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Outside Counsel

Looking at Dispute Resolution in the Trans-Pacific Partnership

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Economists, politicians, trade activists, non-governmental organizations (NGOs), and members of numerous private sector organizations have already pronounced the proposed Trans-Pacific Partnership agreement (TPP) dead on arrival. Misunderstandings run rampant concerning this proposed free-trade arrangement, which involves nine countries: the United States, Canada, Japan, Australia, New Zealand, Chile, Peru, Brunei, Vietnam

and Singapore. For example, recently the presidential hopeful Donald Trump declared that the TPP gives China an advantage, but of course, China is not even a member of the TPP.

While the TPP is very controversial and politicized, and while it may never be passed by Congress, it is incumbent on lawyers and law professors to apply their objective assessment to the TPP provisions that are most closely related to their field: dispute resolution processes. This will allow for a more balanced and mature debate regarding the future of the TPP as it proceeds through the congressional process.

The following is a look at the salient aspects of Chapter 28 (Dispute Settlement)¹ and Chapter 9 (Investment).²

General

The Dispute Settlement Procedures outlined in Chapter 28 are intended to resolve trade disputes between states; these are separate from the Investor-State Dispute Settlement (ISDS) mechanism provided in Chapter 9, which focuses on disputes between private parties and governments over investment issues.

Between Member States

Under Chapter 28 of the TPP, the resolution of trade disputes between member states involves obligations concerning cooperation, consultation, good offices, conciliation and mediation. However, if these procedures do not resolve a trade dispute, the complaining party may request a panel, which will issue a binding report. This type of panel process is at the heart of a compulsory arbitration system. Panels are authorized to resolve disputes and to issue sanctions in order to enforce their decisions. Specifically, panels may authorize the suspension of benefits.

For trade disputes between member states, a roster of panel members shall be established. Panelists are required to have expertise or experience in law and international trade. The function of the panel is to provide an objective assessment. Panels generally make their decisions by consensus.

Oral arguments are permitted, and the resulting hearings are open to the public; written submissions are also allowed, and the parties are required to make their submissions public. Third parties, including NGOs, may participate, and experts may be requested by a party or by the panel.

While the TPP will be a regional organization, it may very well have trade obligations similar to the World Trade Organization (WTO) a larger multilateral organization. It is conceivable that a state may take action for a trade restriction under either entity. Thus, there is a provision in the TPP agreement permitting a member to decide which forum in which to bring its complaint.

Unlike the WTO's system there is no appeals process. It is unclear why this is so, as an appeal mechanism would not be much more time-consuming. It would provide a level of oversight to ensure a uniformity of decisions.

Consultations are required to be held before filing for a panel hearing. Essentially, this provision requires diplomatic negotiations before resorting to litigation. Referring to the Vienna Convention on the Law of Treaties³ for treaty interpretation is very welcome.⁴ This convention, concluded in 1969, is the most important multilateral treaty, as it codifies the rules of treaty law. It covers such topics as treaty conclusion, interpretation, termination and invalidity.⁵ By incorporating the rules of treaty interpretation as enumerated in the Vienna Convention (Articles 31 and 32), the TPP agreement removes disputes over the rules of treaty interpretation.

Chapter 28 sets firm guidelines for interpreting all TPP obligations. In particular, any WTO obligations incorporated in the TPP are to be interpreted in light of the WTO's panel and Appellate Body reports. This is a clear nod to precedent, which the WTO seems to accept in practice. The Appellate Body hears appeals from panels in the WTO system. Precedent is not specifically included in the WTO agreements, but both panel and Appellate Body reports actually cite earlier cases. Thus, it is a significant jurisprudential development that the TPP is explicitly granting precedential value to such reports when similar trade obligations are involved.

Most importantly, in private commercial disputes between firms, no firm may bring an action to domestic courts: "No Party may provide a right of action under its domestic law...."⁶ Instead, parties are encouraged to use international arbitration to settle private disputes with the government.

Investor-State Disputes

The investment chapter of TPP (Chapter 9) treats the issues arising between investors, most often multinational corporations, and host states. Most often these issues relate to the nationalization and expropriation of direct investments. These have been long-standing issues in international law and the subject of extensive international arbitration. These issues have primarily been the subject of bilateral, not multilateral, treaties.

This chapter provides a multilateral agreement concerning substantive rules for foreign investment, a separate dispute settlement procedure, and binding arbitration. Unlike the panel system established for state-state trade disputes, the system established in this chapter, known as Investor-State Dispute Settlement (ISDS), incorporates already-existing institutions. The principal issue that has arisen is whether investment disputes between private parties and states should be resolved outside of national courts.

In foreign investment disputes between a firm and a state, investors can choose either institutional or ad hoc arbitration. Arbitration may be brought before the World Bank's International Centre for Settlement of Investment Disputes (ICSID),⁷ the panels established

by the investment agreement chapter,⁸ or any other agreed-upon arbitral tribunal. There is mandatory consent to arbitration by host states.⁹

Specific rules are provided for panels and arbitration unless others are agreed upon. The agreement requires a consultation prior to submitting a request for arbitration. The arbitration shall be conducted in a transparent manner with documents provided to the public. The parties generally select the arbitrators. The Code of Conduct for the panels for state-state disputes (from Chapter 28), which is still to be formulated, is intended to also be applicable in some manner to the investor-state dispute settlement panels. There is currently no appeals process, but an appellate mechanism may be developed in the future. Parties are permitted to make written submissions, and interim measures of protection may be ordered.

The governing law comprises the rules of the TPP and the applicable rules of international law.¹⁰ This provision again demonstrates that the TPP is intended to fit squarely within the world of public international law. Unlike most costs for international arbitrations, attorney fees may be awarded. This rule is intended to restrict frivolous actions.

Final awards are deemed to be enforceable within each defending state. Such awards are explicitly considered to fall within international arbitral conventions concerning enforcement, such as the New York Convention, the Inter-American Convention, and the World Bank (ICSID) Convention.¹¹ This ensures that international arbitration is easier to enforce than domestic judgments, which are not generally automatically enforceable in another jurisdiction.

This is an updated version of the ISDS procedures that the United States has used for many years in bilateral investment treaties and in NAFTA, which established international panels to review investment disputes.¹² These provisions reflect the updated ones in the 2012 Model Bilateral Investment Treaty (BIT) issued by the U.S. Department of State.¹³ Similar provisions are being negotiated with the European Union under the Transatlantic Trade and Investment Partnership (TTIP) agreement. More than 3,000 agreements worldwide utilize some form of ISDS, and the United States is party to 50 such agreements.¹⁴

Foreign Investment

Chapter 9 also provides substantive rules concerning the protection of foreign investment. These rules are aimed primarily at issues related to the nationalization, expropriation and compensation of foreign investments,¹⁵ as well as the transfer of funds relating to those investments. Performance requirements, such as exports or domestic content requirements, are prohibited. A "minimum standard treatment" of investments is required. Obligations apply to all sectors unless negotiated and excluded (a "Negative List").¹⁶

Most interestingly, this chapter includes (in an annex) a provision confirming the customary international laws concerning the minimum standard of treatment (MST)¹⁷ and the protection of aliens' investments. Expropriation and nationalization are prohibited. Direct and indirect expropriation and interference with reasonable investment-backed expectations are all included in this prohibition.

The agreement requires national and most-favored-nation treatment of investments. This means that there should be no discrimination between investments by foreign firms and those by domestic ones. The agreement applies to measures taken by central or subnational (regional or local) units and to state enterprises that exercise governmental authority. This is a newer addition to the world of foreign investment law.

Observations

The Obama administration has argued that the TPP system has been significantly enhanced and adjusted. For example, it now allows NGOs to provide amicus briefs and for panels to have more transparency. This tracks developments within the WTO, which has gradually increased transparency over the last 20 years.

Provisions are included that specifically reference customary international laws concerning foreign investment and the Vienna Convention on the Law of Treaties regarding treaty interpretation. This clearly demonstrates that these newer provisions sit firmly within the growing international legal system, which provides "rules of the road" for a dynamic global economy. Developing such "rules of the road" has long been one of the Obama administration's trade and foreign policy objectives.¹⁸ The intent is to now write such rules for newer issues—ones that would eventually be applicable to a larger number of states, including China.

Conclusion

From a legal and foreign policy perspective, the TPP dispute resolution system is a well-thought-out approach to global trade and investment litigation for the ever-growing, interconnected ecosystem of world trade. It builds upon prior experience and updates prior practice, especially in terms of transparency. It sets the terms for future trade relations. This is good for U.S. national interests, the global economic system and both old and new players in this system.

The objective of securing a neutral adjudicator for an international investment dispute is as warranted today as it was years ago. No international juridical system for investment disputes yet exists, but Congress does have the right to enact new legislation whenever it wants to limit interpretations given by international arbitration. There can be no serious objection based on the argument that these decisions and interpretations are binding as precedent in domestic litigation or domestic law; they are not.

Endnotes:

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2. Chapter 9—Investment and TPP. (Official Text) USTR (Nov. 5th, 2015).
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3. Vienna Convention on the Law of Treaties (concluded 1969).
[https://treaties.un.org/doc/Publication/UNTS/Volume 1155/volume-1155-I-18232-English.pdf.](https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf)
4. Chapter 28.11(3).
5. Malawer, "A New Concept of Consent and World Public Order: 'Coerced Treaties' and the Convention on the Law of Treaties." *Vanderbilt Journal of International Law* 1 (1970-1971).
6. Chapter 28. Article 28.21.
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8. Chapter 9, Article 9.18 (4).
9. Chapter 9, Article 9.19.
10. Chapter 9, Article 9.24(1).
11. Chapter 9, Article 9.28(12).
12. USTR Summary of TPP under "New Features." (November 2015).
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13. 2012 Model Bilateral Investment Treaty,
[http://www.state.gov/documents/organization/188371.pdf.](http://www.state.gov/documents/organization/188371.pdf)
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[https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-idsd.](https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-idsd)
15. Chapter 9, Article 9.7.
16. Chapter 9, Article 9.11.
17. Chapter 9, Article 9.6.
18. 2015 Trade Policy Agenda and 2014 Annual Report, 3 (USTR 2015).

- **Stuart S. Malawer, *J.D., Ph.D.*, is Distinguished Service Professor of Law and International Trade at George Mason University.**

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