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A Secret Weapon, But For Whom?: Investment Disputes Under The Trans-Pacific Partnership's Anti-Corruption Chapter

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With the rise of populist politics in the 2016 U.S. presidential election and the Brexit referendum, it is not surprising that trade in general, and the Trans-Pacific Partnership in particular, have become lightning rods for controversy. The proposed treaty's provisions on trade, investment, and intellectual property have drawn passionate criticism from both old and new foes of globalization and economic liberalism. But one notable aspect of the TPP has provoked little discussion outside the world of corporate compliance, and virtually none among practitioners of international investment law: the anti-corruption provisions of the TPP's Chapter 26. Its potential effect on investment disputes bears a closer look.

The TPP's Anti-Corruption Provisions

Unlike prior trade agreements, the TPP contains an entire chapter devoted largely to anti-corruption enforcement. Chapter 26 imposes basic standards obligating all member states to enact and enforce laws criminalizing companies' payment of bribes to government officials and those officials' receipt of such bribes. Among other things, it requires TPP members to enact law outlawing bribery, take measures (such as training and whistleblower procedures) to prevent bribery, and facilitate private companies' reporting of bribery.

Earlier anti-bribery treaties, such as the U.N. Convention against Corruption and the OECD's Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions already address similar standards, and are specifically referenced in TPP Chapter 26. In addition, through Chapter 26, the TPP members reaffirm their commitment to the Asia Pacific Economic Cooperation Principles and Codes of Conduct for public officials and business integrity. Those other treaties, however, lack some of the substantive provisions included in the TPP.

Application of the TPP's Anti-Corruption Provisions to Investment Disputes

What may make the TPP's anti-corruption chapter particularly interesting to international investors is the potential interplay between that chapter and the TPP's investment chapter. Like some other trade agreements, such as NAFTA and the EU-

Canada CETA, the TPP includes a chapter (in this case, number 9) providing protections to foreign investors and investments similar to those in bilateral investment treaties, and allowing investors to enforce those protections through investor-state arbitration.

As do most other investment treaties, the TPP (in Article 9.6) requires the host state to provide "fair and equitable treatment" (FET) and "full protection and security" (FPS) to investors from other TPP members. In the past, arbitral tribunals in investment treaty cases have interpreted FET to encompass various different obligations, including "transparency" treatment in accordance with the investor's "legitimate expectations," procedural propriety and due process, good faith, and freedom from coercion or harassment. FPS, meanwhile, has been applied to require the "guarantee of stability in a secure environment, both physical, commercial and legal" (sic).

Bribe Solicitation and Retribution as Treaty Violations

For investors concerned that they might be pressured to pay bribes to foreign officials, or else face retaliation or lose business to corrupt competitors, these provisions may provide some protection. Even under a standard investment treaty, it is quite arguable that a government that forces an investor to make corrupt payments or punishes it for not doing so has not treated it fairly or equitably, and has not provided a stable or secure environment. Indeed, the tribunal in EDF (Servs.) Ltd. v. Romania observed that

> [A] request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the [investment treaty], as well as a violation of international public policy, and . . . exercising a State's discretion on the basis of corruption is a . . . fundamental breach of transparency and legitimate expectations.

Similarly, the tribunal in Liman Caspain Oil B.V., et al. v. Kazakhstan, considering the claimant's allegations that the respondent state's officials had engaged in corrupt activities, agreed that "[c]orruption, if found, would constitute a grave violation of the standard of fair and equitable treatment under [Energy Charter Treaty] Article 10(1), second sentence." And the tribunal in Rumeli Telekom A.S., et al. v. Kazakhstan, while (like the EDF and Liman tribunals) finding insufficient evidence of corruption, implicitly accepted that an alleged conspiracy to expropriate foreign investors' business in order to benefit a politically-connected competitor would, if true, violate the applicable investment treaty.

More recently, the investors in Aven v. Costa Rica alleged denial of fair and equitable treatment and full protection and security, claiming that Costa Rican environmental officials had retaliated against them for refusing to pay bribes, by shutting down their investment project on dubious environmental grounds. Although Costa Rica has denied that any bribes were demanded, it has not disputed that such conduct, if established, would violate the treaty.

Of course, the TPP takes a potentially more restrictive approach to the FET and FPS

provisions. Article 9.6 explicitly limits those terms to "the customary international law minimum standard of treatment of aliens," and defines FPS to require TPP members to "provide the level of police protection required under customary international law." Yet tribunals have repeatedly acknowledged that the customary international law standard has evolved over time to require more of states than it once did, and in particular has been influenced by the continued enactment of investment treaties containing similar treatment provisions, against the backdrop of arbitral jurisprudence interpreting those provisions. Thus, as suggested by the EDF and Liman passages cited above, government officials who demand bribes or penalize investors for refusing to pay them could violate the customary international law standard as well, and give rise to a TPP claim.

The Interpretive Relevance of the TPP's Anti-Corruption Chapter

This is where the anti-corruption provisions in Chapter 26 may come into play. As Annex 9-A to the TPP's Article 9 recites, customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation" – the classical formulation of state practice and opinion juris. As indicated in several earlier cases and more recently reiterated in Philip Morris v. Uruguay, states' adoption of particular rules in international treaties can constitute "evidence" of the "evolution" of customary international law. Most of the TPP signatories are already members of the OECD and UN anti-corruption conventions and APEC guidelines, the former dating back to 1997. In fact, TPP Article 26 reaffirms the APEC principles, requires TPP members to join the UN Convention against Corruption, and allows membership in the OECD Convention to satisfy the TPP's anti-corruption legislative requirements. It could be argued that adoption of those prior treaties and guidelines, combined with the TPP's anti-corruption chapter itself, indicate that prohibition on bribe solicitation is both a consistent state practice among TPP members and is accepted as a legally binding obligation.

The TPP's anti-corruption rules could influence its investment protection chapter in another way. Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty must be interpreted in accordance with the ordinary meaning of its terms "in their context," and that "context" includes both separate treaty provisions and "[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty." The TPP's Article 9 and Article 26, of course, are provisions of the same collective instrument, and thus contextual analysis of the investment protection requirements in Article 9 must consider the anti-corruption provisions in Article 26. While Article 9.6(3) states that "a determination that there has been a breach of another provision of this Agreement . . . does not establish that there has been a breach of this Article" (i.e., the requirement of FET/FPS), that provision still leaves room for other portions of the TPP – such as the anti-corruption chapter – to influence the interpretation of the investment protection rules. Certainly, given their adoption of robust anti-bribery requirements, it would be difficult for any TPP member to argue, as a respondent, that it intended to subject foreign investors to the depredations of corrupt officials, without effective recourse.

Increased Scrutiny of Investor Conduct

The TPP's anti-corruption provisions could also cut the other way in investment disputes. Corruption by investors has become a recurrent issue in investment treaty jurisprudence. Several tribunals have rejected claims by companies that engaged in corrupt activities, whether on the ground that their investment was not covered under the treaty, or because bribery inherently violates international law, leaving the investor with "unclean hands" and unworthy of protection. Other tribunals, most famously in *Yukos*, have held that illegality in operating an investment (as opposed to the initial making of the investment) does not affect jurisdiction nor bar relief on the merits, although it may affect damages.

The TPP's anti-corruption chapter could push tribunals to hold investors more strictly accountable for bribery. As noted above, Chapter 26 specifically requires states to enact and enforce laws prohibiting companies from offering or paying bribes. Within the investment chapter, Article 9.16 states that nothing in that chapter shall be construed to prevent a TPP member from taking measures to ensure investments are "sensitive to . . . regulatory objectives" (presumably, including anti-corruption policy), while 9.17 "reaffirms" the importance of companies' adopting guidelines and principles of "corporate social responsibility." Those provisions may strengthen the position of a respondent state invoking the "unclean hands" doctrine and arguing that an investor's corrupt activity should disqualify it from pursuing a claim altogether.

The TPP's Possible Legacy

It is unclear that the TPP will ever take effect. In the United States, the tenor of the current presidential campaign – in which both major parties' nominees oppose the treaty – suggests that it will not happen before the November 2016 election, and that even then it may be doomed in its current form. Even so, aspects of the TPP – the product of years of negotiations and careful drafting by major economic powers – will likely survive as precedents or templates for future treaty negotiations. In particular, the TPP's anti-corruption chapter may serve as a model for similar multilateral agreements, or portions of future trade agreements. As such, they may yet play a role in determining how future tribunals address the issue of bribery in international investment disputes, and how investors may take part in the global fight against public corruption.

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