

# The Trans-Pacific Partnership Agreement and Non-Investment Concerns in International Investment Law

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## Abstract

*The past decade has been characterized by a multitude of investment awards that has adjudicated on the right to regulate of the State in the public interest which has adversely affected the investment of the foreign investment. This paper analyses as to what extent arbitral tribunals take into account the legitimate state interests and other international law obligations have while decided a claim for reparations for violation of investment guarantees. This paper analyses how the various standards of protection found in the number of investment agreements interact with other non-investment concerns that they have a profound impact on. Finally in the context of the law as laid down by the investment tribunals the author undertakes a study as to how the Transpacific Partnership Agreement has learnt from their experience, and as to what extent the same borne out in the language of the text of the treaty.*

## 1. Introduction

The modern period of investment protection characterized by the multitude of different bilateral and multilateral investment protection regimes across the world seems only to have codified and developed the law related to the protection of the property of aliens. Even within the domain of the protection of aliens the modern Bilateral Investment Treaties<sup>1</sup> and the ICSID convention have only carved out small portion of the customary law, restricted to the definition of investment and accorded certain protections to it by providing certain rights to investors. Other obligations that host nations owe to individuals, such as those in the nature of the broad category of human rights or other obligations under environmental law or under other regulatory frameworks are strictly not within the scope of the object and purpose of the investment treaties.

Accordingly, the arbitrators in Investor-State disputes have often forwarded a myopic interpretation of the treaty, thereby often leading to unanticipated restrictions on a state's sovereign right to regulate activities on its territory. Concerns such as these had been championed by a large number of developing countries before the proliferation of bilateral

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<sup>1</sup> "A Bilateral Investment Treaty is a reciprocal legal agreement concluded between two sovereign States for the promotion and protection of investments by investors of the one State ('home state') in the territory of the other State ('host state')" [hereinafter 'BIT'] M. Jacob, 'Investments, Bilateral Treaties' *Max Planck Encyclopedia of Public International Law*

investment treaties,<sup>2</sup> facing much opposition from developed western states within the various political organs with competence to regulate matters relating to investment.<sup>3</sup> The disagreement amongst the states could never result in a multilateral treaty on investment, thus prompting a proliferation of various North-South and South-South BIT's.<sup>4</sup> The 'TWAIL'<sup>5</sup> approach has long been critical of the institutional bias in the institutions governing the dispute settlement procedures and has often advocated being vary of the expanding jurisdiction of the investor state arbitrations.

According to Sornarajah, it was due to the proliferation of the ideas of neo liberalism that various North-South BIT's were negotiation often containing unfair terms which are of a non terminable nature without mutual consent and nonetheless contained sunset provision with respect to incurred investments. <sup>6</sup> In light of these observations, he even calls it as the 'law for greed', that favors the strong multinational corporate interests over the human rights obligations of states towards their population.<sup>7</sup>

In recent years, due to a considerable arbitration challenging the regulatory sovereignty of states, a number of them being developed states, it seems to be now a general trend that is emerging to reserve a certain regulatory space in the treaties for a public purpose. Non- Investment concerns such as human rights, labour rights, health, environmental regulation and public safety are being addressed in many recent investment agreements. It has rightly been observed by Henckels,<sup>8</sup> that states have adopted a strategy of specificity in drafting to protect room for sovereign regulation of activities. The Trans-Pacific Partnership Agreement<sup>9</sup> that was recently signed by twelve countries on 4 February 2016 presents itself as a

<sup>2</sup> Declaration on the Establishment of a New International Economic Order, (1 May 1974) UNGA Res. 3201(S-VI); Art. 2(2)(c), Charter of Economic Rights and Duties of States, (12 December 1974) UNGA Res. 3281(XXIX)

<sup>3</sup> B. Sen, 'Investment Protection' (1988)

<sup>4</sup> 'Third World Approaches to International Law' R. Sappideen and L.L. He, 'Investor-State Arbitration' (2012) at, 209; OECD, 'Multilateral Agreement on Investment' (Press Release 27 September 1995 available at: <[www.oecd.org/investment/international-investment-agreements/43389907.pdf](http://www.oecd.org/investment/international-investment-agreements/43389907.pdf)> (accessed 3 May 2019).

<sup>5</sup> G.V. Harten, 'TWAIL and the Dabhol Arbitration' (2011) 3 *Trade, Law and Development* 131; B.S. Chimni, 'Third World Approaches to international Law: Manifesto' (2006) 8 *International Community Law Review* 3; J.T. Gathi 'TWAIL' (2006); J. T. Gathii 'TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26.

<sup>6</sup> M. Sornarajah, *Resistance and Change in International Law on Foreign Investment* (2015) at 43; 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 *Trade Law and Development* 203.

<sup>7</sup> M. Sornarajah, 'A law for need for a law for greed: Restoring the lost law in the international law of foreign investment' (2006) 6 *International Environmental Agreements* 329.

<sup>8</sup> C. Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 *JIEL* 27, 30.

<sup>9</sup> 2015 Trans-Pacific Partnership Agreement (21 November 2015) available at: [ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text](http://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text) (accessed 3 June 2019), Chapter 9 on Investment.[hereinafter TPPA]