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The TPP as a Template to Liberalize Investments: Normative Glory or Chaos?

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The Trans-Pacific Partnership ("TPP") is a state-of-the-art multi regional trade agreement that, once ratified, will transform the scenario of international trade and arbitration for the next century. The TPP will have an impact on the rules governing global investment, influencing future and current negotiations of Bilateral Investment Treaties ("BITs") and Free Trade Agreements ("FTAs"). It might even guide the negotiations of the Transatlantic Trade and Investment Partnership ("TTIP"), the Regional Comprehensive Economic Partnership ("RCEP"), and the Free Trade Area of Asia Pacific ("FTAAP").

Moreover, the application of the TPP will have a ripple effect that will surpass the border of the TPP members. Non-signatories states will be certainly affected by the new trade setup and its national investors might want to rethink their current business plans to benefit from the TPP. (See also USTR analysis on the likely effects of TPP in the U.S. economy and on specific industry sectors).

Although the TPP is an agreement of higher standards, article 1.2 could deteriorate it. This article states that the TPP will coexist with all existing international agreements ("IAs"), even though their norms overlap. While some member States will derogate some of their BITs with other member States, many others could remain in force.

Just focusing on the investment provisions, the coexistence of the TPP with the pre-existing universe of BITs and FTAs with investment chapters will raise issues in many aspects and will require thorough interpretation. It is highly possible that, in a claim brought under the TPP, arbitrators will be challenged with conflicts of applicable law issues and will need to interpret overlapping provisions. Not only might the parties in a claim under the TPP want to bring to the dispute a provision of another BIT to elude the stricter standards of the TPP, but also arbitrators might want to consider the universe of existing IAs when they make a decision. Moreover, investors could opt to litigate under another BIT because it is more beneficial to their case as a whole, but at the same time, try to import TPP provisions to their claim.

Seeing that a collision of norms will potentially exist, will the high standards of the TPP be applied as they were originally thought? Will the co-existence of norms lead to a normative chaos?

Walking through the TPP and the potential collision of norms

The concurrence of the TPP with other IAs will create three possible scenarios. The TPP will make other IAs outdated; the TPP will fill in the gaps and upgrade other IAs; or the TPP's provisions will collide with other IAs provoking a normative conflict.

The TPP is structured to be an exclusive forum for litigation; that is, if a claim is initiated under article 9.19, its procedural mechanism will be exclusive. According to article 9.21.b(ii), the notice of arbitration must be accompanied by the claimant's written waiver to initiate or continue a claim before any court or administrative tribunal under the law of the party, or another dispute settlement procedure.

Furthermore, article 9.5 excludes from the scope of the MFN clause any international dispute resolution procedure. An investor will not be able to bring a more favorable procedural provision from another BIT to a TPP dispute through the MFN clause – such as article 6.3 of the Malaysia-Chile BIT that provides a shorter *cooling off* period of 3 months.

Notwithstanding this, an investor could prefer to litigate under other BITs or FTAs instead of the TPP. For instance, a Canadian company suing the U.S. for the denial of a license might prefer to bring a case under NAFTA instead of the TPP because it is more favorable for the investor. Compare, for example, the outcome of *Metalclad v. Mexico (*Award ¶102-112) with Annex 9-B of TPP (expropriation), and the standards applied to transparency of arbitral proceedings in article 9.24 TPP and NAFTA.

In relation to the substantial provisions of the TPP, a collision of norms is likely to exist. First of all, in the TPP there is a careful coordination between the jurisdiction of the arbitral tribunal and the applicable law to the dispute. Following the US Model BIT of 2012, in the TPP, the scope of jurisdiction of the arbitral tribunal extends to a breach of an obligation under Chapter 9 Section A; an investment authorization; and an investment agreement (article 9.19). Regarding the applicable law, if the claim is based on the breach of a TPP substantial obligation, the arbitral tribunal will have to apply the provisions of the TPP and *applicable rules of international law*. If the claim is based on an investment authorization or an investment agreement, the applicable law will be the one *agreed by the parties,* and if it has not been specified, the tribunal will apply the *law of the respondent, including the rules on conflict of laws* and such *rules of international law as may be applicable* (article 9.25).

Having said this, an arbitral tribunal will be able to apply another BIT or FTA it considers relevant to the dispute. The provisions making reference to the *applicable rules of international laws*, *applicable law agreed by the parties,* and even the *domestic laws of the respondent state and such rules on international law* enable arbitrators to interpret the universe of IAs to find a solution.

Moreover, the parties may try to import substantive provisions contemplated in other BITs or FTAs through the MFN clause of the TPP. It is important to keep in mind that there are some limitations to consider. First of all, *like circumstances* should exist; second, procedural mechanisms are excluded from the MFN scope; and third, there are some sectors, subsectors, or activities that are specially excluded from the application of the MFN and national treatment clauses (article 9.11 and Annexes I and II).

Finding possible solutions

Given that collision of the TPP provisions with other BITs and FTAs is likely to occur, is there a way the high standards of the TPP will remain intact?

The best way to avoid a conflict of norms is the denunciation of all existing BITs and FTAs investment chapters that overlap with the TPP. In the case of FTAs with investment chapters, it is not a straightforward issue because amending one chapter could open the gate to renegotiate other provisions of the FTA.

The TPP provides possible solutions to interpret potential collision of norms. First, article 1.2.2 allows for a reconciling interpretation. If a Party considers that there is any inconsistency between the TPP and another IA of which at least another Party is a member, the relevant Parties shall consult with a view to reaching a mutually satisfactory solution. Second, a State may request the Commission of the TPP to interpret any provision of the TPP (article 27.2.2(f)). Such interpretation will be binding to the arbitral tribunal and the decisions issued must be consistent with it (article 9.25.3).The tricky point is that, in practice, this method could fail, since the Commission's decisions require consent of all state members. To put this in perspective, in the 22 years of NAFTA, the Free Trade Commission has only issued one resolution on interpretation of the Treaty. Are these joint resolutions likely to occur in the TPP, a partnership that includes 12 members?

If the arbitral tribunal estimates that there is a conflict of norms on the same subject matter, article 30 of the Vienna Convention on the Law of Treaties ("VCLT") sheds some light, yet it could be a double-edged sword. Article 30.3 of the VCLT could be a solution, by applying the *lex posterior principle*. If the parties to the earlier and later treaty are the same, the earlier treaty would be applied to the extent that its provisions are compatible with those of the later treaty. However, in the context of the TPP, and due to the existence of article 1.2, article 30.2 of the VCLT is likely to apply. It follows the *lex prior principle*, which establishes that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." In this case, a prior BIT or FTA could override the TPP, so arbitrators will have to carefully analyze whether to characterize a conflict as one on the same subject matter.

Conclusion

Article 1.2 TPP will most likely bring conflict of laws between the TPP and other IAs. This creates the potential risk that the high standards of the TPP could not be fully applied. Arbitrators will have to carefully analyze the claims, interpret treaty provisions, and apply a strict criteria to avoid the importation of other BITs provisions that could frivolously deteriorate the TPP standard. Furthermore, TPP member States will have to make efforts to address the interpretation of conflictive provisions in the short term before a large number of cases arise on the same issue with dissimilar reasoning.

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