

THE INVESTMENT  
TREATY  
ARBITRATION  
REVIEW

FOURTH EDITION

Editor  
Barton Legum

THE LAWREVIEWS

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TREATY  
ARBITRATION  
REVIEW

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# PREFACE

The past year has again confirmed *The Investment Treaty Arbitration Review's* contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to their conclusions. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment, therefore, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This fourth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

**Barton Legum**

Dentons

Paris

April 2019

# THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP

*Lars Markert and Shimpei Ishido*<sup>1</sup>

## I INTRODUCTION

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has evolved out of the long-negotiated Trans-Pacific Partnership Agreement (TPP). Entered into force on 30 December 2018, the CPTPP constitutes one of the world's largest regional free trade and investment agreements, encompassing a combined GDP of US\$10 trillion – almost 13.5 per cent of global GDP – 495 million people and over 15 per cent of global trade.<sup>2</sup>

The CPTPP's investment chapter contains a number of interesting provisions that clarify the scope of substantive investment protections and address some of the concerns about the current investor–state dispute settlement (ISDS) regime. This piece will focus on the most relevant provisions of CPTPP's investment chapter and explain why it can be qualified as a modern investment agreement.

## II NEGOTIATION HISTORY

### i TPP

The TPP was negotiated with the goal to reduce tariff and non-tariff barriers across substantially all aspects of international trade in the Asia-Pacific region, and to cover intellectual property, investments and dispute settlement for investors, among others. Negotiations for the TPP started in January 2008 between the United States and members of the Trans-Pacific Strategic Economic Partnership Agreement – Brunei, Chile, Singapore and New Zealand. In November 2008, Australia, Vietnam and Peru joined the negotiations, followed by Mexico and Canada in October 2012, and finally by Japan in July 2013. Due to the involvement of the United States, the TPP initially encompassed nearly 40 per cent of global GDP, over 800 million people and around one-third of global trade.<sup>3</sup>

The TPP was shaped in 19 official negotiation rounds spanning from March 2010 to August 2013. The end of official negotiations coincided with the late addition of Japan in July 2013, after which unofficial negotiations in the form of chief negotiator meetings

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1 Lars Markert is a foreign law partner and Shimpei Ishido is a senior associate at Nishimura & Asahi. The authors gratefully acknowledge the assistance of their colleagues, Masaki Kawasaki, junior associate, and Michael Martínez, trainee associate, in preparing this chapter.

2 Ministry of International Trade and Industry of Malaysia, <https://fta.miti.gov.my/index.php/pages/view/71>. Similar data can be found on the websites of the ministries of other contracting states.

3 Office of the United States Trade Representative, 'Trans-Pacific Partnership Ministers' Statement', 4 February 2016, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>.

and ministerial meetings took place.<sup>4</sup> The terms of the TPP were finally agreed upon on 4 October 2015. On 4 February 2016, 12 Pacific Rim states – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam – signed the TPP.

The TPP was to enter into force when at least six parties accounting for 85 per cent of the combined GDP of the 12 member states ratified the agreement. Thus, essentially both Japan and the United States had to ratify the TPP for it to enter into force. On 23 January 2017, on his fourth day in office, US President Donald J Trump withdrew from the TPP by Executive Order, effectively preventing the TPP from ever taking effect, as the United States accounted for 60 per cent of the combined GDP of the TPP Member States.

## **ii CPTPP**

With the TPP unable to enter into force after the withdrawal of the United States, the remaining member states remained intent on executing a binding agreement. In negotiations for a revised TPP, the newly dubbed CPTPP, and with Japan leading the way,<sup>5</sup> all of the TPP member states, less the United States, agreed to revive the agreement in May 2017. In doing so, 22 provisions from the original TPP that had primarily been pushed by the United States were suspended or modified, as they were not widely supported by the remaining members. After less than a year of negotiations, the CPTPP was signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam on 8 March 2018.

The CPTPP was ratified by Mexico, Japan, Singapore, New Zealand, Canada, Australia and Vietnam in late 2018, and, as of 30 December 2018, the CPTPP entered into force between Australia, Canada, Japan, Mexico, New Zealand and Singapore, and for Vietnam as of 14 January 2019. The CPTPP is open for subsequent accession by other, mainly Asia-Pacific Economic Cooperation member states, and Thailand, Indonesia, Colombia, South Korea and Taiwan seem to have expressed interest in joining the CPTPP.<sup>6</sup>

## **III CONTENT OF THE CPTPP INVESTMENT CHAPTER**

The CPTPP largely incorporates the terms of the TPP by reference and makes them part of the CPTPP *mutatis mutandis* (CPTPP, Article 1.1). This also applies to the TPP Chapter 9 on 'Investment' (the CPTPP Investment Chapter).

The CPTPP leaves the substantive investment protections in Section A of Chapter 9 unchanged. With respect to ISDS contained in Section B of Chapter 9, however, the CPTPP

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4 Although Japan had expressed interest in joining the TPP as early as October 2010, domestic resistance, particularly from the agriculture industry, hindered Japan's attempts to join the free trade agreement. (See *JETRO Newsletter*, 'Japan Looks to Trans-Pacific Partnership to Transform its Economy', February 2011, [https://www.jetro.go.jp/ext\\_images/en/reports/survey/pdf/2011\\_01\\_epa.pdf](https://www.jetro.go.jp/ext_images/en/reports/survey/pdf/2011_01_epa.pdf).) Furthermore, the shift from official negotiation 'rounds' to unofficial meetings seemingly correlates to the addition of Japan to the negotiations, in light of the 2013 deadline to conclude the negotiations. (See Office of the United States Trade Representative, 'Joint Press Statement TPP Ministerial Meeting Bandar Seri Begawan, Brunei Darussalam', 23 August 2013, <https://ustr.gov/joint-press-statement-tpp-ministerial-brunei>.)

5 Tobita, Rintaro and Ohiro, Yuji, *Nikkei Asian Review*, 'Japan rings in the year of mega free trade', 30 December 2018, <https://asia.nikkei.com/Economy/Trade-war/Japan-rings-in-the-year-of-mega-free-trade>.

6 *The Japan Times*, 'TPP countries to start accession talks for new members in 2019', 19 July 2018, <https://www.japantimes.co.jp/news/2018/07/19/business/tpp-countries-start-accession-talks-new-members-2019/>.

suspends the application of provisions on claims arising out of investment authorisations and investment agreements originally foreseen by the TPP (CPTPP, Article 2 and Annex, Article 2). This means that under the CPTPP only claims that relate to a breach of the substantive investment protections contained in Section A of the CPTPP Investment Chapter can be submitted to ISDS.

### **i Scope of investment protection**

Article 9.2 regulates the scope of the CPTPP Investment Chapter. To benefit from its protections, the threshold definitions of investor and covered investment must be satisfied, as well as the threshold for the CPTPP Investment Chapter's application *ratione temporis*. When it comes to the imposition of performance requirements (Article 9.10) or regulation in the public interest (Article 19.16), the CPTPP Investment Chapter applies to all investments, also non-CPTPP investments, because in certain circumstances a partial application or non-application of those measures could create competitive disadvantages for CPTPP investments.<sup>7</sup>

#### ***Investor***

Defined as broadly as under the 2012 US Model Bilateral Investment Treaty (BIT), an investor of a CPTPP member state means a CPTPP member state itself, or a national or an enterprise of a CPTPP member state, that attempts to make, is making or has made an investment in the territory of another member state (Article 9.1).<sup>8</sup> Thus, not only nationals and enterprises, but also CPTPP member states and even separate customs territories for which the CPTPP is in force, fall under the definition of an investor (Article 9.1).

The rather broad notion of 'investor' is counterbalanced by CPTPP member states reserving the right to deny the benefits of the CPTPP Investment Chapter to certain investors and their investments in either of the following two situations ('denial of benefits'):

- a* First, if the investor is an enterprise of another CPTPP member state owned or controlled by a person of a non-CPTPP member state or the host state, that has no substantial business activities in the territory of a CPTPP member state other than in the host state (Article 9.15.1).<sup>9</sup>
- b* Second, if the investor is an enterprise of another CPTPP member state owned or controlled by a person of a non-CPTPP member state, and the host state adopts or maintains measures, with respect to the non-CPTPP member state or a person thereof, that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the CPTPP Investment Chapter were accorded to the enterprise or its investments (Article 9.15.2).

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<sup>7</sup> Lee M Caplan and Jeremy K Sharpe, '18 United States', in: Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (OUP, 2013), page 799.

<sup>8</sup> Sub-definitions are as follows: 'Party means any State or separate customs territory for which the Agreement is in force' (Article 1.3); 'National means a "natural person who has the nationality of a Party" according to Annex 1-A (Party-Specific Definitions) or a permanent resident of a Party' (Article 1.3); and 'Enterprise means an enterprise constituted or organized under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there' (Article 9.1).

<sup>9</sup> Similar provisions can also be found in other investment agreements. See NAFTA, Article 1113; Argentina–United States BIT, Article 1(2); 2012 US Model BIT, Article 17; Austria–Jordan BIT, Article 10.

Where a respondent state successfully establishes either of the above situations in an ISDS proceeding, a claim will likely be rejected.<sup>10</sup>

### ***Investment***

The definition of ‘investment’ is correspondingly broad. Similar to the 2012 US Model BIT, the CPTPP Investment Chapter utilises the term ‘characteristics of an investment’, which includes the commitment of resources, expectation of profit or assumption of risk (Article 9.1).<sup>11</sup> Unlike some other investment agreements,<sup>12</sup> the CPTPP Investment Chapter contains no ‘in accordance with host state’s law’ requirement. Further, as in many other investment agreements, a non-exhaustive list of forms of investments is set out – however, expressly excluding an order or judgment entered in a judicial or administrative action (Article 9.1). Whether an arbitral award may constitute an investment remains unclear but, in light of the wording, cannot be ruled out.<sup>13</sup>

### ***Application ratione temporis***

The CPTPP Investment Chapter defines covered investments as those investments in existence as of the date of entry into force of the CPTPP, or established, acquired or expanded thereafter (Article 9.1). In other words, the CPTPP Investment Chapter applies to all investments, whether made before or after its entry into force.<sup>14</sup> However, the CPTPP Investment Chapter will not bind a CPTPP member state in relation to an act or fact before CPTPP’s entry into force for that member state (Article 9.2.3).

### ***Limitations of scope for certain areas***

Investments into financial services are governed by the Financial Services Chapter (Chapter 11), which incorporates only some of the provisions of the CPTPP Investment Chapter by reference.<sup>15</sup> Accordingly, investors can only invoke these provisions in ISDS proceedings (Article 11.2.2(a) and (b)).

---

10 See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 4.30.

11 Some authors have pointed out that it is somewhat circular to define the term ‘investment’ by invoking the ‘characteristics of an investment’. See, e.g., Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (2012), pages 63, 64.

12 See, e.g., Lithuania–Ukraine BIT, Article 1.1; ASEAN Comprehensive Investment Agreement, Article 4(a); and India–Brunei Darussalam BIT, Article 1(b).

13 See Maximilian Clasmeier, ‘Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law’, *International Arbitration Law Library*, Vol. 39 (2016), page 70: ‘From a mere textual approach, it is difficult to see how an arbitral award could be previously invested before it is rendered. Nevertheless, it is a matter of interpretation to allocate its function in a broader context and the object and purpose of the respective BIT. It must in any case be taken into consideration.’

14 Annex 9-K, however, contains a carve-out with respect to certain claims under government procurement contracts with Malaysia for a period of three years after the date of entry into force of the CPTPP for Malaysia.

15 See Article 11.2.2(a), making reference, e.g., to Article 9.6 (Minimum Standard of Treatment) and Article 9.8 (Expropriation). See also the express limitation in Article 9.3.3.

With respect to taxation measures, the scope of substantive protections is narrowed down (Article 29.4).<sup>16</sup>

## **ii Substantive standards of investment protection**

The most frequently invoked substantive standards of investment protection addressed below seem to have been somewhat curtailed in the CPTPP Investment Chapter, presumably to ensure adequate regulatory power of the member states. This ‘right to regulate’ is emphasised throughout.

In a similar vein, the member states retain control over the scope of the substantive standards. Chapter 27 provides for the forming of a Trans-Pacific Partnership Commission (the Commission), which can issue interpretations of the CPTPP Investment Chapter, which shall be binding on a tribunal (Article 9.25.3).

### ***National treatment and most favoured nation (MFN) treatment***

Like practically all investment agreements, the CPTPP Investment Chapter prohibits nationality-based discrimination by the host state. The CPTPP Investment Chapter’s national treatment clause requires CPTPP member states to guarantee investors of another CPTPP member state and covered investments treatment no less favourable than treatment they accord, in like circumstances, to their own investors and their investments in their territories (Articles 9.4.1, 9.4.2). It also requires CPTPP member states to guarantee investors of another CPTPP member state and covered investments treatment no less favourable than treatment they accord, in like circumstances, to investors of any other state and their investments (Articles 9.5.1, 9.5.2).

It is widely accepted that differentiations are justifiable if rational grounds can be shown. The CPTPP Investment Chapter clarifies in a footnote that whether treatment is accorded in ‘like circumstances’ depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives (Article 9.4, footnote 14).<sup>17</sup>

Article 9.5.3 of the CPTPP Investment Chapter answers the long-standing controversy of whether MFN clauses can apply to dispute settlement provisions by clarifying that the treatment referred to in the MFN clause does not encompass international dispute resolution procedures or mechanisms, such as ISDS covered in Section B of the CPTPP Investment Chapter.

Another limitation of the MFN clause arises out of all of the CPTPP member states appearing to have expressed in some form that the MFN clause shall not extend to legal

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16 Only Article 9.4 (National Treatment), Article 9.5 (Most Favoured Nation Treatment), Article 9.8 (Expropriation) and Article 9.10.2 (Performance Requirements) apply.

17 See also the Drafters’ Note on Interpretation of ‘In Like Circumstances’ Under Article 9.4 (National Treatment) and Article 9.5 (Most Favoured Nation Treatment).

protections in their investment agreements already in force, but only to such protections in investment agreements a member state is to sign in the future.<sup>18</sup> This will require the CPTPP member states to adopt consistent practices when they conclude future investment treaties.<sup>19</sup>

***Customary international law minimum standard of treatment of aliens (minimum standard of treatment)***

Similar to the North American Free Trade Agreement (NAFTA),<sup>20</sup> the CPTPP Investment Chapter equates the fair and equitable treatment (FET) standard (and full protection and security) with the minimum standard of treatment under customary international law (Article 9.6.1). Moreover, the CPTPP Investment Chapter incorporates a NAFTA Free Trade Commission's Note,<sup>21</sup> and provides that the concepts of FET and full protection and security do not require measures in addition to or beyond that which is required by the minimum standard of treatment of aliens, and do not create additional substantive rights (Article 9.6.2). This is echoed in a significant and growing number of recent international investment agreements involving CPTPP member states.<sup>22</sup>

By limiting the FET standard to customary international law, the CPTPP Investment Chapter seeks to rein in the discretion of tribunals when considering the standard's content. In reality, however, the minimum standard itself is quite indeterminate and requires interpretation. The process of establishing the content of customary international law (determining state practice and *opinio juris*) is methodologically difficult and puts an onerous burden on the claimants.<sup>23</sup> This may become an issue under the CPTPP Investment Chapter according to which an investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration

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18 See, e.g., Japan's Annex II to the Investment Chapter, page 18, concerning MFN treatment (Articles 9.5 and 10.4) states 'Japan reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral agreement in force on, or signed prior to, the date of entry into force of this Agreement.' See also Canada's Annex II to the Investment Chapter, page 13; Australia's Annex II to the Investment Chapter, page 19; and New Zealand's Annex II to the Investment Chapter, page 9. This is the case, e.g., in Canada–Burkina Faso FIPA (2015), Annex III.1: 'Article 5 (Most-Favoured-Nation Treatment) does not apply to treatment accorded by a Party under a bilateral or multilateral international agreement in force on or signed prior to the date on which this Agreement came into effect.'

19 Suzy H. Nikiéma, 'The Most-Favoured-Nation Clause in Investment Treaties', IISD Best Practice Series, February 2017, para. 6.2.

20 NAFTA, Article 1105.

21 NAFTA Free Trade Commission: Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

22 See, e.g., the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (2009), the Japan–Philippines EPA (2006), the China–Peru FTA (2009), the Malaysia–New Zealand FTA (2009).

23 UNCTAD Series on Issues in International Investment Agreements II, 'Fair and Equitable Treatment' (2012), pages 28, 29. See, e.g., *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, paras. 9.47–9.65, where the tribunal set a 'high threshold of severity and gravity before finding that a state has breached any elements of [NAFTA] Article 1105', and dismissed claimants' claim because they had failed to pass such a threshold.



(Article 9.23.7).<sup>24</sup> In arbitral practice, the linkage to the minimum standard of treatment has hardly led to differing interpretations and applications of the FET standard, irrespective of which governing standard is ultimately assumed.<sup>25</sup>

There are also other novel attempts to articulate the content of the FET standard in the context of certain controversial issues, by the clarification that the mere facts that (1) a party takes or fails to take an action that may be inconsistent with an investor's expectations, and (2) a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a CPTPP member state, do not themselves constitute a breach of the FET standard, even if there is loss or damage to the covered investment as a result (Articles 9.6.4, 9.6.5).

### ***Expropriation***

CPTPP member states agree not to expropriate or nationalise covered investments, either directly or indirectly, except (1) for a public purpose; (2) in a non-discriminatory manner; (3) on payment of prompt, adequate and effective compensation; and (4) in accordance with due process of law (Article 9.8.1). These elements are generally in line with many other international investment agreements.

An annex to the CPTPP Investment Chapter elaborates on the meaning of expropriation and requires, in determining an indirect expropriation, a case-by-case, fact-based inquiry that considers, among others, the economic impact, legitimate expectations and character of the government action. Non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation (Annex 9-B(3)).<sup>26</sup>

The CPTPP Investment Chapter clarifies the concept of expropriation in the context of subsidies and grants. A CPTPP member state's decision not to issue, renew or maintain a subsidy or grant, or a decision to modify or reduce a subsidy or grant, in the absence of a legal or contractual commitment to do so, or in accordance with terms of the subsidy or grant, standing alone, does not constitute expropriation (Article 9.8(6)).

### ***Performance requirements***

The CPTPP Investment Chapter prohibits member states from imposing performance requirements such as export requirements, local content requirements and technology transfer requirements on investors (Articles 9.10.1 and 2). This aims to ensure that investors' efficient business activities are undisturbed by host states' demands in the interest of developing their economies.

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24 In a number of arbitral cases, tribunals relied on past arbitral decisions that did not refer to state practice or *opinio juris* in ascertaining the content of the minimum standard of treatment, see, Dumberry, 'The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law', *Journal of International Arbitration*, Vol. 33.3, pages 277-284.

25 Marc Jacob and Stephan W. Schill, 'Standards of Protection I. Fair and Equitable Treatment: Content, Practice, Method', in: Marc Bungenberg et al. (eds.), *International Investment Law* (2015), page 708. In a number of cases, arbitrators seemed to be less interested in the theoretical discussion on the relationship between the FET and the minimum standard of treatment, and turned their attention primarily to the content of the FET obligation, and to whether it is qualified by the minimum standard of treatment, see UNCTAD, above note 23, pages 59, 60.

26 The 2004 Canada Model BIT and the 2004 US Model BIT have a similar annex with respect to expropriation.

Most of the requirements stipulated in the CPTPP Investment Chapter are similar to those in past investment agreements, such as NAFTA. However, the CPTPP Investment Chapter sets forth novel performance requirements prohibited in relation to the use of technology. One is the requirement to use or accord preference to a technology of the host state or a person of the host state (Article 9.10.1(h)),<sup>27</sup> and the other is the requirement to adopt certain terms as required by the host state in the technology licensing agreement freely entered into between the investor and a person of the host state (Article 9.10.1(i)).<sup>28</sup> These provisions are expected to help investors investing in manufacturing and high-tech industries to freely make use of the technology they developed.

These new provisions are subject to an exception that allows the host state to adopt or maintain measures to protect legitimate public welfare objectives (Article 9.10.3(h)).

### ***Right to regulate and corporate social responsibility***

Apart from emphasising the right to regulate with respect to various substantive standards of protection as indicated above, the CPTPP Investment Chapter expressly, but somewhat declaratorily,<sup>29</sup> acknowledges that CPTPP member states can undertake measures otherwise consistent with the CPTPP Investment Chapter to ensure that investment activity will be undertaken in a manner sensitive to environmental, health or other regulatory objectives (Article 9.16).

In a similar declaratory fashion, CPTPP member states reaffirm the importance of encouraging enterprises operating in their territory to voluntarily comply with corporate social responsibility standards (Article 9.17).

### **iii ISDS**

The CPTPP Investment Chapter contains a modernised form of investment arbitration to address ISDS. This distinguishes it from NAFTA's successor, the United States–Mexico–Canada Agreement, which has largely abolished ISDS, or the investment agreements negotiated by the European Union, which aim to establish an investment court system.

#### ***ISDS mechanism***

A claimant may submit a claim under one of the following alternatives: the ICSID Convention and the ICSID Rules;<sup>30</sup> the ICSID Additional Facility Rules;<sup>31</sup> the UNCITRAL Rules; or, if the claimant and respondent agree, any other arbitral institution or any other arbitration rules (Article 9.19.4).

When doing so, the claimant must be aware of:

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27 The provision was just adopted in the US Model BIT (2012); see Caplan and Sharpe, note 7 above, page 799.

28 A similar provision can be found in Japan's recent treaty practice, see, Japan-Mongolia EPA, Article 10.7.1(k).

29 Lars Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States', in: Marc Bungenberg et al. (eds.), *International Investment Law and EU Law* (2011), pages 145, 149-150.

30 Provided that both the respondent and the claimant are parties to the ICSID Convention.

31 Provided that either the respondent or the claimant is a party to the ICSID Convention.

- a the mandatory six-month prior consultation and negotiation period (Articles 9.18, 9.19);<sup>32</sup>
- b the three-year-and-six-month time limitation from the date on which the claimant first acquired, or should have first acquired, knowledge of breach or damage (Article 9.21.1);
- c the requirement of a mandatory written waiver of any right to initiate or pursue the same claims before any court or administrative tribunal, or through any other dispute settlement procedures (Article 9.21.2(b)); and
- d a fork-in-the-road-clause in the case of Chile, Mexico, Peru or Vietnam, which provides that an investor must elect between litigation before these state's domestic courts or administrative tribunals, on the one hand, or an investment arbitration claim, on the other hand. The election is definitive and exclusive, and choosing the former will prevent the investor from submitting the claim to arbitration (Annex 9-J).

### ***Selection of arbitrators***

In contrast to proposals by the European Union to replace investment arbitration with a standing investment court, parties under the CPTPP Investment Chapter continue to be able to select their arbitrators. However, the Chapter addresses perceived legitimacy concerns that arise when a system of adjudication permits adjudicators to act as arbitrator in one case and legal counsel in another (double hatting).<sup>33</sup>

On 19 January 2019, the Commission established the Code of Conduct for Investor-State Dispute Settlement Proceedings (the Code of Conduct),<sup>34</sup> which is required under Article 9.22.6. As a countermeasure against double hatting, the general principles of the Code of Conduct require that an arbitrator, upon selection, shall refrain for the duration of the proceedings from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the CPTPP Investment Chapter or any other international agreement (Code of Conduct, 3(d)). In the event of an alleged breach of the Code of Conduct, the rules governing the arbitration shall apply to any challenge, disqualification or replacement of an arbitrator (Code of Conduct, 3(f)).

### ***Conduct of the arbitration***

The CPTPP Investment Chapter offers procedural provisions to improve the efficiency of arbitral proceedings.

A tribunal shall address and decide as a preliminary question any objections by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards) or that a claim is

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32 As explained above, the claimant cannot avoid this requirement by invoking a more favorable dispute settlement clause of another treaty that does not contain such a requirement because the treatment under the CPTPP MFN clause does not encompass the dispute resolution mechanism.

33 Neither the various arbitration rules (i.e., ICSID, SCC, ICC, and UNCITRAL) nor the IBA Guidelines on Conflicts of Interest in International Arbitration explicitly prohibit this practice, although the latter list 'double hatting' in the Orange List. For an empirical analysis of 'double hatting', see, e.g., Malcolm Langford, Daniel Behn, Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration', *Journal of International Economic Law*, Volume 20, Issue 2, 1 June 2017, pages 321-324.

34 Decision by the Commission of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership regarding ISDS Code of Conduct, [https://www.cas.go.jp/jp/tpp/tpp11/pdf/190119\\_tpp\\_dec\\_en\\_08.pdf](https://www.cas.go.jp/jp/tpp/tpp11/pdf/190119_tpp_dec_en_08.pdf).

manifestly without legal merit (Article 9.23.4). A similar provision can be found in ICSID Arbitration Rule 41.5, but the CPTPP Investment Chapter allows a respondent to submit the above-referenced objections even in arbitral proceedings under other arbitration rules. Further, if the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis such an objection or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits, and issue a decision or award on the objection, stating the grounds therefore, no later than 150 days after the date of the request (Article 9.23.5).<sup>35</sup>

Most notable, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties for their comments. They may submit written comments on the proposed award on liability, which the tribunal shall consider for its decision or award (Article 9.23.10). It remains to be seen whether the party review effectively addresses tribunal oversights, or whether it will be used by the parties to reargue their case.

Probably with a nod to reform efforts regarding the ISDS system currently undertaken within the UNCITRAL Working Group III, the CPTPP Investment Chapter provides that if an appellate mechanism for reviewing awards rendered by ISDS tribunals is developed in the future under other institutional arrangements, the CPTPP member state shall consider whether awards rendered under Article 9.29 should be subject to such an appellate mechanism (Article 9.23.11).

### ***Side letter to the CPTPP***

On 8 March 2018, alongside signing the CPTPP itself, New Zealand also signed side letters with five signatories to the CPTPP – Brunei, Malaysia, Peru, Vietnam and Australia – to exclude compulsory ISDS by the following two approaches:

The first approach is to fully exclude an investor's right to ISDS. This can be seen in the side letters exchanged with Peru and Australia.<sup>36</sup> Investors of Australia and New Zealand may nevertheless be able to draw on the ASEAN–Australia–New Zealand free trade agreement (AANZFTA) to get around this exclusion. By contrast, as of March 2019 New Zealand has no overlapping investment agreement with Peru, meaning that the exclusion of ISDS between those two states is effective.

The second approach, taken in the remaining three side letters,<sup>37</sup> is more complex and provides for dispute resolution on a staged basis. In the case of a dispute, an investor should make a written request for consultations and negotiations, briefly describing the facts

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35 However, the same article also provides that if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days. In addition, when the tribunal makes a determination on such objections, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment (Article 9.23.6).

36 New Zealand–Peru Side Letter, paras. 1-2, and New Zealand–Australia Side Letter, paras. 3-4, both stating that no investor of a party shall have recourse to dispute settlement against the government of another party under Chapter 9, Section B (ISDS) of the CPTPP.

37 New Zealand–Brunei Side Letter, paras. 1-2; New Zealand–Malaysia Side Letter, paras. 1-2; and New Zealand–Vietnam Side Letter, paras. 1-2.

regarding the measures at issue. The state and the investor will then try to resolve the dispute amicably within six months by using non-binding third-party procedures, including good offices, conciliation and mediation, failing which the dispute may be submitted to arbitration in accordance with the CPTPP Investment Chapter, provided that the states concerned consent (and, in case of the Vietnam side letter, ‘specifically’ consent) to its application. However, despite the new requirement for specific host state consent, investors from those four states may be able to draw on the general consent to arbitration in a prior treaty such as AANZFTA to pursue ISDS against one of the states, even without the respondent state’s specific consent to arbitrate that dispute.

### ***Joint declaration on ISDS***

In addition to signing the side letters, New Zealand, together with Chile and Canada, made a joint declaration on ISDS. While reaffirming the right of each state to regulate within its territory to achieve legitimate policy objectives, this declaration recognises the strong procedural and substantive safeguards that are included in the CPTPP Investment Chapter, and ‘the important role of civil society and other interested groups on public policy matters relating to ISDS’, and intends ‘to consider evolving international practice and the evolution of ISDS including through the work carried out by multilateral international fora’.<sup>38</sup>

## **IV CONCLUSION**

As the above shows, the CPTPP Investment Chapter is calibrating, but not abandoning, familiar substantive and procedural investment protections.<sup>39</sup> The contracting states have addressed current concerns about the investment protection system in an ‘evolutionary’ rather than a ‘revolutionary’ manner. This stands in stark contrast to the renegotiations of NAFTA or the European Union’s efforts to replace the tried and tested ISDS investment arbitration with an investment court system.

It would therefore not be surprising if the CPTPP Investment Chapter became an inspiration for other states seeking to modernise their investment agreements, in Asia and beyond.

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38 Joint Declaration on Investor State Dispute Settlement among New Zealand, Canada and Chile.

39 See Alexander Yanos and Carlos Ramos-Mrosovsky, ‘Investor-State Arbitration and the “Next Generation” of Investment Treaties’, in Barum Legum (ed.), *Investment Treaty Arbitration Review* (2018), page 353.

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