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Empirically situating the TPP
in the investment treaty universe

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THE NEW GOLD STANDARD? EMPIRICALLY SITUATING THE TPP IN THE INVESTMENT TREATY UNIVERSE^{*}

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Abstract

The Transpacific Partnership (TPP) has been labelled a “new, high-standard trade agreement”. But just how “new” and “high” are the standards it sets? In this paper, we answer this question in relation to the TPP investment chapter. Combining traditional legal analysis with computational text comparisons we are able to situate the TPP in the wider universe of international investment agreements (IIAs). We find that the TPP investment chapter offers few truly novel features and is instead heavily influenced by prior American treaty practice — 82% of its text is taken from the USA-Colombia FTA investment chapter. The TPP investment disciplines do, however, set high standards that go beyond the majority of IIAs previously concluded by the TPP parties and beyond. Treaties coexisting in parallel to the TPP, such as NAFTA, have thus become largely redundant. Yet, given that the majority of overlapping agreements is still in force, the TPP standards are open to circumvention and challenge through forum shopping and normative conflicts. Finally, the TPP’s high standards arguably make it less rather than more likely that its investment chapter becomes a template for future multilateralization efforts. As disagreement persists with Europe and among BRICS countries as to what constitutes high standards in investment treaty design, multilateralization remains a distant goal.

^{*}We developed a companion website <http://mappinginvestmenttreaties.com/specials/tpp/> to showcase the findings of this paper in an interactive fashion. The usual disclaimer applies.

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Introduction

ON OCTOBER 5, 2015 THE NEGOTIATIONS on the Trans-Pacific Partnership (TPP) Agreement were concluded. The TPP brings together 12 countries on both sides of the Pacific that jointly account for nearly 40% of the world's GDP and about $\frac{1}{3}$ of global FDI inflows.¹ It is today's prime example of a new generation of "mega-regional" trade agreements that bring together more states and cover more trade and investment flows than earlier free trade agreements (FTAs).²

While the TPP breaks new ground in terms of size, what type of agreement was reached in terms of substance? The TPP parties themselves have affirmed that they have concluded a "new, high-standard trade agreement".³ Yet, how "new" are the TPP disciplines in fact? Is the TPP an FTA 2.0 or is it more of the same? And how "high" are the standards it sets really? Is the TPP an ambitious gold standard or, rather, the lowest common denominator of negotiations involving 12 very diverse countries?

In this article, we answer these questions with respect to the TPP investment chapter. By combining computational comparisons of text with traditional legal analysis we are able situate the TPP's investment disciplines in the broader universe of international investment agreements (IIAs). After a brief overview of the TPP investment rules, we show that they are not as new as they are proclaimed to be. Instead, the TPP investment chapter largely follows U.S. treaty practice copying 82% of its text from the next closest investment chapter of the U.S.-Colombia FTA. The TPP does, however, go further than most non-U.S. IIAs. Both between TPP parties and beyond, it provides for a broader scope of investment protection, more specific coordination between investment and non-investment values and a state-of-the-art investment arbitration mechanism. The TPP thereby sets high standards rather than codifying treaty practice at a lowest common denominator.

The location of the TPP as a high standards agreements in a universe of predominantly

¹Office of the United States Trade Representative, *Overview of the Trans Pacific Partnership*, available at: <https://ustr.gov/tpp/overview-of-the-TPP>; UNCTAD, World Investment Report 2015, p. 6.

²World Economic Forum, *Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?*, Global Agenda Council on Trade & Foreign Direct Investment, July 2014, available at: http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf

³White House Press Release, *Fact Sheet: How the Trans-Pacific Partnership (TPP) Boosts Made in America Exports, Supports Higher-Paying American Jobs, and Protects American Workers*, October 5 2015, available at: <https://www.whitehouse.gov/the-press-office/2015/10/05/fact-sheet-how-trans-pacific-partnership-tpp-boosts-made-america-exports>. Similarly, Australian Department of Foreign Affairs and Trade, *Summary of the Trans-Pacific Partnership Agreement*, available at: <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/summary-of-the-tpp-agreement.aspx>; Ministry of Trade and Industry Singapore, *Trans Pacific Partnership Free Trade Agreement (TPP) 7 things you should know*, available at: [https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/TPP/Seven things you should know about the TPP \(Final\).pdf](https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/TPP/Seven%20things%20you%20should%20know%20about%20the%20TPP%20(Final).pdf)

less elaborate investment agreements has implication for TPP's interaction with other investment treaties and future negotiations. The TPP currently overlaps with 35 investment agreements, such as NAFTA, concluded among a subset of TPP parties, which, in their investment dimension, have been rendered largely redundant by the TPP. Yet, the unfortunate choice of TPP parties to nevertheless leave most of these overlapping agreements in place is likely to give rise to serious coordination challenges, jurisdictional forum shopping and normative conflict. Turning to future negotiations, the hopes for a multilateralization of investment norms, which the TPP has rekindled,⁴ are likely to be disappointed. First, finding a common ground between the U.S. and EU will be difficult as their respective opinions of how a "high standards" agreement looks diverge. Second, alternative views on the desirability and design of investment treaties and arbitration have become prominent in BRICS countries making a convergence of treaty design around the TPP seem unrealistic. Rather than harmonization around the TPP's high standards, we are thus likely to see a proliferation of mega-regional treaties that differ in the standards they set at least in the short run.

With multilateralization looming farther away, it becomes increasingly important to make sense of the growing complexity of the existing universe of investment treaties. Therefore, this paper is accompanied by an interactive web-based tool, which enables users to trace our findings and to further compare the TPP investment text to other IIAs in order to situate it in the broader investment treaty universe.

1 Overview of the TPP's investment disciplines

To set the stage, we begin by providing a concise overview of the TPP investment disciplines. The TPP investment chapter presents a familiar two-part structure first introduced by NAFTA in which substantive investment protection clauses (Section A) are followed by investor-state arbitration provisions (Section B). In addition, other TPP chapters contain investment-related elements. We will review these three parts in turn emphasizing their innovations and departures from established practice.

⁴As the United States Trade Representative Froman recently put it: "When we complete TPP and T-TIP, we'll have free trade with two-thirds of the global economy, making it easier to multilateralize high standards." *Remarks by Ambassador Michael Froman to the Atlantic Council*, October 27, 2015, Washington, D.C. available at: <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/October/Remarks-Ambassador-Froman-Atlantic-Council>

1.1 Section A — Substantive Protection

The TPP investment chapter begins with a definition section that builds on existing practice with some innovations.⁵ Investments under the TPP are understood as any asset that contains investment characteristics such as a commitment of capital, the expectation of gain, or the assumption of risk. A notable innovation is that administrative or judicial orders and judgments do not constitute an investment. Also the notions of investment agreements and authorizations between a host state and a foreign investor have been further refined excluding various types of governmental actions from its ambit.⁶ Finally, the TPP also clarifies that the provisions on performance requirements (Article 9.9) and environmental, health and regulatory purpose measures (Article 9.15) apply vis-à-vis all investments rather than just covered investment by an investor of another state party. The TPP thereby continues the interesting practice of offering some protection also to domestic and third party investments.⁷

Turning to the relative standards of protection, the non-discrimination obligations in TPP ensure that covered investments and investors are treated no less favorably than their domestic or foreign counterparts in like circumstances.⁸ Finding like circumstances between investors and investments depends on the totality of the circumstances, which encompasses distinctions drawn pursuant to legitimate public welfare objectives.⁹ The TPP parties thereby affirm prior arbitral case law that allows countries to distinguish between investors and investments based on conditions unrelated to national origin.¹⁰ The contracting parties also clarify that the most-favored nation (MFN) clause cannot be used to attract more favorable dispute settlement provisions from other investment treaties.¹¹ Importantly, both the national treatment (NT) and the MFN clause encompass the establishment and acquisition of investments thereby adding a liberalization component to the investment chapter.

When it comes to the absolute standards of protection, the TPP builds on American and Canadian treaty practice equating the notions of fair and equitable treatment and full protec-

⁵Article 9.1.

⁶Ibid., Footnotes 5-10.

⁷This practice started with NAFTA Article 1101(1) c) and has been continued in subsequent Canadian and U.S. treaties.

⁸Articles 9.4 (National Treatment) and 9.5 (Most-favored Nation Treatment).

⁹Ibid., Footnote 14.

¹⁰See Drafters' Note on Interpretation of "In Like Circumstances" Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment) referring specifically to *Archer Daniels Midland, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007) and *Grand River Enterprises Six Nations Ltd. et al. v. United States of America*, UNCITRAL, Award (12 January 2011). See also Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 48 (2008).

¹¹Article 9.5(3).

tion and security with the international minimum standard of treatment.¹² Going beyond existing practice, the TPP further clarifies that a frustration of an investor's expectation or a reduction of a previously provided subsidy or grant does not in itself amount to a violation of the minimum standard even if it results in losses for the investor.¹³ The expropriation clause contains a similar formulation on the reduction of subsidies and grants in addition to the by now familiar interpretive annex specifying that a claim of indirect expropriation requires a case-by-case, fact-based inquiry of the governmental measure and clarifying that non-discriminatory public purpose regulations do not amount to a compensable expropriation except in rare circumstances.¹⁴

The remaining substantive provisions of the TPP investment chapter consist of non-discriminatory compensation in case of losses arising from armed conflict or civil strife (Article 9.6*bis*), a transfer of funds (Article 9.8) and freedom to appoint senior management (Article 9.10) clause, an extensive provision on performance requirements (Article 9.9) and an elaborate article on non-conforming measures carving out identified legislation and sectors from the scope of the national treatment, MFN, performance requirements and senior management provisions based on country-specific reservations (Article 9.11). The substantive part concludes with miscellaneous provisions relating to the subrogation of rights (Article 9.12), special information requirements on investors (Article 9.13), denial of benefits (Article 9.14) and corporate social responsibility (Article 9.16). The Chapter also enshrines the right of contracting parties to regulate investment in a manner sensitive to environmental, health or other regulatory objectives (Article 9.15).

1.2 Section B — Investor-State Dispute Settlement

The investor-state dispute settlement part of the TPP investment chapter builds on the architecture first established in NAFTA, which situates the direct opposition of host state and foreign investor in a wider system of public international law and public law elements.¹⁵

The public international law elements of the TPP include the right of a non-disputing contracting party to make written and oral submissions to the tribunal,¹⁶ *a renvoi* of questions on the interpretation of annexes upon request by the respondent state to the inter-state commission set-up under the TPP¹⁷ and the ability of the said commission to issue binding in-

¹² Article 9.6 and Annex 9-A.

¹³ Article 9.6(4) and (5).

¹⁴ Article 9.7 and Annex 9-B.

¹⁵ This type of arbitration architecture has been referred to as “embedded” investor state arbitration. See Wolfgang Alschner, ‘The Return of the Home State and the Rise of “Embedded” Investor-State Arbitration’, *The Role of the State in Investor-State Arbitration* (Brill 2015).

¹⁶ Article 9.22(2).

¹⁷ Article 9.25(1).

terpretations of the TPP.¹⁸ The public law elements encompass procedural specifications that are more reminiscent of public law adjudication than traditional commercial arbitration. They include a practice first established by the NAFTA Free Trade Commission to make hearings and documents public¹⁹ and to allow the acceptance of *amicus curiae* submissions.²⁰ A novel step towards a more public guise of arbitration is the foreseen elaboration of a code of conduct for arbitrators as well as guidelines on conflicts of interest.²¹

The TPP also follows NAFTA practice by detailing the arbitration procedure to be followed from an arbitration's commencement with the investor's notice of intent to its end when a confined set of remedies consisting primarily of damages can be awarded. This contrasts to other investment treaties, which leave it to the disputants and arbitrators in conjunction with applicable extraneous arbitration rules (e.g. ICSID or UNCITRAL) to fashion the individual stages of the arbitration. Article 9.22, for instance, establishes specific guidelines for the resolution of preliminary matters, the expedited dismissal of claims without merit, and a comment procedure allowing the parties to react to a draft award. Among the novel procedural clarifications in the TPP is that the investor bears the burden of proving all elements of her claim.²² A final innovation introduced by the TPP relates to the remedies awarded. Here, the TPP specifies that damages are limited to those incurred by an investor "in its capacity as an investor of a Party". It will remain to be seen to what extent such damages can be distinguished from those suffered by an investor in a personal capacity (e.g. its human rights) or those arising from non-investment commercial activities (e.g. exportation or importation).²³ The TPP also clarifies that damages resulting from pre-establishment claims are capped by the losses incurred while attempting to make the investment (rather than counterfactual future lost profits had the investment been made).²⁴

1.3 Investment provisions outside of the investment chapter

Several provisions in other chapters affect the scope and content of the TPP's investment disciplines. TPP Chapter 29 contains exceptions that in part apply to the investment chapter. Article 29.2 clarifies that the TPP does not prevent a member from taking measures that

¹⁸Article 9.24(3) and 9.25(2).

¹⁹Article 9.23.

²⁰Article 9.22(3).

²¹Article 9.21(6).

²²Article 9.22(7).

²³Arguably this will require investment tribunals to pay more attention to the specific protective scope afforded by individual investment protection provisions. See Wolfgang Alschner, 'Aligning Loss and Liability — Towards an Integrated Assessment of Damages in Investment Arbitration' in Theresa Carpenter, Marion Jansen and Joost Pauwelyn (eds), *The Use of Economics in International Trade Disputes: Lessons Learned and Challenges Ahead*.

²⁴Article 9.28(4).

it considers necessary to protect its essential security interest. Furthermore, TPP parties can restrict capital movements when facing serious balance of payment difficulties,²⁵ apply prudential measures to regulate financial services²⁶ and pursue exchange rate policies²⁷ notwithstanding the TPP's investment disciplines. Chapter 11 on financial services further introduces a special procedure for investment disputes involving financial measures that allows the host and home states' financial regulators to determine whether or not a challenged measure benefits from a financial policy exception.²⁸ Such determination is then binding on a tribunal.²⁹ A similar mechanism exists with respect to taxation measures that are challenged as expropriatory.³⁰ Consistent with prior U.S. FTAs, but departing from Canadian and Japanese treaty practice, the incorporated GATT XX/GATS XIV general exception clauses do not apply to the TPP investment chapter.³¹ The TPP does, however, add a novel exception provision allowing member states to deny the benefits of investor-state arbitration to investor claimants challenging tobacco control measures.³² Finally, Chapter 28 provides for inter-state dispute settlement including for violations of the investment chapter.³³

2 Situating the TPP in the investment treaty universe

The descriptive overview of the TPP's investment disciplines provides a first intuition how innovative or far-reaching its standards are. Yet, such descriptive accounts are less useful when we want to systematically relate the TPP's provisions to other IIAs. So how we can conceptualize, measure and compare a multitude of different investment agreements? In this paper, we develop three complementary methods and apply them to situate the TPP's investment disciplines in the wider IIA universe. After introducing our method and dataset we will first identify those agreements most similar to the TPP leading us to conclude that the TPP closely follows U.S. practice. Second, we turn to the question whether the TPP truly sets high standards by relating the TPP to the treaties with which it overlaps in terms of membership. We find that the TPP indeed sets high standards making its overlapping agreements largely redundant. Finally, we relate the TPP to the wider universe of investment treaties concluded over the past 25 years showing that the TPP goes further than most existing BITs.

²⁵Article 29.3.

²⁶Article 11.11(1), footnote 11.

²⁷Article 11.11(2).

²⁸Article 11.22.

²⁹Article 11.22(3). If a joint determination cannot be reached, the issue falls to the tribunal to decide.

³⁰Article 29.4(8).

³¹Article 29.1.

³²Article 29.5.

³³Article 28.3(a) and (b).

Three complementary methods for the comparison of IIAs We develop three distinct yet complementary tools to compare the text and content of IIAs. First, we rely on similarity scores that measure to what degree the language of two treaties overlaps. More specifically, we split each treaty in its continuous 5-character-gram components and then calculate the Jaccard distance between these components in a given treaty pair.³⁴ The appeal of this method, which is also being used in plagiarism detection software, is that it provides a simple expression of what agreements are very similar to the TPP and what are very different. In addition, the method, once applied to the article-level rather than the treaty-level, can identify the provisions where the TPP departs most strongly from existing treaty practice and where it follows it.

Second, while a textual similarity metric can tell us that two texts are similar, it cannot tell us what legal features drive the similarity. To solve that problem, we code for selected treaty features along three dimensions: (1) investment protection, (2) host state flexibility and (3) investor-state arbitration. These elements can then be used to assess how two agreements differ substantively from one another. In particular, we use them to determine whether the TPP is indeed a high standard agreement going beyond the content of most other IIAs. Moreover, the data derived from the coding scheme can be aggregated into an index to situate treaties alongside a single axis.

Third, the inclusion or omission of a clause only provides a partial picture of the true normative content in a treaty. This is especially true when the same type of provision varies starkly in scope and depth across treaties. Performance requirements, for instance, may be limited to a prohibition to use domestic goods in one treaty, but can cover domestic services or technology requirements in another treaty. In these circumstances, only a manual comparison of texts can evaluate the often nuanced normative differences between agreements. To facilitate this task we introduce a comparative tool, which color-codes differences across treaties at word level, highlighting the unique features in each of them. While it is beyond the scope of this paper to use this tool for a comparative in-depth analysis of each article in each treaty vis-à-vis the TPP, we have relied on it heavily to identify noteworthy features. The online version of the tool, which we provide on the accompanying website, then allows users to conduct their own analysis above and beyond the specific treaty features identified here.

Each of these three tools is geared towards answering different questions. Employed jointly, however, they can usefully complement each other. They allow us to situate the TPP investment chapter in the broader universe of IIAs, to zoom in to investigate what treaty features

³⁴ See Wolfgang Alschner and Dmitriy Skougarevskiy, 'Consistency and Legal Innovation in the BIT Universe' (2015) STANFORD PUBLIC LAW WORKING PAPER NO. 2595288, available at: <http://ssrn.com/abstract=2595288>

drive differences and similarities between agreements, and to trace how the language of the same clause differs from one treaty to another.

Data set Our dataset comprises English-language texts of 1582 bilateral investment treaties, 51 investment chapters of free trade agreements, and 7 plurilateral investment treaties obtained from UNCTAD *Investment Policy Hub*, *Kluwer Arbitration* and *Investment Claims.com*.³⁵ We manually cleaned the texts for optical character recognitions errors and typos, cross-checked treaty metadata (dates of signature and parties) in various sources. We then split each treaty into articles, which yielded almost 25 thousand candidate article texts to compare with the TPP.³⁶

2.1 The TPP Investment Chapter — Made in the USA

To situate the TPP in the IIA universe, we first calculate the Jaccard distance between the TPP investment chapter and all other treaties in our database.³⁷ The result is striking: the disciplines of the TPP investment chapter are “made in the USA”. Figure 1 visualizes the Jaccard distance between the TPP and its 20 most similar agreements. It shows that 82% of the language in the main body of the TPP chapter has been taken from the U.S.–Columbia FTA investment chapter.³⁸

Virtually all agreements closest to the TPP are FTAs or BITs concluded over the past decade by the USA and to a lesser extent Canada. TPP is thus heavily influenced by recent North American treaty practice, which builds on NAFTA, to which TPP displays a 60% similarity. In contrast, the lower end 20 agreements most dissimilar to TPP primarily include short and simple European agreements signed in the 1960s to 1980s. The most dissimilar agreement to the TPP in our dataset is the Libya–Malta BIT (1973) with an overlap of only 9%. This highlights the evolution of the design of investment agreements over time and the fact that TPP is quite different from early European treaty practice.

When brought down to the article level, we can use similarity scores to quickly identify provisions that contain innovative features rather than only copying from existing practice. For instance, while the National Treatment clause in the TPP is about 95% similar to the U.S.–Colombia FTA, the Minimum Standard of Treatment provision of the TPP only shares a

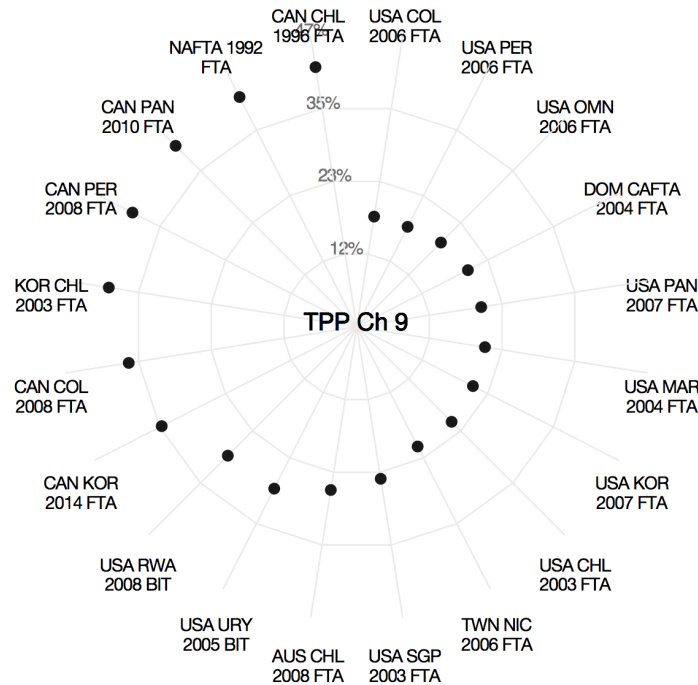
³⁵Even though this data represents only 51% of the BIT universe, Alschner and Skougarevskiy (2015) show that under-sampling is not a major source of concern.

³⁶When splitting the treaties into articles, we relied on HTML mark-up of article texts for *Kluwer* and *Investment Claims.com* data and did it manually for the texts originating from UNCTAD.

³⁷We calculate the Jaccard distance based on the main text of the investment chapter only omitting footnotes and annexes.

³⁸The Jaccard distance is 0.18 meaning that the pair shares 82% of their unique 5-character gram components and that 18% of their joint unique 5-character gram components are only found in one of the treaties.

Figure 1: Jaccard distances from TPP Chapter 9 to 20 closest IIAs



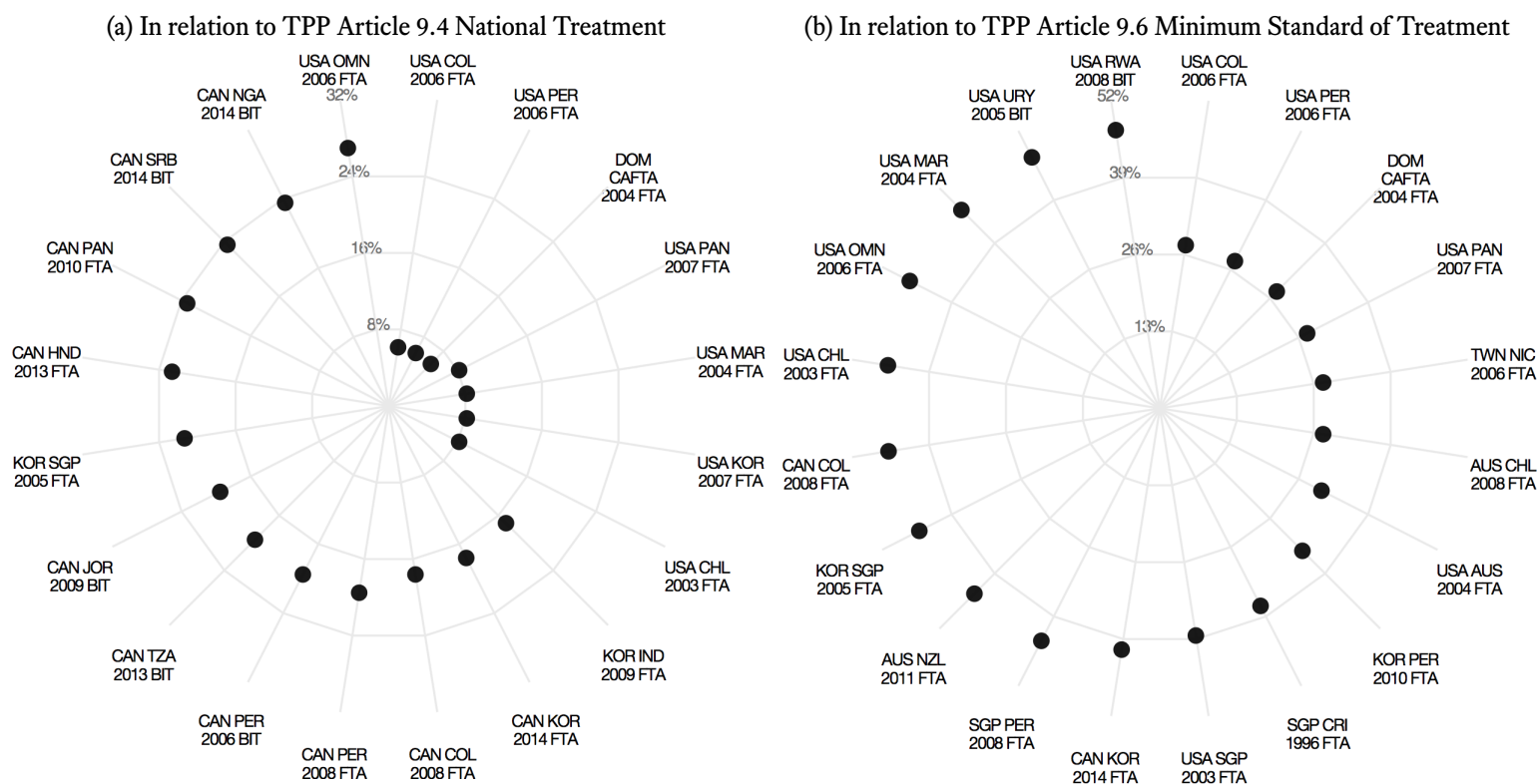
Note: this chart shows Jaccard distances to TPP Chapter 9 for closest international investment agreements. FTAs include only the respective investment chapters. Interactive version is available at <http://mappinginvestmenttreaties.com/specials/tpp/>.

75% similarity with that nearest agreement, due to the innovative language in the TPP relating to legitimate expectations (Figure 2). In addition, article-level similarity scores can show where a treaty other than the U.S.–Colombia FTA inspired the TPP. When looking at the TPP’s MFN clause, for instance, the Canada–China FTA is closest since, in contrast to other U.S. treaties, it clarifies that MFN does not attract more favorable dispute settlement provisions from third treaties. Another example is TPP Article 9.16 on corporate social responsibility, which finds no equivalent in U.S. practice and is instead inspired by Canadian treaties. In short, similarity scores are useful tools to identify which treaties or articles are similar to each other allowing us to better understand diffusion and differentiation processes in treaty-making.

2.2 Gold standard or lowest common denominator? TPP versus its overlapping IIAs

We next turn to the question whether the TPP is a deep or shallow investment agreement. On the one hand, U.S. Trade Representative Froman and his colleagues around the Pacific

Figure 2: Jaccard distances from selected articles of TPP Chapter 9 to 20 closest IIA articles



Note: this chart shows Jaccard distances to selected TPP Chapter 9 articles from closest articles in other international investment agreements. FTAs include only the respective investment chapters. Interactive version is available at <http://mappinginvestmenttreaties.com/specials/tpp/>.

have emphasized repeatedly that a “high standards” agreement was achieved in TPP.³⁹ On the other hand, the involvement of 12 nations with starkly different levels of development and varying economic interests could suggest that the agreement brokered sets a floor rather than a gold standard for regional economic cooperation. Which characterization better describes the TPP is a matter of empirical legal analysis.

The TPP, when concluded, overlapped with 54 BITs and other IIAs that had been signed by sub-sets of its member states.⁴⁰ Of these treaties 35 contain fully-fledged investment provisions (as opposed to cursory reference to investment, the incorporation of an existing treaty or a negotiation mandate for a future investment chapter). What can these parallel treaties tell us about the TPP? If the inter-se agreements are deeper than the TPP in their investment disciplines, the TPP is best understood as setting a regional floor of investment commitments. Overlapping bilateral and regional agreements would then be used to go beyond that lowest common denominator to achieve greater levels of economic integration between a subset of TPP parties. If, however, these inter-se agreements systematically fall below the depth of the TPP, then the TPP is best understood as a gold standard setting the current regional ceiling when it comes to investment disciplines.

Coding for the depth of an investment agreement We operationalize the depth of investment treaties by coding the TPP and its 35 overlapping treaties alongside the three dimensions: (1) investment protection, (2) host state flexibility and (3) investor-state arbitration. Focusing exclusively on investment protection as proxy for an agreement’s depth would fail to capture the complex policy trade-offs involved in modern IIAs. When countries, as in the TPP, expect bidirectional investment flows, they have to balance their outward interest of protecting their investors abroad with their inward interest of retaining regulatory flexibility at home.⁴¹ Moreover, countries face trade-offs when it comes to delegating adjudicative power to tribunals: third party delegation makes treaty commitments

³⁹Remarks by Ambassador Michael Froman to the Atlantic Council, October 27, 2015, Washington, D.C., available at: <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2015/October/Remarks-Ambassador-Froman-Atlantic-Council>. *See also supra* note 3, at 3.

⁴⁰Depending on what is counted this number may vary. In its 2015 World Investment Report, UNCTAD, for instance, reported 14 overlapping BITs and 26 IIAs. If the TPP member states are entered in UNCTAD’s database, however, 51 agreements are returned as having been signed. To this we added the ASEAN Comprehensive Investment Agreement (2009) as well as the ASEAN-Japan FTA (2008) and ASEAN-Australia-New Zealand FTA (2009). Importantly, for this analysis, we also count agreements that have been signed but not ratified (such as the Chile-Vietnam BIT (1999)) and those that have been terminated (e.g. Singapore-Peru BIT (2003)) or that will be terminated as part of the TPP (e.g. Australia-Peru BIT (1995)), since we are interested in situating the TPP in relation to investment treaty design practices generally. In part 3, we will then distinguish between agreements in force and those terminated.

⁴¹Countries thus have to strike an optimal balance between commitment and flexibility. *See* Anne van Aaken, ‘International Investment Law between Commitment and Flexibility: A Contract Theory Analysis’ 12 JOURNAL OF INTERNATIONAL ECONOMIC LAW 507 (2009).

more credible, but also creates new agency costs such as misinterpretations or inconsistent decisions.⁴² Measured by that benchmark, a high standards investment agreement is one that achieves the highest degree of investment protection possible while retaining sufficient policy flexibility as well as ensuring effective policing of treaty commitments without bestowing arbitral tribunals with inefficiently broad discretion.⁴³

We have identified 35 treaty features listed in Appendix A.1, which describe the scope of investment protection of a treaty (11 features), areas of host state flexibility (11 features) and elements structuring the arbitration process and limiting the discretion of arbitral tribunals (13).⁴⁴ We check for their inclusion or omission in the TPP and its overlapping treaties.⁴⁵ An agreement that contains most or all of these 35 features can be understood as resolving the above described trade-offs well setting high standards, while an agreement that only has few of these features fares poorly in addressing these trade-offs and will be shallow. Aside from accounting for the individual treaty features, their cumulative number per treaty can serve as an admittedly crude, but we believe still useful, proxy for an agreement's depth. The results of the feature coding are displayed in Figure 3 using color-coding to distinguish between our three dimensions. The finding under each dimension will be discussed in turn.

Investment protection The landscape of investment protection provisions in our treaty sample is fairly homogenous across agreements with some notable differences. “Core” investment protection obligations such as the duty to pay compensation in case of expropriation, non-discrimination obligations (NT and MFN) and Transfer of Funds are ubiquitous while other clauses such as compensation of losses in situations of armed conflict, fair and equitable treatment and full protection and security are present in the overwhelming majority of agreements. Greater variation does occur, however, when it comes to pre-establishment protection liberalizing the admission of investment, entry and sojourn of per-

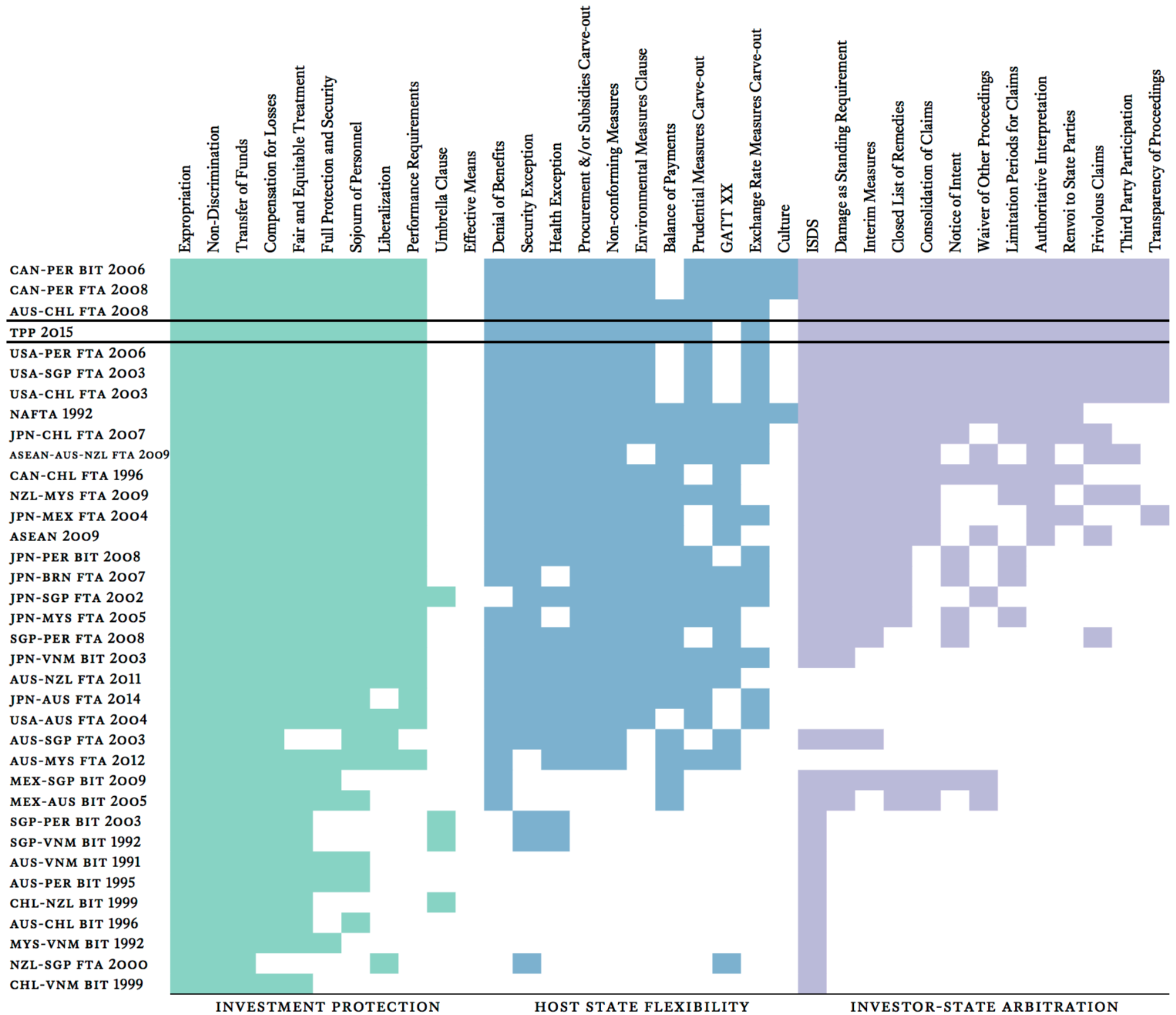
⁴²Anne van Aaken, ‘Delegating Interpretative Authority in Investment Treaties: The Case of Joint Commissions’ 11 *TRANSNATIONAL DISPUTE MANAGEMENT* (2014).

⁴³For a more theorized notion of the underlying contract theoretical concepts see Wolfgang Alschner, *State-Driven Change in International Investment Law and Its (Uncertain) Impact on Investor-State Arbitration: An Empirical Big Data Analysis*, Ph.D. Thesis, The Graduate Institute of International and Development Studies, 2015.

⁴⁴These features validly distinguish between treaties irrespective of the existence of MFN clauses. General exceptions cannot be circumvented by MFN since they limit the scope of MFN in the first place. MFN can also not be used to alter most procedural arbitration elements since features such as transparency in proceedings are not “less favorable treatment” of investors. Finally, more favorable “treatment”, if left undefined in the treaty must be interpreted in accordance with the treaty text as context. If the base treaty does not extent to a certain treatment, e.g. investment liberalization, pre-establishment clauses from third treaties cannot be incorporated since they fall outside of the scope of MFN. In any event, all TPP members carve-out the application of MFN to pre-TPP investment treaties in their respective schedules of non-conforming measures.

⁴⁵For FTAs we look both in the investment chapter and in other chapters.

Figure 3: Prevalence of treaty features in selected IIAs



Note: in this figure we color a cell if a feature in column is present in the treaty in row. Colors are defined by three dimensions reported in the bottom of the table and in Appendix A.1.

sonnel including senior management connected to the investment and performance requirements. Umbrella clauses occur only in a minority of treaties and effective means clauses are not found at all. The TPP includes all the occurring protective obligations apart from umbrella clauses and thus is equivalent to or even goes beyond the protection offered in its overlapping BITs and FTAs.⁴⁶ The TPP thus points towards high investment protection standards rather a lowest common denominator.

Viewing the TPP as a high standard agreement is further confirmed once one zooms into specific clauses, such as performance requirements. Out of the 24 agreements, which prohibit performance requirements, one third incorporates *mutatis mutandis* the WTO TRIMs Agreement. Article 9.9 of the TPP goes well beyond the TRIMs baseline prohibiting requirements to use local services or to engage in technology transfer. The TPP arguably reaches further than all other overlapping agreements by also preventing countries from imposing the use of local technology on investors. Figure 4 provides a text-to-text word-level comparison between the TPP Article 9.9 and the next similar article (in terms of Jaccard distance) found in the USA-Colombia FTA Article 10.6 highlighting the differences between the two clauses (features only present in the former are color-coded green while features only appearing in the latter are red).

In conclusion, the TPP, given the scope and depth of its protective obligation, is a high standards agreement in relation to its overlapping agreements. We should, however, add two caveats to this finding. First, we have not systematically analyzed and compared the measures and sectors individual countries have carved-out from the scope of some of the protective provisions under each treaty. At the same time, these non-conforming measures are typically limited to sojourn, liberalization and performance requirements — clauses largely absent in the treaties that scored low. Second, the TPP contains a wide range of clarifications that some may interpret as back-sliding. Yet whether these clarifications neutrally explain the meaning of concepts also enshrined in other treaties or narrow down their protective scope is a matter of interpretation on which reasonable investment lawyers may disagree.⁴⁷ Given this ambiguity, we want to leave these debates aside here. The point, however, still stands that based on the number of protective obligations it covers, the TPP is broader or at least equal in protective scope than many of the agreements it overlaps with.

⁴⁶What to make of this omission is somewhat ambivalent since the TPP provides investor-state consent for investment agreements and authorizations under domestic law, thereby offering a treaty-based mechanism for the enforcement of contractual claims. This, in turn, is exactly what umbrella clauses offer in the eyes of some commentators, such as James Crawford.

⁴⁷For instance, does TPP Annex 9-B, which explains that except in rare circumstances non-discriminatory regulatory actions pursuing public welfare objectives will not amount to an indirect expropriation, make the TPP less protective than NAFTA where such language is absent? Similar questions may be raised with respect to the application of MFN to dispute settlement or the content of the fair and equitable treatment clause and its relationship to the customary international minimum standard of treatment.

Figure 4: Word differences between TPP Article 9.9 and USA–Colombia FTA

TPP Article 9.9 Performance Requirements

1. No Party **shall**, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking: (a) to export a given level or percentage of goods or services; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment; (e) to restrict sales of goods or services in its territory that the investment produces or supplies by relating **those** sales in any way to the volume or value of its exports or foreign exchange earnings; (f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its **territory**; (g) to supply exclusively from the territory of the Party the goods that the investment produces or the services that it supplies to a specific regional market or to the world market; (h) **(i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party; or (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology; or (i) to adopt: (i) a given rate or amount of royalty under a licence contract; or (ii) a given duration of the term of a licence contract, in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future licence contract freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party. For greater certainty, paragraph 1(i) does not apply when the licence contract is concluded between the investor and a Party.** 2.

USA COL 2006 FTA Article 10.9 Performance Requirements

1. No Party **may**, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking: (a) to export a given level or percentage of goods or services; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with **such** investment; (e) to restrict sales of goods or services in its territory that **such** investment produces or supplies by relating **such** sales in any way to the volume or value of its exports or foreign exchange earnings; (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its **territory**; **7** or (g) to supply exclusively from the territory of the Party the goods that **such** investment produces or the services that it supplies to a specific regional market or to the world market. 2. No Party **may** condition the

Note: this figure show the texts of TPP Article 9.9. and its closest counterpart — U.S.–Colombia FTA Article 10.9. Word-level diff algorithm is applied to color additions in TPP text in green and changes in U.S.–Colombia FTA text in red. Interactive version is available at <http://mappinginvestmenttreaties.com/specials/tpp/>.

Host State Flexibilities The majority of treaties in our sample contain a set of host state flexibilities. These include denial of benefits clauses allowing a host state to withdraw treaty protection to covered investments in some circumstances, security and public health exceptions, carve-outs for government procurement or subsidies, exchange rate measures, prudential financial regulations and country-specific non-conforming measures, as well as clarifications that contracting states can enact treaty-consistent environmental measures.

Two trends are noteworthy, however. First, in deviation from the majority of treaties in the sample, the TPP does not contain a GATT-XX-like general exception clause. It follows U.S. investment treaty practice in that regard.⁴⁸ Second, the TPP contains many exceptions absent in earlier investment treaties with which it overlaps. This concerns principally agreements signed in the 1990s. While this may make these earlier treaties seemingly more attractive for investors, it essentially means that the policy conflicts specifically resolved in later agreements through exceptions remain to be decided under these earlier treaties on an ad hoc basis through investor-state tribunals without specific guidance from the treaty drafters. States thus remain in the dark how far their investment treaty commitment stretches and how much policy space they have retained.

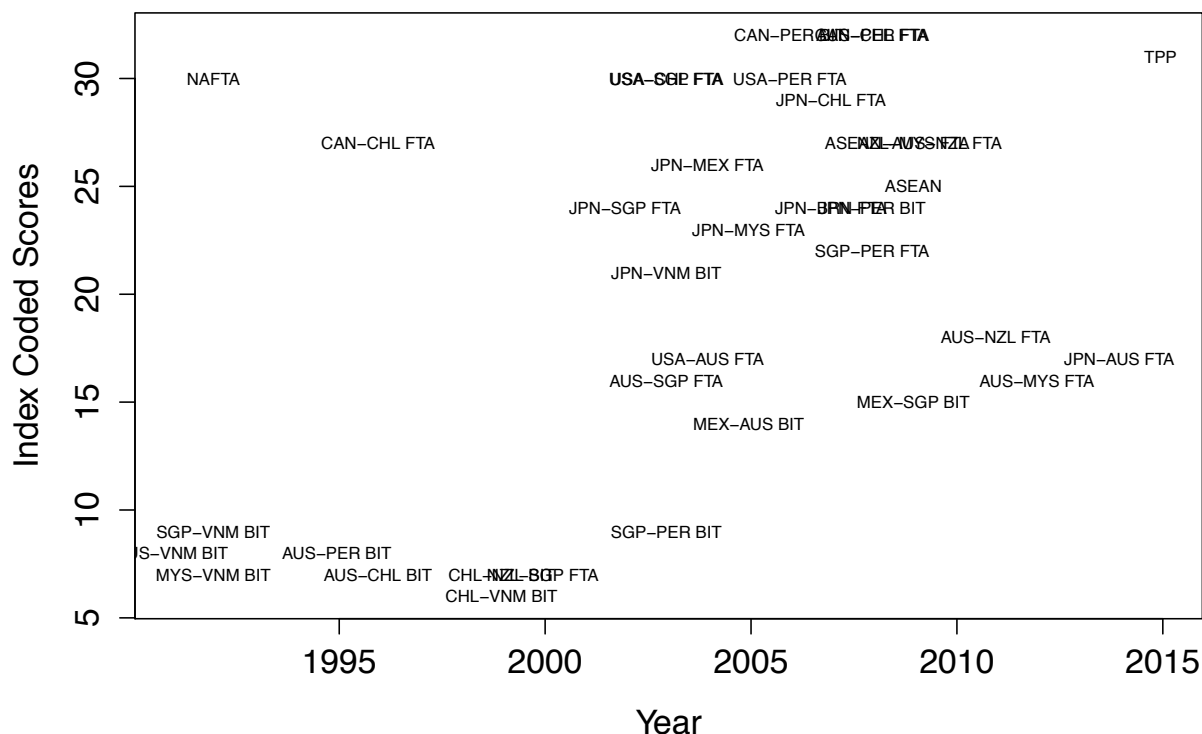
Investment Arbitration All but four agreements overlapping with the TPP contain investor-state arbitration provisions. Of these, three agreements (Australia–Japan, Australia–Malaysia, and Australia–U.S.) have now lost much of their practical significance, because investors can finally bring direct investment claims under the parallel TPP. Interestingly, the same cannot be said for the fourth agreement, the Australia–New Zealand FTA (2011), since both countries in an exchange of side letters agreed that their respective investors shall not be able to have recourse to investor-state arbitration under the TPP against the other party.⁴⁹

Under all other agreements, investors now have the choice whether they want to opt into an architecture modeled on commercial arbitration leaving large discretion to the arbitral tribunal or whether they want to use the architecture of the TPP, which following recent U.S. and Canadian practice, carefully structures the arbitration procedure from the notice

⁴⁸On the one hand, this may be seen as a commitment to higher investment protection standards. On the other hand, the clause's dubious relationship to the codified customary international law standards FET and expropriation (Does the treaty offer less protection than customary international law?) as well as the flexibility elements found individual in other TPP standards (e.g. "in like circumstances" in national treatment or specific exceptions to performance requirements) clouds the real-world impact of the inclusion or omission of the clause. For a critical discussion, see Barton Legum and Ioana Petculescu, 'GATT Article XX and International Investment Law' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press 2013); Catharine Titi, *The Right to Regulate in International Investment Law* (Bloomsbury Publishing 2014).

⁴⁹See the exchange of letters Australia — New Zealand: Investor State Dispute Settlement, Trade Remedies and Transport Services, available at: <http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>.

Figure 5: Temporal evolution of features in selected IIAs



Note: this chart plots the sum of features (as defined in Figure 3) present in IIAs over time of signature of those agreements.

of intent to the types of remedies, and which includes means of public and inter-state interventions in the arbitral process. While not going far enough for some commentators,⁵⁰ the TPP sets out a superior architecture as compared to these earlier agreements for curbing agency slack without undermining the commitment-policing function of arbitration. The TPP's highly elaborate investor-state arbitration architecture thus sets high standards in investment arbitration design.

Conclusion: Convergence around the high standards made in the USA On all three accounts, investment protection, host state flexibility and investment arbitration, the TPP sets high standards rather than a lowest common denominator. Figure 5 contains an alternative representation of the above coding results of the TPP and its overlapping agreements. By aggregating the 35 elements of the three categories into an index between 0 (minimum) and 35 (maximum) that is then plotted along the time dimension, we can obtain a visual impression of the relationship between TPP and its overlapping treaties.

⁵⁰Lise Johnson and Lisa Sachs, 'The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system', COLUMBIA CENTER ON SUSTAINABLE INVESTMENT Policy Paper, November 2015, available at: <http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-18-Nov-FINAL.pdf>

of TPP plus 35 overlapping agreements an additional 1369 English-language BITs from our database. We then determine their aggregated score based on our 35 coding categories and plot the results again along the time axis. The ensuing patterns displayed in Figure 6 are similar to what we already observed in the TPP region: while the majority of agreements have low scores, Canadian, American and some Japanese IIAs rank in the proximity of the TPP. This suggests that the TPP not only constitutes a high standards agreement for TPP region, but for the global IIA landscape more generally.

3 Implications of the TPP as high standards agreement

The previous section has shown that the TPP is a high standards agreement closely mimicking U.S. treaty practice. In this section we discuss the implications of this finding for the existing treaty landscape in the Pacific region and for future multilateral rule-making.

3.1 Pacific Region: Redundant agreements leading to normative conflicts

Given that TPP provides for high standard investment disciplines, what happens with the overlapping less ambitious investment treaties? The TPP provides in Article 1.2(1) that these overlapping bilateral or regional IIAs continue to exist in parallel to the TPP:

Recognizing the Parties' intention for this Agreement to coexist with their existing international agreements, each Party affirms, ... (b) in relation to existing international agreements to which that Party and at least one other Party are party, its existing rights and obligations with respect to such other Party or Parties, as the case may be.

Upon closer observation, however, the picture becomes more complex. A number of states use the TPP for consolidating their treaty network by terminating their overlapping BITs in side-agreements, while other states leave overlapping agreements in place. Most of the low-scoring trans-Pacific BITs signed in the 1990s and 2000s and analyzed above have been terminated already prior to the TPP (Australia–Chile (1996), Singapore–Peru (2003)), have been signed but never entered into force (Chile–New Zealand (1999), Chile–Vietnam (1999)) or will be terminated through the TPP. The latter group comprises three BITs connecting Australia to Vietnam (signed 1991), Peru (signed 1995) and Mexico (signed 2005), which will be terminated once the TPP enters into force. The respective side-agreements

state that with respect to investments made or measures enacted prior to the date of termination, the terms of the BITs will continue to apply for another five years with Peru and Vietnam or three years with Mexico. Moreover, investors can submit arbitration claims under these BITs for another three years after their termination. In contrast, low-scoring intra-regional BITs in South East Asia, namely the Malaysia–Vietnam BIT (1992) and Singapore–Vietnam BIT (1992), continue to remain in force. In addition, FTAs with investment chapter existing parallel to the TPP, such as NAFTA, are also left in place. Some states, in their side-letters, explicitly affirm the parallel obligations. The exchange of notes between Malaysia and New Zealand, for instance, provides that

Nothing in TPP will derogate from the rights and obligations of New Zealand or Malaysia under AANZFTA [ASEAN–Australia–New Zealand FTA (2009)] or MNZFTA [New Zealand–Malaysia FTA (2009)]. To the greatest extent possible, the Agreements will be interpreted consistently. Where AANZFTA, MNZFTA or TPP provides different treatment for an exporter, service supplier or investor of New Zealand or Malaysia, that exporter, service supplier or investor is entitled to claim the more favourable of the treatment accorded to that exporter, service supplier or investor under that Agreement.⁵¹

The considerable overlap between TPP and parallel agreements gives rise to three coordination challenges, which we will briefly discuss in turn: (a) functional coordination, (b) jurisdictional coordination and (c) applicable law coordination.⁵²

Functional coordination: Duplication and redundancy To meaningfully coexist and avoid redundancy, different layers of agreements on the same subject matter should fulfill different functions rather than merely duplicate each other. In trade law, for instance, countries can sign bilateral or regional FTAs and custom unions to go beyond the multilateral baseline set by WTO Agreements.⁵³ In the TPP context, however, as we have seen, the agreements overlapping with TPP offer less rather than more investment protection. Apart perhaps from umbrella clauses in a few treaties, the TPP sets out broader and deeper protective disciplines, making overlapping treaties redundant in this regard. Moreover, many overlapping agreements provide less guidance when it comes to regulatory space of host

⁵¹See the side letter on the relationship between TPP and existing agreements: Malaysia — New Zealand [http://fta.miti.gov.my/miti-fta/resources/Text%20f%20TPPA/Side Letter Relationship between TPP and Existing Agreements Malaysia - New Zealand.pdf](http://fta.miti.gov.my/miti-fta/resources/Text%20f%20TPPA/Side%20Letter%20Relationship%20between%20TPP%20and%20Existing%20Agreements%20Malaysia%20-%20New%20Zealand.pdf)

⁵²This section draws on the issues identified in Wolfgang Alschner, ‘Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?’ 17 JOURNAL OF INTERNATIONAL ECONOMIC LAW 271 (2014), 285.

⁵³GATT Article XXIV and GATS Article V structure this interaction.

countries and do not structure the arbitration procedure in similarly great detail. Simply put, these overlapping agreements leave gaps, which have been carefully filled by the TPP negotiators. Hence, rather than any functional differentiation or division of labor between overlapping treaties, we see a differentiation in quality. This makes it difficult to understand why TPP countries left agreements in place that either duplicate or deliver no added value compared the high standards TPP. The reasonable thing to do would have been to provide for a more widespread termination or at least suspension of the investment provisions in overlapping treaties once the TPP enters into force.

Jurisdictional coordination: Detrimental forum shopping Since TPP parties decided to leave overlapping treaties in place, more than one investment treaty will now often govern investment relations between TPP parties. As a result, investors can choose under which treaty to bring an investment claim. While ambiguity works against states leaving the scope of their policy space ill-defined and delegating excessive discretion to arbitral tribunals, investors may find it advantageous in specific cases to rely on more ambiguous treaties than the TPP, since they give investors more flexibility to argue their case and to influence the arbitration procedure. This forum shopping then undermines the role of the TPP if the high standards carefully negotiated therein can be circumventing by bringing claims under parallel agreements. Most blatantly perhaps, under NAFTA, an investor can challenge a tobacco control measure without impediment, while under the TPP the respondent state can stop an equivalent claim by denying the investor the benefits of protection.

TPP parties have, however, effectively addressed another problem otherwise occurring in the context of overlapping treaties: parallel or consecutive investment claims brought under two treaties. The TPP investment chapter states that investors have to waive the right to initiate or continue a claim against a measure before another dispute settlement procedure if they want to file an arbitration under the TPP.⁵⁴ This waiver clause together with the time limitation that claims become moot if filed after three and a half years before it first arose⁵⁵ effectively preclude concurrent or subsequent claims in most circumstances.⁵⁶

Applicable law coordination: Complexity and conflict Most problematic, however, are the potential normative inconsistencies arising from parallel treaties. There is a myriad

⁵⁴ Article 9.20(2).

⁵⁵ Article 9.20(1).

⁵⁶ Theoretically, consecutive arbitration claims against the same measure under two treaties could still arise if TPP dispute settlement is initiated first and then, if unsuccessful, a second claim is brought under a parallel treaty which neither has a waiver clause nor a limitation of claims provision such as the Singapore–Vietnam BIT (1992). This way the investor would have a second bite at the apple unless general international principles such as *res judicata* prevent it. See Alschner, ‘Regionalism and Overlap in Investment Treaty Law’, *supra* note 52, at 22.

of examples where overlapping treaties provide for different norms, e.g. no performance requirements vs performance requirements, GATT XX exception vs. no GATT XX exception, or differently worded norms (which may or may not translate into normative differences), e.g. self-standing FET vs FET linked to the customary international law minimum standard. These differences can affect normative outcomes making it more likely for an investor to win a given claim under one agreement rather than another. Investment law thus becomes (unnecessarily) complex as investors search for the right treaty to file a claim under and states try to manage their contradictory commitments.

Aside from increased complexity, actual normative conflicts among overlapping agreements will play out in arbitration. Depending on the scope of the jurisdictional and applicable law clauses at issue normative conflicts arise in two different guises before arbitrators. First, where two different treaties provide consent only for violations arising out of their respective agreements (i.e. a narrow jurisdictional clause), an investor will have to choose the agreement that forms the cause of action. For instance, a Canadian investor who wants to sue the United States can bring a violation of the TPP under a TPP arbitration or of NAFTA under a NAFTA arbitration.⁵⁷ Once the claim is brought, however, a tribunal constituted under either agreement can “decide the issues in dispute in accordance with this Agreement *and applicable rules of international law*” (emphasis added). Between the Canadian investor and the USA as host state both NAFTA and the TPP will be applicable rules of international law. This, in turn, can give rise to normative inconsistency. Under the TPP, for instance, the frustration of an investor’s expectation by a governmental act or omission, e.g. when a promised permit is not given, is not in itself a breach of FET even if the investor incurs losses, whereas under NAFTA arbitral tribunals have considered such fact patterns to giving rise to a violation of FET.⁵⁸ On the one hand, a tribunal could find that no normative conflict exists in that instance, since the TPP either clarifies the customary international minimum standard referred to in NAFTA, or it constitutes a subsequent agreement between the parties regarding the interpretation of NAFTA and is therefore relevant context for its interpretation under the VCLT 31(3). On the other hand, the tribunal could also find that NAFTA prohibits what TPP permits giving rise to a genuine normative conflict. Since the TPP does not contain a specific conflict clause, this conflict of norms refers us back to the general international law fall back rules of the VCLT. Its Article 30(2) provides that “[w]hen a treaty specifies that it is subject to, or that it is not to be considered

⁵⁷ An investor could, however, not redress a TPP violation in a NAFTA proceeding because of the narrow jurisdictional clause in NAFTA.

⁵⁸ In *Metalclad*, for instance, governmental officials had assured the investor that a permit would be granted for the operation of a landfill would be granted. When the municipality later refused the permit, the legitimate expectations of the investor were violated and a violation of NAFTA Article 1105 was found. See *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶80, 87-101.

as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” Given that TPP in Article 1.2(1) explicitly affirms existing overlapping treaties, NAFTA would prevail in case of a conflict. Whether or not the US has to pay compensation for refusing a promised permit is thus a matter of how the tribunal characterizes the interaction between the TPP and NAFTA.⁵⁹

A second, even more problematic issue from a policy perspective arises when the jurisdictional scope of the underlying investment treaty is broad. The Singapore–Vietnam BIT (1992), for instance allows an investor to bring “[a]ny dispute between a national or company of one Contracting Party and the other Contracting Party in connection with an investment” (emphasis added) to arbitration under Article 13(1). The range of disputes is thus not limited to violations of the BIT. As a result, a Singaporean investor in Vietnam could use the arbitration mechanism in the Singapore–Vietnam BIT to claim a violation of the TPP in addition to the BIT. Crucially, this method could then be used to challenge tobacco control measures including under the TPP! The tobacco control provision of TPP Article 29.5 only allows member states to “deny the benefits of Section B of Chapter 9” — the arbitration mechanism — and not Section A, the substantive protection, which would be applied by the tribunal constituted under the Singapore–Vietnam BIT. Moreover, conflicts of norms arising between such BITs and TPP will be more severe and more difficult to resolve by interpretive means than in the context of the more similarly worded NAFTA and TPP. Where BIT clauses could be interpreted as more protective than the TPP (e.g. self-standing FET vs FET linked to customary law) or where the TPP provides an exception when the BIT only contains obligations (think of an expropriatory financial measure benefiting from an exception under TPP but not the BIT) arbitral tribunals are likely to find a genuine conflict of norms which will be resolved in favor of the BIT through VCLT Article 30(2). Hence, especially the BITs signed in the 1990s and left in force can thus undermine the high standards achieved in the TPP.

In short, the choice of leaving investment treaties and chapters parallel to the TPP in place is difficult to justify: they provide few if any additional benefits of protection, yet they create significant potential costs of jurisdictional forum shopping and normative conflict thereby circumventing and undermining TPP’s high standards.

⁵⁹ As highlighted above, some states (but not the NAFTA parties) have concluded side-letters clarifying the relationship between agreements to which tribunals can resort rather than falling back on general international law. In accordance with the above cited New Zealand–Malaysia letter exchange, for instance, a tribunal would first try to interpret the agreements consistently and, if that fails, give priority to agreement more favorable to the investor.

3.2 Implications for the World: TPP as stepping stone for multilateralism?

The successful conclusion of the TPP has given new impetus for calls to multilateralize investment disciplines.⁶⁰ In addition to the TPP's potential for incremental growth through the accession of new members,⁶¹ the TPP investment chapter could serve as template for future multilateral treaty-making on investment. Several efforts to conclude a multilateral investment agreement have failed in the past. Negotiations under the auspices of the OECD in the 1960s and 1990s were abandoned and attempts to integrate investment protection rules into the WTO in the 1990s were short-lived. So what are the chances of concluding a multilateral investment agreement this time?

Bringing investment disciplines across the globe up to TPP levels is an ambitious undertaking, but not an impossible one. The main appeal of the TPP as template for multilateralization is its codification of state-of-the-art treaty design. Most BITs were signed in the 1990s following short and simple European model agreements, which fail to rein in arbitral discretion and do not actively structure the interaction of investment rules with other economic (e.g. trade) and non-economic (e.g. environmental regulation) issues. As the renegotiation of thousands of agreements is costly, a multilateral investment agreement could bring the investment policy of hundreds of countries from 20th century to 21st century standards. The TPP is well suited for that task. First, it reunites countries of different levels of developments making it appeal to a wider audience of states. Second, it builds on parties' experience, in particular from NAFTA, in defending against investment arbitration cases. As a result, it embodies a careful balancing of inward and outward investment interests using tailored exceptions and a more refined investment arbitration architecture that curbs arbitral discretions and enhances mechanisms of state control and public participation. These features will likely be seen by many countries as a welcomed update of their investment treaty practice. In particular smaller developing countries facing capacity constraints will find it advantageous to "free ride" on the codifications and innovations achieved in the TPP.

At the same time, however, the TPP goes also well beyond the lowest common denominator when it comes to investment protection. Bringing countries to agree to liberalization commitments, sojourn clauses and extensive prohibitions on performance requirements will require tough negotiations. Admission of investment has traditionally been at the discretion

⁶⁰See Froman, *supra* note 3, at 3. See also Valbona Zeneli, 'TPP: A Step Forward in Multilateral Cooperation', THE DIPLOMAT, October 16th 2015, available at: <http://thediplomat.com/2015/10/tpp-a-step-forward-in-multilateral-cooperation/>; Congyan Cai, 'Trans-Pacific Partnership and the Multilateralization of International Investment Law' 6 JOURNAL OF EAST ASIA AND INTERNATIONAL LAW (2013).

⁶¹Article 30.4. Accession negotiations are reported to be already underway including with South Korea and Indonesia.

of the host state and performance requirements are an important policy tool for states to let the local economy reap the full benefits from the presence of foreign investors. Multilateral negotiations around the TPP model would require countries to agree on relinquishing these tools and to bargain instead over measures and sectors grandfathered from these obligations in country-specific reservations. A less ambitious agreement that codified a lowest common denominator of investment protection and allowed countries to agree on more protection bilaterally would seem to be easier to negotiate than the TPP high standards.

Yet even assuming that countries agree to negotiate a high standards agreement, it is unclear whether the American-style TPP model can attract enough support from other developed and emerging economies to serve as focal point of the negotiations. Indeed, the success of the TPP as template for future multilateral negotiations will in particular depend on (1) finding common standards with the EU and (2) bringing BRICS countries aboard.

Finding common ground with EU One obstacle of making TPP the basis for multilateralization is the challenge of squaring treaty practice in the Pacific region with that of Europe. On the one hand, the prospects for harmonization are much better today than they were in the late 1990s. First, since the 2009 Treaty of Lisbon, the EU Commission has been in charge of foreign investment relations. That means that Europe is in a better position to speak with one voice than before. Second, European investment treaty practice has been “Americanized” since the Treaty of Lisbon. The treaties, which the EU Commission has negotiated so far, the Canada-EU Trade Agreement (CETA) and the Singapore-EU FTA contain investment protection, exceptions and dispute settlement provisions, which in their design, scope and depth, more closely resemble the complex and comprehensive North American Treaty practice post NAFTA than the short and simple templates employed by European states prior to Lisbon. An analysis of CETA shows a 53% textual overlap with the TPP, while the nearest German treaty (Germany–Mexico BIT 1998) only displays 35% of similarity to CETA.

While there is convergence between the EU and TPP parties on the principle that today’s investment agreements have to touch on more issues, proactively address policy conflicts and set out detailed investor-state dispute settlement provisions, the way each of these issue is to be dealt with differs starkly between them. A cursory comparison of CETA and the TPP, as displayed on our accompanying website, shows that language often differs considerably. While in some instances different formulations express similar concepts (e.g. when carving out dispute settlement provisions from MFN) other provisions approach the same issue from very different angles (e.g. TPP defining FET in context of the customary international law minimum standard, while CETA develops a closed list of elements constituent

to FET).⁶² In some cases, CETA goes beyond the TPP containing a novel absolute market access clause in addition to relative market access based on pre-establishment national treatment.⁶³ In other instances, the opposite is true, with TPP establishing more extensive prohibitions on performance requirements than CETA.⁶⁴

These differences in substance will have to be resolved in the ongoing T-TIP negotiations between the U.S. and the EU. The primary bone of contention relates, however, not to the substantive but to the procedural investment disciplines. While the EU has recently come forth with a proposal on an institutionalized “Investment Court”,⁶⁵ the U.S. remains committed to ad hoc arbitration as mechanism for the resolution of investment disputes.⁶⁶ Hence, the fate of multilateralism, at least in the short term, depends on whether the T-TIP negotiations, if successful, converge around TPP or whether they will create standards different from those of the TPP.

Overcoming opposition from the BRICS An even greater obstacle to a multilateralization of investment disciplines around the TPP, however, is the likely opposition of the BRICS countries to such a project. Each of the five BRICS countries have expressed investment policy preferences that diverge from the TPP making convergence around it less likely.

Among the BRICS countries, China is likely to be most sympathetic to a multilateralization of investment disciplines around TPP. The country is among the states that have concluded most investment agreements. Moreover, its recent BIT with Canada overlaps textually to 50% with the TPP and converges in substance in some areas. When it comes to MFN, for instance, the China–Canada BIT is the closest treaty to TPP in our database. Still, other issues are far from converging. Most importantly, China has been reluctant to agree on pre-establishment commitments — one of the central features included in the TPP. Getting China to agree on market liberalization would be a major challenge in multilateral negotiations around the TPP. Also on performance requirements, it remains to be seen whether China is willing to go beyond the WTO TRIMs standard currently set in its BIT with Canada.

Greater opposition, however, is to be expected from South Africa, Brazil, India and Russia.

⁶²Compare TPP Article 9.6 and CETA Article X.9.

⁶³CETA Article X.4.

⁶⁴Compare TPP Article 9.9 and CETA Article X.5.

⁶⁵*EU finalises proposal for investment protection and Court System for TTIP*, European Commission — Press release, Brussels, 12 November 2015, available at http://europa.eu/rapid/press-release_IP-15-6059_en.htm

⁶⁶*U.S. wary of EU proposal for investment court in trade pact*, Reuters, 29 October 2015, available at <http://www.reuters.com/article/2015/10/29/us-trade-ttip-idUSKCN0SN2LH20151029>

South Africa has begun terminating its bilateral investment agreements. An internal policy review prompted by a case challenging the country's anti-Apartheid legislation came to the conclusion that the economic advantages of the BITs the country had signed are uncertain, yet their potential liability costs were real. As a result, it began terminating its BITs and refrained from concluding new ones.⁶⁷ It is doubtful whether the innovations made in the TPP are enough to convince South Africa to return to the IIA universe. Brazil, in turn, has recently re-entered the IIA scene. The country signed but never ratified more than a dozen BITs in the 1990s. Now it has launched a new investment treaty program, but of radically different design than the TPP.⁶⁸ India, after facing several investment claims, has put the negotiations on new investment treaties on hold and initiated an internal review of its BIT practice. In early 2015, the fruits of this reform were published in form of a new model BIT.⁶⁹ Although different from the Brazilian practice, the Indian program is also markedly different from the TPP. Finally, Russia is also likely to oppose multilateral convergence around the TPP. Russia has been skeptical about the TPP, including for geopolitical reasons,⁷⁰ and has grown increasingly weary of investment agreements and arbitration. In 2009 Russia withdrew from the Energy Charter Treaty, which it had signed and provisionally applied before, but never ratified and is currently battling a \$50 billion award in setting aside proceedings before Dutch courts that an arbitral tribunal rendered in 2014 in relation to the unlawful expropriation of *Yukos*.⁷¹ In short, Russia is unlikely to embrace a treaty that will further expose it to liability and that so clearly embodies American treaty design.

Conclusion While the path to the successful conclusion of the TPP has been long, the road to a multilateral treaty modeled on TPP will be longer, if we get there at all. A less ambitious agreement would have perhaps made it easier to multilateralize investment disciplines among a global lowest common denominator. A high standards agreement, like the TPP, in contrast will require countries to converge their practice on the top rather than at the bottom. The question then becomes who sets these high standards? The EU, China,

⁶⁷ *South Africa begins withdrawing from EU-member BITs*, Investment Treaty News, 30 October 2012, available at <https://www.iisd.org/itn/2012/10/30/news-in-brief-9/>

⁶⁸ *The Brazil-Mozambique and Brazil-Angola Cooperation and Investment Facilitation Agreements (CIFAs): A Descriptive Overview*, Investment Treaty News, 21 May 2015, available at <https://www.iisd.org/itn/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview/>

⁶⁹ The Indian model treaty is available at https://mygov.in/sites/default/files/master_image/ModelTextfortheIndianBilateralInvestmentTreaty.pdf

⁷⁰ In 2014 Vladimir Putin, the President of Russia, for instance, stated that: "Obviously, the Trans-Pacific Partnership is just another U.S. attempt to build an architecture of regional economic cooperation that the USA would benefit from." *US seeks to create economic cooperation for its own benefit — Putin on TPP*, 6 November 2014, available at <http://tass.ru/en/russia/758460>.

⁷¹ *Yukos moves to the Dutch courts*, GLOBAL ARBITRATION REVIEW, 27 January 2015, available at <http://globalarbitrationreview.com/b/33336/>

Brazil or India are unlikely to identify with the treaty text negotiated among the TPP parties and its American handwriting. Rather than multilateralization around the TPP, we are thus more likely to see an incremental growth of differently designed “high standards” bilateral, regional and mega-regional agreements. These future agreements, among them the TPP, can then form the basis of multilateral harmonization that either aims at distilling a lowest common denominator among them or at jointly creating high standards acceptable to a multilateral community. Either way, we should expect the TPP to be a step towards rather than a blue-print for the multilateralization of investment law.

Conclusion

The TPP contracting parties promised a “new, high-standard” agreement and they have kept what they promised — at least in part. On the whole, the TPP investment disciplines are not fundamentally new but rather build on prior U.S. investment treaty practice. At the same time, some genuine innovations have been included in the TPP’s substantive investment standards (e.g. its minimum standard clause or its extensive performance requirements), its arbitration procedure (e.g. code of conduct for arbitrators) and its general exceptions (e.g. providing a denial of benefits provision for investors challenging tobacco control measures). The TPP does, however, live up to the expectation of being a high standards agreement, at least compared to the existing universe of investment treaties. It thereby renders overlapping agreements largely redundant, without altogether terminating them. This, in turn, is likely to give rise to detrimental forum shopping and normative conflicts between simultaneously applicable investment agreements. Finally, the TPP has rekindled hope that its high standards could serve as a stepping stone for multilateralism. While many developing countries facing capacity constraints may view the TPP template as a welcomed “free” update of their investment policies, disagreement is likely to arise with the EU and BRICS countries as to the content of the high standards to be enshrined in a future multilateral investment treaty. In the short term, we are thus likely to see the emergence of competing high standards rather than a multilateral convergence around the TPP template.

Appendix

Table A.1: List of IIA features describing the scope of investment protection

Dimension	Feature
Investment Protection	Effective Means
	Expropriation
	Fair and Equitable Treatment
	Full Protection and Security
	Liberalization
	Compensation for Losses
	Non-Discrimination
	Performance Requirements
	Sojourn of Personnel
	Transfer of Funds
	Umbrella Clause
Host State Flexibility	Culture
	Exchange Rate Measures Carve-out
	Denial of Benefits
	Environmental Measures Clause
	GATT XX
	Health Exception
	Security Exception
	Procurement and/or Subsidies Carve-out
	Prudential Measures Carve-out
	Non-conforming Measures
	Balance of Payments
Investor-State Arbitration	Consolidation of Claims
	ISDS
	Frivolous claims
	Interim measures
	Authoritative Interpretation
	Limitation Periods for Claims
	Damage as Standing Requirement
	Notice of Intent
	Closed List of Remedies
	<i>Renvoi</i> to State Parties
	Third Party Participation
	Transparency of Proceedings
	Waiver of Other Proceedings