Memo
To: Whom It May Concern
From: Todd Tucker, University of Cambridge
RE: Quick and Dirty Analysis of Changes of Final TPP Investment and Financial Services Chapters (and related Exceptions) Relative to January 2015 Draft TPP and Korea FTA
Date: November 5, 2015 (updated November 9, 2015)

The 12 governments Trans-Pacific Partnership (TPP) governments released the texts of over 30 chapters and annexes of the agreement on November 5, 2015.[1]

The broad outlines of the investment and financial services chapters do not vary relative to past agreements. For example, investor-state dispute settlement (ISDS) is the most important institutional innovation in recent trade pacts. This allows foreign investors to challenge host government regulations for cash compensation outside of national courts. The fundamental governance aspects of ISDS (ad hoc tribunals, no appeals, cash remedies, ample treaty shopping opportunities) are remarkably constant over 3,000 plus pacts around the globe (Allee and Elsig 2015; Tucker 2015). The TPP is no exception. Indeed, the U.S. Trade Representative's major governance reform proposal was to a Code of Conduct for arbitrators (Calmes and Tavernise 2015). However, the TPP text does not establish any clear commitments in that regard. Instead, the negotiators punted the code of conduct to a later date (Article 9.21.5). It is unclear if this will be done in advance of ratification by TPP countries' legislatures.

Nonetheless, the TPP does have some variance in the margins. The new provision that has thus far gotten the most attention is the option that states now have to block tobacco-related disputes from going forward (Article 29.5). But there is a broader range of changes that deserve scrutiny. Some of these will benefit investors, others states, and others will have mixed effects. Finally, some will boost the sanctity of contracts. I include "pro-contract" as a separate category of textual changes, because investment tribunals have sometimes been willing to allow treaties to trump specific contractual commitments that specific states signed with specific investors.[2] This divergence is important for both empirical and normative reasons, as ISDS's supposed promotion of contract sanctity is a major mechanism connecting these treaties to economic growth (Wellhausen 2014).

The present memo is the result of a legal blackline analysis comparing the TPP investment and financial chapters to five precedent documents. These precedent documents are analyzed in each section below, and include:

1) The draft TPP investment chapter negotiating text leaked by the Wikileaks in January 2015.[3] This is of interest since many commentators based earlier TPP analyses on these provisions.
2) The Korea free trade agreement's (FTA) investment chapter from 2011.[4] This is the last major trade agreement ratified by the Obama administration, including then-Secretary of

[1] Full text available at: http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-Trans-Pacific-Partnership.php
[2] For one prominent example, see http://www.italaw.com/cases/309
[3] Available at: https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf

State Hillary Clinton. As such, it provides a baseline against which to compare how the administration's position has evolved over time.

3) The Korea FTA's financial services chapter from 2011.[5] The financial services chapter imports many of the investment chapter's disciplines into disputes between finance companies and governments.
4) The World Trade Organization's (WTO) General Agreement on Trade in Services (GATS)' general exception for balance-of-payments crises. The TPP includes a new temporary safeguard provision (Article 29.3) that is based largely on the GATS precedent, with a few differences. Such an exception has not been included in prior bilateral and regional U.S. trade agreements, but it does apply to the many countries that took services trade commitments at the WTO.[6]
5) Hillary Clinton and John Kerry's substitute for investor-state dispute settlement in the 2002 Fast Track bill.[7] This document was the most extensive elaboration of an alternative to investment chapter rules of any current U.S. presidential candidate. Earlier this year, Clinton announced her opposition to the TPP. To the extent that this proposed 2002 amendment may represent a "marker" for Clinton's thinking on the topic,[8] the below analysis allows for an analysis of how closely the final TPP meets Clinton's prescriptions.

This is a preliminary and quick analysis; please feel free to contact me with any corrections.

I. INVESTMENT - LEAK V. FINAL TPP TEXT

Pro-Investor Changes

- Australia no longer carved out from chapter; Australia's health policies no longer have a blanket carve-out; Canada's cultural policies don't have a blanket carve-out; Malaysia's procurement policies don't have blanket carve-out (only three year phase out, Annex 9-K).
- One or more TPP members had argued for a one-year pursuit of a domestic remedy before an investor could launch an ISDS claim (Article II.19.3 in leaked text). This was deleted in the final text.

Pro-Contract Changes

- Investor-state disputes can be brought over alleged damage to investments, investment agreements (akin to contracts), or investment authorizations (akin to regulatory permission). The final TPP text has greater precision than the earlier draft text in the definition of "investment agreement" to root more firmly in national contract law (Agreement must "create[] an exchange of rights and obligations, binding on both parties

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[4] Available at: https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text
[5] Available at: https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text
[6] Future research should examine the precise extent of countries' services trade commitments in the TPP relative to the WTO.
[7] Available at: https://www.congress.gov/amendment/107th-congress/senate-amendment/3430/cosponsors
[8] Her campaign has not explicitly indicated that this is the case from their perspective.

under the law applicable"....) Article 9.1 Renewal of pre-TPP contract not included in definition of investment agreement (fn 6).

- Clearer authorization of counter-claims by a state when a state's contract or authorization is at issue (Article 9.18.2). Thus, while a state cannot launch an ISDS claim against an investor, it is not kept from invoking its rights under a contract once the ISDS dispute is under way.
- More specific language that ensures that expedited procedures are available when a claim "is manifestly without legal merit" (Art 9.22.4).
- There is a clarification that the investor bears the burden of proof on its minimum standard of treatment (MST) / fair and equitable treatment (FET) claims (Article 9.22.7), including arguing the public international law dimensions. This might lead some tribunals to argue that investors must show that novel or adventurous arguments have a basis in state practice.
- Further clarification that - when law of respondent is default rule (a rare case) and controls (Gaillard and Banifatemi 2003) - that domestic law includes law on damages, mitigation, interest and estoppel (fn 35).
- A brand new annex saying investors can't use TPP protections for investment agreements if the underlying investment agreement itself envisions a different procedure. States can also consolidate contract- and treaty-based claims when the two overlap. Investors with investment agreements can still bring claims alleging violations of rights under investment authorizations or investments (Annex 9-L).[9] It is unclear why investors that they would not simply re-characterize investment agreement related disputes as investment-related or authorization-related.

Pro-State Changes

- A more specific listing of natural resource contracts that are covered under definition of investment agreement, including " oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources", but excluding land, water or radio spectrum (fn 8).
- To count as qualifying "investment authorization", public service contracts must be structured so that the end user is the public. This could eliminate claims for government contracts that put some service out into the world, but which is not directly consumed by public. Exclusion of "correctional services, healthcare services, education services, childcare services, welfare services or other similar social services" from list of covered public service investment agreements (fn 9).
- "Investment authorization" redefined to not include non-discriminatory licensing regimes and non-foreign-investment-authority-granted incentives (fn 10).
- The leaked version had a requirement that government enforcement of the terms of investment authorizations, but then subjected this to a requirement that it would not be a "disguised means" of violating the agreement. That limitation is now removed (Article 9.18, fn 31).

[9] Canada, Mexico and Peru list some special exceptions in this regard.

Cosmetic or Mixed Changes

- Scope of agreement does not include acts predating TPP (Article 9.2.3), although (as with other deals) the definition of investment does include investments an investor "has made" pre-TPP (Article 9.1).
- A clarification on FET / MST such that upset expectations alone or subsidy alterations alone are not violations.[10] This could rein in tribunals that would have found on this basis alone, although I don't know that this is a real problem in the case law. Usually investors make some claim involving past (rather than only prospective) damage. In any case, the new language would still allow investors and arbitrators to use upset expectations and subsidy changes as an element of a broader MST/FET violation.
- Modification or reduction of subsidies or grants is not alone an expropriation (Article 9.7.6). This adds to the leaked version's change (relative to the Korea FTA) that issuance, renewal and maintenance of same are not (on their own) expropriations. These could continue to be elements in expropriation claims.
- There is new language requiring litigants to ensure their appointees have subject matter expertise (Article 9.21.6). But verification of this is left up to the appointers.
- More explicit inclusion of various health issues (including health pricing) are among legitimate public welfare objectives in "rare circumstances" carve-out from definition of indirect expropriation (Annex 9-B, fn 37). It's not clear that adding more things to an indicative list changes much, especially when indirect expropriation claims are rarely successful in the first place.

II. INVESTMENT - KOREA FTA V. FINAL TPP TEXT

In addition to the above, the TPP Investment Chapter has further changes relative to the Korea FTA - the most recent major pact signed by the Obama administration.

Pro-Investor Changes

- Korea FTA had specific definitional language saying that "market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments". This language has been deleted in the TPP.
- Denial of benefits language allows what would have otherwise been "home state" substantial business activities to be located anywhere in the TPP region (Article 9.14.1).

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[10] It reads: "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.... For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result". (Article 9.6.4-5)

This means that a company could claim to be American, but really only have substantial business presence in Canada, and challenge Singapore.
- Deletion of a footnote to an essential security exception that required a tribunal to find that countries' invocation of an essential invocation shields the measure from scrutiny (Article 23.2 in Korea FTA vs. Article 29.2 in TPP).

Pro-Contract Changes

- For an "investment agreement" to be binding, it must be meaningful under national law and the investor must have acted in detrimental reliance on the promises (Article 9.1).
- To be qualifying investor, must have "taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence." This establishes a higher (or at least clearer) threshold for when investors with minimal skin in the game begin to be protected. (Article 9.1)
- Sets a much firmer tone for non-disclosure of confidential information. This would seem to pose some obstacles to Wikileaks data being used for ISDS claims (Article 9.23.4).
- Investor can only recover for damages to themselves (Article 9.28.2). This gets around the original problem in *Occidental v. Ecuador* (Oxy II), where Oxy claimed for damages suffered to one of its business partners. This part of the ruling has since been annulled (Fernandez-Armesto, Feliciano, and Oreamuno Blanco 2015).
- In those cases where the only damage claimed is for being impaired in attempting to make an investment, a tribunal cannot award for damages beyond the immediate transaction costs the would-be investor made (Article 9.28.4). This could lead to cases where an investor wins on merits for what seems a speculative case, but then really not see that much of a payday as a result.
- Article 9.28.6 strengthens prohibitions on awarding punitive damages ("shall not" instead of "may not"). There are similar clampdowns on overly quick moves to enforce award rulings.
- The Customary International Law / MST / FET annex ties the rights that foreign investors get to their "investments" (which are presumably as defined by TPP), not the more amorphous phrase "economic rights" (Annex 9-A).
- A new public debt annex. It is unclear how much it does. It starts with a bold statement that suggests that certain negotiated restructurings could not be challenged. But this is not as meaty when you read that all a claimant would have to show is that the restructuring violated a substantive ISDS protection under Section A (Annex 9-G). There is a meaningful fork in the road for serious negotiated restructurings and a cooling off period.
- Fork in the road for investment with some developing countries, but not developing nations (Annex 9-J).

Pro-State Changes

- Most favored nation (MFN) rules can't be used for procedural treaty protections, only substantive rights (Article 9.5.3). This will close off some treaty shopping opportunities.
- Post-strife compensation not required to be "prompt, adequate, and effective" , just appropriate (Art 9.6.2).

Cosmetic or Mixed Changes

- Definition of "investment" doesn't include inter-governmental loans. Unclear how meaningful. (Article 9.1)
- "Investment authorization" does not include "actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws..." In Korea FTA, "competition laws" were the only ones specifically enumerated.
- Definition of "claimant" can't include natural person of host state (Article 9.1). This avoids the situation where a national can claim to be foreign for ISDS purposes to circumvent local courts, although apparently not in cases when they use a foreign corporate vehicle to gain standing.
- National treatment provisions have language tying "like circumstances" to regulatory considerations (fn 14). This has long been a hobby horse of USTR at the WTO, although national treatment claims are rarely successful in investment arbitration.
- Expropriation "public purpose" tied to various domestic and international definitions (Article 9.7). I think tribunals have mostly followed this anyway.
- Non-renewal or non-issue of subsidy not in itself an expropriation (Art 9.7.6).
- Social insurance transfers exempted in part from transfers' obligations, provided they are non-discriminatory (fn 22). Unclear if this has ever been an issue.
- Technology and licensing issues added to performance requirement obligations, subject to some state defenses (Article 9.9.1(h-i), 9.9.3(h)).
- Clarification that performance requirement to employ local workers is allowed, provided that firms don't have to buy locally produced goods (Article 9.9.4), thereby limiting backward linkages channel of job creation.
- "Health and regulatory objectives" added to the empty "environmental" defense that green policies are allowed so long as they are "otherwise consistent" with investment chapter and TPP rules (Article 9.15).
- The expropriation annex does not have meandering language that suggests that only heavily regulated sectors are likely to be exempt from definition of indirect expropriation. Relative to the Korea FTA, specific example of real estate stabilization as subject of legitimate regulation is cut out, but a whole host of specifically enumerated health measures left in (like pricing and pharmaceutical policies) (as noted above) (Annex 9-B). Since indirect expropriation claims are rare, this specific enumeration probably does not matter much.
- A specific land expropriation annex for Singapore and Vietnam added (Annex 9-C).
- Some country specific carveouts for investment authorization policies (Annex 9-H).

III. FINANCIAL SERVICES - KOREA FTA AND TPP FINAL TEXT

There was no leaked financial services chapter, so the only one of our precedent documents we can compare the final TPP text to is the Korea FTA.

Pro-Investor Changes

- A big addition of MST/FET to cover financial services (Article 11.2.2). Previously, the only major investment chapter-style rules included for financial services claims were expropriation, transfers, national treatment and MFN. This could open up a wide variety of new claims, such as the need for financial regulators to offer an unchanging regulatory environment (Bonnitcha 2014).
- While national governments have to not discriminate on average between domestic and foreign producers, regional governments have to give foreign investors the best treatment given to anyone (could be a single firm - but unclear) (Article 11.3.3).

Pro-State Changes

- Cross-border providers explicitly not eligible (under TPP requirements) for subsidies and grants (Article 11.2.5).
- MFN language does not allow non-TPP treaty procedural protections to be imported in. By implication, substantive standards could be (Article 11.4.2).
- Prudential measures defense (PMD) much stronger. If a tribunal follows lead of only known precedent (the WTO Argentina-Panama case from this year), and finds that prudential includes basically anything under the sun (Pettigrew, de las Casas, and Valenzuela 2015), then the tribunal must stop the analysis and not award any damages (fn 11). Prudential reasons also expanded to include "financial and operational integrity of payment and clearing systems" (fn 10). However, overall scope of defense is somewhat scaled back for instances where prudential policies impact technical standards and goods trade (Article 11.11.1). Unclear exactly how this overlap would happen. Anti-circumvention second sentence somewhat tightened to be even more circular ("those provisions", i.e. expro, etc.).

Cosmetic or Mixed Changes

- USTR's "in like circumstances" hobby horse updated to make sure regulatory conditions are part of likeness examination (fn 5).
- Tribunals have new role assessing intellectual property rights (IPR) aspects of financial services when national treatment /MFN at issue (Article 11.10.4). Unclear exactly what this means or when it would come up.
- State-state disputes can (but needn't) get an assessment by a tribunal of financial services experts (Article 11.21.4); cross-retaliation in financial services requires consultation with FS experts (Article 11.21.5). Space for non-litigating governments to weigh in on financial services disputes (Article 11.22.2, fn 14). Binding PMD report, unlike ambiguous language in Korea FTA (Article 11.22.3). Can't draw adverse inference against country when they fail to invoke PMD (Article 11.22.4).

IV. GATS BALANCE OF PAYMENTS vs. TPP Temporary Safeguard

The TPP includes a new safeguard for balance of payments. It is unlike what has been in past FTAs, but similar to a provision in the WTO's GATS. The below table compares the TPP to the comparable GATS provision.

GATS language	TPP Language	Comment
Article XII: Restrictions to Safeguard the Balance of Payments 1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition. 2. The restrictions referred to in paragraph 1:	1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to payments or transfers for current account transactions in the event of serious balance of payments and external financial difficulties or threats thereof. 2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to payments or transfers relating to the movements of capital: (a) in the event of serious balance of payments and external financial difficulties or threats thereof; or (b) if, in exceptional circumstances, payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management. Any measure adopted or maintained under paragraph 1 or 2 shall:	Similar emphasis on precedent conditions, although a bit more emphasis on development in GATS.
(a) shall not discriminate among Members;	a) not be inconsistent with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 11.3 (National Treatment) and Article 11.4 (Most-Favoured-Nation Treatment)	Similar.
(b) shall be consistent with the Articles of Agreement of the International Monetary Fund;	b) be consistent with the Articles of Agreement of the International Monetary Fund;	Same
(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;	c) avoid unnecessary damage to the commercial, economic and financial interests of any other Party	Same
(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;	d) not exceed those necessary to deal with the circumstances described in paragraph 1 or 2	Same
(e) shall be temporary and be phased out progressively as the situation	e) be temporary and be phased out progressively as the situations	No cap in GATS, 18 months default in TPP...

specified in paragraph 1 improves.	specified in paragraph 1 or 2 improve, and shall not exceed 18 months in duration; however, in exceptional circumstances, a Party may extend such measure for additional periods of one year, by notifying the other Parties in writing within 30 days of the extension, unless after consultations more than one half of the Parties advise, in writing, within 30 days of receiving the notification that they do not agree that the extended measure is designed and applied to satisfy subparagraphs (c), (d) and (h), in which case the Party imposing the measure shall remove the measure, or otherwise modify the measure to bring it into conformity with subparagraphs (c), (d) and (h), taking into account the views of the other Parties, within 90 days of receiving notification that more than one half of the Parties do not agree	... although this can be extended, subject to veto of majority of concerned TPP members.
	f) not be inconsistent with Article 9.7 (Expropriation and Compensation); (FN 5 - For greater certainty, measures referred to in paragraph 1 or 2 may be non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives as referred to in Annex 9-B(3)(b) (Expropriation).	There is no comparable obligation in GATS.
	g) in the case of restrictions on capital outflows, not interfere with investors' ability to earn a market rate of return in the territory of the restricting Party on any restricted assets; and (fn 6 - he term "restricted assets" in this subparagraph refers only to assets invested in the territory of the restricting Party by an investor of a Party that are restricted from being transferred out of the territory of the restricting Party)	Similar, although footnote 8 of the GATS has comparable obligations for countries that took relevant Mode 1 and 3 commitments. Difference in TPP would be negative list architecture.
3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting	h) not be used to avoid necessary macroeconomic adjustment.	An insertion of TPP scrutiny into necessity of macroeconomic policy. A more sovereign determination in GATS.

a particular service sector.		
N/A	4. Measures referred to in paragraphs 1 and 2 shall not apply to payments or transfers relating to foreign direct investment (fn 7 - For the purposes of this Article, "foreign direct investment" means a type of investment by an investor of a Party in the territory of another Party, through which the investor exercises ownership or control over, or a significant degree of influence on the management of, an enterprise or other direct investment, and tends to be undertaken in order to establish a lasting relationship. For example, ownership of at least 10 percent of the voting power of an enterprise over a period of at least 12 months generally would be considered foreign direct investment.)	See above on rate of return. More restrictions in TPP.
N/A	5. A Party shall endeavour to provide that any measures adopted or maintained under paragraph 1 or 2 be price-based, and if such measures are not price-based, the Party shall explain the rationale for using quantitative restrictions when it notifies the other Parties of the measure.	No similar language in GATS. In any case, hortatory in TPP.
4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council. 5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article. (b) The Ministerial Conference shall establish procedures(4) for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate. (c) Such consultations shall assess the balance-of-payment situation of the	6. In the case of trade in goods, Article XII of GATT 1994 and the Understanding on the Balance of Payments Provisions of the GATT 1994 are incorporated into and made part of this Agreement, mutatis mutandis. Any measures adopted or maintained under this paragraph shall not impair the relative benefits accorded to the other Parties under this Agreement as compared to the treatment of a non-Party. 7. A Party adopting or maintaining measures under paragraph 1, 2 or 6 shall: (a) notify, in writing, the other Parties of the measures, including any changes therein, along with the	Different institutional proceedings. More multilateral and prescriptive in GATS. More bilateral in TPP.

Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as: (i) the nature and extent of the balance-of-payments and the external financial difficulties; (ii) the external economic and trading environment of the consulting Member; (iii) alternative corrective measures which may be available. (d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e). (e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member. 6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary	rationale for their imposition, within 30 days of their adoption; (b) present, as soon as possible, either a time schedule or the conditions necessary for their removal; (c) promptly publish the measures; and (d) promptly commence consultations with the other Parties in order to review the measures adopted or maintained by it. (i) In the case of capital movements, promptly respond to any other Party that requests consultations in relation to the measures adopted by it, provided that such consultations are not otherwise taking place outside of this Agreement. (ii) In the case of current account restrictions, if consultations in relation to the measures adopted by it are not taking place under the framework of the WTO Agreement, a Party, if requested, shall promptly commence consultations with any interested Party.	

V. HRC 2002 Proposal for Investment vs. Final TPP Text

Clinton's 2002 proposal had some provisions that were more pro-state and others that were more pro-investor than what is included in the final TPP text.

HRC Proposal	**Comment**
The principal negotiating objective of the United States regarding foreign investment is to reduce or eliminate artificial or trade distorting barriers to trade-related foreign investment. A trade agreement that includes investment provisions shall–	There are more conditions put on national treatment than past agreements, in keeping with tendency to move towards more exceptions.

(A) reduce or eliminate exceptions to the principle of national treatment;	
(B) provide for the free transfer of funds relating to investment;	There are more conditions put on free transfers' rules than past agreements, in keeping with tendency to move towards more exceptions.
(C) reduce or eliminate performance requirements, forced technology transfers, and other unreasonable barriers to the establishment and operation of investments;	There are more conditions put on performance requirement rules than past agreements, in keeping with tendency to move towards more exceptions.
(D) ensure that foreign investors are not granted greater legal rights than citizens of the United States possess under the United States Constitution;	U.S. nationals do not get to sue the U.S. government outside of U.S. courts (and there are limitations on when it may do so domestically - rarely for cash compensation (Schuck 1983)), although TPP investors will be able to do so. U.S. citizens do not get to appeal a U.S. Supreme Court decision, although a SCOTUS ruling could be the subject of an investment arbitration claim under the TPP. All investment disputes involve the former, and many have involved the latter (Paulsson 2005; Tucker 2013) . The TPP does not change that.
(E) limit the provisions on expropriation, including by ensuring that payment of compensation is not required for regulatory measures that cause a mere diminution in the value of private property;	Investment tribunals have used expropriation standards more expansively than U.S. takings jurisprudence (Porterfield 2004). U.S. takings and regulatory takings doctrine evolves over time, and the TPP does not require that its rules be aligned with U.S. standards in the present or future.
(F) ensure that standards for minimum treatment, including the principle of fair and equitable treatment, shall grant no greater legal rights than United States citizens possess under the due process clause of the United States Constitution;	Investment tribunals have used MST/FET standards more expansively than U.S. due process jurisprudence (Bonnitcha 2014). U.S. due process doctrine evolves over time, and the TPP does not require that its rules be aligned with U.S. standards in the present or future.
(G) provide that any Federal, State, or local measure that protects public health, safety and welfare, the environment, or public morals is consistent with the agreement unless a foreign investor demonstrates that the measure was enacted or applied primarily for the purpose of discriminating against foreign investors or investments, or demonstrates that the measure violates a standard established in accordance with subparagraph (E) or (F);	This is not a major change, since investment treaties only allow a government measure to be challenged if it violated a substantive protection of the agreement. However, it does suggest that: (a) discrimination claims under MFN or national treatment would only prevail if there were a discriminatory intent; and (b) standards other than FET and expropriation (e.g. transfers, performance requirements, etc.) could not be used to challenge a public interest policy. The TPP does not make such broad carve-outs.
(H) ensure that– (i) a claim by an investor under the agreement may not be brought directly unless the investor first submits the claim to an appropriate competent authority in the investor's country; (ii) such entity has the authority to disapprove the pursuit of any claim solely on the basis that it lacks legal merit; and (iii) if such entity has not acted to disapprove the claim within a defined period of time, the investor may proceed with the claim;	The TPP includes no such broad requirement for the investor's home state to filter the claim. In contrast, in financial services, the home state has a say in some cases as to whether the host state can invoke a prudential defense (Article 11.22.2), whether the TPP should trump a host state's tax treaties (Article 29.4.4), and whether a host state's taxation measures constitute an expropriation (Article 29.4.8).
(I) improve mechanisms used to resolve disputes between an investor and a government through– (i) procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims; (ii) procedures to enhance opportunities for public input into the formulation of government positions; and (iii) establishment of a single appellate body to review decisions in investor-to-government disputes and thereby provide coherence to the interpretations of investment provisions in trade agreements; and	The meatiest recommendation - the creation of an appellate body - is not included in the TPP (Article 9.22.11). There are no changes to upgrade the "efficiency" of arbitral selection, or mechanism for host state governments to get input from affected domestic parties (although this may exist under TPP countries' domestic law).
(J) ensure the fullest measure of transparency in the dispute	The TPP will require that respondent governments promptly

settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential, by– (i) ensuring that all requests for dispute settlement are promptly made public; (ii) ensuring that– (I) all proceedings, submissions, findings, and decisions are promptly made public; (II) all hearings are open to the public; and (III) establishing a mechanism for acceptance of amicus curiae submissions from businesses, unions, nongovernmental organizations, and other interested parties.	make most major documents public, including many more types of documents than the "request for dispute settlement". However, there does not seem to be any mechanism to ensure that governments do so (Article 9.23.1). There are various restrictions on respondents' disclosing of confidential information. The TPP does not explicitly require that "all" hearings are open to the public, only that some of its hearings be open (Article 9.23.2). Finally, it will be up to each TPP tribunal whether they accept amicus submissions - and these are subject to various requirements of pertinence (Article 9.22.3 - Article 9.23).

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