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Joint Interpretations, a TPP Investment Chapter, and Australia

Mark Feldman (Peking University School of Transnational Law) · Thursday, August 15th, 2013 · Institute for Transnational Arbitration (ITA), Academic Council

Negotiations to establish a Trans-Pacific Partnership (TPP) agreement have been active and ambitious. Following 18 negotiating rounds since 2010, TPP talks now include 12 States, representing nearly 40 percent of global GDP. Scholars have observed that a TPP agreement, given its scale, could provide "staggering" economic benefits as well as a "genuine Asia-Pacific integration track."

But the TPP negotiations, particularly with respect to the potential inclusion of an investor-State dispute settlement mechanism, have been criticized on policy grounds by certain judges, legislators, scholars, and organizations. As a legal matter, however, it is the criticism of investor-State dispute settlement by one of the TPP negotiating States that ultimately could complicate, if not undermine, the proper operation of an investor-State dispute settlement mechanism in a TPP investment chapter.

In 2011, one of the TPP negotiating States, Australia, announced that it would no longer seek inclusion of investor-State dispute settlement procedures in trade agreements. So long as Australia continues to follow that policy, Australia very likely would not consent to investor-State dispute settlement under a TPP investment chapter. Such a development could raise fundamental questions concerning the proper operation of any joint interpretation mechanisms that might be included within a TPP agreement.

Joint interpretation mechanisms have been included in recent agreements entered into by many of the TPP negotiating States. For example, under the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), Article 27(2) of the investment chapter authorizes a tribunal to request a joint interpretation by the Parties of any provision of the agreement and Article 27(3) establishes the binding nature of joint interpretations. Under the U.S.-Korea Free Trade Agreement (KORUS), Article 22.2 authorizes the Parties, through a Joint Committee, to issue interpretations of any provision of the agreement and Article 11.22, like Article 27(3) of the AANZFTA investment chapter, establishes the binding nature of joint interpretations.

A decision by a Party not to consent to a certain section of a treaty can complicate, if not undermine, the proper operation of joint interpretation mechanisms contained within the treaty. Illustrating this point, a decision by Australia not to consent to a dispute settlement section of a TPP investment chapter could give rise to multiple challenging questions of treaty interpretation, which are outlined below.

First, whether Australia would have authority to participate in the joint interpretation of provisions contained within the dispute settlement section of a TPP investment chapter. The existence of such authority could be challenged on grounds that Australia, unlike the other TPP Parties, would be interpreting provisions that it had not agreed to and was not bound by.

Second, whether Australia could participate in joint interpretations that would be issued pursuant to provisions contained within the dispute settlement section of a TPP investment chapter. For example, under the AANZFTA investment chapter, a provision contained within the dispute settlement section of that chapter—Article 27(2)—authorizes the Parties to issue joint interpretations "within 60 days of the delivery" of a joint interpretation request by a tribunal. When joint interpretations are authorized by provisions contained within the dispute settlement section of an investment chapter, a decision by a Party not to join that section could prevent the Party from participating in the development of such interpretations.

Third, whether joint interpretations would be binding on TPP investment chapter tribunals if the provision establishing the binding force of joint interpretations had not been agreed to by all TPP Parties. For example, the KORUS provision establishing the binding force of joint interpretations—Article 11.22—is contained within the dispute settlement section of the KORUS investment chapter. In the TPP context, it is quite possible that a provision similar to KORUS Article 11.22 would be included in the dispute settlement section of a TPP investment chapter. A decision by Australia not to join that section could be seen as equivalent to a failure by the TPP Parties to reach agreement on the binding nature of joint interpretations.

A similar argument could be made with respect to a fourth joint interpretation issue: whether a TPP investment chapter tribunal would have the power to request joint interpretations from the TPP Parties when the provision establishing that authority had not been agreed to by all TPP Parties. For example, Article 27(2) of the AANZFTA investment chapter, which is contained within the dispute settlement section of that chapter, authorizes tribunals to request joint interpretations from the Parties. A provision similar to Article 27(2) could be included in the dispute settlement section of a TPP investment chapter. A decision by Australia not to join that section could be seen, again, as equivalent to a failure by the TPP Parties to reach agreement on an issue of fundamental importance for the proper operation of any TPP joint interpretation mechanisms.

The issues outlined above could be resolved through careful drafting of a TPP agreement. For example, provisions establishing the (i) authority to request and/or issue joint interpretations and (ii) the binding force of joint interpretations could be located outside the dispute settlement section of a TPP investment chapter. A failure to address these issues at the drafting stage, however, could create uncertainty regarding the legal effect of any joint interpretations that might be issued by the TPP Parties. Such uncertainty might, or might not, be resolved by TPP investment chapter tribunals. If a TPP investment chapter ultimately does include an investor-State dispute settlement section that is not joined by Australia, treaty drafting by the Parties, rather than treaty interpretation by tribunals, should be the preferred approach for clarifying the proper operation of joint interpretations under the TPP. Fortunately, TPP negotiations remain ongoing, with a 19th round of talks to be held later this month in Brunei.

Mark Feldman is Assistant Professor of Law at the Peking University School of Transnational Law. For more detailed discussion of the treaty interpretation issues addressed above, see Mark Feldman, "Joint Interpretations under a Divided TPP Investment Chapter," China, ICSID, and International Investment Treaty Arbitration (Vol. 1 of the Silk Road Collected Courses on

International and Comparative Law) (Wenhua Shan, ed.) (Brill) (forthcoming 2013).

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