

Legal review on investor-state dispute settlement under TPP

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ABSTRACT: Investor-state dispute settlement (“ISDS”) is an instrument of public international law, which grants an investor the right to use dispute settlement proceedings against a foreign government. Though, there are pros and cons in ISDS under Trans-Pacific Partnership, which is originated from international treaties and practice of U.S. However, ISDS under Trans-Pacific Partnership has some innovations compared with the original ISDS. This paper first briefly introduces ISDS under Trans-Pacific Partnership and does a theoretical analysis of ISDS, then makes comparison between ISDS under Trans-Pacific Partnership and other dispute settlement mechanism to find new international investment standard, finally considers China should make a comprehensive research on ISDS and other TPP clauses so that reform measures to promote international investment could be taken.

Keywords: ISDS; Trans-Pacific partnership; arbitration

After 7 years of negotiations, the Trans-Pacific Partnership (TPP) was reached on 5 October 2015. Compared with other trade agreements, the TPP Agreement contains measures to lower trade barriers such as tariffs, and establish an investor-state dispute settlement mechanism (but states can opt out from tobacco-related measures) named “ISDS” for short^[1]. This achievement has evoked great repercussion in the world. TPP is not only the reconstruction of the trade rule of WTO, but also the challenge for the countries that are not partners of TPP. It is known that 12 participating countries together occupy 40% global economy. Thus for China, which is excluded in TPP, it is time to do a comprehensive research on TPP.

1 A BRIEF INTRODUCTION OF ISDS UNDER TPP

Chapter 9 of TPP has divided the agreement related investment into section A and section B. Section A is the general regulations of investment, while section B is special about ISDS. ISDS is an instrument of public international law, which grants an investor the right to use dispute settlement proceedings against a foreign government. United States Trade Representative (USTR) has made a brief introduction of TPP, which

points that the ISDS under TPP makes up for the defects of the original mechanism, and establishes higher standard to guarantee investors, the main measures of TPP are as follows^[2].

(1) The right to regulate. New TPP language underscores that countries retain the right to regulate in the public interest, including health, safety, the financial sector, and the environment. (2) Proof burden. TPP explicitly clarifies that an investor bears the burden to prove all elements of its claims, including claims on the minimum standard of treatment (MST). (3) Dismissal of frivolous claims. TPP includes new standard permitting governments to seek expedited review and dismissal of claims that are manifest without legal merit. (4) Expectations of an investor. TPP explicitly clarifies the mere fact that a government measure frustrating an investor’s “expectations” does not give rise to an MST claims. (5) Arbitrator ethics. TPP countries will provide detailed additional guidance on arbitrator ethics and issues of arbitrator independence and impartiality. (6) Clarifying rules on non-discrimination. TPP explicitly clarifies tribunals evaluating discrimination claims should analyze whether the challenged treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives. (7) Scope of available

damages. TPP explicitly limits compensation that an investor can recover to damages that he or she has actually incurred, to address concerns about claimants seeking ISDS damages arising from cross-border trade activity.

TPP also includes a range of important additional ISDS safeguards. Many of these safeguards go beyond what was included in the past trade deals like North American Free Trade Agreement (NAFTA)^[3]. These key ISDS safeguards include^[4]:

(1) Transparency. TPP requires ISDS panels to “conduct hearings open to the public” and to make public all notices of arbitration, pleadings, submissions, and awards. (2) Public participation. Members of the public and public interest groups—for example, labor unions, environmental groups, or public health advocates—can make *amicus curiae* submissions to ISDS panels “regarding a matter of fact or law within the scope of the dispute.” (3) Remedies. A government can only be required to pay monetary damages. ISDS does not and cannot require countries to change any law or regulation. (4) Challenge of awards. All ISDS awards are subject to subsequent review either by domestic courts or international review panels. (5) Expedited review and dismissal of claims. As in U.S. courts, TPP allows panels to review and dismiss certain unmeritorious claims on an expedited basis. (6) Attorney’s fees for frivolous claims. A panel may award attorney’s fees and costs in cases of frivolous claims. (7) Expert reports. A panel can consult independent experts to help resolve a dispute. (8) Binding interpretations. TPP countries can agree on authoritative interpretations of ISDS provisions that “shall be binding on a tribunal.” (9) Consolidation. A panel can consolidate different claims that “arise out of the same events or circumstances.” This protects against harassment through duplicative litigation.

ISDS is not only the demand for foreign investors, but also a game among the countries. Ostensibly, TPP is not only a regional trade agreement, but what TPP is involved in is more than the general trade range. TPP allows investors directly to make a claim for host state to ICSID and other institution for arbitration. It entitles investors to make a complaint to the host state, which now becomes the strongest safeguards for investors under international investment agreement^[5]. To some extent, ISDS gives extraordinary new privileges and powers and rights to just one interest. Foreign investors are privileged vis-a-vis domestic companies, vis-a-vis the government of a country, and vis-a-vis other private sector interests.

2 THE THEORETICAL ANALYSIS OF ISDS UNDER TPP

In general, TPP inherits US-led capital exported countries’ challenge for “Carlo Calvo”^[6], and weakened state sovereignty. ISDS goes much further: the obliga-

tion to compensate investors for the losses of expected profits can and has been applied even where rules are nondiscriminatory and profits are made from causing public harm.

The advocates of ISDS think that it is difficult for foreign investors to find reasonable legal relief measures through relief mechanism in sovereign state. Also ISDS sets non-discrimination rules for investors since ISDS makes a claim outside the host state’s jurisdiction. In theory, the interest under this article is based on the relationship between state and investor, which means that once something about investment happens, host state will interfere with the interest of investors alternatively. So in general, ISDS will include a series of implement rules, which could reduce the possibility of nationalization when investors consider whether to invest overseas. However, the critics also give three reasons to criticize ISDS, which are ignorance of law, diversification of law and vagueness of law^[7].

One of the reasons of traditional ISDS being criticized is that the arbitral tribunal is lack of consistency and transparency, as well as the fee is too high. For example, when South Africa made the decision that it would not review the bilateral investment treaty with Belgium-Luxembourg economic union, South Africa gave the reason that there were unforeseen and unacceptable risks. This concern has caused many experts and USTR to find the way to reform ISDS. European Union has published a list that shows how committee to settle these problems in the future^[8]. Thence the highlights of ISDS under TPP are as follows:

First, absorb consultation and negotiation mechanism. Article 9.17 of TPP is about the procedure of consultation and negotiation before arbitration, it means that the claimant and the respondent “should” initially seek to resolve the dispute through consultation and negotiation, not the parties “shall” regard the consultation as prepositional procedure. It is not very difficult to find that compared with 2012 U.S. Model Bilateral Investment Treaty, TPP pays more attention to arbitration while gives a little attention to consultation which is the customary practice.

Second, strengthen the arbitral transparency. Because of the face-to-face solution mode of arbitration, the private arbitration is essential for the protection of commercial interest, which has been known that traditional ISDS is lack of transparency and the citizens have no chances to participate as *amicus curiae*. For most dispute settlement, the procedure of ISDS is not open except both parties agree to be public, however, mostly; the investor will choose to be confidential. By 2012, there were 85 cases according to UNCITRAL, and only 18 of them were public. In general, the procedure and tribunal of arbitration is confidential.

The lack of transparency and participation mechanism is worthy of our concern, since arbitral tribunal will affect the health of the public and environmental policy. Although the nature of investment arbitration

is the dispute under private law between foreign investor and host state, the main issue is concentrated on public law, such as the execution of environmental regulation. Also due to the high damages of investment arbitration, host state usually does not implement this policy or modify it. Such as the case of *Metalclad vs. Mexico*, the panel required Mexico to compensate for \$16200000, and the reason is a government in Mexico refused to permit the company to expand a toxic waste facility to an environmentally sensitive area. Another case is that a Canadian petroleum corporation *Ethyl* made a claim for Australia injunction on exploitation of MMT, the corporation asked for damages at about \$200 billion. For this potentially huge social responsibility, Canada agreed to revoke the injunction^[9].

In this aspect, investment arbitration is different from commercial arbitration, because commercial arbitration has little influence on public law, while an ISDS tribunal will influence the citizens' rights, so, the establishment of ISDS mechanism shall have the articles of transparency and *amicus curiae*. Transparency demands tribunal to be public, it is very important for public to make a limitation on discretion^[10].

The arbitral procedure under TPP is unconventional, its basic principle is "publication in principle, non-disclosure is exception", which means that when claimant makes a claim to arbitration, respondent shall promptly transmit the related documents to the non-disputing parties and make them available to the public, and the tribunal shall conduct hearings open to the public, except some documents need to be confidential. To this point, ISDS clause of TPP is a bold innovation compared with the traditional ISDS.

Third, keep tribunal consistency. Due to the lack of *stare decisis* and the procedure to appeal, there usually some tribunals inconsistently happen former and latter. Just as what have discussed, tribunals will have different ideas when make an interpretation on the articles. Some experts have said: the lack of certainty and consistency of treaty lead to the challenge on arbitration whether it is legal. Inconsistency reduces citizens' self-identity degree on ISDS, because it limits states and investors to predict the behavior in the future. Furthermore, unpredictability could lead to dispute and make more unnecessary cost for the government.

Another aspect is that the lack of transparency will make the difficulty for tribunal to make a total evaluation on the case. That is why so many cases are inconsistent. Also the *ad hoc* of tribunal and vagueness of the article for the protection further exacerbate the severity of this problem. It is known that the governments also have no methods to settle these problems. And most arbitral procedure is not allowed to evaluate the matter of fact.

For the settlement of the tribunal, many experts suggest that it should set the procedure for investors to appeal. But TPP does not follow the experts' advice.

No procedure of appeal, on the one hand, is due to the nature of "arbitration award is a final ruling", on the other hand, is to improve the efficiency of dispute settlement.

Finally, concern the damages of dispute settlement. The negative effect of ISDS on public interest is the huge damages. Up till now, only by ISDS based on American regional investment agreements to investors are more than \$430 million. The great number of cases increases the risks of national responsibilities. The number of cases is to increase 1 or 2 cases per year in the late 1980s to 30 per year in 2003. In 2011, the new cases were at least 46; it is the highest number since the record^[11].

Because the damages of ISDS are always millions of dollars, this will give more pressure on public finance and could create new regulations on public interest. It often gives broad definition on "investment" in the international investment agreement, also including the benefit. In Article 9.1 of TPP, investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. It could provide meaningful protection for investors without injuring the adjustment ability of state on public interest. Furthermore, In order to prevent the "frivolous" behavior, TPP makes a limitation on the range of damages, which means that only financial damages, no punitive damages, and host state does not need to modify the regulations. Hence, if once a behavior is regarded to be frivolous, the respondents could get some reasonable costs and attorney's fees^[12].

3 THE COMPARISON BETWEEN ISDS UNDER TPP AND OTHER DISPUTE SETTLEMENT MECHANISM

The same experience of national and international law is that any civilized society needs a corresponding rules and procedures for the peaceful settlement of disputes. So no matter whether is bilateral investment agreement or multilateral/regional investment agreement, all have dispute settlement mechanism. So it is necessary to make a comparison among NAFTA, China ASEAN Free Trade Area (CAFTA), World Trade Organization (WTO)^[13] and ISDS under TPP (see Table 1).

From the earlier comparison, we could make a preliminary conclusion that the ISDS under TPP is originated from the State-investor dispute settlement in NAFTA, but it makes more improvement. The main aspects are the preliminary procedure and *amicus curiae*, and it fully reflects the flexibility of TPP. Furthermore, it is easily to find that the parties under TPP are investor and state, while members of CAFTA and WTO are states. Under CAFTA and WTO, the investors only could make a relief through government. However, Chapter 28 of TPP is the regulation on dis-

Table 1. The comparison between TPP, NAFTA, CAFTA and WTO

	TPP	NAFTA	CAFTA	WTO
Consultation and negotiation	Alternative procedure	Pre-procedure	Alternative procedure	Pre-procedure
Disputing parties	State-investor	State-investor	State-state	Nation
Submission of a claim to arbitration	6 months after consultation	6 months after the injured facts happen	60 days after consultation(sometimes 20days)	Be like judicial procedural, except the implementation of panel report could be involved in tribunal, no procedural is related to this
Consent of each party to arbitration	Each party consents to the submission	Each party consents to the submission	Each party consents to the submission	
The rules of arbitration	The ICSID Convention; the ICSID additional facility rules; the UNCITRAL arbitration rules; parties agrees to choose	The ICSID Convention; the ICSID additional facility rules; the UNCITRAL arbitration rules	Agreement on dispute settlement mechanism of the framework agreement on comprehensive economic co-operation between China and ASEAN	
The selection of arbitrator	3 arbitrators	3 arbitrators	3 arbitrators	
Consolidation	Based on a question of law or fact in common and arise out of the same events or circumstances	Based on a question of law or fact in common and arise out of the same events or circumstances	Based on a question of law or fact in common and arise out of the same events or circumstances	
Governing law	This agreement and applicable rules of international law	This agreement and applicable rules of international law	This agreement and applicable rules of international law	DSU
Implementation	ICSID Convention; New York Convention; Inter-American Convention	ICSID Convention; New York Convention; Inter-American Convention	Agreement on dispute settlement mechanism of the framework agreement on comprehensive economic co-operation between China and ASEAN	DSU
Award	Monetary damages, no punitive damages	Monetary damages, no punitive damages	Modify the regulations	Modify the regulations
Transparency	Yes	No	No	Yes
The others	Amicus curiae	-	--	--

pute settlement among countries; investors have the rights to choose.

By comparing the ISDS mechanism in TPP and 2012 U.S.BIT, they are nearly the same text, both originated from NAFTA. So there is no doubt that TPP is an U.S.-led multilateral investment agreement. The comparison between TPP and 2012 U.S.BIT is as follows (see Table 2).

4 SECOND THOUGHT ON ISDS UNDER TPP

During the negotiation of TPP, different countries have different ideas on whether absorbing ISDS into TPP, which includes Australia and any other countries that actively opposed.

In 2011, Australian regulation-Trade Policy Statement^[14] put forward: the government does not support to absorb ISDS, because it gives more rights to the foreigners than the natives. Especially, the statement does not support the regulations that based on public interests and environment, while these regulations will not give discrimination on trade abroad. So at that time, Australia stated that it would not absorb ISDS during the negotiation of TPP. Actually, merely from the Trade Policy Statement, it could predict that the investment agreement in the future, ISDS mechanism will be replaced by native court. There is no doubt that

the jurisdiction in 2011 Trade Policy Statement is based on the theory that the dispute between investors and states should be settled by native court, not by international arbitration, also foreign investors will not have more rights than native investors. Its source is the theory of public policy: if it entitled foreign investors priority on dispute settlement, it is not very good for the achievement of national interest, what's more, if it could not achieve the national interests, the native courts will replace the jurisdiction. Just because of these theories, Australia actively objected the behavior to absorb ISDS into TPP. Australia is the only country to seek a full exemption from the ISDS clause in the TPP. Other countries are simply seeking a partial exemption from the ISDS mechanism. Also Australia is not necessary to make a firm decision that all disputes between investors and states are settled by native courts. At the beginning of the negotiation, Australia advised to absorb two-level dispute mechanism, which means the parties have rights to choose whether the dispute is settled by native courts or ISDS. The final decision will also vary depending on the circumstances, such as the case Philip Morris, the basis is Australian free trade agreement, not Australian jurisdiction^[15].

The new model bilateral investment treaty, such as 2012 U.S. model bilateral investment treaty and bilateral investment treaty between China and Canada,

Table 2. The comparison between TPP and 2012 U.S.BIT

	The same	The different	others
Consultation and negotiation(article 9.17 in TPP& article 23 of BIT)	Alternative pre-procedure (should)	—	Claimant could choose whether to have consultation and negotiation
Submission of a claim to arbitration(article 9.18 in TPP& article 24 of BIT)	1. The claimant can be on behalf of himself or an enterprise 2. The arbitration rule: The ICSID Convention; the ICSID additional facility rules; the UNCITRAL arbitration rules; parties agrees to choose	Article 9.18.2 in TPP entitle respondent can make a counterclaim	The procedure of counterclaim TPP prevents the claimant to behave illegal indirectly.
Consent of each party to arbitration(article 9.19 in TPP& article 25 of BIT)	1. Each party consents to the submission 2. Satisfy the requirements of: Chapter II of the ICSID Convention and the ICSID additional facility rules, article II of the New York convention, article I of the inter-American convention	Article I of the Inter-American convention is new in	TPP is more serious than U.S. BIT
Conditions and limitations on consent of each Party(article 9.20 in TPP& article 26 of BIT)	Conditions and limitations	The time in TPP is 3 years and 6 months while in BIT is 3 years.	IPP prolongs the time to protect investors.
Selection of arbitrators(article 9.21 of TPP& article 27 of BIT)	One arbitrator appointed by each of the disputing parties the presiding arbitrator, appointed by agreement of the disputing parties	The more details for arbitrators in TPP, such as more expertise or relevant experience	—
Conduct of the arbitration(article 9.22 in TPP& article 28 of BIT)	1. The legal place of arbitration is free choice 2. Non-disputing party can make submissions 3. Amicus curiae 4. Reasonable costs and attorney's fees	—	—
Transparency of Arbitral Proceedings(Article 9.23 in TPP& Article 29 of BIT)	1. Prompt publication 2. Conducting hearings open to the public 3. Public information required to be disclosed	—	In general, arbitration is confidential; the transparency of arbitral proceedings in TPP and BIT is good for both parties.
Governing law(article 9.24 in TPP& article 30 of BIT)	The convention and applicable rules of international law	Commission has the right to interpret in TPP, while both parties have the rights in BIT	—
Interpretation of annexes(article 9.25 in TPP& article 31 of BIT)	90 days for interpretation	—	—
Expert reports(article 9.26 in TPP& article 32 of BIT)	Report in writing on factual issue concerning scientific matters	—	Expert reports have positive effect on arbitration
Consolidation(article 9.27 in TPP& article 33 of BIT)	A question of law or fact in common and arise out of the same events or circumstances	—	Improve the efficiency of the arbitration award
Awards(article 9.28 in TPP& article 34 of BIT)	1. Monetary damages 2. No punitive damages	—	The damages are monetary, and the state does not need to modify the regulations, so little influence on the host country.

because of the increasing number of disputes between investors and states, it has replaced the former model bilateral investment treaty, such as 2004 U.S. model bilateral investment treaty. So the model of BITs clearly defines the substantive contents that the tribunal has to make a decision, which is to expand the scope of the collection and regulation in order to distinguish the “Fair and Impartial treatment” and “the Minimum Treatment”, and also make a limitation on National Treatment for foreign investors. Modern bilateral investment agreement, especially one party is American, always include the article for the protection of national security and also the measures taken by the government to protect the public health, public morality, social welfare and sustainable development social and public interests, such as the bilateral investment agreement between the United States and Peru and the

economic cooperation agreement between Singapore and India.

The result of this development is like Australia, although the final text of TPP comprises ISDS, it reduces the range that could be used. What's more, Australia is not the only country to object ISDS. During the negotiation of TPP, Some judges, lawyers and scholars from New Zealand, Australia, Canada and Britain who have considerable influence reject the introduction of ISDS mechanism in TPP. Firstly, the main reason is the definition of “investment”, because it does not require foreign investors to make contribution to the host state. Secondly, it is the specific content, which always entitles foreign investors more than native investors. The third reason is that TPP entitles investors immunity based on “the conflict of law”. The fourth reason is the interpretation of the “gov-

ernment measures” in the private contract litigation. The fifth reason is to avoid the regulation that “government requires investors to seek remedies in the court” through the “Most Favored Nation Treatment”. The sixth reason is the applicable dispute settlement mechanism. And the last reason is the role changing between the lawyer and judge. Because it is against the principle of transparency, consistency and due process the most meaningful conclusion is that “all the states participating the negotiation of TPP should deny ISDS in order to maintain the integrity.”

Although TPP in the negotiation stage suffered a number of voices of opposition, and in the final text, some countries have also made reservations about the individual matters, for instance, Australia has made some of its policies and regulations related to the investment policy not applying to the dispute settlement in Annex 9-H. Canada, Mexico and New Zealand reserve jurisdictions on whether to allow reconsideration of foreign investment. The same in Annex 9-J, Peru, Chile, Mexico, Vietnam adopt “Fork clause”, which means that investors can only choose one of the methods between litigation in native court and arbitration^[16]. So the ISDS under TPP has not been accepted by all the countries in the negotiations. But the final text of the TPP is sufficient to illustrate its advantages outweighing the disadvantages. Research and acceptance of ISDS mechanism is the trend of the world dispute settlement mechanism.

On the basis of value orientation, there are two stages—the stage of national standard and the investor standard^[17]. The national standard stage is that investors only have the status of litigation subject in domestic law, and have no litigation subject in international dispute settlement mechanism (such as WTO). In the event of interest conflict, investors can only seek relief from home state, and home state, as eligible subject, provides help through diplomatic protection or international arbitration. While investor standard stage is marked by Convention on the Settlement of Investment Disputes between States and Nationals of other states (ICSID Convention), investors can be a legal entity in the international proceedings, this means that investors could have right of claim based on the treaty.

China, as a member of ICSID, signing the convention in 1993, stated that China only transfers the jurisdiction to ICSID on expropriation and nationalization, but with the increasing number of bilateral investment treaties between China and other states, China also basically gave up the reservation of ICSID, fully accept the jurisdiction of ICSID^[18].

China has been the biggest exporter since 2009, and according to the total amount of imports and exports, China surpassed the United States for the first time in 2014 to become the largest trading nation in the world^[19]. Especially with the dual national policy—“One Belt One Road” strategy and “Going Out” strategy boosting, appropriate consideration of the acceptance

of ISDS mechanism is necessary.

China has signed a bilateral investment agreement with Canada and Chile in 2012, among the bilateral investment agreements between China and Chile, the dispute settlement procedure between investor and host state is consultation, submission to arbitration, consent by both parties, the limitation on the range of arbitration, the selection of arbitrator and so on. So, it can be seen that China gradually accepts ISDS in bilateral investment agreement.

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