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The Trans-Pacific Partnership investment chapter sets a new worldwide standard

by
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The Trans-Pacific Partnership (TPP) investment chapter released on November 5, 2015 heralds the emergence of a new standard for international investment agreements (IIAs), building on the post-NAFTA United States (US) experience. The chapter has widened the regulatory space reserved to states, but exhibits some perplexing changes. This *Perspective* focuses on developments having a broader systemic effect.

Given the strong objections to investment protections from some labor, environmental and civil society groups, it is not surprising to see provisions addressing fears of regulatory chill in the areas of environment, public welfare and health (Art. 9.15, 9.16), and with respect to financial regulation (Art. 29.3, Annex 9-G). Key in this respect is the "tobacco exception" that allows states to prevent or stop claims based on tobacco regulations under the denial-of-benefits provision.[1] In addition, the long-controversial coverage of investment authorizations and agreements has been restricted, both in substance and with respect to investor-state dispute settlement (ISDS). The chapter provides that actions taken to enforce competition, environmental, health, and other laws are not to be mistaken for authorizations,[2] and states may bring counterclaims.[3]

Perhaps most surprising is the explicit direction in the minimum-standard-of-treatment (MST) provision that "actions inconsistent" with investors' expectations are not covered.[4] In addition, with an eye to investors' current target, the MST provision excludes subsidies from its scope,[5] and a tweak of the expropriation provision seems aimed at preserving states' discretion to grant or modify subsidies.[6]

Then there is a provision in the General Exceptions chapter allowing temporary financial safeguards in "exceptional circumstances."[7] Clearly, the shadow of the Argentina investment jurisprudence looms large – various Asian-Pacific countries themselves had to deal with a scarring financial crisis around the same time.

From a US policy perspective, the "demotion" of the appellate mechanism is an inexplicable backtrack. Post-2000 US IIAs have either required or strongly aspired to establishing an appellate mechanism. But if a review mechanism is established somewhere else, the TPP parties "shall consider" whether to subject TPP awards to that mechanism. Perhaps the parties are awaiting ICSID's current efforts to draft such a mechanism, but given the assault ISDS is under today, and the possibility that an appellate mechanism could appease some legitimate concerns about ISDS, it seems questionable to divorce it from TPP. As a negotiator I did not like this Congressional requirement, but there are now sufficient US-based provisions in multiple IIAs requiring an appellate mechanism to ensure uniformity in the interpretation of those US agreements. Further, with the Transatlantic Trade and Investment Partnership pending, and Europe clearly expressing a preference for some kind of review, it would seem a political necessity.[8]

Moreover, considering that US IIAs contain provisions instructing tribunals to interpret regulatory measures in the context of customary international law standards, it is surprising that the TPP interpretation of expropriatory measures no longer refers to those standards (Annex 19B).

Other interesting TPP features include:

- The definition of "in like circumstances" under the national treatment and most-favored-nation provisions (Articles 9.4, 9.4, footnote 14) and the direction to consider legitimate public welfare objectives in assessing a claim under this provision.
- Australia's consent to ISDS (not really a surprise).
- The agreement to develop a code of conduct for arbitrators (Article 9.21(6)).
- Limitations on pre-establishment claims (Article 9.28).
- US submission to the Queen's English.

TPP sets the new standard for IIAs by incorporating a number of provisions protecting state discretion – the question is, will it be enough for the doubters and for Europe?

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[1] Art. 29.5. However, the invocation of a denial of benefit is itself subject to ISDS under the chapter.

[2] *See* Art. 9.1, footnotes 5-11. Agreements concerning land, water or radio spectrum are not covered.

[3] Art. 9.18(2); Annex 9-L directs that, if the agreements provide for contractual arbitration under the ICC, LCIA or ICSID, those clauses should be respected, but also provides for consolidation of contractual and investment disputes.
[4] Art. 9.6(4), even if there is loss or damage to the covered investment as a result. Despite the NAFTA interpretation, at least one NAFTA tribunal recently has ignored the direction to apply customary international law, and other tribunals have argued that customary international law had evolved to include expectations. In addition, in Art. 9.22(7), there is a clear statement that, in alleging a violation of the MST, the investors bears the burden of proof on all elements.
[5] Art. 9.6(5) (the "mere fact that a subsidy or grant has not been issued, renewed or maintained . . . does not constitute a breach . . . even if there is loss or damage to the covered investment as a result.") This is subject to a caveat of a specific commitment.
[6] Art. 9.7(6)(a)(b). But these provisions are circumscribed by ISDS provisions
[7] Art. 29.3. The provision is subject to the national treatment, most-favored-nation and expropriation and compensation provisions.
[8] The European Union recently disclosed an "investment court" proposal. While it is unlikely that the US will agree to such a framework, it seems clear that the current system of ad hoc tribunals without any review will not work in an agreement with Europe. Previously, there seemed to be consensus that the solution was an appeals mechanism.

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