

Some impacts of a TPPA investment chapter

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Introduction

The Trans-Pacific Partnership Agreement (TPPA) is likely to include an investment chapter with investment protections similar to those in bilateral investment treaties (BITs). In a 2010 statement about these types of provisions, eminent investment law academics said ‘We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.’¹

The current TPPA negotiations provide an important opportunity to revisit the framework of trade and investment rules that have significantly contributed to these problems for both developed and developing country governments in existing US free trade agreements (FTAs). At a time when investment law experts are saying that ‘There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration’² because of these problems, instead of repeating the USFTA model a 21st century TPPA should at the least exclude these problematic substantive investment rules and enforcement mechanisms and relieve its parties of their existing bilateral obligations to each other.

However, so far the TPPA negotiations have taken the opposite approach. The process began as an expansion of the Trans-Pacific Economic Partnership Agreement or “P-4” between New Zealand, Chile, Singapore and Brunei to cover financial services and investment, with the US as a fifth party. The standard USFTA draft texts that were developed have been carried into the TPPA process and reportedly form the basis for bracketed composite draft texts on financial

¹ http://www.osgoode.yorku.ca/public_statement/ (also in Spanish at that website).

² http://www.osgoode.yorku.ca/public_statement/ (also in Spanish at that website).

services and investment that were compiled during the Auckland TPPA negotiations in December 2010. Those draft texts remain secret, which increases the risk that governments will adopt obligations that carry unacceptable economic and social consequences. To provide a basis for independent experts to analyse the implications of a TPPA investment chapter, a mock draft text has been compiled from the existing US FTAs with Singapore, Chile, Peru and Australia (see Annex).

The following analysis is based on this mock chapter and it finds that these investment provisions would constrain the ability of governments, both developed and developing, to regulate.

Investment law experts note that investor protections of the type likely to be in the TPPA put pressure on states to refrain from or restrict regulatory initiatives in order to avoid the risk or threat of an investor claim.³ North American Free Trade Agreement (NAFTA) cases show that both developed and developing country regulations, in areas including health, environmental protection and water conservation⁴ could be challenged under this chapter.⁵ Under equivalent investor protections in other treaties, investors have sued governments for: affirmative action policies,⁶ regulation of the oil sector,⁷ measures taken to reduce budget deficits during a severe financial crisis,⁸ the investor's permits being revoked because it violated the law,⁹ value-added taxes,¹⁰ rezoning of land,¹¹ measures on hazardous waste facilities,¹² regulation of water companies,¹³ declaration of the area as a nature reserve to preserve the unique wildlife of the region¹⁴ and treatment at the hands of media regulators.¹⁵ In 2006 alone there were cases launched challenging the Ukrainian Government's requirement for its radio stations to play a minimum of 50% local music, enforcement of a Nicaraguan court's decision against the Shell Oil Company for harming people with its agrochemical pesticide DPCB,¹⁶ failure to fulfil alleged privatization commitments (even when made by an alleged corrupt former official) and tax evasion investigations (which led to a drop in share price).¹⁷ A separate paper analyses the impact of these investment provisions on financial instability.¹⁸

³ See for example http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461097.

⁴ A 2009 paper outlines the various provisions in an investment chapter that could each jeopardise access to water by local users and consumers, http://www.iisd.org/pdf/2009/thirst_for_distant Lands.pdf.

⁵ See for example http://www.citizen.org/documents/NAFTAReport_Final.pdf.

⁶ See for example the case against South Africa, http://www.iisd.org/pdf/2007/itn_nov30_2007.pdf

⁷ See for example http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461097,

⁸ See for example *Siemens v Argentina*, http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_feb19_2007.pdf.

⁹ <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202431684674&slreturn=1&hbxlogin=1>

¹⁰ UNCTAD/ITE/IIT/2005/4 and *Investment Treaty News: 2006- a year in review*, Luke Eric Peterson, International Institute for Sustainable Development.

¹¹ UNCTAD/ITE/IIT/2005/4 and *Investment Treaty News: 2006- a year in review*, Luke Eric Peterson, International Institute for Sustainable Development.

¹² UNCTAD/ITE/IIT/2005/4 and *Investment Treaty News: 2006- a year in review*, Luke Eric Peterson, International Institute for Sustainable Development.

¹³ UNCTAD/ITE/IIT/2005/4 and *Investment Treaty News: 2006- a year in review*, Luke Eric Peterson, International Institute for Sustainable Development.

¹⁴ *Santa Elena vs. Costa Rica*: the foreign investor's right to convert the coastal area into a tourist resort was found by the tribunal to have priority over the later decision to turn the area into a nature reserve.

¹⁵ UNCTAD/ITE/IIT/2005/4 and *Investment Treaty News: 2006- a year in review*, Luke Eric Peterson, International Institute for Sustainable Development.

¹⁶ In 2002, a Nicaraguan Court awarded US \$489 million in compensation to victims of Shell's agrochemical pesticide. The court ordered an embargo to enforce this judgment, but Shell responded by claiming expropriation of Shell's brands and trademarks used in Nicaragua under an investment treaty. Shell only withdrew its investment treaty claim when a higher Nicaraguan Court overturned the embargo.

¹⁷ *Investment Treaty News: 2006- a year in review*, Luke Eric Peterson, International Institute for Sustainable Development.

¹⁸ 'The TPPA, Financial instability and Governments' Regulatory Space' at http://web.me.com/jane_kelsey/Jane/TPPA.html

While many of the examples in this analysis come from NAFTA as it is a USFTA that has been operating for long enough to accumulate 64 cases against all three NAFTA governments,¹⁹ others come from challenges under equivalent provisions in bilateral investment treaties to give a preliminary indication of the range of possible interpretations of these provisions and the types of measures which can be impacted.

This analysis only examines some of the main provisions. More detailed analysis can be provided to those interested.²⁰

Analysis of some likely investment chapter provisions

Scope and coverage

According to the mock investment chapter, the TPPA investment chapter is likely to limit the use of performance requirements on investments from any country, not just those from TPPA countries. This would restrict performance requirements imposed on investors from any country and performance requirements can be a useful way to ensure the host country obtains more benefits from foreign investment, see below.

While any TPPA investment chapter is unlikely to apply to measures covered by a financial services chapter, the financial services chapter itself is likely to exacerbate financial instability as the 'The TPPA, Financial instability and Governments' Regulatory Space' paper outlines²¹.

National treatment

The mock investment chapter shows that a TPPA is likely to include the right of investors from TPPA countries to enter other TPPA countries ('pre-establishment rights') and receive treatment that is at least as good as domestic investors after they enter the country ('post-establishment rights') in many sectors. This is because it would require national treatment on a negative list basis (all sectors opened unless they are listed as exceptions).

However, the United Nations Conference on Trade and Development (UNCTAD) notes that countries may wish to restrict foreign investment in a number of sectors: 'Various considerations have figured in host government limitations on admission and establishment: infant industry considerations, defence capabilities, employment effects, technology transfer, and environmental and cultural effects . . . Land and natural resources may also be subject to screening controls and ownership restrictions to protect what is considered to be part of the natural wealth and resources of the host country. Ownership and establishment restrictions may be more prevalent in certain services industries (e.g. financial services) than in manufacturing, owing to the pivotal role these industries play in the national economy and thus the consequent need for effective prudential supervision. Liberalization in this area has thus proceeded at a slower pace. They are prime candidates for an 'opt in' approach as described above. It is also conceivable that restrictions over foreign ownership of infrastructure in a host country are motivated by a desire to regulate a natural monopoly in the public interest. Another justification for controls over foreign entry and establishment is the protection of small and medium-sized enterprises. Finally, controls over foreign access to cultural industries may be justified to protect the cultural heritage of the host country . . . Host government policies in this respect emerge from the specific mix of political and economic circumstances characterizing particular countries.'²²

An illustration of the implications of pre-establishment rights can be seen in the controversy over land ownership, for example the Peru-USFTA requires national treatment on a negative list basis and the Peruvian Government did not list land ownership as an exception.²³ This allowed foreign ownership

¹⁹ As of November 2010, http://www.citizen.org/documents/NAFTA_Investor_State_Chart_Nov_2010.pdf

²⁰ Please contact sanya@twnetwork.org for further information.

²¹ Available at http://web.me.com/jane_kelsey/Jane/TPPA.html.

²² UNCTAD/ITE/IIT/18. See boxes 1 & 2 of UNCTAD/ITE/IIT/10 (Vol. II) for more examples of host country measures restricting pre-establishment rights.

²³ <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>

of indigenous land which led to protests by more than 12,000 indigenous people²⁴ ending in more than 54 deaths²⁵. The laws implementing this were eventually revoked,²⁶ the Peruvian Prime Minister resigned over the issue²⁷ and the indigenous rights group: Inter-Ethnic Association for Development of the Peruvian Jungle called for the suspension of the USFTA²⁸. Foreign ownership of land has also already been sensitive in other TPPA countries such as New Zealand where concerns have been expressed by the current Prime Minister²⁹ and other political parties^{30, 31}.

UNCTAD notes that ‘in practice national investors, especially those that could be identified as “infant industries” or “infant entrepreneurs”, may be in an economically disadvantageous position by comparison with foreign investors, which may be economically powerful transnational corporations (TNCs).’³² UNCTAD continues ‘there may be no substitute for the promotion by host countries of domestic industries to ensure economic development and, in a world marked by stark inequalities in economic power, technical capabilities and financial strength, a certain differentiation between national and non-national firms may be necessary precisely in order to bring about a degree of operative equality.’³³ UNCTAD adds that national treatment ‘may raise difficulties for many host countries, since such treatment may make it difficult to foster the growth of domestic enterprises. This is especially the case for developing countries, since their national enterprises may be particularly vulnerable, especially vis-à-vis large TNCs. Indeed, host Governments sometimes have special policies and programmes that grant advantages and privileges to domestic enterprises in order to stimulate their growth and competitiveness. If a national treatment clause in an IIA obliges a host country to grant the same privileges and benefits to foreign investors, the host Government would in effect be strengthening the ability of foreign investors to compete with local business’³⁴ This is because: ‘The activities of foreign investors in their host countries encompass a wide array of operations, including international trade in products, trade in components, know-how and technology, local production and distribution, the raising of finance capital and the provision of services, not to mention the range of transactions involved in the creation and administration of a business enterprise. Hence wider categories of economic transactions may be subjected to national treatment disciplines under investment agreements than under trade agreements.’³⁵

Since national treatment prevents the imposition of obligations on foreign investors that are not required of domestic investors, this is also likely to prevent measures such as requirements to employ and train locals and site the investment in relatively underdeveloped parts of the country in the sectors liberalised (unless these are listed as exceptions or are also required of domestic investors).

UNCTAD notes that providing national treatment on a negative list basis ‘may curtail the ability of a host country to distinguish between domestic and foreign investments as it may be difficult to identify with precision all the industries and activities to which national treatment should not apply.’³⁶

UNCTAD concludes that ‘The discretion of central and local governmental agencies to pursue development strategies may be unnecessarily curtailed by the fear that differential treatment of domestic firms could jeopardize the national treatment principle. As a result, otherwise useful policies

²⁴ <http://www.sierraclub.org/trade/globalization/us-peru-fta.aspx>

²⁵ <http://news.bbc.co.uk/2/hi/americas/1224690.stm>

²⁶ http://news.bbc.co.uk/2/hi/in_depth/8108388.stm

²⁷ <http://news.bbc.co.uk/2/hi/americas/1224690.stm>

²⁸ <http://www.scoop.co.nz/stories/WO0906/S00154.htm>

²⁹ Eg http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10656731

³⁰ See for example <http://www.labour.org.nz/node/2742> and <http://www.greens.org.nz/foreignownership>.

³¹ See for example <http://www.teara.govt.nz/en/land-ownership/8>, <http://www.nbr.co.nz/article/govt-concerned-over-farm-sales-foreigners-125719> and

http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10656731.

³² UNCTAD/ITE/IIT/11 (vol IV)

³³ UNCTAD/ITE/IIT/11 (vol IV)

³⁴ UNCTAD/ITE/IIT/11 (vol IV)

³⁵ UNCTAD/ITE/IIT/11 (vol IV)

³⁶ UNCTAD/ITE/IIT/11 (vol IV)

and programmes might never be attempted, and existing development schemes favouring local firms and other bodies abandoned.³⁷

Whilst exceptions to national treatment can be listed, a legal academic notes that in US bilateral investment treaties (BITs) (which have basically the same provisions as the investment chapter of USFTAs), ‘the developing or capital-importing state is obliged to open its economy to foreign ownership and control, and to relinquish its right to attach conditions to foreign investment, to a much greater extent than is the U.S.’³⁸

Pre-establishment rights are only common in U.S. and Canadian BITs.³⁹ Of a sample of 164 BITs involving 22 home countries, only the US has pre-establishment rights in all of them.⁴⁰

Most-favoured nation (MFN) treatment

The MFN provision in the mock investment chapter would incorporate better treatment that TPPA parties have given to investors from non-TPPA countries into the TPPA via the MFN provision. This can be problematic because:

- a) those other investment treaties may not have the safeguards present in the TPPA (such as a prudential defence or conditions that must be met before investors can bring cases challenging taxation measures). This would widen the liability TPPA governments face under those other investment treaties to also being sued by investors from TPPA countries
- b) it would make treaties which are only enforceable via state-to-state dispute settlement such as the World Trade Organization’s (WTO) General Agreement on Trade in Services enforceable via investor-to-state dispute settlement (ISDS). This is troubling because i) NAFTA’s experience shows that investors bring cases under ISDS much more frequently than states use the state-to-state dispute settlement mechanism and ii) ISDS can require governments to pay monetary compensation, which state-state dispute settlement does not, see below.
- c) it would effectively make those other investment treaties which may only be enforceable via ISDS now enforceable for investors from TPPA countries via both ISDS and any TPP state-to-state dispute settlement mechanism.

(An MFN provision in a treaty between a TPPA country and a non-TPPA country is also likely to import any benefits provided to investors in the TPPA).

Minimum standard of treatment – FET

The mock chapter shows that there is likely to be a requirement to provide fair and equitable treatment (FET) to investments. There has been wide variation in investor-state tribunal decisions on the content and extent of the FET obligation. Some interpretations⁴¹ of decisions such as *Tecmed v Mexico*, *Enron v Argentina*, *CMS and PSEG v Turkey* are that governments cannot affect the basic expectations the investor had when it made the investment, ie that changes in the legislative environment are contrary to the need for the stable and predictable business environment required by the BIT. Such interpretations of FET would make it difficult to introduce new regulations (for example in response to new information about climate change or the causes of the financial crisis).

In case this seems like an unlikely interpretation, UNCTAD notes that ‘The debate regarding the fair and equitable treatment clause in Chapter 11 of NAFTA, and more recently in some BIT disputes, has evidenced the risks of including unqualified language in IIAs. The wording of such a clause could be broad enough to apply to virtually any adverse circumstance involving an investment, thus making the

³⁷ UNCTAD/ITE/IIT/11 (vol IV)

³⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461097

³⁹ *The International Law on Foreign Investment*, second edition, Sornarajah, Cambridge University Press, 2004. UNCTAD notes that the post-entry model is at present much more common -- UNCTAD/ITE/IIT/11 (vol IV)

⁴⁰ Japan has them in some of its BITs, <http://www.chowla.org/writing/ComparingBITs.pdf>.

⁴¹ http://www.unctad.org/en/docs/iteiia20073_en.pdf, http://www.unctad.org/en/docs/iteiia20083_en.pdf.

fair and equitable treatment provision among those provisions most likely to be relied upon by an investor in order to bring a claim under the ISDS proceedings.⁴²

(The Annex on customary international law is unlikely to sufficiently narrow the minimum standard of treatment requirement).

Expropriation and compensation

In combination with the broad definition of ‘investment’, the expropriation provision in the mock chapter would prevent TPPA governments from taking measures that reduce the value of the investment (for example by lowering its profits), unless an Annex is effective⁴³.

According to UNCTAD, countries may need to take property, for example to reorganise specific industries.⁴⁴ Even the United Kingdom and Canada have renegotiated contracts relating to natural resources investments when they turned out to be disadvantageous to them.⁴⁵ This indicates that governmental power will be utilised both by developed and developing countries in order to redraw disadvantageous contracts in important industries.⁴⁶

However, UNCTAD notes that this type of expropriation provision puts severe limitations on the host government’s ability to regulate foreign investments⁴⁷ because ‘almost any governmental measure could be construed as an act of interference in the business of a foreign investor. The difficulty lies in distinguishing between regulatory measures that have to be compensated and measures that do not carry with them, under international law, the obligation to pay compensation.’⁴⁸

If regulatory measures to protect the environment were a compensable taking under the expropriation provision, this would insure a foreign investor from the consequences of any environmental harm caused and so remove any deterrent from causing such harm.⁴⁹ Furthermore, local businesses would be subject to environmental regulations that increase their costs, whereas foreign investors would not have to comply with such regulations.⁵⁰ Lastly, if TPPA countries are party to international environmental treaties, their regulations to implement these treaties may contravene the expropriation provision of the proposed BIT.⁵¹

In addition to the NAFTA cases which have shown the types of common government regulations which can be challenged under the expropriation provision,⁵² government measures to reduce cigarette smoking have also been threatened under this provision. For example Canada abandoned its tobacco control measures when a tobacco company merely threatened to sue them under NAFTA (including its expropriation provision).⁵³ Philip Morris has used Australia’s proposed tobacco control measures to argue for the need for ISDS in the TPPA⁵⁴ and has already sued Uruguay under a bilateral investment treaty for its tobacco control measures.⁵⁵ Yet there is a clear need for tobacco control

⁴² http://www.unctad.org/en/docs/iteiia20073_en.pdf

⁴³ The Annex in the mock chapter is unlikely to be sufficient, ‘The TPPA, Financial instability and Governments’ Regulatory Space’ at http://web.me.com/jane_kelsey/Jane/TPPA.html

⁴⁴ UNCTAD/ITE/IIT/15

⁴⁵ UNCTAD/ITE/IIT/15

⁴⁶ UNCTAD/ITE/IIT/15

⁴⁷ UNCTAD/ITE/IIT/15

⁴⁸ UNCTAD/ITE/IIT/15

⁴⁹ UNCTAD/ITE/IIT/15

⁵⁰ UNCTAD/ITE/IIT/15

⁵¹ UNCTAD/ITE/IIT/15, which notes that countries could deal with this by establishing a hierarchy of international obligations in the event that they conflict.

⁵² See for example http://www.citizen.org/documents/NAFTAReport_Final.pdf.

⁵³ http://www.citizen.org/documents/NAFTAReport_Final.pdf and

<http://www.ftamalaysia.org/article.php?aid=61> where the lawyer notes that tobacco control measures could also be challenged under the intellectual property, technical barriers to trade, services and other investment chapter provisions (such as fair and equitable treatment) in USFTAs.

⁵⁴ <http://www.smh.com.au/lifestyle/wellbeing/fresh-assault-on-antismoking-laws-20110116-19slv.html>

⁵⁵ <http://www.iisd.org/itn/2010/05/11/philip-morris-initiates-arbitration-against-uruguay-over-new-labeling-requirements-taxes/>

measures in TPPA countries like Malaysia, where almost half of the Ministry of Health's budget is spent on treating tobacco-related disease and an estimated 10,000 Malaysians die a year from smoking-related disease⁵⁶.

Transfers

Professor Sornarajah notes that the main objective of all foreign investment is to make profits and to repatriate those profits to the home state.⁵⁷ However, the host country may want to require the foreign investor to reinvest its profits locally in order to increase the benefits of the investment and avoid balance of payments problems, see below. Regulation of capital flows has also been recommended to avoid and deal with financial crises.⁵⁸ Based on the mock chapter, these types of regulation of capital flows would not be possible.

Performance requirements

Performance requirements are frequently used by both developed and developing countries.⁵⁹ They continue to be used and are not eliminated in a race to the bottom to attract foreign investors, perhaps because firms themselves find them useful in terms of spillovers (such as better trained workers and technology transfer) and they can increase the gains from FDI.⁶⁰

However, the mock chapter shows that a TPPA is likely to impose limitations on the use of performance requirements such as technology transfer, beyond the limitations already required by the World Trade Organization (WTO) rules.

Investment and environment

Although the mock chapter has an 'investment and environment' provision, it does not allow environmental concerns to override obligations under the investment chapter because environmental measures must be 'otherwise consistent' with the investment chapter in order to be permitted.

Investor-to-state dispute settlement (ISDS)

ISDS would allow investors to sue the host government at an international tribunal for monetary compensation and is common in USFTAs. In one case alone under NAFTA, the investor sued for \$14 billion in compensation⁶¹ and under a BIT, an investor claimed US\$ 33 billion in another case⁶². Even if the government succeeds, the legal costs themselves (which the government often has to pay, even when it wins) can be expensive. For example, the average legal costs incurred by governments are between US\$1-2 million⁶³ and the Czech Government spent US \$10 million defending two claims⁶⁴.

However, the Australia-USFTA does not include ISDS due to widespread opposition to it in Australia.

UNCTAD notes that 'In accordance with the principle of national sovereignty over activities occurring on the territory of a State, most countries have traditionally maintained that investor-State

⁵⁶ <http://www.ftamalaysia.org/article.php?aid=61>

⁵⁷ The International Law on Foreign Investment, second edition, Sornarajah, Cambridge University Press, 2004

⁵⁸ See 'The TPPA, Financial instability and Governments' Regulatory Space' at http://web.me.com/jane_kelsey/Jane/TPPA.html

⁵⁹ Graham, Edward M. (2000), Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises, Institute for International Economics, Washington D.C

⁶⁰ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=436542

⁶¹ http://www.citizen.org/documents/NAFTA_Investor_State_Chart_Nov_2010.pdf

⁶² UNCTAD/ITE/IIT/2005/4.

⁶³ UNCTAD/ITE/IIT/2005/4.

⁶⁴ UNCTAD/ITE/IIT/2005/4.

disputes should be resolved in their national courts. In its strict formulation, this position means that foreign investors ought not, in principle, to have the option to pursue investor-State settlement.⁶⁵

UNCTAD points out that ‘not only developing countries but also, it seems, developed countries may view the process of international dispute settlement in this field with some suspicion. This can be seen from, for example, academic, judicial and political criticism of recent North American Free Trade Agreement (NAFTA) arbitration awards (De Palma, 2001; Foy and Deane, 2001)’.

If countries are concerned that without ISDS they will not attract foreign investors, UNCTAD notes that ‘factors such as market size, economic growth, the quality of the infrastructure and the availability of skills typically bear most heavily on the decision (UNCTAD, 1994). For example, China, a host country that ranks highly in a number of these variables, has generally not allowed internationalized third-party adjudication for all investor-State disputes.’

Based on existing UFSTAs, any ISDS is likely to be ultimately enforceable via the dispute settlement chapter of the TPPA. This would mean that the requirement to pay the compensation awarded to foreign investors could be enforced by a state-state dispute which could result in tariffs on the exports of the losing country.

Definitions

‘Investment’

Based on the mock chapter, the TPPA is likely to have a broad definition of ‘investment’ which explicitly includes the expectation of profit and has an open-ended list of the types of forms that an investment can take. Such a broad definition would increase the liability of TPPA governments to be sued for measures which may constitute expropriation etc.

UNCTAD notes that a broad definition of investment may not be consistent with a government's development policy at every period in the life of a treaty.⁶⁶ ‘The danger of an open-ended definition is that it may commit a host country to permitting, promoting or protecting forms of investment that the host country did not contemplate at the time it entered into an agreement and would not have agreed to include within the scope of the agreement had the issue arisen explicitly.’⁶⁷

‘Investor’

If the definition of ‘investor’ is loose in the TPPA, it will allow investors ‘treaty-shop’ and define themselves as coming from another country in order to obtain the protection of a BIT or FTA.⁶⁸ This treaty shopping is noted as an issue of concern by UNCTAD.⁶⁹ Therefore in order to ensure that TPPA governments are not exposed to additional liability from companies from countries outside the TPPA, a narrow and tight definition of ‘investor’ is vital.

Do FTAs bring more beneficial FDI?

Some claim that an FTA could result in more inflows of beneficial FDI. A preliminary analysis of this claim is below.

⁶⁵ UNCTAD/ITE/IIT/30.

⁶⁶ UNCTAD/ITE/IIT/18.

⁶⁷ UNCTAD/ITE/IIT/11 (vol II)

⁶⁸ See for example cases in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461097 and that Philip Morris threatened to sue the Canadian government as a US company under NAFTA (http://www.citizen.org/documents/NAFTAReport_Final.pdf) and is now claiming to be a Swiss company to sue the Uruguayan government under the Switzerland-Uruguay BIT, <http://www.iisd.org/itn/2010/05/11/philip-morris-initiates-arbitration-against-uruguay-over-new-labeling-requirements-taxes/>.

⁶⁹ UNCTAD/ITE/IIT/2005/4

What kind of FDI do countries usually want?

While governments often want foreign direct investment (FDI) to provide capital, new jobs and new technology, ‘careful studies have been able to find very little systematic evidence of technological and other externalities from foreign direct investment, some even finding negative spillovers’⁷⁰. In addition, the ability to regulate to increase the benefits of FDI (such as by requiring technology transfer, local employment and training and reinvestment of profits) would be restricted under the mock chapter, see analysis above.

Furthermore, the mock chapter would open TPPA countries to portfolio investment as well which has been criticised for its destabilising effects.

Is FDI always beneficial?

Eminent investment law academics said in a recent statement that ‘Foreign investment may have harmful as well as beneficial impacts on society and it is the responsibility of any government to encourage the beneficial while limiting the harmful.’⁷¹

For example, as noted above, the main objective of all foreign investment is to make profits and to repatriate those profits to the home state.⁷² This can be seen in the case of Malaysia where the remittances of profits from FDI were a primary cause of its current account deficit reaching a level seen as being unsustainable between 1990-1996 and increasing the risks of the financial crisis which occurred in 1997.⁷³ However the mock chapter would not allow the restrictions on this repatriation of profits with the implications noted above.

Do FTAs bring more FDI?

According to the United Nations Development Programme, there is no convincing evidence that an FTA with developed countries increases FDI. This is because countries receiving the most FDI typically have a large market, peace and stability, good infrastructure and high levels of human capital.⁷⁴ For example Brazil has no FTA with a developed country according to the WTO,⁷⁵ yet still receives large amounts of FDI due to its large population.

Studies have also investigated whether the provisions found in particular chapters of FTAs encourage FDI.

Does stronger investment protection bring more FDI?

A number of studies have been carried out on whether BITs attract FDI. Since the mock chapter’s investment provisions are very similar to those in the BITs analysed, these studies can provide useful insights. For example, according to the World Bank, ‘countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact.’⁷⁶

Does stronger intellectual property protection bring more FDI?

⁷⁰ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=617544. In this paper, Dani Rodrik goes on to note the constraints on industrial policy imposed by USFTAs.

⁷¹ http://www.osgoode.yorku.ca/public_statement/ (also in Spanish at that website).

⁷² The International Law on Foreign Investment, second edition, Sornarajah, Cambridge University Press, 2004

⁷³ ‘The Next Crisis? Direct and Equity Investment in Developing Countries’, David Woodward, Zed Books, 2001.

⁷⁴ For example, UNCTAD notes that economic factors (such as market size and per capita income, market growth, natural resources, low cost unskilled labour, skilled labour, physical infrastructure (ports, roads, power, telecommunications etc), low input costs etc are the principle determinants of FDI flows, UNCTAD/ITE/IIT/18.
⁷⁵

<http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?enc=bUbyxPA3Wob5pG8+pdmN/7Oyzb5J7E+43L CGgHQBh6I=>

⁷⁶ Global Economic Prospects, 2003.

The TPPA is likely to require stronger intellectual property protection, however studies show this is not likely to increase FDI either. A commonly cited study⁷⁷ claiming that stronger intellectual property protection will cause increased FDI has been comprehensively rebutted by Heald⁷⁸ for a number of reasons.

The United Nations' study on intellectual property rights and foreign direct investment found that there is insufficient linkage between patents and foreign direct investment.⁷⁹ The study found that cost, market size, levels of human capital and infrastructure development and broad macro-economic conditions were more important.⁸⁰ For example China⁸¹ and India⁸² had very large FDI inflows when they had low levels of intellectual property protection.

Recommendation

Given the concerns outlined above, the TPPA should not include the problematic provisions above including broad definitions of investment, pre-establishment right, expropriation, minimum standard of treatment, free movement of capital and ISDS.

ANNEX: MOCK TEXT OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT INVESTMENT CHAPTER

Introduction

It is essential that all parties and all their diverse constituencies are fully aware of the implications of these Trans-Pacific Partnership Agreement (TPPA) negotiations. To date, that has not been possible because the draft text the parties are working on has not been released to enable independent analysis and informed debate to occur.

Such analysis cannot wait for the release of the text at the conclusion of the negotiations when it is extremely difficult to change what has been agreed. It is therefore essential that all the negotiating parties agree in Chile to release the draft texts at the end of each round, starting with the February 2011 round in Santiago, Chile.

Pending the release of the official text, the attached mock text on the investment chapter has been developed to provide the basis for independent expert analysis.

The mock text is based on a comparison of the existing free trade agreements (FTAs) between the United States and: Australia, Chile, Peru and Singapore. It contains the main articles⁸³ but does not yet include the section on investor-to-state dispute settlement or the Annexes⁸⁴ or schedules. It does not note grammar or spelling differences, paragraph numbering differences, or differences in the order of articles. Footnotes are footnotes in the FTA texts, endnotes indicate which FTA it comes from.

⁷⁷ Edwin Mansfield, 1994, International Finance Corporation (an arm of the World Bank).

⁷⁸ PJ Heald, *Information Economics and Policy* 16 (2004) 57-65.

⁷⁹ 'Intellectual Property Rights and Foreign Direct Investment', United Nations, New York, 1993.

⁸⁰ 'Intellectual Property Rights and Foreign Direct Investment', United Nations, New York, 1993.

⁸¹ Renowned trade economist at Columbia University, Professor Jagdish Bhagwati, Testimony before U.S. House of Representatives Committee on Financial Services, April 1, 2003, <http://www.columbia.edu/~jb38/testimony.pdf>.

⁸² <http://www.oup.com/isbn/0-19-567482-0?view=in>

⁸³ See at 'Mock TPPA Financial Services, Investment and Capital Movements Text' at http://web.me.com/jane_kelsey/Jane/TPPA.html for a comparison of the definitions of 'investment' in these FTAs.

⁸⁴ See at 'Mock TPPA Financial Services, Investment and Capital Movements Text' at http://web.me.com/jane_kelsey/Jane/TPPA.html for a comparison of the customary international law, expropriation and public debt annexes of these FTAs.

Investment chapter provisions

Article 1: Scope and coverage^[85]ⁱ

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party;
 - (b) covered investments; and
 - (c) with respect to Articles (performance requirements) and (investment and environment), all investments in the territory of the Party.
2. [For greater certainty, nothing in this Chapter imposes an obligation on a Party to privatise]ⁱⁱ.
3. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
4. A requirement by a Party that a service [supplier]ⁱⁱⁱ [provider]^{iv} of the other Party post a bond or other form of financial security as a condition of [the cross-border supply of]^v [providing]^{vi} a service [into its territory]^{vii} does not of itself make this Chapter applicable to [measures adopted or maintained by the Party relating to such cross-border supply of the]^{viii} [the provision of that cross-border]^{ix} service. This Chapter applies to [measures adopted or maintained by the Party relating to]^x [that Party's treatment of]^{xi} the posted bond or financial security, [to the extent that such bond or financial security is a covered investment]^{xii}.
4. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter (Financial Services).
5. [A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.
6. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement].^{xiii}

Article 2: National treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to 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.
3. [The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a [regional level of government]^{xiv} [state, territory or possession]^{xv}, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that [regional level of government]^{xvi} [state, territory or possession]^{xvii} to investors, and to investments of investors, of the Party of which it forms a part.]^{xviii}

Article 3: Most-favoured nation treatment

1. Each Party shall accord to investors of the [other]^{xix} [another]^{xx} Party treatment no less favourable than that it accords, in like circumstances, to investors of [any other Party or of]^{xxi} any non-Party with

⁸⁵ [For greater certainty, nothing in this Chapter shall be construed to impose an obligation on a Party to privatize any investment that it owns or controls or to prevent a Party from designating a monopoly, provided that, if a Party adopts or maintains a measure to privatize such an investment or a measure to designate a monopoly, this Chapter shall apply to such measure.]

respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of [any other Party or of]^{xxii} any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.^{[86]xxiii}

3. [Each Party shall accord to investors of the other Party and to their covered investments the better of national treatment or most-favored-nation treatment.]^{xxiv}

Article 4: Minimum standard of treatment⁸⁷

1. Each Party shall accord to covered investments treatment in accordance with [the]^{xxv} customary international law [minimum standard of treatment of aliens]^{xxvi}, including fair and equitable treatment and full protection and security.

2. For greater certainty, [paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.]^{xxvii} the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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

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

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 5: Treatment in case of strife

1. [Without prejudice to Article 4.1 and]^{xxviii} Notwithstanding Article 12.5(b), each Party shall accord to investors of [the other]^{xxix} [another]^{xxx} Party, and to covered investments, [non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.]^{xxxi} [with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

(a) its own investors and their investments; and

(b) investors of any non-Party and their investments]^{xxxii}.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in [paragraph 1]^{xxxiii} [that paragraph]^{xxxiv}, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor with restitution [,]^{xxxv} [or]^{xxxvi} compensation, [or both, as appropriate, for such loss]^{xxxvii}. [Any compensation]^{xxxviii} [which in either case]^{xxxix} shall be prompt,

⁸⁶ For greater certainty, treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.

⁸⁷ Article 4 shall be interpreted in accordance with Annex (customary international law).

adequate, and effective [, and, with respect to compensation, shall be]^{xl} in accordance with Article 6.2 through 6.4, [*mutatis mutandis*]^{xli}.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 2 but for Article 12.5(b).

Article 6: Expropriation [and compensation]^{xlii} 88

1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (“expropriation”), except:

- (a) for a public purpose^[89]^{xliii};
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation [in accordance with paragraphs 2, 3, and 4]^{xliv}; [and
- (d) in accordance with due process of law [and Article 4]^{xlv}^{xlvi}.

2. [The compensation referred to in paragraph 1(c) shall]^{xlvii} [Compensation shall]^{xlviii}:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the [expropriation took place]^{xlix} [expropriatory action was taken]^l (“the date of expropriation”);
- (c) not reflect any change in value occurring because the [intended expropriation]^{li} [expropriatory action]^{lii} had become known [earlier]^{liii} [before the date of expropriation]^{liv}; and
- (d) be fully realisable and freely transferable.

3. If the fair market value is denominated in a freely usable currency [or the Australian dollar]^{lv}, the compensation [referred to in paragraph 1(c)]^{lvi} [paid]^{lvii} shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. [However,]^{lviii} if the fair market value is denominated in [the Australian dollar and the Australian dollar is not transferable on the date of payment at the market rate of exchange, or if it is denominated in another]^{lix} [a]^{lx} currency that is not freely usable, the compensation [referred to in paragraph 1(c)]^{lxi} [paid]^{lxii} – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such [issuance,]^{lxiii} revocation, limitation, or creation is consistent with Chapter Seventeen (Intellectual Property Rights) [of this Agreement]^{lxiv}.^[90]^{lxv}

Article 7: Transfers^[91]^{lxvi}

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

⁸⁸ Article 6 shall be interpreted in accordance with Annexes A and B.

⁸⁹ Article 10.7 shall be interpreted in accordance with Annex 10-B.

⁹⁰ For greater certainty, the reference to the “TRIPS Agreement” in paragraph 5 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

⁹¹ For greater certainty, this Article is subject to Annex 10-C.

- (a) contributions to capital[, including the initial contribution]^{lxvii};
- (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments made under a contract[, including a loan agreement]^{lxviii} [entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement]^{lxix};
- (e) payments made pursuant to Articles 5.1 and 5.2 and Article 6; and
- (f) payments arising [out of a dispute]^{lxx} [under Section B]^{lxxi}.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing [at the time]^{lxxii} [on the date]^{lxxiii} of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in [an investment authorization or other]^{lxxiv} [a]^{lxxv} written agreement^[92]^{lxxvi} between the Party and a covered investment or an investor of [another]^{lxxvii} [the other]^{lxxviii} Party [that takes effect on or after the date of entry into force of this Agreement]^{lxxix}.

[4. Neither Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits, or other amounts derived from, or attributable to, investments in the territory of the other Party.]^{lxxx}

5. Notwithstanding paragraphs 1 through 3, a Party may prevent [or delay]^{lxxxi} a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, [options,]^{lxxxii} or derivatives;
- (c) criminal or penal offences;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

[6. Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 5.]^{lxxxiii}

Article 8: Performance requirements

[Mandatory Performance Requirements]^{lxxxiv}

1. [Neither]^{lxxxv} [No]^{lxxxvi} Party may, 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 [of the following]^{lxxxvii} requirement[s]^{lxxxviii}, or enforce any commitment or undertaking, to:⁹³

- (a) export a given level or percentage of goods or services;
- (b) achieve a given level or percentage of domestic content;
- (c) purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

⁹² Notwithstanding any other provision of this Chapter, this paragraph takes effect on the date of entry into force of this Agreement.

⁹³ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

- (e) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) transfer a particular technology, [a]^{lxxxix} production process, or other proprietary knowledge to a person in its territory;^{94]}^{xc} or
- (g) supply exclusively from the territory of the Party the goods that [such investment]^{xc} [it]^{xcii} produces or the services that [such investment]^{xciii} [it]^{xciv} supplies to a specific regional market or to the world market.

[Advantages Subject to Performance Requirements]^{xcv}

2. [Neither]^{xcvi} [No]^{xcvii} Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any [of the following]^{xcviii} requirement[s]^{xcix} to:

- (a) achieve a given level or percentage of domestic content;
- (b) purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

[Exceptions and Exclusions]^c

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraph 1(f) does not apply:

(i) when a Party authorises use of an intellectual property right in accordance with Article [17.9.7 (Patents)]^{ci} [31^{95]}^{cii} of the TRIPS Agreement]^{ciii}, [or]^{civ} [and]^{cv} to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under [a Party's laws relating to the prevention of anticompetitive behaviour]^{cvi} [the Party's competition laws]^{cvii}.⁹⁶

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, [and provided that such measures]^{cviii} [or]^{cix} do not constitute a disguised restriction on investment or international trade, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

⁹⁴ For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, 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, from imposing or enforcing a requirement or enforcing a commitment or undertaking to train workers in its territory, provided that such training does not require the transfer of a particular technology, production process, or other proprietary knowledge to a person in its territory.

⁹⁵ The reference to "Article 31" includes footnote 7 to Article 31.

⁹⁶ The Parties recognize that a patent does not necessarily confer market power.

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
 - (ii) necessary to protect human, animal, or plant life or health; or
 - (iii) related to the conservation of living or non-living exhaustible natural resources.
 - (d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
 - (e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to [government]^{cx} procurement.
 - (f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
4. For greater certainty, paragraphs 1 and 2 do not apply to any [commitment, undertaking, or]^{cxii} requirement other than [the requirements]^{cxii} [those]^{cxiii} set out in those paragraphs.
5. [This Article]^{cxiv} [Paragraph 1]^{cxv} does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement. [For purposes of this Annex, private parties may include designated monopolies or government enterprises, where such entities are not exercising delegated governmental authority as described in Articles 12.3.1(c)(i) and 12.3.2(b) (Designated Monopolies and Government Enterprises), respectively.]^{cxvi}

Article 9: Senior management and boards of directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions [individuals]^{cxvii} [natural persons]^{cxviii} of any particular nationality.
2. A Party may require that a majority [or less]^{cxix} of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 10: Investment and environment

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 11: Denial of benefits

1. A Party may deny the benefits of this Chapter to an investor of [the other]^{cxx} [another]^{cxxi} Party that is an enterprise of such other Party and to investments of that investor if [persons]^{cxxii} [an investor]^{cxxiii} of a non-Party own or control the enterprise and the denying Party:
 - (a) does not maintain diplomatic relations with the non-Party; or
 - (b) adopts or maintains measures with respect to the non-Party or [a person]^{cxxiv} [an investor]^{cxxv} of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or [to]^{cxxvi} its investments.
2. [Subject to Article 22.4 (Consultations),]^{cxxvii} A Party may deny the benefits of this Chapter to an investor of [the other]^{cxxviii} [another]^{cxxix} Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of [the other]^{cxx} [any]^{cxxxi} Party [, other than the denying Party,]^{cxxxi} and persons of a non-Party, [or of the denying Party,]^{cxxxi} own or control the enterprise.

Article 12: Non-conforming measures

1. Articles 2, 3, 8 and 9 do not apply to:
 - (a) any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedule to Annex I,

- (ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or
- (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 2, 3, 8 and 9.

2. Articles 2, 3, 8 and 9 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this

Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 2 and 3 do not apply to any measure that is an exception to, or derogation from, the obligations under Article (National Treatment in Intellectual Property Chapter) as specifically provided [for]^{cxixiv} in that Article.

5. Articles 2, 3 and 9 do not apply to:

- (a) [government]^{cxixv} procurement; or
- (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article 13: Special formalities and information requirements

1. Nothing in Article 2 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of [the other]^{cxixvi} [another]^{cxixvii} Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 2 and 3, a Party may require an investor of [the other]^{cxixviii} [another]^{cxixix} Party[,]^{cxli} or [a]^{cxlii} [its]^{cxliii} covered investment [,]^{cxliiii} to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect [any confidential information]^{cxliiv} [such information that is confidential]^{cxliiv} [any confidential business information]^{cxliiv} [such business information that is confidential]^{cxliiv} from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its [domestic]^{cxliiii} law.

[Article 14: Implementation

The Parties shall [meet]^{cxlix} [consult]^{cli} annually, or as agreed otherwise, to [discuss]^{cli} [review]^{clii} the implementation of this Chapter and [other issues]^{cliii} [consider any investment matter]^{cliv} of mutual interest, including [the operation of their respective investment regimes]^{clv} [consideration of the development of procedures that could contribute to greater transparency of measures described in Article 10.7(1)(c)]^{clvi} .^{clvii}

[Article 15: Consultations on investor-state dispute settlement

1. If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a

request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.

2. For greater certainty, nothing in this Article prevents a Party from raising any matter arising under this Chapter pursuant to the procedures set out in Chapter 21 (Institutional Arrangements and Dispute Settlement). Nor does anything in this Article prevent an investor of a Party from submitting to arbitration a claim against the other Party to the extent permitted under that Party's law.]^{clviii}

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- ⁱ Peru-USFTA (PUSFTA)
 - ⁱⁱ Australia-USFTA (AUSFTA)
 - ⁱⁱⁱ AUSFTA, PUSFTA
 - ^{iv} Chile-USFTA (ChUSFTA), Singapore-USFTA (SUSFTA)
 - ^v AUSFTA, PUSFTA
 - ^{vi} ChUSFTA, SUSFTA
 - ^{vii} ChUSFTA, SUSFTA
 - ^{viii} AUSFTA, PUSFTA
 - ^{ix} ChUSFTA, SUSFTA
 - ^x AUSFTA, PUSFTA
 - ^{xi} ChUSFTA, SUSFTA
 - ^{xii} AUSFTA, PUSFTA
 - ^{xiii} PUSFTA
 - ^{xiv} PUSFTA
 - ^{xv} SUSFTA
 - ^{xvi} PUSFTA
 - ^{xvii} SUSFTA
 - ^{xviii} PUSFTA, SUSFTA
 - ^{xix} AUSFTA, ChUSFTA, SUSFTA
 - ^{xx} PUSFTA
 - ^{xxi} PUSFTA
 - ^{xxii} PUSFTA
 - ^{xxiii} PUSFTA
 - ^{xxiv} SUSFTA
 - ^{xxv} AUSFTA
 - ^{xxvi} AUSFTA
 - ^{xxvii} ChUSFTA, PUSFTA, SUSFTA
 - ^{xxviii} SUSFTA
 - ^{xxix} AUSFTA, ChUSFTA, SUSFTA
 - ^{xxx} PUSFTA
 - ^{xxxi} ChUSFTA, PUSFTA, SUSFTA
 - ^{xxxii} AUSFTA
 - ^{xxxiii} AUSFTA, PUSFTA
 - ^{xxxiv} ChUSFTA
 - ^{xxxv} AUSFTA, PUSFTA
 - ^{xxxvi} ChUSFTA
 - ^{xxxvii} AUSFTA, PUSFTA
 - ^{xxxviii} AUSFTA, PUSFTA
 - ^{xxxix} ChUSFTA
 - ^{xl} ChUSFTA
 - ^{xli} AUSFTA, PUSFTA
 - ^{xlii} AUSFTA, ChUSFTA, PUSFTA
 - ^{xliii} PUSFTA
 - ^{xliv} SUSFTA
 - ^{xlv} SUSFTA
 - ^{xlvi} AUSFTA, PUSFTA, SUSFTA
 - ^{xlvii} AUSFTA, ChUSFTA, PUSFTA
 - ^{xlviii} SUSFTA
 - ^{xliv} AUSFTA, ChUSFTA, PUSFTA
 - ^l SUSFTA

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- li AUSFTA, ChUSFTA, PUSFTA
 - lii SUSFTA
 - liii AUSFTA, ChUSFTA, PUSFTA
 - liv SUSFTA
 - lv AUSFTA
 - lvi AUSFTA, ChUSFTA, PUSFTA
 - lvii SUSFTA
 - lviii AUSFTA
 - lix AUSFTA
 - lx ChUSFTA, PUSFTA, SUSFTA
 - lxi AUSFTA, ChUSFTA, PUSFTA
 - lxii SUSFTA
 - lxiii AUSFTA, PUSFTA, SUSFTA
 - lxiv SUSFTA
 - lxv AUSFTA
 - lxvi ChUSFTA, SUSFTA. For a comparison of these Annexes (and PUSFTA's), see 'Mock TPPA Financial Services, Investment and Capital Movements Text' at http://web.me.com/jane_kelsey/Jane/TPPA.html
 - lxvii AUSFTA
 - lxviii AUSFTA, PUSFTA
 - lxix ChUSFTA, SUSFTA
 - lxx AUSFTA, PUSFTA
 - lxxi ChUSFTA, SUSFTA
 - lxxii AUSFTA, PUSFTA, SUSFTA
 - lxxiii ChUSFTA
 - lxxiv ChUSFTA, SUSFTA
 - lxxv AUSFTA, PUSFTA
 - lxxvi ChUSFTA
 - lxxvii PUSFTA
 - lxxviii AUSFTA, ChUSFTA, SUSFTA
 - lxxix AUSFTA
 - lxxx ChUSFTA
 - lxxxi AUSFTA
 - lxxxii AUSFTA, SUSFTA
 - lxxxiii ChUSFTA
 - lxxxiv ChUSFTA
 - lxxxv AUSFTA, ChUSFTA, SUSFTA
 - lxxxvi PUSFTA
 - lxxxvii ChUSFTA, SUSFTA
 - lxxxviii ChUSFTA, SUSFTA
 - lxxxix AUSFTA, ChUSFTA, PUSFTA
 - xc PUSFTA
 - xc i AUSFTA, PUSFTA
 - xc ii ChUSFTA, SUSFTA
 - xc iii AUSFTA
 - xc iv ChUSFTA, PUSFTA, SUSFTA
 - xc v ChUSFTA
 - xc vi AUSFTA, ChUSFTA, SUSFTA
 - xc vii PUSFTA
 - xc viii ChUSFTA, SUSFTA
 - xc ix ChUSFTA, SUSFTA
 - c ChUSFTA
 - ci AUSFTA, SUSFTA (Article 16.7.6)
 - cii ChUSFTA
 - ciii ChUSFTA, PUSFTA
 - civ AUSFTA, ChUSFTA, PUSFTA
 - cv SUSFTA
 - cvi AUSFTA
 - cvii ChUSFTA, PUSFTA, SUSFTA
 - cviii AUSFTA, PUSFTA, SUSFTA

cix ChUSFTA
cx AUSFTA, SUSFTA
cxi PUSFTA
cxii AUSFTA, ChUSFTA, SUSFTA
cxiii PUSFTA
cxiv AUSFTA, ChUSFTA, PUSFTA
cxv SUSFTA in an Annex
cxvi SUSFTA Annex
cxvii ChUSFTA, SUSFTA
cxviii AUSFTA, PUSFTA
cxix AUSFTA
cxx AUSFTA, ChUSFTA, SUSFTA
cxxi PUSFTA
cxxii AUSFTA, PUSFTA
cxxiii ChUSFTA, SUSFTA
cxxiv AUSFTA, PUSFTA
cxxv ChUSFTA, SUSFTA
cxxvi ChUSFTA, PUSFTA, SUSFTA
cxxvii ChUSFTA
cxxviii AUSFTA, ChUSFTA, SUSFTA
cxxix PUSFTA
cxxx AUSFTA, ChUSFTA, SUSFTA
cxxxi PUSFTA
cxxxii PUSFTA
cxxxiii AUSFTA, PUSFTA, SUSFTA
cxxxiv ChUSFTA, SUSFTA
cxxxv AUSFTA, SUSFTA
cxxxvi AUSFTA, ChUSFTA, SUSFTA
cxxxvii PUSFTA
cxxxviii AUSFTA, ChUSFTA, SUSFTA
cxxxix PUSFTA
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cxlii PUSFTA
cxliii AUSFTA, ChUSFTA, SUSFTA
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cxlv ChUSFTA
cxlvi PUSFTA
cxlvii SUSFTA
cxlviii ChUSFTA
cxlix AUSFTA
cl ChUSFTA
cli AUSFTA
clii ChUSFTA
cliii AUSFTA
cliv ChUSFTA
clv AUSFTA
clvi ChUSFTA
clvii AUSFTA, ChUSFTA
clviii AUSFTA