c) the sector the investor is in; (d) the aim of the measure concerned; (e) the regulatory process generally applied in relation to the measure concerned; and (f) other factors directly relating to the investment or investor in relation to the measure concerned; and the examination shall not be limited to or be biased towards any one

Model BIT or the Common Market for Eastern and Southern Africa Common Investment Area Agreement, the TPP only notes that the "totality of the circumstances" includes "whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[38] The TPP's language that clarifies "like circumstances" bears some resemblance to the test adopted in *Pope & Talbot Inc. v. Canada* (*Pope & Talbot*), where the tribunal held a governmental measure must possess a "reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[39]

The negotiating parties also released a Drafters' Note on the interpretation of "in like circumstances" to "ensure that tribunals follow the existing approach set out" in the Drafters' Note.[40] The Drafters' Note clarifies that Articles 9.4 (National Treatment) and 9.5 (Most-Favored-Nation Treatment) "do not prohibit all measures that result in differential treatment," but instead prohibit only those measures that treat foreign investors and their investments "less favorably on the basis of their nationality."[41] As with similar provisions guiding tribunals' interpretation of Article 9.6 (Minimum Standard of Treatment),[42] the Drafter's Note requires a tribunal find discriminatory intent on the part of the host-state and thus also creates a permissible basis for differential treatment "based on legitimate public welfare objectives."[43]

In clarifying the meaning of this language, the Drafters' Note explicitly endorses a line of NAFTA tribunal decisions that employ a similar methodology for evaluating "like circumstances." The Drafters' Note cites *Grand River Enterprises Six Nations Ltd., et al. v. United States of America* for the proposition that evaluation of "like circumstances" requires evaluating the legal regimes governing sectors of the economy within which the investor acts.[44] The Drafters' Note also cites *GAMI Investments Inc. v. United Mexican States* as an example of a tribunal that determined a foreign investor failed to demonstrate like circumstances when differential treatment was "plausibly connected with a

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factor."), *quoted in*, Spears, *supra* note 13, at 287.

38. Spears, *supra* note 13, at 287.

39. Pope & Talbot Inc. v. The Government of Canada, Award on the Merits of Phase 2, (UNCITRAL, April 10 2001), para. 78.

40. TPP Drafters, *Drafters' Note on Interpretation of "In Like Circumstances" Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favored-Nation Treatment)*, November 5, 2015, https://www.tpp.mfat.govt.nz/assets/docs/Interpretation%20of%20In%20Like%20Circumstances.pdf ("Drafter's Note").

41. *Id.*

42. *See infra*, section II(A)(ii).

43. Drafter's Note, *supra* note 43.

44. *Id.* para. 5, (citing *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, Award, (UNCITRAL, January 12, 2011), paras. 166-67 in support of the proposition that "NAFTA tribunals have also accepted distinctions in treatment between investors or investments that are plausibly connected to legitimate public welfare objectives, and have given important weight to whether investors or investments are subject to like legal requirements.").

legitimate goal of policy . . . and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity."[45] Finally, the Drafters' Note approvingly cites *Pope & Talbot* for the proposition quoted above.[46]

Overall, the negotiating parties' provisions guiding tribunals' interpretation of "like circumstances" creates additional room for governmental regulation. The interpretive guidance requires an arbitral tribunal to examine whether the measure in question has a legitimate regulatory purpose when evaluating the otherwise unrelated "like circumstances" component of a MFN or national treatment claim.[47] The TPP's requirement that tribunals evaluate legitimate regulatory purposes when adjudicating MFN and national treatment claims is particularly significant as an expansion of legitimate regulation into each of foundational rights that states must afford investors: most-favored nation treatment, national treatment, minimum standard of treatment, and just compensation for expropriation.[48] While the adjudication of claims brought under the expropriation and minimum standard of treatment provisions in almost any U.S.-negotiated investment agreement requires examination of the legitimacy of the government measure's regulatory purpose, the MFN and national treatment articles would possess no such requirement absent this footnote. That the footnote was not included in the 2012 U.S. Model BIT[49]—and was included only as tentative language with at least one state still consulting and at least one other state still considering the footnote when Wikileaks released the draft TPP investment chapter[50]—implies resistance from the more investor-friendly negotiating parties.

The inclusion of the "like circumstances" footnote thus signals a broader urgency on the part of the negotiating parties to explicitly direct tribunals to consider whether there exists a legitimate public welfare justification for a governmental measure, while maintaining an adequate level of investor protection. Even while expanding the number of claims that require the tribunal to account for the legitimacy of governmental regulation, the "like circumstances" footnote seeks to maintain investor protection by remaining silent on how tribunals should weigh the various factors that constitute "like circumstances." Without specifying how to balance the conflicting

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45. Drafter's Note, *supra* note 43 (citing *GAMI Investments Inc. v. United Mexican States*, Award, (UNCITRAL, November 15, 2004), paras. 111-15).

46. Drafter's Note, *supra* note 43, para. 5.

47. TPP, *supra* note 6, art. 9.4, note 14.

48. *See infra* sections II.A(2) and II.A(3) for demonstrations of the ways in which the TPP requires consideration of a host-states' legitimate regulatory purposes when adjudicating claims brought under the expropriation and minimum standard of treatment provisions.

49. U.S. Dep't of State, [Draft] Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, April 20, 2012,

http://www.state.gov/documents/organization/188371.pdf [hereinafter, "2012 US Draft Model BIT"].

50. WikiLeaks Investment Chapter, *supra* note 6, note 12.

considerations, the TPP leaves open the possibility that a tribunal could determine that the state employed the governmental measure with discriminatory intent, even if connected to a legitimate public welfare justification.[51] The adjudication of "like circumstances" would then involve the proportionality examination tribunals have employed for similar considerations, wherein the strength of the legitimate government interest is weighed against the investor's economic harm.[52] By incorporating this type of proportionality examination into MFN and national treatment claims through the "like circumstances" note, the TPP requires tribunals to consider the legitimacy of public welfare objectives when interpreting any of substantive provisions under which investors can bring claims.

2. Investor Expectations

TPP 9.6(4) (Minimum Standard of Treatment)	Annex 9-B (Expropriation), Footnote 36
For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.	[modifying Annex 9-B(3)(a)(ii): The extent to which the government action interferes with distinct, reasonable investment-backed expectations;] For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

The TPP's treatment of investor expectations marks another clear mechanism through which the negotiating parties sought to narrow an arbitral tribunal's ability to create expansive investor protections under both Article 9.6 (Minimum Standard of Treatment) and Article 9.7 (Expropriation). First, in Article 9.6, the TPP includes interpretative guidance not found in past U.S.-negotiated investment agreements or model BITs to clarify that a host-State's failure to fulfill investor expectations alone does not constitute a breach of the minimum standard of treatment under the TPP.[53] More significantly, the

51. TPP, *supra* note 6, art. 9.4, note 14 (including "legitimate public welfare objectives" as only one of many factors that compose "the totality of the circumstances").

52. *See* Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/002/2, Award (May 29, 2003) [hereinafter "*Tecmed*"].

53. *Cf.* TPP, *supra* note 6, art. 9.6(4) *with* 2012 US Draft Model BIT, *supra* note 52.

negotiating parties also included language to guide a tribunal's evaluation of investors' investment backed expectations for the purposes of expropriation in Annex 9-B.[54]

The evolution of investment treaty guidance concerning the adjudication of expropriation claims exemplifies the process by which U.S.-negotiated investment treaties have evolved since NAFTA. NAFTA Article 1110 (Expropriation and Compensation) contained only the vaguest definition of expropriation, coming closest when stating, "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation")."[55] In response to a number of tribunals constituted under NAFTA reading Article 1110 in a manner that, according to some U.S. commentators, provided foreign investors with greater protections than domestic investors,[56] the negotiating parties in the BIT's and FTAs of the 2000s began to include an annex defining the negotiating parties' understanding of expropriation. First, U.S.-negotiated investment agreements after NAFTA included additional clauses—maintained in the TPP—specifying that, "except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[57] The TPP retains this provision with an additional footnote clarifying the public health component of legitimate public welfare objectives.[58]

Additionally, U.S.-negotiated investment agreements after NAFTA defined indirect expropriation with standards that closely track those that the U.S. Supreme Court established in its takings jurisprudence.[59] In CAFTA, Annex 10-C requires tribunals examine on a case-by-case basis, "(i) the economic impact of the government action. . .(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."[60] The TPP takes this requirement a step further than any previous U.S.-negotiated investment agreement, including the

54. TPP, *supra* note 6, 9.6(4).

55. North American Free Trade Agreement, U.S.-Can.-Mex., Dec 17, 1992, H.R. Doc. No. 103-159, vol. l, art. 1110 (1993).

56. David Singh Grewal & Marco Simons, *The Case Against ISDS*, BALKINIZATION (June 8, 2015), http://balkin.blogspot.com/2015/06/the-case-against-isds.html, *citing Tecmed, supra* note 55.

57. The Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, pmbl., Aug. 2, 2005, 119 Stat. 462, Annex 10-C(4)(b) [hereinafter "CAFTA"].

58. TPP, *supra* note 6, Annex 9-B (Expropriation), note 37 (stating, "[f]or greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect tothe regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.").

59. *See*, Michael Muse-Fisher, *supra* note 13.

60. CAFTA, *supra* note 61, Annex 10-C.

2012 U.S. Draft Model BIT, by providing interpretative guidance for an arbitral tribunal's evaluation of "reasonable investment-backed expectations" under the definition of an indirect expropriation in Annex 9-B(3)(a)(ii).[61] The TPP's specification of the conditions that define "reasonable investment-backed expectations" narrows the category of government-induced reasonable expectations in two significant ways.[62]

First, the TPP specifies that reasonable investment-backed expectations are contingent upon "the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."[63] Here, the negotiating states, at a bare minimum, embrace a holding from *Saluka Instruments B.V. v The Czech Republic*, which examined investor expectations and found:

> [n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.[64]

The TPP's provisions that govern the evaluation of reasonable investment-backed expectations shift the scale even more heavily towards the host state. The language in *Saluka* creates a balancing test between the investor's reasonable investment-backed expectations and the legitimate right to regulate domestic matters in the public interest. However, the language of the TPP requires that the legitimate right to regulate domestic matters reduces the investor's reasonable expectations before a tribunal can balance those expectations with the right to regulate.[65] In other words, the legitimate right to regulate counts twice. First, the arbitral tribunal must minimize the investor's expectations to account for the potential for regulation in the relevant sector. Second, the tribunal balances those expectations against the legitimacy of the regulation under language presuming the legitimacy of "non-discriminatory regulatory actions by a Party that are designed and intended to protect legitimate public welfare objectives."[66]

While the TPP's provisions that elucidate the term "reasonable investment-backed expectations" is not present in the draft 2012 U.S. Model BIT, the United States had argued as a defendant in cases brought under NAFTA Chapter 1110 that, "although regulation is no excuse for expropriation, 'where an industry is already highly regulated, reasonable extensions of those regulations

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61. TPP, *supra* note 6, Annex 9-B.

62. *Id*. Annex 9-B and note 36.

63. *Id*.

64. Saluka Investments B.V. v. The Czech Republic, Partial Award, (UNCITRAL, Marc. 17, 2006) paras. 305, 309.

65. TPP, *supra* note 6, Annex 9-B.

66. TPP, *supra* note 6, Annex 9-B.3(b). Note, however, that the provision includes language allowing a tribunal to determine otherwise; the aforementioned regulatory actions "do not constitute indirect expropriations, except in rare circumstances." *Id*.

are foreseeable.'"[67] The inclusion of these provisions embraces the holding in *Glamis Gold*, where

> [t]he reasonableness of the expectations may depend on the regulatory climate existing at the time the property was acquired, in the particular sector in which the investment was made. Consideration of whether an industry is highly regulated, for example, or whether the investment involved development of environmentally sensitive areas, is a standard part of the legitimate expectations analysis.[68]

Thus, the TPP's provision guiding a tribunal's interpretation of "reasonable investment-backed expectations" significantly strengthens a State's ability to regulate, particularly in extensively regulated areas such as environment and labor, without becoming immediately liable for the potential violation of investment-backed expectations.

The TPP's clarification of reasonable expectations is a direct response to a number of cases brought under previous investment agreements that determined certain government measures constituted indirect expropriation for undermining foreign investor's investment-backed expectations. In *Metalclad Corporation v. The United Mexican States*, an arbitral tribunal constituted under NAFTA held that an indirect expropriation occurred even when a municipality denied the Claimant a local construction permit, because the Claimant was able to claim its investment-backed expectations relied on non-written representations from federal officials.[69] The TPP's implicit response to the holding in *Metalclad* would require the arbitral tribunal to evaluate the likelihood for regulation in the waste disposal sector and to treat only binding, written assurances as an adequate basis upon which the Claimant can establish reasonable investment-backed expectations.[70]

The TPP also rejects the approach taken by a tribunal constituted under the Mexico-Spain BIT in *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* ("*TecMed*"), which found that commitments could be inferred in statements made by a government official when examining fair and equitable treatment.[71] By implicitly providing that "binding written assurances" would

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67. Lee M. Caplan & Jeremy K Sharpe, *United States*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES, 755, 790-91 (Chester Brown, ed., 2013), *citing* Glamis Gold, Ltd. v. The United States of America, Award, (UNCITRAL, June 8, 2009) 91 [hereinafter "Glamis Gold"].

68. Caplan & Sharpe, *supra* note 71, at 790, citing Glamis Gold, *supra* note 71, at 91.

69. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000), paras. 102-12 (holding "[b]y permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).") [hereinafter "*Metalclad*"]. For a summary of the holding in *Metalclad,* see Rachel D. Edsall, *Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U. L. REV. 931, 940 (2006).

70. *See*, TPP, *supra* note 6, Annex 9-B.

71. *Tecmed*, *supra* note 55, paras.158-74; *Metalclad*, *supra* note 73, paras 28-29.

supply an investor a reasonable basis for investment-backed expectations, the negotiating Parties appear to reject inferred assurances and non-written representations as a source of reasonable investment-backed expectations. However, similar to other changes made in the TPP from previous U.S.-negotiated investment agreements, this clarifying language only aims to guide a tribunal's determination while leaving significant discretion for a case-by-case application of the rules.

For the negotiating parties, the decisions of tribunals constituted under existing investment agreements serve not only as interpretations to foreclose, but also as sources of inspiration for provisions and interpretative guidance in future investment agreements. The TPP's modifications to previous investment agreements on the determination of investor expectations help guide TPP tribunals towards a reading more similar to *Methanex Corporation v. United States* (*Methanex*). In *Methanex*, a NAFTA tribunal dismissed claims of indirect expropriation in a California executive order regulating the use of methyl tertiary-butyl ether.[72] The tribunal's determination closely resembles the language added to the TPP. *Methanex* stands for the proposition that:

> a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which effects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[73]

While the *Methanex* tribunal found this holding in a "principal of general international law,"[74] the TPP attempts to remove the possibility for courts to reach an alternative reading consistent with *Metalclad* by requiring an evaluation of the intent[75] of the governmental measure and "specific commitments" as a foundation for a reasonable investor's investment-backed expectations.[76] There is no question that partially conditioning the reasonability of investor's expectations on the "nature and extent of governmental regulation or the potential for government regulation in the relevant sector"[77] constrains an investor's ability to successfully bring claims for unlawful expropriation under the TPP. Given the extent of 21st century governmental regulation in the economic sectors where significant amounts of foreign investment occur,[78] the TPP shifts the foundation of investor expectations from assumptions and

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72. Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, (UNICTRAL, August 3, 2003) [hereinafter "*Methanex*"]. For a summary of the holding in *Methanex,* see, for example, Edsall, *supra* note 73, at 948.

73. *Methanex*, *supra* note 73, at 1456, para. 7.

74. *Id*.

75. Here, both the public benefit sought through the governmental measure and any suggestion of discriminatory treatment constitute intent.

76. For ways in which CAFTA's language differs from *Methanex*, see Edsall, *supra* note 73, at 958.

77. TPP, *supra* note 6, Annex 9-B.

78. *See, e.g.*, the regulation of methyl tertiary-butyl ether in *Methanex*, *supra*, note 76.

inferences to binding commitments and written assurances. This modification significantly increases the government's ability to regulate without fear of violating the TPP's expropriation provision.

3. Minimum Standard of Treatment

TPP Annex 9-A	CAFTA Annex 11-B
The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens	[T]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect economic rights and interests of aliens

The TPP also modifies the extent to which the customary international law minimum standard of treatment protects foreign investors under TPP Article 9.5 (Minimum Standard of Treatment), changing the scope of protection from "economic rights and interests of aliens" in CAFTA and the 2012 U.S. Model BIT to "investments of aliens."[79] Customary international law first appeared as the minimum standard of treatment in the United States' investment agreements after claimants tried to argue that NAFTA Article 1105(1) required host States provide treatment "in accordance with international law" and treatment exceeding that guaranteed under the minimum standard of treatment for aliens under customary international law.[80] Yet, tribunals have struggled to determine precisely what body of law or principles establishes the minimum standard of treatment since the introduction of such provisions. For example, the *Metalclad* tribunal found Mexico violated the minimum standard of treatment without reference to customary international law;[81] on the other hand, the *Pope & Talbot* tribunal concluded that the standard for fair and equitable treatment was "additive to the requirements of international law;"[82] and, finally, the *S.D. Myers* tribunal found a breach of the minimum standard of treatment in the host state's breach of the national treatment obligation.[83]

In response to these tribunals' decisions, the NAFTA Free Trade Commission supplied the three following clarifications concerning NAFTA Article 1105 in the July, 2001 Notes of Interpretation of Certain Chapter 11 Provisions:

1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment afforded to investments of investors of another party.

79. 2012 US Draft Model BIT, *supra* note 52, Annex A.

80. *See* Caplan & Sharpe, *supra* note 71, at 784.

81. Gilbert Gagne & Jean-Frederic Morin, *supra* note 10, at 369.

82. Caplan & Sharpe, *supra* note 71, at 793.

83. *Id.*

2) 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 the customary international law minimum standard of treatment of aliens.
3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[84]

Nonetheless, there still exists significant disagreement among both States and tribunals over what customary international law specifically guarantees as the minimum standard of treatment that a host state must provide an investor.[85]

The lack of agreement regarding what customary international law principles protect offers one explanation for the narrowing scope of protection customary international law provides from the "economic rights and interests of aliens" in CAFTA to "the investments of aliens" in the TPP. In other words, because the applicable principles of customary international law are unclear, narrowing the scope of the protection those principles afford is one way in which the negotiating parties can limit their liability in the face of creative claimants in the future. If the argument advanced by Professors Schwebel and Spears[86] is correct in diagnosing significant disagreement on the substantive protections afforded by customary international law, the narrowing of the language in the TPP constrains arbitral tribunals from protecting economic rights and interests which are broader than those merely pertaining to the investment in dispute.

However, the TPP's language, which describes customary international law principles that protect the investments of aliens, ascribes legitimacy to the argument that an emerging consensus on a customary international law exists, at least insofar as those principles of customary international law concern the protection of aliens' investments.[87] In response to modifications in the U.S.

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84. NAFTA FREE TRADE COMMISSION, NORTH AMERICAN FREE TRADE AGREEMENT NOTES ON INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS, July 31, 2001, http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp

85. Spears, *supra* note 13, at 284 (describing "*Merril & Ring v. Canada*, held that today's MST is broader than that defined in the *Neer* case and provides for the fair and equitable treatment of alien investors within the confines of 'reasonableness'. . . . [while] [t]the second tribunal, in *Chemtura Corporation v. Canada* . . . stated . . . that MST is not confined to the kind of outrageous treatment referred to in the *Neer* case, but rather requires an analysis of the record as a whole to determine whether a government acted fairly, in keeping with due-process standard and in good faith when taking regulatory measures."); *see also*, Schwebel, *supra* note 12, at 156 (arguing "[t]he profound, and startling, deficiency of the 2004 provision is that there is no agreement within the international community on the content of 'customary international law' on which the 2004 Model BIT relies. There was, and is, no agreement within the international community on the content of the 'customary international law minimum standard of treatment of aliens,' or even on whether such a minimum standard existed or exists.").

86. *Supra* notes 12, 13

87. Stephen Schwebel, *Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law*, 98 PROCEEDINGS OF THE ANNUAL MEETING AM. SOC'Y OF INT'L L. 27, 28 (2004) (arguing "when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant

2004 Model BIT, Professor Schwebel raised concerns that the protections afforded under customary international law are meaningless as few nations agree in practice on the substantive protections relevant to investments that compose the customary international law minimum standard of treatment.[88] The TPP's provisions,[89] however, strongly imply that there now exists a body of customary international law that protects the investments of aliens. This implied body of law rejects the finding in *ADF Group Inc. v United States* that:

> [w]e are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The Investor, for instance, has not shown that such a requirement has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant.[90]

Clearly, however, the parties negotiating the TPP believe a body of customary international law governing the treatment of investments now exists, specifying in Annex 9-A that "[t]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens."[91] Any cogent approach to interpreting the TPP must reject the otherwise unfounded claim that negotiating parties included vacuous language providing no protections. If customary international law provided no investment protections, there would be little reason to define the minimum standard of treatment with reference to customary international law.

Also worth observing is the decision by the negotiating parties not to include a more detailed definition of one the enumerated principles of customary international law: fair and equitable treatment.[92] While potentially narrowing the rights afforded under customary international law to those regarding the protection of an alien's investment, the parties negotiating the TPP chose not to specify the meaning of the minimum standard of treatment under customary international law in concrete terms.[93] As with all other recent U.S.-negotiated investment agreements, the TPP specifies that fair and equitable treatment includes, "the obligation not to deny justice in criminal, civil or administrative

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BITs. The minimum standard of international law is the contemporary standard.").

88. Schwebel, *supra* note 12, at 156.

89. TPP, *supra* note 6, Annex 9-A.

90. ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1 Award (January 9, 2003) para. 183.

91. TPP, *supra* note 6, Annex 9-A.

92. TPP, *supra* note 6, art. 9.6.

93. For a summary of the elements of fair and equitable treatment, see Catherine Yannaca-Small, *Fair and Equitable Treatment in International Investment*, *in* INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE, 79, 104 (OECD, 2005) (claiming fair and equitable treatment is constituted by four categories: "a) Obligation of vigilance and protection, b) Due process including non-denial of justice and lack of arbitrariness, c) Transparency and respect of investor's legitimate expectations and d) Autonomous fairness elements.").

adjudicatory proceedings in accordance with the principles of due process embodied in the principal legal systems of the world."[94] However, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), signed in 2014 during the TPP negotiations, provides a more detailed enumeration of possible violations of the fair and equitable treatment obligation.[95] CETA specifies that:

> [A] party breaches the obligation of fair and equitable treatment. . .where a measure or series of measures constitutes: (a) Denial of justice in criminal, civil or administrative proceedings; (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. (c) Manifest arbitrariness; (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) Abusive treatment of investors, such as coercion duress, and harassment; or (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.[96]

An earlier draft of CETA also included transparency and legitimate expectations in the enumerated violations of fair and equitable treatment.[97]

The TPP groups the first and second breaches of obligations of fair and equitable treatment articulated in CETA, and likely accounts for the fifth enumerated violation in the TPP's clarification that full protection and security "requires each Party to provide the level of police protection required under customary international law."[98] While the language of CETA implies that the enumerated breaches of the obligation of fair and equitable treatment are an exhaustive list, the TPP only notes that fair and equitable treatment "includes the obligation not to deny justice."[99] In this way, when compared with concurrently negotiated investment agreements, the TPP leaves significantly more discretion to arbitral tribunals in determining the specific manifestations of a breach of fair and equitable treatment.

The TPP also contains a provision not found in existing U.S. investment agreements that specifies that an investor bears the burden of proving all elements of its claims, including a claim brought alleging a host-state breached the Minimum Standard of Treatment.[100] This added provision seems intended to

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94. TPP, *supra* note 6, art. 9.6(2)(a).

95. P. Dumberry, *Drafting the Fair and Equitable Treatment Standard Clause in the TPP and RCEP: Lessons Learned from the NAFTA Article 1105 Experience*, 12 TRANSNAT'L DISP. MGMT. 1, 26 (2015).

96. Comprehensive Economic and Trade Agreement, E.U.-Can., Aug. 2014, Art. 8.10, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

97. Dumberry, *supra* note 98, at 27.

98. TPP, *supra* note 6, art. 9.6(2)(b).

99. *Id*. art. 9.6(2)(a).

100. *Id*. art. 9.22(7) (stating, "[f]or greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.").

enshrine a holding from *Glamis Gold, Ltd. v The United States of America*,[101] requiring that the claimant demonstrate an evolution of the customary fair and equitable treatment if claiming a breach that falls short of the standard established in *Neer v. Mexico*.[102] While it is unlikely that this new language constitutes a departure from the treatment of an investor's burden of proof in the status quo, this added provision in the TPP ensures tribunals do not deviate from the established allocation of the burden of proof in investor-state arbitration.

B. Changes Foreclosing Particular Claims and Claimant Strategies

Along with clarifying the primary, substantive provisions of investor treatment that states must provide, the TPP also includes a number of provisions not found in previous U.S.-negotiated investment agreements to foreclose the possibility of particular claims and claimant strategies that host states have found particularly troublesome. As with the evolution in the provisions governing the obligations states owe investors, these more specifically tailored modifications to the TPP largely emerged in response to particular arbitral decisions that created a procedural system that unduly favored the investor in the eyes of the negotiating states.[103] This section will first examine the *Maffezini* line of cases and the TPP's response to the application of Most-Favored Nation provisions to the procedural components of investment agreements. This section will also address new provisions that the negotiating parties intended to foreclose claims brought exclusively on the basis of modifications to state subsidy schemes. Next, this section examines new provisions governing claims brought against the enforcement of conditions upon which investments are permitted under investment authorization legislation. Finally, this section notes language specifically permitting states to bring counterclaims against investors for the first time in a U.S.-negotiated investment agreement.

1. Maffezini and Procedural Cherry-Picking

TPP 9.5(3) (Most-Favored-Nation Treatment)	For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms such as those included in Section B.

101. *Glamis Gold*, *supra* note 71, para. 22.

102. Neer v. Mexico, 4 R. INT'L ARB. AWARDS 4 (Oct. 15, 1926) (holding that "[t]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.").

103. For a history of the procedural changes from NAFTA to the 2004 Model BIT, see, for example, Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. OF INT'L ARB. 383 (2004).

The TPP's most-favored nation article includes a provision that limits the article's application to exclusively substantive investment provisions. Article 9.5 (3) reads:

> For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B.[104]

This limitation ensures that investors cannot circumvent the procedural provisions negotiated by each party to the agreement through recourse to procedural provisions more favorable to the investor in pre-existing agreements. In the context of the TPP and its relatively state-friendly provisions, this limitation is imperative: the parties to the agreement have already signed nearly five hundred agreements subject to the most-favored-nation article in the TPP.[105]

Critics of the TPP have nonetheless claimed that the inclusion of both a most-favored-nation provision and an investor-state arbitration mechanism would allow the investor to bypass the more state-friendly procedural provisions established under the TPP.[106] Critics point to a line of ICSID cases beginning with *Maffezini v. Spain*, finding it possible to apply most-favored-nation clauses to preconditions of arbitration and dispute resolution mechanisms.[107] Cumulatively, tribunals have not established a consistent jurisprudence in their attempt to resolve the doctrinal debate surrounding the extension of most-favored-nation clauses to a treaty's arbitration provisions.[108]

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104. TPP, *supra* note 6, art. 9.5(3)

105. Chaisse, *supra* note 18, at 138; *see also*, Thompson, *supra* note 20 (arguing the most-favored-nation clause restriction present in the TPP "no doubt derives from the efforts of investors in a line of ICSID cases beginning with *Maffezini v Spain* to argue that MFN clauses should apply to preconditions to arbitration and dispute resolution clauses.").

106. *See, e.g.*, Todd Tucker, *The TPP Has a Provision Many Will Love to Hate: ISDS. What Is It, and Why Does It Matter?* WASH. POST, (Oct. 6, 2015), https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/10/06/the-tpp-has-a-provision-many-will-love-to-hate-isds-what-is-it-and-why-does-it-matter/ (claiming the most-favored-nation provision could "allow investors to claim the best procedural and substantive treatment contemplated in any of a host country's treaties. This is particularly useful where the treaty that the investor used as its vehicle is more state-friendly (say TPP, arguably) than others in the respondent's treaty portfolio."). *But, see* Stephen Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 561 (2009) ("Seeking the most favorable protection offered by the BITs of a specific host State is therefore not a shopping for unwarranted advantages, but the core objective of MFN clauses . . . . application of MFN clauses [to matters of jurisdiction] harmonizes compliance procedures for the host State's obligations under investment treaties.").

107. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, (Jan. 25, 2000) para. 56 (holding "that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.").

108. For a summary of the existing tension in tribunals' jurisprudence, see AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW 137, note 704 (2013).

However, every U.S.-negotiated investment agreement after CAFTA has limited the scope of application for the most-favored-nation provision in a manner similar to the TPP. The final draft text of CAFTA released by the United States included an interpretive footnote stating that the parties understood that the most-favored-nation clause does not apply to investor-state dispute settlement and "therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case."[109] The parties elected not to include this footnote explicitly rejecting *Maffezini* in the final text, but instead agreed that the footnote should inform the interpretation of the treaty as part of the agreement's negotiating history that expresses a shared understanding of scope of the most-favored-nation provision.[110]

The U.S.-Peru Trade Promotion Agreement ("TPA"), for example, contained a footnote specifying that the treatment guaranteed under the most-favored-nation provision "does not encompass dispute resolution mechanisms, such as those in section B, that are provided for in international investment treaties or trade agreement."[111] The language in the TPP and the U.S.-Peru TPA is a more explicit acknowledgement of the limitations on the scope of most-favored-nation articles than that of the 2012 U.S. Model BIT, which specifies that the most-favored-nation treatment apply only "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[112] While this language drawn from the 2012 U.S. Model BIT seems to exclude dispute settlement, arbitral tribunals could broadly interpret the 'management' of an investment to include dispute procedures intended to protect the investment.[113] The language that the negotiating states selected for the TPP thus removes any ambiguity, explicitly excluding dispute settlement from the scope of the TPP's MFN provision.

2. Subsidy Schemes and Breaches of Investor Protection

TPP 9.6(5) (Minimum Standard of Treatment)	TPP 9.7(6) (Expropriation)
For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party,	For greater certainty, a Party's decision not to issue, renew, or maintain a subsidy or grant, (a) in the absence of any specific

109. *Id*. at 138, note 704.

110. *Id*.

111. United-States – Peru Trade Promotion Agreement, U.S.-Peru, art. 10, note 2, April 12, 2006,
https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf.

112. 2012 US Draft Model BIT, *supra* note 52, art. 4. "According to the principle of *ejusdem generis*, 'no other rights can be claimed under a most-favoured-nation clause than those falling within the limits of the subject matter of the clause'." Caplan & Sharpe, *supra* note 71, at 780.

113. Gilbert Gagne & Jean-Frederic Morin, *supra* note 10, at 375.

does not constitute a breach of this article, even if there is loss or damage to the covered investment as a result	commitment under law or contract to issue, renew, or maintain that subsidy or grant; or (b) in accordance with any terms or conditions attached to the issuance, renewal, or maintenance of that subsidy or grant, standing alone, does not constitute an expropriation.

The TPP also contains two provisions in both Article 9.6 (Minimum Standard of Treatment) and Article 9.7 (Expropriation and Compensation) to specify that the removal, withdrawal, or reduction in subsidies or grants does not constitute a breach of the minimum standard of treatment or an expropriation. Creating a safe harbor for changes in subsidies that governments provide is a clear response to recent arbitration cases holding governments liable for breaches of the minimum standard of treatment and expropriation when altering subsidy schemes.[114] Specifically, there exist a number of cases brought against European states for the retroactive rollbacks of subsidies for renewable energy in the midst of budgetary crises.[115] In these claims, subsidies constituted a component of the investor's reasonable investment-backed expectations, and their withdrawal then constituted a breach of the fair and equitable treatment obligation.[116] Liability for the restructuring of subsidy schemes can play a controlling role in state accession to investment agreements; the claims brought against Italy for reducing subsidies to photovoltaic plants following the global recession led to Italy withdrawing from the Energy Charter Treaty.[117] The TPP's new provisions precluding state liability for altering subsidy schemes thus further exemplify the responsive evolutionary model in investment agreements, whereby negotiating parties modify investment agreements in response to particularly expansive arbitral decisions and creative claims.

114. Bernasconi-Osterwalder, *supra* note 15.

115. Vyoma Jha, *Trends in Investor Claims over Feed-in Tariffs for Renewable Energy*, INV. TREATY NEWS: INT'L INST. FOR SUSTAINABLE DEV., (July 19, 2012), https://www.iisd.org/itn/2012/07/19/trends-in-investor-claims-over-feed-in-tariffs-for-renewable-energy/#_ednref10; *see also*, Rachel Thorn, *Renewable Energy Policy Changes Lead to Damages Claims*, PROJECT FIN. NEWSWIRE, (June 2014), http://www.chadbourne.com/renewable_energy_policy_changes_june2014_projectfinance (noting that "[w]ind and solar companies and investors backing their projects have filed a large number of claims against the governments of Spain and the Czech Republic after the governments scaled back feed-in tariffs and other subsidies for renewable energy. Italy is also facing arbitration after making similar changes to its regulatory policies.").

116. *Id*.

117. Gaetano Iorio Fiorelli, *Italy Withdraws from Energy Charter Treaty*, GLOBAL ARB. NEWS, (May 6, 2015), http://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/.

3. Investment Authorization and Precluded Claims

TPP Footnote 31	WikiLeaks Footnote 30	Wikileaks Alternative Text
Without prejudice to a claimant's right to submit to arbitration other claims under this Article, a claimant may not submit to arbitration a claim under subparagraph (a)(i)(B) or subparagraph (b)(i)(B) that a Party covered by Annex 9-H has breached an investment authorization by enforcing conditions or requirements under which the investment authorization was granted.	Without prejudice to a claimant's right to submit to arbitration other claims under this Article, a claimant may not submit to arbitration a claim under subparagraph (a)(i)(B) or subparagraph (b)(i)(B)that a Party covered by Annex I-H has breached an investment authorization by enforcing conditions or requirements under which the investment authorization was granted*, unless such enforcement is used as a disguised means to repudiate or otherwise breach its own commitments by invalidly withdrawing the authorization*.	For greater certainty, a claim for breach of an investment authorization does not arise solely because a Party requires compliance with, seeks to enforce, or enforces, conditions or requirements under which the investment authorization is granted to an investor.

Creating further room for the enforcement of governmental regulations, the TPP contains a footnote not found in CAFTA-DR or previous investment agreements specifying that a claimant cannot submit to arbitration of a claim that a host state has breached "an investment authorization by enforcing conditions or requirements under which the investment authorization was granted" for the following parties: Australia, Mexico, Canada, and New Zealand.[118] This provision is one of the few to have changed substantively in the final months of negotiation, indicating fundamental disagreements between the negotiating parties on the number of states for which the TPP creates a safe harbor concerning the enforcement of conditions under which the host-state granted the investment authorization. The WikiLeaks investment chapter released in March of 2015 but dated January of that year contained two alternative formulations of the relevant provision, one narrower and one significantly broader than the final wording. The first formulation is identical to

118. TPP, *supra* note 6, art. 9.18, note 31; *Id*. at Annex 9-H.

the provision included in the final released text, except for an additional clause creating an exception to the safe harbor in the event "such enforcement [of conditions or requirements under which the investment authorization was granted] is used as a disguised means to repudiate or otherwise breach its own commitments by invalidly withdrawing the authorization."[119] The second "alternative proposed working text" would be significantly broader and apply to all host states, explaining "a claim for breach of an investment authorization does not arise solely because a Party requires compliance with, seeks to enforce, or enforces, conditions or requirements under which the investment authorization is granted to an investor."[120]

The provision the negotiating parties eventually placed in the TPP strikes a compromise between the two proposed working provisions. Two observations emerge from the disagreement between negotiating parties expressed in the contrasting working texts. First, given the breadth of protection the second alternative proposed working text affords any host-state party, the final wording is a significant victory for the protection of investors and investments. While the second wording would permit potentially arbitrary and discriminatory enforcement of conditions under which any host state granted investment authorization, the final text creates a safe harbor only for enforcement of conditions under a specific piece of domestic legislation in each of the four states enumerated in Annex 9-H. Second, of the four states authorizing investments at the pre-establishment phase, only Mexico qualifies as a traditional capital-importing state. Australia's presence, however, is consistent with its broader rejection of the investor-state arbitration mechanism, including its attempt to avoid the investor-state arbitration mechanism altogether in the leaked working draft of the TPP's investment chapter.[121] Nonetheless, this provision provides four states with a mechanism to control foreign investment in the sectors governed by those states' foreign investment legislation with far more room for government regulation.

4. Counterclaims

TPP 9.18(2)	When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant. [32] [Footnote 32: In the case of investment authorizations, this paragraph shall apply only to the extent that the investment authorization, including instruments executed after the date the

119. WikiLeaks Investment Chapter, *supra* note 6, at note 30.

120. *Id*.

121. *Id*.

	authorization was granted, creates rights and obligations for the disputing parties.]

For the first time in a U.S.-negotiated investment agreement, there exists a provision in the TPP that explicitly permits a respondent state to bring a counterclaim against the investor before the same tribunal evaluating the investor's claims. The draft 2012 U.S. Model BIT does not include provisions allowing states to make counterclaims against investors, indicating either an evolution in the United States' negotiating position over the past three years, or, more likely, the United States viewing counterclaims as a necessary concession to other negotiating parties.[122] Previously, counterclaims had been extremely rare in investor-state arbitration.[123] While the ICSID Convention expressly provides for counterclaims in Article 46, respondent states have encountered difficulty when tribunals assess whether or not investors have granted consent to the adjudication of counterclaims under a particular investment agreement.[124]

Despite this hesitancy, investor-state arbitration tribunals began to seriously consider counterclaims with the ICSID award in *Roussalis v. Romania*.[125] While the majority declined jurisdiction over the Respondent state's counterclaims, Arbitrator Reisman dissented, forcefully arguing that an international tribunal's adjudication of counterclaims is not only more efficient, but also beneficial to the investor when the investor itself choses to bring suit before the neutral arbitral tribunal to avoid the national courts to which the arbitral tribunal would send the counterclaims back to.[126] After the dissent in *Roussalis*, ICSID tribunals have affirmed jurisdiction over a number of counterclaims, one example being the counterclaim brought by the Republic of Burundi in the case of *Antoine Goetz and Others*.[127] In other post-*Roussalis* arbitrations, however, tribunals have denied jurisdiction over counterclaims, leaving the doctrinal issue unsettled and largely dependent on both the degree of connection between the counterclaims and the investor's original claims and the investment agreement under which the dispute was brought.[128]

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122. 2012 US Draft Model BIT, *supra* note 52.

123. Helene Bubrowski, *Balancing IIA Arbitration Through the Use of Counterclaims*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 212, 215 (Armand De Mestral & Celine Levesque, eds., 2012); *see also*, Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461 (2013).

124. Michael Waibel & Jake Rylatt, *Counterclaims in International Law*, U. CAMBRIDGE FAC. L. LEGAL STUD. RES. PAPER SERIES 9-12 (December 2014).

125. Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, (Dec. 7, 2011).

126. *Id*. (Reisman dissenting) ("Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.").

127. Waibel and Rylatt, *supra* note 127, at 12.

128. *Id*. at 13-14; *see also*, Anne K. Hoffmann, *Counterclaims in Investment Arbitration*, 28 ICSID REV. 438 (2013); Andrea K. Bjorklund, *supra* note 126.

By explicitly granting jurisdiction over counterclaims to arbitral tribunals, the parties negotiating the TPP resolved one of the fundamental challenges to respondent states bringing counterclaims. The TPP still requires the tribunal assess and determine the adequate degree of connection a counterclaim must share with the original investor's claim for the tribunal to assume jurisdiction. Nonetheless, the possibility of respondent states bringing counterclaims plays a significant role in maximizing efficiency within the international investment law system and promoting the best interests of both the investor and the state.[129] Indeed, commentators have noted that "overcoming the current obstacles to bringing counterclaims . . . serves the overall integrity and legitimacy of international investment law by infusing balance into the dispute settlement mechanism."[130]

III.
CONTINUITY IN U.S.-NEGOTIATED INVESTMENT AGREEMENTS

A. Overview

Despite a number of changes from previous U.S. investment agreements that the negotiating parties intended to limit the protections afforded to investors under the TPP, the TPP's investment chapter is perhaps most notable for what has remained constant from NAFTA, to DR-CAFTA, and to almost all U.S.-negotiated BITs in the 2000s. At various points in time, in particular following the decision in U.S.-Australian FTA not to include an investor-state arbitration mechanism, commentators have considered investor-state arbitration a dying institution.[131] Other skeptics have noted that the watering-down of provisions protecting investors may itself be an inadequate response to a theoretically broader crisis in arbitration.[132]

Despite these concerns about the durability of investor-state arbitration, the TPP maintains and significantly expands the geographic reach of the investor-

129. *See*, *supra* note 118, dissent of Michael Reisman.

130. Bubrowski, *supra* note 126, at 229.

131. *See, e.g.*, Capling & Nossal, *supra* note 6, at 3. (concluding "that because the abandonment of NAFTA-style Chapter 11 mechanisms in the Australian agreement will effectively preclude the inclusion of such provisions in future trade agreements between developed countries, the blowback we observe in the Australian case has wider and longer-term implications.") *But see*, Gilbert Gagne & Jean-Frederic Morin, *supra* note 10, at 382 (arguing that "even if some substantive provisions may be further scaled back and more procedural safeguards be added, there is no evidence that the United States will do away with investor-state dispute settlement or even that it will accept that such provisions be significantly curtailed.").

132. *See*, M. Sornarajah, *The Descent into Normlessness*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 631, 656 (Chester Brown & Kate Miles, eds., 2012) (arguing "[t]he third and most damaging of the developments is that defences have come to be expressly introduced into the treaties making the treaty instrument unstable and inherently worthless to the investor . . . . the foreign investors themselves will see little value in such an uncertain system. It is clear that a change has to come about which will significantly undermine the existing system.").

state arbitration regime.[133] At a time when some critics claim international investment arbitration is descending into 'normlessness,'[134] it is vital to the durability of the institution of investor-state arbitration that the TPP not only affirms the efficacy of the existing international investment arbitration regime but also significantly expands its scope in two fundamental ways. First, the TPP generally raises the floor for rights and remedies states must provide investors in the already existing investment agreements signed by the states negotiating and ratifying the TPP. Even if the protections afforded investors under the TPP are slightly narrower than those provided in previous U.S.-negotiated investment regimes, they are generally more expansive than those existing investment treaties negotiated between many of the TPP's parties.[135] Second, in its unprecedented scope, the TPP serves as a vehicle for the entrenchment of the United States-led international investment regime as the global model.[136] When the other states party to the TPP—cumulatively forty percent of the global economy[137]—negotiate future investment agreements, the TPP is likely to serve as the foundation and model agreement.[138]

Even the method by which the negotiating parties attempted to create a more host-state friendly agreement was one of responsive and incremental change, further demonstrating the stability of the existing international investment regime. While a number of states have written a general clause creating exceptions for government regulations applicable to the entire treaty,[139] the TPP's investment chapter instead stakes out the narrow exceptions—most commonly framed only as interpretive assistance—addressed above. Nonetheless, the TPP does not include a general regulatory exception, illustrating the reactive model of evolution in international investment law that the negotiating parties employed, and the extent to which the negotiating parties maintained the underlying substantive investor protections while clarifying their application.

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133. Loukas Mistelis, *ISDS in TPP and TTIP Negotiations – Lessons for the EU*, EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION BLOG, (Nov. 10, 2015), http://efilablog.org/2015/11/10/isds-in-tpp-and-ttip-negotiations-lessons-for-the-eu/ (arguing "[t]he key conclusion to draw from the ISDS provisions in TPP is undoubtedly a strong and unequivocal endorsement of the current practice of private arbitration of investment disputes (traditional ISDS) where the focus has moved to substantive protection rules rather than arbitration as a method.").

134. M. Sornarajah, *supra* note 135, at 641 (arguing "all is not well with investment arbitration. It is necessary to ask what led to his present position where there is neither 'evolution' nor 'revolution'. . . but a descent into the morass of 'normlessness'.").

135. Chaisse, *supra* note 18, at 134.

136. *Id*. at 104-5 (arguing the TPP "implies that the US-inspired investment rule-making is about to achieve global status.").

137. FERGUSSON, MCMINIMY, WILLIAMS, *supra* note 3.

138. Chaisse, *supra* note 18, at 104-5.

139. TITI, *supra* note 111, at 173-4 (noting that the general exception clause exists in Canada's Model BIT and an increasing number of free trade agreements, including the Energy Charter Treaty, the Australia-Singapore FTA, the ASEAN CIA, the ASEAN-Korea FTA, the ASEAN-China Investment Agreement and, the CETA).

B. Expanded Investor Protections

Additionally, the parties negotiating the TPP provide new rights for investors not found in previous investment agreements that the United States ratified in at least one noteworthy way. The TPP includes the following language that is new to U.S.-negotiated investment agreements:

> No party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking . . . .
>
> > (f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory . . . .
> > (h) (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party [footnote 24: For the purposes of this Article, the term "technology of the Party or of a person of the Party" includes technology that is owned by the Party or a person of the Party, and technology for which the Party or a person of the Party holds, an exclusive license.]; or (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology . . . .[140]

This prohibition against discriminatory indigenous technology requirements originated with the 2012 U.S. Model BIT.[141] The TPP's language relies heavily upon Article 8(1)(h) of the 2012 Model BIT, which prohibits both requirements to purchase, use, or accord a preference to local technologies and requirements that prevent the purchase of a particular technology.[142] Commentators have noted that this requirement expands the usual performance requirements provision found in existing U.S. investment agreements so as to prohibit a host state from preferring local technology throughout the lifespan of the investment.[143] The host state, however, retains the authority to require particular technologies, provided they serve a legitimate and non-discriminatory purpose, further illustrating the extent to which the parties negotiating the TPP sought to emphasize a host state's capacity for regulation.[144]

CONCLUSION

Through the modifications discussed in Section II, the final investment chapter in the TPP addresses many of the most significant criticisms of investor-state arbitration raised during the negotiations. Whether resolving claims that U.S.-negotiated trade agreements grant investors protections that exceed those afforded to domestic, American investors[145] or including a number of new provisions to strengthen the basis upon which a state can regulate without fear of

140. TPP, *supra* note 6, art. 9.9(1)(f), art. 9.9(1)(h)(i)-(ii).

141. 2012 US Draft Model BIT, *supra* note 52, art. 8.1(f).

142. Caplan & Sharpe, *supra* note 71, at 799.

143. Chaisse, *supra* note 18, at 126.

144. Caplan & Sharpe, *supra* note 71, at 800.

145. *See supra* § II.A.5.

incurring liability for the losses of foreign investors,[146] the TPP strengthens the position of respondent states relative to previous U.S.-negotiated investment agreements. The negotiating parties employ the vast majority of these modifications to respond to previous investment tribunals' decisions—or even unsuccessful claims brought by investors—that undermined the domestic political legitimacy of investor-state arbitration, while maintaining the foundational architecture of the existing international investment regime: national treatment, most-favored nation treatment, minimum standard of treatment, and the prohibition on uncompensated expropriation.

Indeed, it remains to be seen whether such modifications to the guarantees host states must provide investors will prove to substantively alter the resolution of investor claims brought against parties to the TPP. Because the TPP's MFN clause is characteristic of most U.S.-negotiated FTAs and BITs in its complete coverage of substantive rights, it is very possible that claims brought under the TPP will primarily seek to apply the substantive provisions of a host state's existing investment agreements.[147] The TPP's most significant legacy in the area of investment arbitration may simply be the linking and geographical expansion of existing investment protections through the TPP's MFN provision that requires the equivalence of substantive protections for foreign investors across all of a host-state's investment agreements.[148] If the treatment states must provide investors is even slightly more favorable for investors in previous investment agreements than in the TPP, the TPP may primarily constitute an extension of the most favorable provisions in any given host state's inventory of existing investment agreements for the investors of parties to the TPP.[149]

This possibility does not, however, imply that the provisions added to the TPP will have little effect on the resolution of investor-state disputes; rather, the possibility for incorporation of substantive protections in parties' existing investment agreements through the TPP's MFN provision offers a compelling explanation for the method the TPP parties employed in introducing changes from previous agreements to the TPP. By presenting many of the modifications

146. *See supra* § II.

147. Chaisse, *supra* note 18, at 135 (explaining "[t]he TPP MFN expressly extends the coverage of the MFN obligation to pre-establishment rights.").

148. For a summary of the existing international investment agreements that the parties negotiating the TPP have ratified, see Chaisse, *supra* note 18, at 129-34.

149. For more on this broad effect of the MFN provision on international investment law, see STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 366 (Cambridge University Press, 2009). (concluding that, assuming the existence of an investment agreement, "MFN clauses, therefore, create a uniform regime for the protection of foreign investors in any given host State independent of the investor's nationality."). Also worth noting is the open nature of the TPP; the TPP permits any new member to sign up without regard for geographic or economic conditions so long as the current TPP member states elect to accept the prospective member. With a number of prospective member states already expressing interest in ratifying the agreement, there exists the potential for the TPP's investment chapter to form in effect a multilateral agreement on investment protection, providing the vehicle through which the MFN clauses of a party state's existing investment agreements are disseminated.

as interpretative guidance or clarifications, the negotiating parties frame a modification as merely the most recent expression of established understanding in international investment law. The TPP thus seeks both to extend the existing U.S.-negotiated international investment regime and to clarify the provisions that investment regime guarantees in a manner that expands a state party's ability to regulate for the public welfare.