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The Investment Chapter of the Trans-Pacific Partnership Agreement and Latin America

A Possibility of Change and Convergence?

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This paper analyses the possible effects that would create for Latin American countries, the inclusion of an investment chapter in the Trans-Pacific Partnership (TPP) agreement, currently in negotiation. The article discusses four aspects that are of particular importance given the divergence of interests between some of the negotiating States of the TPP: the substantive protection of foreign investment and its scope; domestic regulations on capital controls; the emergence of state entities as foreign investors; and the settlement of disputes through investor-state arbitration. The author concludes that compared to the current international investment agreements signed by the Latin America countries that are negotiating the TPP, the inclusion of an investment chapter in this agreement is an opportunity to advance in the convergence of the regulation foreign investment, both in terms of substantive standards of investment protection and to improve investor-state arbitration as a mechanism of dispute resolution.

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THE INVESTMENT CHAPTER OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT AND LATIN AMERICA
A possibility of change and convergence?

Rodrigo Polanco Lazo *

Abstract

This paper analyses the possible effects that would create for Latin American countries, the inclusion of an investment chapter in the Trans-Pacific Partnership (TPP) agreement, currently in negotiation. The article discusses four aspects that are of particular importance given the divergence of interests between some of the negotiating States of the TPP: the substantive protection of foreign investment and its scope; domestic regulations on capital controls; the emergence of state entities as foreign investors; and the settlement of disputes through investor-state arbitration. The author concludes that compared to the current international investment agreements signed by the Latin America countries that are negotiating the TPP, the inclusion of an investment chapter in this agreement is an opportunity to advance in the convergence of the regulation foreign investment, both in terms of substantive standards of investment protection and to improve investor-state arbitration as a mechanism of dispute resolution.

Keywords: Trans-Pacific Partnership, Investor-State arbitration, foreign investment, regulatory convergence, Latin America.

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I. INTRODUCTION

The so-called "Trans-Pacific Partnership" Agreement (TPP), is currently under negotiation among 12 countries of the Pacific Rim: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam, which together account for nearly 40 per cent of global GDP.[1]

The TPP negotiation process was initiated by countries that are currently part of the Trans-Pacific Strategic Economic Partnership Agreement (Brunei Darussalam, Chile, New Zealand and Singapore) – a treaty also known as P4 – signed in 2005 and in force since 2006, which lays the foundation of the Trans-Pacific Partnership. However, subsequent to the P4, the TPP negotiations have been ambitious and very active. Since its first round that took place in Melbourne, Australia, on March 15 to 19, 2010, to the latest in Ottawa, Canada on July 3-13, 2014, to date twenty rounds of negotiations have been completed. Additional technical and political negotiations have been taking place since July 2014 to May 2015.[2]

The TPP aims at further liberalization of trade in the economies of the Asia-Pacific region, and intend to be an "innovative" and "high quality" treaty for the XXI century.[3] Because of the large number of economies involved and its markets, it has been praised as a way of providing "amazing" economic benefits, as well as a "genuine way of integrating" the Asia-Pacific region.[4]

However, the negotiations of the agreement have faced harsh criticism from some lawmakers and members of civil society from around the world, which claim that TPP provisions will increase the monopoly of pharmaceutical patents, promote deregulation in financial matters, weaken security food, and reduce the protection of personal data of

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[1] U.S. Department of State, 'State Dept. Fact Sheet On Trans-Pacific Partnership' (*IIP Digital*, 5 September 2013) <http://iipdigital.usembassy.gov/st/english/texttrans/2013/09/20130913282779.html#axzz3VP1x0vsS> accessed 25 March 2015.

[2] On October 3-4, 2013, Trade Ministers from TPP participating countries met to further advance the TPP negotiations. Trade Ministers and Heads of Delegation from TPP participating countries held a four-day Ministerial meeting in Singapore, from 07-10 December 2013. Additionally, Trade Ministers from TPP participating countries held two meetings in Singapore: one on 17-25 February and another on 19-20 May 2014. A new meeting of the TPP technical groups took place in Hanoi, Vietnam, from 1 to 10 September 2014. Trade Ministers and Heads of Delegation met on 25-27 October 2014. Trade Ministers from TPP participating countries held another meeting in November 2014, in Beijing, China. On 07-12 December 2014, Chief Negotiators of TPP participating countries held a meeting in Washington, D.C. Organization of American States (OAS), Foreign Trade Information System, 'Trans-Pacific Partnership Agreement' (*Trade Policy Developments*, no date) <http://www.sice.oas.org/TPD/TPP/TPP_e.ASP> accessed 31 March 2014.

[3] C. L. Lim and others, 'What Is "High-Quality, Twenty-First Century" Anyway?' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Pub 2014) 3–18.

[4] Mark Feldman, 'Joint Interpretations, A TPP Investment Chapter, And Australia' (*Kluwer Arbitration Blog*, 15 August 2013) <http://kluwerarbitrationblog.com/blog/2013/08/15/joint-interpretations-a-tpp-investment-chapter-and-australia/> accessed 25 March 2015.

Internet users.[5] Considering those criticisms, some countries have tried to provide more transparency to the negotiations. For example, the Chilean Government has recently created an "Adjunct Room" providing information, dialogue, and debate with private organizations, NGOs and academia, among others that have directly expressed interest on the TPP. However, the information on the documents under negotiation is still limited.[6]

To date, it is difficult to assess the effectiveness of the benefits and harms of this treaty, since negotiations have been conducted in a confidential manner, and supposed features of the treaty derive from some official reports have been made public,[7] or that have been leaked online. [8] This contrasts with the recent negotiations between the US and the EU in the so-called Transatlantic Trade and Investment Partnership (TTIP) which is subject to regular reporting on an official site specially dedicated to that purpose in the European Union.[9]

In any case, the fact is that negotiations on the Trans-Pacific Partnership include an investment chapter. The information available today shows that there are differences on how to address the protection of foreign investment, which is particularly important for Latin America, considering it is one of the areas most affected by investment arbitration and several of its economies comprising the Asia-Pacific region. This article will attempt to expose the magnitude of these differences, under the premise that the TPP does not innovate on the basics of international regulation of foreign investment among countries negotiating the agreement, and can be a valuable opportunity to advance convergence of substantive aspects of the protection of foreign investment in a balanced way, leaving more room for certain public policies, and recognizing the different role that states play as investors and regulators. The effectiveness and depth of this change will depend on the outcome of the negotiations.

II. THE REGULATION OF FOREIGN INVESTMENT IN THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

TPP negotiations have addressed the international regulation of foreign investment, a key issue for all participating countries. Although national laws and policies remain the most concrete and detailed part of the legal structure of foreign investment, the current

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[5] Citizens Trade Campaign (CTC), 'Trans-Pacific Investment Partnership (TPP) Investment Chapter [leaked Version]' (13 June 2012) <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf> accessed 6 November 2014.

[6] Directorate General of International Economic Affairs (DIRECON), 'Acuerdo Transpacífico De Libre Comercio (TPP)' (10 March 2015) <http://www.direcon.gob.cl/tpp/> accessed 25 March 2015.

[7] See e.g. United States Trade Representative, 'Trans-Pacific Partnership (TPP)' (January 2015) <https://ustr.gov/tpp> accessed 23 February 2015.

[8] Maira Sutton, 'International Criticism Escalates Against TPP As Negotiations Go Further Underground' (*Electronic Frontier Foundation*, 6 September 2013) <https://www.eff.org/deeplinks/2013/09/international-criticism-escalates-against-tpp-negotiations-go-further-underground> accessed 25 March 2015.

[9] European Commission, 'Transatlantic Trade And Investment Partnership (TTIP)' (*In Focus: The Transatlantic Trade and Investment Partnership. Making Trade Work for You*, 29 October 2014) <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 6 November 2014.

system has come to rely increasingly on international investment agreements (IIAs), treaties that serve as instruments for the promotion, protection and liberalization of foreign investment by establishing standards of protection and treatment.[10]

IIAs now exist in three major ways: bilateral investment treaties (BITs) signed by two states; regional investment treaties (RITs) concluded by groups of countries in the same geographical area; and investment chapters integrated into free trade agreements (FTAs), signed either at the bilateral or regional level.[11] UNCTAD has reported that by the end of 2014, the regime of these agreements included a total of 2,923 BITs and 345 "other arrangements", totalling 3,268 international investment agreements, with a downward trend in bilateral investment treaties and upward in regional agreements, especially as part of FTAs.[12]

The legal framework of international investment agreements has also evolved significantly since the growing jurisprudence derived from the application of BITs and investment chapters in FTAs, raises new questions of interpretation and application, both for governments and for the investors from developed and developing countries. The number of disputes between foreign investors and host states has increased dramatically in recent times. In 2013, a record high of 59 new international arbitrations investment disputes were initiated pursuant to IIAs, which is the largest number of known cases in a year. [13] Although in 2014 the number of initiated cases was reduced to 42, still is close to the average observed between 2003 and 2010, a data that confirms the trend that foreign investors prefer to use this form of dispute resolution. [14]

The first P4 agreement in 2006 did not contain an investment chapter, although its Article 20.1 stipulated the need to negotiate one no more than two years after its entry into force.[15] This meant that negotiations on this matter with the wider group of countries negotiating the TPP started from square one. It was only in the second round of the TPP negotiations that took place in San Francisco on June 14-18, 2010, that an investment working group was established. Since then, numerous exchanges between negotiators have been taking place, which following the sixth round held in Singapore from May 21 to April 1, 2011 started to receive inputs from different stakeholders like

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[10] Peter T. Muchlinski, *Multinational Enterprises & The Law* (2 edition, OUP Oxford 2007) 97, 578.

[11] Julien Chaisse, 'TPP Agreement: Towards Innovations In Investment Rule-Making' in C. L. Lim and others (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press 2012) 147.

[12] United Nations Conference on Trade and Development (UNCTAD), 'Recent Trends In IIAs And ISDS' [2015] IIA Issues Note, 2.

[13] ibid 5.

[14] United Nations Conference on Trade and Development (UNCTAD), 'Investor-State Dispute Settlement: Review Of Developments In 2014' [2015] IIA Issues Note, 2.

[15] Article 20.1: Investment Negotiations: Unless otherwise agreed, no later than 2 years after entry into force of this Agreement the Parties shall commence negotiations with a view to including a chapter on investment in this Agreement on a mutually advantageous basis. Organization of American States (OAS), 'Trans Pacific Partnership Agreement' (*SICE - Foreign Trade Information System*, March 2015) <http://www.sice.oas.org/TPD/CHL_Asia/CHL_Asia_e.ASP> accessed 25 March 2015.

business groups, labour unions and academia.[16] Unfortunately, the text of the investment chapter still remains confidential. A January 20, 2015 working draft of the Investment Chapter for the Trans-Pacific Partnership has recently leaked by the end of March 2015.[17]

According to the available information, apparently the TPP investment chapter is essentially based on the 2012 US Model BIT[18] rather than the current FTAs signed by Asian countries, which is consistent with the importance of the United States as one of the pioneers in the regulation of this subject in Chapter 11 of the North American Free Trade Agreement (NAFTA)[19] in 1994, and as the largest recipient of foreign direct investment (FDI) state, although in recent years has seen threatened that position.[20]

In any case, the TPP would include substantive and procedural protection for foreign investment provisions. Among them, there are four issues that are of particular importance given the divergence of interests between some of the negotiating States: the scope of protection of foreign investment; the rules on transparency of investment regimes and their disputes; the emergence of state entities and foreign investors; and especially the resolution of disputes through investor-state arbitration. We will discuss these aspects separately according to the limited information accessible to date.

A. The Scope of Protection of Foreign Investment in the TPP

As for the definition of foreign investment, there are concerns about its breadth, which is reflected in an open letter that a significant number of lawyers, academics, judges and members of legislatures, public service, business and other legal communities in Asia and the Pacific Rim signed 2012. In that letter, it is argued that a broad definition of "investment" that would be contained in the TPP, requires that a foreign investor to make a contribution to the economy of the host country, therefore extending the protection of foreign investments far beyond foreign direct investment (FDI), to include speculative financial instruments, government permits, public procurement, intangible contract rights, intellectual property and market share.[21]

However, this concern comes too late. The vast majority of countries participating in the TPP negotiations already incorporate broad definitions of investment and investor in

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[16] Ministerio de Comercio Exterior y Turismo de Perú, 'Singapore. Sixth Round Of Negotiations For The Trans-Pacific Partnership (TPP)' (4 April 2011) <http://www.sice.oas.org/TPD/TPP/Negotiations/6round_s.pdf> accessed 25 March 2015.

[17] 'Trans-Pacific Partnership Agreement (TPP) - Investment Chapter - Version 20 January 2015' (*TDM Journal (Transnational Dispute Management)*, 26 March 2015) <http://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=13913> accessed 1 April 2015.

[18] Mélida Hodgson, 'The Leaked TPP Investment Chapter Draft: Few Surprises . . . Is That A Surprise?' (*TDM Advance Publication*, April 2015) <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=579> accessed 17 June 2015.

[19] Canada-Mexico-United States, 'North American Free Trade Agreement (NAFTA), Dic. 17, 1992' (1993) 32 International Legal Materials 289.

[20] Julien Chaisse (n 11) 148.

[21] TPP Legal, 'Open Letter' (8 May 2012) <https://tpplegal.wordpress.com/open-letter/> accessed 25 March 2015.

IIAs concluded precisely with other countries in the Pacific Rim, so the TPP would not add more uncertainty in the breadth of that already existing protection.[22]

In fact, some have pointed out that the TPP investment chapter would limit pre-establishment protection, included for long in U.S. investment agreements.[23] After defining investor of a Party as "a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party", with the purpose of providing "greater certainty" a footnote of Article II.1 clarifies what the parties understand when an investor "attempts to make" an investment, meaning that when that investor "has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses".[24]

But this is not novel for Latin American countries negotiating the TTP – Chile, Mexico and Peru – as these limitations on pre-establishment were already considered on investment chapters of FTAs concluded with other TPP negotiating parties, like in NAFTA (1992), Japan – Mexico FTA (2004), Chile – Peru FTA (2006), Peru – Singapore FTA (2008), Mexico – Peru FTA (2012), and the Pacific Alliance Protocol (2014),[25] in almost identical terms that it is reportedly considered in the TPP investment chapter.[26] The Peru – United States FTA (2006) also include restrictions on pre-establishment but with a different wording.[27] Conversely, the Chile-Canada FTA (1996), Chile-Mexico FTA (1998), Chile-United States FTA (2003), Chile-Japan FTA (2007), Australia-Chile FTA (2008), Canada – Peru FTA (2008), and Japan – Peru BIT (2008) have a broader definition of pre-establishment.[28]

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[22] For example this happens in the FTAs signed between the US-Peru, Chile-Colombia, among many others.

[23] Mélida Hodgson (n 18) 7.

[24] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. II.1, fn 10.

[25] The Pacific Alliance was established in April 2011, and formalized by a Framework Agreement signed in Paranal, Chile on June 6, 2012. Current members are Chile, Colombia, Peru and Mexico. Costa Rica is finishing up the process to be incorporated as the Alliance's fifth member, and Panama is an official candidate to the bloc. Organization of American States (OAS), Foreign Trade Information System, 'Pacific Alliance' (*Trade Policy Developments*, 20 June 2014) <http://www.sice.oas.org/TPD/Pacific_Alliance/Pacific_Alliance_e.asp> accessed 10 July 2014.

[26] NAFTA, Art. 1139; Japan – Mexico FTA, Art. 96(j); Chile-Peru FTA, Art. 11.28, footnote 15; Peru-Singapore FTA, Art. 10.1.7; Mexico-Peru FTA, Art. 11.1, footnote 1; Pacific Alliance Protocol, Art. 10.1, footnote 4 (still not in force).

[27] Regarding pre-establishment, Peru-US FTA, Art. 10.28, define investor of a party as a state enterprise or a national or an enterprise of a Party, that "attempts through concrete action to make, is making, or has made an investment in the territory of another Party". Canada-Peru FTA, Art. 847 defines investor of a party as a national or enterprise that "seeks to make, is making or has made an investment".

[28] Chile-Canada FTA, Art. G-40; Chile-Mexico FTA, Art. 9-01; Chile-United States FTA, Art. 10.27; Chile-Japan FTA, Art. 105.1(j); Canada-Peru FTA, Art. 847, Japan-Peru BIT, Art. 1(2)(b) defines investor of a party as a national or enterprise that "seeks to make, is making or has made an investment". Australia-Chile FTA, Art. 10.1(c) indirectly does the same considering a similar definition for "investor of a non-Party".

With respect to the definition of investment, the TPP leaked chapter characterize it as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk", including an enterprise; shares, stock and other forms of equity participation in an enterprise; bonds, debentures, other debt instruments, and loans; futures, options and other derivatives, turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; intellectual property rights; licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges. However, this definition does not include an order or judgment entered in a judicial or administrative action.[29]

Again, this is not completely new for Chile, Mexico and Peru, as several IIAs concluded by these countries with TPP negotiating parties, include an identical definition of investment[30] or with minor variations.[31] However, some still follow the broad "classic" asset-based BIT definition considering several groups of illustrative categories, without further explanation on the characteristics of the investment.[32]

B. Substantive Protections of Foreign Investment in the TPP

Once defined its material scope, international investment agreements generally enshrine a series of obligations on States to ensure a stable and favourable environment for foreign investors business. These relate to the treatment that should be given to foreign investors and their investments in the host country by national authorities, so as to guarantee that foreign investors have the ability to perform certain key operations associated with their investment.[33]

In this context, the investment chapter of TPP recognizes the right of foreign investors to be protected from arbitrary expropriation; compensation for losses due to armed conflict, civil unrest or state of emergency; to the free transfer of payments related to a covered investment; and commitment to standards of protection under international

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[29] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. II.1.

[30] Chile-United States FTA (2003), Art. 10.27, Peru-United States FTA (2006), Art. 10.28; Peru-Singapore FTA (2008), Art. 10.1.6; and Chile-Australia FTA (2008), Art. 10.1(j).

[31] NAFTA (1992), Art. 1139, Canada-Chile FTA (1996), Art. G-40, Chile-Mexico FTA (1998), Art. 9-01, Japan-Mexico FTA (2004), Art. 96(i), Australia-Mexico FTA (2005), Art. 1.1, Chile-Japan FTA (2007), Art. 105.1(h), Canada-Peru FTA (2008), Art. 847, Mexico-Peru FTA (2011), Art. 11.1, and Japan-Peru FTA (2011), Art.1, include carve-outs on the definition with respect to debts and commercial contracts; and the Pacific Alliance Protocol (2014), Art. 10.1, does not include a debt instrument of a Party or of a state enterprise.

[32] Chile-Malaysia BIT (1992), Art. 1(a), Australia-Peru BIT (1995), Art. 1(a), Peru-Malaysia BIT (1995), Art. 1(a), and Mexico-Singapore BIT (2009), Art. 1.7

[33] United Nations Conference on Trade and Development, *World Investment Report 2012, Towards A New Generation Of Investment Policies* (United Nations 2012) 136.

investment law, such as national treatment (NT) and the most-favoured-nation (MFN), fair and equitable treatment (FET) and full protection and security (FPS).[34]

In this regard, it has been observed that MFN provisions existing in other IIAs signed by the negotiating countries of the TPP will have a systemic effect, extending the benefits of the investment chapter of the Trans-Pacific Partnership to third countries of the region which already have IIAs with MFN provisions with TPP members, but that are not part of such agreement.[35] This would occur, for example, with Thailand and China (except with respect to the settlement of disputes and certain specific obligations), as both countries have concluded several IIAs with TPP negotiating countries. But the same can be said of existing international investment agreements concluded by TPP negotiating countries with other countries of the Pacific Rim, like CAFTA-DR (2004),[36] and the Chile-Colombia FTA (2006),[37] among others, as they also contain MFN clauses.

For Kelsey, the MFN provisions in the TPP could create the effect that the rights of investors and the host state's obligations will extend beyond what is established in the investment chapter that is negotiation today.[38] While these apprehensions are valid, the extension of benefits is part of the essence of MFN treatment, and allowing investors of third countries to import most-favourable provisions using MFN clauses from previous IIAs with TPP negotiating countries, will enable progress in the convergence of standards of treatment in a regime where there are thousands of investment agreements in place. While it could theoretically be negotiated an investment chapter of the TPP without MFN, this appears to be unlikely, since this obligation is in all IIAs signed by the countries negotiating the TPP.

At the present time it is not possible to predict the scope, scale and impact of the TPP through MFN clauses, but if old bilateral investment treaties remain in force, the effect could be in fact the opposite, creating *de facto* carve-outs to the investment chapter of the TPP. For example, many old BITs concluded by TPP negotiating parties contain no safeguards in financial regulations or a clear definition of what is meant by indirect expropriation as the TPP reportedly does. The MFN clause of the TPP investment chapter could be interpreted to allow investors from signatory states of the TPP, to import the "most-favoured" treatment from those old BITs that leave less room for manoeuvre to the host State in both subjects.[39] In fact, the MFN provision in the TPP

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[34] Julien Chaisse (n 11) 149. See 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Arts. 11.4, 11.5, 11.6, 11.6bis, 11.7, and 11.8.

[35] Julien Chaisse (n 11) 151.

[36] Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR) (adopted 5 August 2004) <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>, Arts. 10.3 and 10.4.

[37] Chile-Colombia FTA, Arts. 9.2 and 9.3.

[38] Jane Kelsey, 'How The Trans-Pacific Partnership Agreement Could Heighten Financial Instability And Foreclose Governments' Regulatory Space' (2010) 8 New Zealand Yearbook of International Law 3, 24

[39] ibid.

could be considered more restricted than the ones commonly included in old BITs,[40] as is only applicable to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Reaching an agreement on other substantive aspects of treatment and protection of investments, can also be a challenge. Today, there is no single definition or fair and equitable treatment or indirect expropriation among all countries negotiating the TPP negotiators. For example, the definition of the principle of fair and equitable treatment contained in BITs of some of the TPP negotiating countries is broader than in others,[41] which consider FET merely as a minimum standard of treatment, that includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process, as it happens in most of the IIAs concluded by the United States.[42] Others stipulate that the concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens.[43] We also found significant discrepancies between TPP negotiating countries on indirect expropriation and countries like New Zealand or Singapore do not always consider that provision in their investment agreements.[44]

The problem becomes even clearer if we analyse the Non-Binding Investment Principles of the APEC (Asia-Pacific Economic Cooperation) a forum that includes all TPP negotiating countries. While in these principles, adopted in 1994, it appears that APEC countries have a high degree of convergence on expropriation, agreeing that this can only be done for public purposes and on a non-discriminatory basis, granting

[40] For example, according to the Argentina-Peru BIT (1994), Art. 3(1), Peru-Denmark (1994), Art. 3(2), Mexico-Switzerland (1995), Art. 4(2), Chile-Greece BIT (1996), Art. 4.2, Austria-Chile BIT (1997), Art. 3(2), and Mexico-Netherlands BIT (1998), Art. 3.2, each Contracting Party shall accord to investment, made in its territory by investors of the other contracting Party, treatment "not less favourable" than that which it accords to investments of its own investors or to investments of investors of any third state, whichever is more favourable.

[41] Several BITs merely refer to a "fair and equitable treatment", without defining the content of that standard. See for example: Belarus - Mexico BIT (2008), Art. 5; BLEU (Belgium-Luxembourg Economic Union) - Peru BIT (2005), Art. 3; Peru - Singapore BIT (2003), Art. 3; Greece - Mexico BIT (2000), Art. 3; Korea, Republic of - Mexico BIT (2000), Art. 2; Denmark - Mexico BIT (2000), Art. 3; Italy - Mexico BIT (1999), Art. 2; Mexico - Portugal BIT (1999), Art. 2; Chile - Lebanon BIT (1999), Art. IV; Chile - Viet Nam BIT (1999), Art. IV; Chile - New Zealand BIT (1999), Art. 3, among many others. Mexico - Sweden BIT (2000), Art. 2 refers to "fair and equitable treatment in accordance with the relevant international standards under International Law".

[42] Julien Chaisse (n 11) 151–52. See also: Korea-Peru FTA (2010), Art. 9.5; China-Peru FTA (2009), Art. 132; Japan - Peru BIT (2008), Art. 5; Australia-Chile FTA (2008), Art. 10.5; Peru-US FTA (2006), Art. 10.5; Chile-US FTA (2003), Art. 10.4.

[43] China - Mexico BIT (2008), Art. 5.2; Canada-Peru FTA (2008), Art. 895; Mexico - Slovakia BIT (2007), Art. 5; India - Mexico BIT (2007), Art. 5, Chile-Japan EPA (2007), Art. 75; Mexico - United Kingdom BIT (2006), Art. 3; Australia - Mexico BIT (2005), Protocol to Article 4, paragraph (1); Iceland - Mexico BIT (2005), Protocol to Article 3, Paragraph (1); Japan-Mexico EPA (2004), Art. 60; Chile-Korea FTA (2003), Art. 10.5; Czech Republic - Mexico BIT (2002), Protocol Ad Article 2, paragraph (3).

[44] For example, there is no protection against expropriation in the agreement between New Zealand-Singapore (2000), and there is only limited in the New Zealand-China FTA (2008).

compensation adequate and effective,[45] to determine what measures may be considered indirect expropriation, it is still an important point of disagreement between APEC economies.[46] The same goes for the different formulations of the standard of fair and equitable treatment, which is considered a matter of fundamental debate among the economies that make up APEC.[47]

Despite a series of decisions of international arbitral tribunals, the distinction between indirect expropriation and government regulatory measures that do not require compensation has not been clearly articulated and depends on the facts and circumstances of each case.[48] Something similar happens with the interpretation of the standard of fair and equitable treatment.[49] This is why in recent years, a new generation of IIAs, notably those concluded by United States and Canada, have introduced specific provisions helping to determine whether there is an indirect expropriation that requires compensation,[50] and also limited the concept of fair and equitable treatment. The most recent IIAs concluded by Chile, Mexico and Peru typically includes clauses providing that the FET standard does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens,[51] closely following the Note of Interpretation of NAFTA Article 1105(1), by the NAFTA

[45] Carlos Kuriyama, 'APEC And The TPP: Are They Mutually Reinforcing?' in C. L. Lim and others (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press 2012) 253–54.

[46] Thomas Westcott, *Identifying Core Elements In Investment Agreements In The APEC Region* (UNCTAD series on international investment policies for development, United Nations Conference on Trade and Development ed, United Nations 2008) 42.

[47] ibid 30.

[48] See among others: Santiago Montt, *State Liability In Investment Treaty Arbitration: Global Constitutional And Administrative Law In The BIT Generation* (Studies in international law v. 26, Hart Pub 2009) 231–92; Anne van Aaken, 'International Investment Law Between Commitment And Flexibility: A Contract Theory Analysis' (2009) 12 J Int Economic Law 507, 510–12.

[49] See among others: Martins Paparinskis, *The International Minimum Standard And Fair And Equitable Treatment* (OUP Oxford 2013) 256–59; Kenneth J. Vandevelde, 'A Unified Theory Of Fair And Equitable Treatment' (2010) 43 New York University Journal of International Law and Politics (JILP) 43, 43; Ioana Tudor, *The Fair And Equitable Treatment Standard In International Foreign Investment Law* (1 edition, Oxford University Press 2008) 163–68.

[50] Rachel D. Edsall, 'Indirect Expropriation Under NAFTA And DR-CAFTA: Potential Inconsistencies In The Treatment Of State Public Welfare Regulations' (2006) 86 BUL Rev 931, 953–61

[51] See: Czech Republic – Mexico BIT (2002), Ad Art 2(3); Chile-Korea FTA (2003), Art. 10.5; Mexico-Uruguay FTA (2003), Annex 13-06; Japan-Mexico (2004), Art. 60; Mexico-Panama BIT (2005), Art. 6; Mexico-United Kingdom (2006), Art. 3; Mexico – Trinidad and Tobago BIT (2006), Art. 5; India-Mexico BIT (2007), Art. 5; Chile-Japan FTA (2007), Art. 75; Mexico-Slovakia BIT (2007), Art.5; Canada-Peru FTA (2008), Art. 805; China-Mexico BIT (2008), Art. 5; Japan-Mexico BIT (2008), Art. 5; Belarus-Mexico BIT (2008), Art. 5; Mexico-Peru FTA (2011), Art. 11.6; Chile-China Supplementary Protocol to Chile-China FTA (2012), Art. 6.

Free Trade Commission (FTC) in 2001.[52] This is limited content of the FET standard has also been followed in the TPP investment chapter.[53]

Similarly, recent Latin American TPP negotiating countries also have restricted the interpretation of what constitutes "indirect expropriation" – a measure or series of measures that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure – stipulating that it must be determines on a case-by-case basis, considering among other factors: (i) the economic impact of a measure or a series of measures; (ii) the extent to which the measure or series of measures interferes with distinct, reasonable, investment-backed expectations; and (iii)the character of the measure or series of measures. Generally these agreements also consider that a measure or series of measures designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute an indirect expropriation, except in rare circumstances, such as when is so severe in light of its purpose that it cannot be reasonably viewed to have been adopted and applied in good faith, or in a non-discriminatory basis.[54] Again, this is exactly the same path that it has been followed by the TPP investment chapter.[55]

However, this does not guarantee that arbitrators follow these restrictive criteria.[56] Indeed, the substantive rights under investment chapters of FTAs and BITs have expanded significantly through the system of arbitration between investors and host states, as evidenced by arbitral jurisprudence that incorporates broad interpretations of these concepts. Certain of these interpretations have been considered as prioritizing the protection of property and economic interests of transnational corporations over the sovereign right of states to regulate and govern their own affairs.[57]

C. Domestic Regulations on Capital Controls

From the domestic regulations that may affect foreign investment, those related to capital controls have become even more relevant after the recent financial crisis. The vast majority of IIAs signed by the United States require the free flow of capital to and from the, without exception or restriction, even if those are implemented temporarily or for purposed of financial stability. Under these treaties, if the government of a country

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[52] North American Free Trade Agreement (NAFTA) - Free Trade Commission, 'Notes Of Interpretation Of Certain Chapter 11 Provisions' (31 July 2001) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx> accessed 29 April 2014.

[53] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. II.6.

[54] See with some variations: Korea-Peru FTA (2010), Annex 9-B (which exclude real estate price stabilization for low-income households from indirect expropriation); Japan-Peru BIT (2008), Annex IV referred to Article 13; Australia-Chile FTA (2008), Annex 10-B; Canada-Peru FTA (2008), Annex 812.1; and Chile-US FTA (2003), Annex 10-D.

[55] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Annex II-B.

[56] Roland Kläger, *'Fair And Equitable Treatment' In International Investment Law* (Cambridge University Press 2011) 9–47.

[57] TPP Legal (n 21).

receiving investment from the United States restricts any flow of capital, may be subject to investor-state arbitration, and the host State should pay for the "damage" caused to the foreign investor.[58] This was evident in cases arising from the financial crisis in Argentina, a country that tried to impose a tax on capital outflows that it was considered equivalent to a "taking" in some ISDS cases interpreting the 1991 US-Argentina BIT.[59]

However, other capital exporters also negotiating the TPP allow more flexibility in this area. Most BITs and FTAs negotiated by Japan and Canada, consider a safeguard that enables the host State to use its internal regulations to control capital accounts, or to prevent and mitigate financial crises. For example, the investment chapter of the 1196 FTA between Canada and Chile include an annex that allows the Chilean Central Bank to impose unremunerated reserve requirements ("encaje") on a foreign investment of an investor for the purpose of preserving the stability of the Chilean peso,[60] a provision that Chile has continued to include in all its later IIAs.

Chile – and later Peru – secured in its preferential trade agreements with the United States some limited flexibility to implement capital controls under a "cooling clause". According to this provision, claims against Chile or Peru concerning the imposition of restrictive measures with regard to payments and transfers, are disallowed for one year after the events that give rise to the claim. If after that period an investor-State arbitration is initiated, loss or damage arising from the restrictive measure on capital inflows, are limited only to the reduction in value of the transfers, excluding loss of profits, loss of business or any similar consequential or incidental damages.[61]

Finding common ground in this area has been difficult, and some reports have mentioned that US negotiators have taken a strong stance against capital control measures in existing current TPP negotiations, taking an even more strict position that the International Monetary Fund (IMF).[62] In fact the IMF has expressed concern that restrictions on capital controls in US International Investment Agreements, may conflict with the IMF's authority to recommend capital controls in certain programs in selected countries, as has happened with Iceland among others.[63]

Attempts to limit the flexibility given through "cooling clause" in the TPP, could be problematic, not only with Chile or Peru, but also with other negotiating countries, such as Malaysia, which often have resorted to capital controls. These countries may be especially reluctant to accept additional restrictions in this area, given the continued

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[58] Kevin P. Gallagher, 'Capital Account Regulations And The Trading System' in Kevin P. Gallagher and others (eds), *Regulating global capital flows for long-run development* (Pardee Center Task Force Report, 2012) 124–25.

[59] See: William W. Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs And The Legitimacy Of The ICSID System' (SSRN Scholarly Paper, 24 January 2008).

[60] Kevin P Gallagher (n 58) 120.

[61] See Chile – United States FTA (2003) and Peru – United States FTA (2006), Annex 10-E.

[62] Julien Chaisse (n 11) 149.

[63] Kevin P Gallagher (n 58) 127.

uncertainty in the aftermath of the recent global financial crisis and the related concern of developing countries on the volatility of capital flows in the short term.[64]

But seemingly, some common ground has been found. In the latest leaked TPP investment chapter are two approaches on temporary safeguard measures to this issue. The first stipulates that nothing in the agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to transfers or payments, and the movement of capital, in the event of serious balance of payments and external financial difficulties or threats thereof, or when cause or threaten to cause serious difficulties for macroeconomic management, in particular, the operation of monetary policy or exchange rate policy. However, any action taken in this regard must be applied on a non-discriminatory basis, consistent with the Articles of Agreement of the IMF, avoid unnecessary damage to the commercial, economic and financial interests of any other Party, not exceed those necessary to deal with the circumstances that triggered the restriction, and be temporary and be phased out progressively, as the situation improves.[65] This is drafting is highly linked to existing procedures set out in GATT and GATS agreements.[66]

A second "alternative" text is more focused on the protection of investments as, in addition to requirements previously mentioned for the implementation of such safeguards, requires that these measures be price-based, not confiscatory, not interfere with investors' ability to earn a market rate of return in the territory of the restricting Party; and not be used as a substitute for or avoid necessary macroeconomic adjustment, including exchange rate adjustment. Finally, this version excludes the use of safeguards measures to transfers associated with equity investments. [67]

According to Hodgson in these negotiations there is a clear tension between "ensuring that States are able to take measures which they already have the right to take under the WTO agreements, and dealing with the fact that investment provisions generally restrict this flexibility".[68]

D. State entities and foreign investors in the TPP

There is a growing role of state-controlled entities such as state-owned enterprises (SOEs) and sovereign wealth funds (SWF) in the global investment. Despite increasing towards market liberalization and privatization observed trend in the last decade, the role of states has certainly grown in importance in some particular aspects of foreign investment.

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[64] Sebastián Herreros, 'Coping With Multiple Uncertainties: Latin America In The TPP Negotiations' in C. L. Lim and others (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press 2012) 272.

[65] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. CCC.3.

[66] Mélida Hodgson (n 18) 6–7.

[67] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. CCC.3 ("alternative working compromise text")

[68] Mélida Hodgson (n 18) 6–7.

In fact, the recent economic crisis emphasized the role that national governments and foreign investors can play. In particular, emerging economies have increased their investments abroad, mainly through SOEs and SWFs. This trend was reinforced in 2010 and 2011, when sovereign funds held sway despite the fears and turmoil that spread worldwide due to the global economic and financial crisis.[69] The year 2012, state-controlled entities, remained important as foreign investors.[70]

According to UNCTAD, the level of foreign direct investment that is coming from SWFs is small compared to the size of their assets, although it continues to expand in terms of assets, geographical spread and target industries. Conversely, while the number of SOEs that are trans-national companies (TNCs) is also relatively small, their importance is significant and some are among the largest TNCs in the world. UNCTAD has estimated there are at least 550 SO-TNCs with more than 15,000 foreign affiliated, foreign assets of over $2 trillion and FDI of more than $160 billion in 2013. Although these companies are less than 1% of the universe of TNCs, they account for over 11% of global FDI flows.[71]

The SWFs and SOEs have grown in importance as foreign investors in recent years. The SWF come mostly from countries of the Pacific Rim as Canada, New Zealand, Malaysia, Singapore, Vietnam and Chile. However, these economies do not always have the same standards of transparency or destination of investment funds. For example, Canada and New Zealand – involved in a wide range of investments including bonds, equities, and commodities through SWFs – have enacted transparency provisions with respect to the investment criteria and financial accounting of its SWF. In addition to transparency measures, investment from Malaysia and Singapore SWFs, pursue strategic objectives, focusing on industries operating within its national interest.[72]

TPP negotiating countries have faced some problems in reaching an agreement concerning the protection of SOEs and SWFs as foreign investors. Although the definition of "enterprise" includes any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled,[73] with respect to SOEs, United States and Australia have proposed requiring that SOEs effectively operate commercially and do not obtain benefits from their condition, such as preferential access to subsidies, state loans or operating licenses. Vietnam has expressly opposed this, and Malaysia can also be against some of these

[69] Julien Chaisse (n 11) 150.

[70] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013. Global Value Chains: Investment And Trade For Development.* (2013) 2, 4.

[71] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014. Investing In SDGs: An Action Plan* (United Nations 2014) 19–20.

[72] Julien Chaisse (n 11) 150.

[73] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. II.1.

provisions. The dispute would focus mainly on whether regulation should focus on the state as such body or in his eventual "anticompetitive" behaviour. [74]

The regulation of SOEs and SWFs has been cited as a major stumbling block to progress on the TPP negotiations.[75] Australia and the US could try to establish a link between the TPP and the Principles and Generally Accepted Practices (GAPP) on SWF (or "Santiago Principles") which were presented by the IMF on 11 October 2008. The Santiago Principles include a set of twenty voluntary principles for sovereign wealth funds to ensure its competitiveness in global financial markets that promote independence in investment decisions, transparency and state accountability.[76]

Another aspect that may arise in the TPP negotiations with respect to state-controlled entities is their ability to use investor-state arbitration as a dispute resolution mechanism which is available to them in most IIAs.[77] A guideline for this debate could be found in the Non-Binding Investment Principles of APEC. According to these principles members of the forum should minimize regulatory and institutional barriers to outward investment, and are encouraged to avoid double taxation in relation to foreign investment. [78] With respect to the settlement of disputes, these can be solved through consultation or negotiation between the parties. If the dispute remains unresolved, these principles recognize the right of the parties to proceed to arbitration in accordance with international obligations or any other acceptable approach. [79]

E. Investor-State Arbitration in the TPP

Perhaps one of the most controversial aspects of the TPP negotiations is related to the settlement system of investor-state disputes through international arbitration, which has faced various criticisms in recent years and resistance to inclusion in TPP by New Zealand and particularly Australia.

The vast majority of IIAs allows foreign investors to have direct recourse to international arbitration against the host State, when they have been affected in certain the substantive rights recognized in those treaties. This mechanism of investor-state

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[74] Mireya Solís, 'Endgame: Challenges For The United States In Finalizing The TPP Negotiations' (2013) 622 Kokusai Mondai (International Affairs) 1, 4.

[75] Tsuyoshi Kawase, 'Trans-Pacific Partnership Negotiations And Rulemaking To Regulate State-Owned Enterprises' (*VOX, CEPR's Policy Portal*, 29 July 2014) <http://www.voxeu.org/article/trans-pacific-partnership-negotiations-and-rulemaking-regulate-state-owned-enterprises> accessed 19 June 2015.

[76] Julien Chaisse (n 11) 152. Paul Rose, 'Sovereign Wealth Fund Investment In The Shadow Of Regulation And Politics' (SSRN Scholarly Paper, 13 April 2009) 10.

[77] See, among others: Andrew D. Mitchell and James Munro, 'Special Legal Issues In State-State Dispute Settlement Under The Trans-Pacific Partnership Agreement' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Pub 2014); Nikos Lavranos, 'The New EU Investment Treaties: Convergence Towards The NAFTA Model As The New Plurilateral Model BIT Text?' (SSRN Scholarly Paper, 29 March 2013).

[78] International Forum of Sovereign Wealth Funds (IFSWF), 'Sovereign Wealth Funds: Generally Accepted Principles And Practices ("Santiago Principles")' (October 2008).

[79] Carlos Kuriyama (n 45) 254.

dispute settlement (ISDS) is expressly supported by business groups such as the US Business Coalition for the TPP, among others.[80]

As the use of investor-state arbitration has increased dramatically – especially in Latin America – the ability of foreign investors to choose this system has gradually found under greater scrutiny. Critics of the regime often point that allows private arbitrators decide on the legality of the sovereign acts or public policies and there are concerns about its high costs, the possibility of "forum shopping", their deficits in transparency, rights of third parties and criticism of its lack of predictability and consistency.[81] Some scholars have strongly criticized the regime, emphasizing that "the arbitration of investment treaties, as currently constituted, is not a fair, independent and balanced for dispute settlement investment method, which you should not rely on it for this purpose".[82] This should be a concern for the TPP negotiating countries.

US non-governmental organizations like Public Citizen, the Sierra Club and Friends of the Earth have called for a model agreement that protects the environment, rights of workers and the general public interest.[83] The same concerns have been raised by environmental groups in New Zealand. [84] If this new approach is followed in the TPP, there would be a need to eliminate or decrease dramatically the provisions of the agreements providing for ISDS.

Following the filing of an investor-State arbitration concerning the plain-packaging of cigarettes,[85] Australia announced that it would not accept the inclusion in its trade agreements of procedures to settle disputes between investors and the Australian State through arbitration, which would extend to the TPP. The Productivity Commission of the Government of Australia was particularly critical of this mechanism, noting that foreign investors already have several ways to insure themselves against the risks of investing abroad, and identifying various potential risks for the host states, like a "regulatory chill" (for fear of triggering claims arising in arbitration), as well as other concerns related to the arbitration (institutional bias, conflict of interests of arbitrators,

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[80] Julien Chaisse (n 11) 153.

[81] See among others: Gus Van Harten, *Investment Treaty Arbitration And Public Law* (Oxford University Press, USA 2008); Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions And Reality* (Wolters Kluwer Law & Business 2010); and United Nations Conference on Trade and Development (UNCTAD), 'Reform Of Investor-State Dispute Settlement: In Search Of A Roadmap' (2013) 2 IIA Issues Note.

[82] Osgoode Hall Law School, 'Public Statement On The International Investment Regime' (31 August 2010) <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> accessed 25 March 2015.

[83] Earthjustice and others, 'Investment Rules In Trade Agreements. Top 10 Changes To Build A Pro-Labor, Pro-Community And Pro-Environment Trans-Pacific Partnership' (9 August 2010) <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf> accessed 25 March 2015

[84] It's Our Future, 'Investor-State Dispute Settlement (ISDS)' (2012) <http://www.itsourfuture.org.nz/th_gallery/investor-state-dispute-settlement-isds/> accessed 25 March 2015.

[85] *Philip Morris Asia Limited (Hong Kong)* v *The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12 (Hong Kong–Australia BIT).

lack of transparency and excessive compensation granted to foreign investors).[86] However, a later change of government in Australia marked a slight change in that policy, as evidenced by the fact that the FTA between Australia and South Korea, the negotiation was completed in early December 2013, included investor-State arbitration.[87] However, a more recent Australia–Japan FTA does not include ISDS provisions. [88]The Australian government has recently declared that the inclusion of ISDS clauses will be considered on a case-by-case basis.[89]

In any case, it can be argued that Australia does not have a consistent position on this matter. While the Australia-US FTA does not contain an ISDS provision,[90] other FTAs concluded by Australia – such as with Singapore – they consider that dispute settlement mechanism between a foreign investor and the host State. Moreover, it remains to be seen how far Australia's rejection of ISDS in the TPP will influence other negotiating parties. One of the arguments that Australia has used to try to persuade other parties to not include investor-State arbitration in the investment chapter, is the claim that it will not necessarily ensure foreign direct investment into TPP countries, which backed-up through an independent study.[91]

Although some authors have suggested that this should be a topic of interest that must be seriously considered by developing countries participating in the TPP negotiations, even suggesting that those counties may have to carry out a study to confirm or refute the findings of Australia,[92] this is also a debate that comes a little late, since almost all developing countries participating in the TPP negotiations have included ISDS provisions in previous IIAs concluded with TPP negotiating countries. Latin American countries like Chile, Mexico and Peru and have a wide network of treaties including this mechanism.[93]

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[86] Sebastián Herreros (n 64) 272.

[87] Australian Government - Department of Foreign Affairs and Trade, 'KAFTA – A Snapshot' (February 2015) <http://dfat.gov.au/trade/agreements/kafta/fact-sheets/Pages/kafta-a-snapshot.aspx> accessed 25 March 2015.

[88] Luke Nottage, 'Why No Investor–state Arbitration In The Australia–Japan FTA?' (*East Asia Forum*, 7 April 2014) <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/> accessed 28 April 2014.

[89] Australian Government - Department of Foreign Affairs and Trade, 'ISDS' (January 2015) <http://www.dfat.gov.au/trade/topics/pages/isds.aspx> accessed 24 March 2015.

[90] This is the only FTA concluded by the United States that does not consider investment arbitration as a mechanism for resolving disputes between investor and the host State of the investment. Its Article 11.16 leaves open the possibility of consultations between the two states to eventually allow an investor of a Party to submit a claim to arbitration with the other Party, if it occurs change in circumstances affecting the settlement of disputes between States, as they are currently set.

[91] Gillard Government Trade Policy Statement, 'Trading Our Way To More Jobs And Prosperity' (April 2011).

[92] Julien Chaisse (n 11) 153.

[93] All BITs and FTAs with investment chapter concluded by Chile, Mexico and Peru consider this dispute settlement mechanism.

Moreover, the refusal of Australia to investor-state arbitration has apparently not affected other countries. New Zealand has expressed its apprehensions but has not taken an official stance against this mechanism of dispute resolution. Some of the criticism voiced by South Korea partly during their negotiations of an FTA with the US (KORUS FTA), were a consequence of the debate at the parliamentary and presidential elections in Korea in 2012, rather than legal or economic arguments. In fact, Korea has not replicated this position in the TPP negotiations.[94]

If Australia is successful in excluding ISDS in the TPP, probably it will only be exceptionally, to the extent is not applied to Australia, but without rejecting its use to other parties to the treaty. There is precedent for this plurilateral structure in the exchange of letters between Australia and New Zealand that accompanies the ASEAN Free Trade Agreement Australia - New Zealand (AANZFTA). Considering that New Zealand and four ASEAN members are also parties to the TPP negotiations (Brunei Darussalam, Malaysia, Singapore and Vietnam) a selective application of ISDS may be considered.[95] Finally, it is worth noting that Australia is seeking an exemption only from investor-state arbitration, not to the substantive provisions of an investment chapter of the TPP.[96]

The proliferation of investment disputes (and some questionable awards), has progressively led some governments to question the benefits of ISDS. However, it has not articulated a clear alternative to investor-state arbitration, which on the one hand, aims to take disputes outside the possibly arbitrary political sphere of diplomatic protection, and on the other, from possibly not neutral national courts. International investment arbitration process has deficiencies and the substantive rules applied need refinement. But some argue that it is preferable to improve the system rather than abandon it.[97] In fact, certain "BITs models" include broad exceptions for measures taken by governments to protect national health, public morals, welfare and sustainable development.[98] Agreements concluded by TPP negotiating countries also provide for these exceptions, like NAFTA, US-Peru FTA and Economic Cooperation Agreement between Singapore and Japan. [99] The TPP reportedly declares that nothing in the investment chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that investment activity in

[94] Julien Chaisse (n 11) 154.

[95] ibid 155

[96] Leon E. Trakman, 'Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation Of The Status Quo' (2012) 35 UNSWLJ 979, 983.

[97] Julien Chaisse (n 11) 154.

[98] Andrew Newcombe, 'General Exceptions In International Investment Agreements' (BIICL Eighth Annual WTO Conference, London, May 2008) 4 <http://www.biicl.org/files/3866_andrew_newcombe.pdf> accessed 25 March 2015.

[99] Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore (entered into force 1 August 2005) Government of India Ministry of Commerce and Industry - Department of Commerce <http://www.commerce.nic.in/ceca/toc.htm>.

its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.[100]

As there are different levels of acceptance of ISDS and IIAs between the TPP negotiating countries, a definitive agreement on these issues may be difficult. Negotiators will have to consider technical issues related to ISDS, such as whether TPP countries can innovate with respect to access and investment arbitration proceedings in a manner that preserves policy space, maintain the protection of the legitimate interests of the investors, for example, through filter mechanisms be designed to exclude frivolous lawsuits or to circumscribe the scope of what is actionable.[101]

Opposition to investment arbitration, or in the alternative, to national courts to decide the investor-state disputes is not exceptional. The United Nations Conference on Trade and Development (UNCTAD) found that both the investor-state arbitration, as the use of national courts is unduly burdensome and delaying options. UNCTAD has expressed a preference on measures of conflict management and dispute prevention in light of the differences, sometimes irreducible between the state and the interests of foreign investors.[102]

One option worth looking at, considering the technical difficulties to formalize an innovative framework of international mediation, is to encourage the settlement of disputes between States, or allow official interpretations of some of the provisions of IIAs. That is precisely what would have been considered in several FTAs from NAFTA until the recent Comprehensive Trade and Economic Agreement (CETA) between Canada and the European Union.[103]

Three TPP negotiators from Latin America – Chile, Peru, and Mexico – have signed or renegotiated new IIAs with important improvements particularly with respect to ISDS arbitral proceedings and treaty interpretation. This trend has been recently confirmed by the inclusion of an investment chapter[104] in the Pacific Alliance Protocol,[105] a novel regional trade bloc that includes those countries together with Colombia.

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[100] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. 11.15.

[101] Julien Chaisse (n 11) 154.

[102] United Nations Conference on Trade and Development (UNCTAD), *Investor-State Disputes: Prevention And Alternatives To Arbitration* (United Nations Publications 2010) xvi.

[103] European Commission - Directorate General for Trade, 'Consolidated CETA Text, 26 September 2014' (*TDM Journal (Transnational Dispute Management)*, 26 September 2014) <http://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=544> accessed 21 October 2014.

[104] See Chapter 10 of the Pacific Alliance Additional Protocol, 10 February 2014 (still not in force) Organization of American States (OAS), Foreign Trade Information System (n 25).

[105] The Pacific Alliance was established in April 2011, and formalized by a Framework Agreement signed in Paranal, Chile on June 6, 2012. Current members are Chile, Colombia, Peru and Mexico. Costa Rica is finishing up the process to be incorporated as the Alliance's fifth member, and Panama is an official candidate to the bloc. ibid.

However, according to the outline announced by the negotiating countries in Hawaii (2011)[106] and in the recent leaked investment chapter, the TPP will include investor-state arbitration, although discussions continue on its scope and coverage. That should not be a significant challenge for many negotiating countries, particularly in Latin America, since as noted, all of them have already accepted this mechanism in its preferential trade agreements with the United States. However, as in many other areas, it is unclear what the TPP will differ from existing agreements.[107]

In fact, the TPP investment chapter that has recently leaked seems to expand the scope of ISDS, extending it to provisions such as non-conforming measures (NCMs), special formalities and information requirements, denial of benefits, subrogation, and clauses on corporate social responsibility, investment and environmental health and other regulatory objectives, that have been traditionally not enforceable using investor-State arbitration, particularly in US treaties.[108]

Finally, another big challenge with respect to ISDS negotiations, will be to standardize the practices of countries negotiating the TPP with respect to transparency on investor-State arbitration in at least three basic procedural aspects: the knowledge of the dispute, access to the procedure and information relating to its final outcome.[109] Some countries, like the United States and Canada have promoted fairly detailed knowledge of the arbitration proceedings that have been initiated against them, while others countries have maintained a more "confidential" approach to arbitration, despite the clear public interest involved in many of these disputes and even internal rules on transparency.[110] In the case of Mexico, less publicity is given to ISDS cases outside NAFTA.[111] Something similar happens with Chile, where there is no direct access to documents that are part of the State's defence in these arbitrations, even in the face of constitutional rules on transparency of governmental actions,

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[106] United States Trade Representative, 'Outlines Of TPP' (12 November 2011) <https://ustr.gov/tpp/outlines-of-TPP> accessed 19 June 2015.

[107] Sebastián Herreros (n 64) 272

[108] Mélida Hodgson (n 18) 8–9.

[109] This is what some authors have called "external transparency" of arbitration. See: Federico Ortino, 'External Transparency Of Investment Awards' (SSRN Scholarly Paper, 14 July 2008).

[110] For example, official data on investor-state arbitrations in NAFTA, is available in the case of United States: U.S. Department of State, 'NAFTA Investor-State Arbitrations' (February 2015) <http://www.state.gov/s/l/c3439.htm> accessed 25 March 2015; Canada: Government of Canada, 'The North American Free Trade Agreement (NAFTA) - Chapter 11 - Investment' (4 February 2014) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng> accessed 25 March 2015; y Mexico: Secretaría de Economía de México, 'Inversionista - Estado' (February 2015) <http://www.economia.gob.mx/comunidad-negocios/comercio-exterior/solucion-controversias/inversionista-estado> accessed 25 March 2015.

[111] Compare the information provided for Mexico NAFTA cases and others outside NAFTA. e.g. *Abengoa, S.A. y COFIDES, S.A*. v. *Estados Unidos Mexicanos*, available at the same web page of the Mexican Ministry of Economy (n 43).

The TPP leaked text contains rules on transparency of arbitral proceedings[112] that will certainly be an important step in consolidating a standard of transparency in investor-State dispute settlement system.

III. CONCLUSION

This article analyses four of the most debated and controversial issues in the regulation of foreign investment in the TPP negotiations, which are: (i) the substantive protection of foreign investment and its scope, (ii) domestic regulations on capital controls (iii) the treatment of entities controlled by the State; and (iv) investor-State arbitration, including its rules on transparency of the proceedings.

The various positions taken by countries in relation to these issues reflect the fragmented regime where the regulation of global investment is taking place, and are not inherent to the TPP, but are amplified given the magnitude of the agreement. Far from the relative maturity achieved in the field of trade, investment regulation has yet to reach substantive and procedural agreements these new areas, while clarifying existing concepts in order to provide greater predictability for foreign investors and host States. In that sense, the negotiation of an investment chapter in the TPP, rather than creating more conflicts in a hotly contested field of international law, can be seen an opportunity for convergence on substantive and procedural aspects of the international regulation of foreign investment, at least in the Pacific Rim.

For these reasons, the treatment of investment between countries of the TPP and further negotiations on investor-state arbitration, promise to remain passionately debated issues until the end of the TPP negotiations.[113]

[112] 'Trans-Pacific Partnership Agreement (TPP) - Investment chapter - version 20 January 2015' (n 17), Art. 11.23.

[113] Julien Chaisse (n 11) 155.