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Can the Language of the Trans-Pacific Partnership Still Contribute to the International Investment System? An Analysis of TPP's Language Regarding States' Powers to Regulate

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**CAN THE LANGUAGE OF THE TRANS-PACIFIC
PARTNERSHIP STILL CONTRIBUTE TO THE
INTERNATIONAL INVESTMENT SYSTEM? AN ANALYSIS
OF TPP’S LANGUAGE REGARDING STATES’ POWERS TO
REGULATE**

Yurica Ramos Montes¹

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ABSTRACT

States around the world have signed several modern investment treaties and free trade agreements over the past few decades. Some of them are still in the process of being ratified, such as the Trans-Pacific Partnership (TPP). People worldwide have severely criticized the content of the TPP and have pointed out that the TPP principally protects the rights of the investors while leaving citizens

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in vulnerable conditions. For instance, the language of the TPP states in general that a measure adopted by a State to protect a legitimate welfare objective should not be considered as indirect expropriation *except* in rare circumstances. This exception and other issues, regarding the regulatory powers of a State, have been at the center of several debates. This article reviews some of these debates and highlights the impact of the TPP's language for future treaties and agreements.

RESUMEN

Estados alrededor del mundo han firmado de manera creciente varios tratados modernos de inversión y acuerdos de libre comercio en las últimas décadas. Algunos de ellos todavía están en proceso de ratificación, como el Acuerdo Transpacífico de Cooperación Económica (TPP en sus siglas en inglés). Personas de todo el mundo han criticado severamente las negociaciones del TPP y han señalado que el TPP protege principalmente los derechos de los inversionistas y deja a las comunidades en condiciones vulnerables. Por ejemplo, el lenguaje de TPP establece en general que una medida adoptada por un Estado para proteger un objetivo de bienestar legítimo no debe ser considerada como expropiación indirecta excepto en raras circunstancias. Esta excepción y otras cuestiones relativas al poder regulador de un estado han creado varios debates. Este artículo recolecta estos debates y destaca el impacto del lenguaje del TPP en futuros tratados y acuerdos.

I. INTRODUCTION

The Trans-Pacific Partnership (the “TPP” or “the treaty”) was signed on February 4, 2016. It was the end product of five years of negotiations between twelve countries and is the largest global trade agreement in the last twenty years.² Prior to the

² Once ratified, TPP would become the largest trade bloc on earth, concentrating forty percent of the world's gross domestic product. The signatories represent around 40 percent of the global economy and a quarter of world trade. Membership to the TPP is also open to other Asia-Pacific

expansion in 2016, the TPP was a regional free trade agreement between the United States, Canada, Australia, New Zealand, Japan, Singapore, Malaysia, Vietnam, Mexico, Chile, Peru and Brunei (“TPP Member States”).³ The TPP made history as the first ever mega-regional treaty to be concluded.⁴ However, its ratification has been tainted by uncertainty after the United States Government signed an executive order to withdraw from TPP negotiations and the treaty overall.⁵

Notwithstanding the result of the TPP’s negotiations, the language of the TPP set the basis for Bilateral Investment Treaty (BIT) and Free Trade Agreement reforms that are pending approval, ratification, and renegotiation.

Critics of the TPP, including experts in law and economics, have warned about the dangers of the Investor-State Dispute Settlement (ISDS) mechanism included in the TPP.⁶ One major critique is that this mechanism impacts the sovereign rights of a State⁷ and weakens the rule of law.⁸ Critics contest that States’

countries, with both Republic of Korea and Indonesia expressing a strong interest in becoming signatories. *See* GITANJALI BAJAJ ET AL., DLA PIPER, THE TRANS-PACIFIC PARTNERSHIP SERIES: NAVIGATING A NEW ERA OF TRADE IN THE PACIFIC RIM: PART I – INVESTMENT PROTECTIONS & INVESTOR-STATE DISPUTE SETTLEMENT, 2 (2016), https://www.dlapiper.com/~media/Files/Insights/Publications/2016/04/TPP%20Series_Part_1.pdf.

³ *Id.* (“The signatories represent around 40 per cent of the global economy and a quarter of world trade. Membership to the TPP is also open to other Asia-Pacific countries, with both Korea and Indonesia expressing a strong interest in becoming signatories.”).

⁴ *See* PETER DRAPER ET AL., EUROPEAN CTR. FOR INT’L POLITICAL ECON., MEGA-REGIONAL TRADE AGREEMENTS: IMPLICATIONS FOR THE AFRICAN, CARIBBEAN, AND PACIFIC COUNTRIES 8, (2004), <http://ecipe.org/app/uploads/2014/12/OCC22014.pdf> (coining the term ‘mega-regional’).

⁵ Presidential Memo, 82 Fed. Reg. 8497 (Jan. 23, 2017).

⁶ 162 CONG. REC. S480 (daily ed. Feb. 2, 2016) (Statement of Senator Warren).

⁷ Opponents to the TPP have argued that in general the ISDS system attacks the sovereignty of States because arbitral tribunals rather national courts analyze whether government measures fulfill international investment standards and consequently if such government can be found liable internationally.

⁸ LAURENCE TRIBE ET AL., 220+ LAW AND ECONOMICS PROFESSORS URGE

sovereign rights are affected because States do not have freedom to adopt regulatory measures in certain circumstances under the Treaty. This is reflected in a recent trend of cases brought by investors, who have challenged States' regulatory measures passed in times of emergency, measures related to the use of natural resources, and public health measures, all of which include sensitive issues.⁹

Proponents posit that past experience has shown that ISDS is not a threat to a national government's regulatory power, as many critics claim. Out of the hundreds of resolved ISDS cases worldwide, few involved cases against legislative governmental actions, and cases that did challenge such sovereign actions, rarely succeeded.¹⁰ The majority of measures that are challenged by investors involve breaches of administrative law, rather than general regulatory powers of States.

Central to the discussion by TPP critics is the treaty's language defending States' sovereign regulatory power. By incorporating language stating that regulatory actions should not be considered indirect expropriation, so long as they are designed and applied to protect legitimate public objectives, critics feel as though the TPP goes too far in protecting States' regulatory

CONGRESS TO REJECT THE TPP AND OTHER PROSPECTIVE DEALS THAT INCLUDE INVESTOR-STATE DISPUTE SETTLEMENT (ISDS), 2, (2016), <https://www.citizen.org/sites/default/files/isds-law-economics-professors-letter-sept-2016.pdf>; see also NIGEL CORY & STEPHEN EZELL, INFO. TECH. & INNOVATION FOUND., HOW TPP CRITICS MUDDLE FACTS, FICTIONS, AND UNFOUNDED FEARS: A POINT-BY-POINT ANALYSIS 15 (2016), http://www2.itif.org/2016-tpp-critics-muddle-facts-fiction.pdf?_ga=2.241631746.1268927901.1537972815-1923363078.1537823248. (“The most serious accusation leveled against ISDS are that it undermines state sovereignty, as it can overturn domestic court decisions and force a country to damage its laws – both of which are false. ISDS is not a threat to the core responsibilities of governments – it cannot be used to attack a country's health and social security systems, and regulations in the TPP explicitly confirm that every country retain the right to regulate in its public interest, including with regard to health, safety, the financial sector, and environment protection.”).

⁹ Philip Morris Brands Sàrl. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (Jul. 8, 2016).

¹⁰ Cory, *supra* note 8, at 16.

powers.¹¹ These contentious TPP provisions will be analyzed in the following sections.

II. INVESTMENT AND EXCEPTION CHAPTERS

The Investment and Exception chapters of the TPP contain language dealing with a State's regulatory power. The Investment Chapter of the TPP (Chapter Nine) offers investors a guideline that is considered to be the "Standard suite" of investment protections.¹² These provisions incorporate language such as "*rare circumstances*" and "*otherwise consistent with this chapter*"¹³ to emphasize that regulatory measures adopted under a State power to regulate should not be considered an indirect expropriation, unless it meets such standards.¹⁴ There are also several key provisions regarding investment protections in the TPP that host States must guarantee in order to fulfill the object and purpose of the treaty. These investment protections include, but are not limited to: National Treatment, Most-Favorable Nation Treatment, Minimum Standard of Treatment, and Expropriation and Compensation standards.

Additionally, the Exception Chapter of the TPP sets the language of the carve out clause regarding Tobacco Control.¹⁵ Both chapters

¹¹ Regulatory measures regarding public health, safety and environment can be considered as a legitimate public objective that a State can adopt to protect its citizens.

¹² The TPP offers what can be thought of as the standard suite of protections for investors in the territory of the other Parties. These measures, which in the TPP generally govern both pre-establishment and post-establishments investments, include: National Treatment, Most Favoured Nation, Expropriation, Fair and Equitable Treatment, and more. See John W. Boscardiol & Robert A. Glasgow, *Trans-Pacific Partnership—Investment Protection and Investor-State Claims*, MCCARTHY TETRAULT (Nov. 26, 2015),

<https://www.mccarthy.ca/en/insights/blogs/terms-trade/trans-pacific-partnership-investment-protection-and-investor-state-claims>.

¹³ Trans-Pacific Partnership, art. 9.16, annex 9-B, Feb. 4, 2016, *never ratified*, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>

¹⁴ Such measures can be adopted in the context of public health, safety, environmental and other regulatory objectives.

¹⁵ Trans-Pacific Partnership, *supra* note 13, art. 29.5,

language has been heavily criticized and left open to interpretation.

This article will highlight these criticisms and interpretations through three main considerations. The intention behind this article is to highlight positive aspects of the TPP's language dealing with State power to regulate and proposes that this language be used in future negotiations of BITs and Free Trade Agreements.

A. REGARDING “RARE CIRCUMSTANCES”

Article 9.8: Expropriation and Compensation in the TPP states that:

1. No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and
- (d) in accordance with due process of law.¹⁶

This provision is similar to stipulations in other international investment agreements (“IIAs”). It protects a covered investment from both direct expropriation, the transfer of title or seizure of property,¹⁷ and from indirect expropriation.¹⁸ Indirect

<https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf>.

¹⁶ *Id.* art. 9.8, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.

¹⁷ Mariana Pendás & Eduardo Mathison, *TPP and Investor-State Dispute Settlement: An Intertwined Spectrum of Options for Investors?*, 11 GLOBAL TRADE & CUSTOMS J. 157, 158 (2016).

¹⁸ An action or series of actions by a TPP State Member that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure. *See* GITANJALI BAJAJ ET AL., *supra* note 2, at 2 (“The signatories represent around 40 per cent of the global economy and a quarter of world trade. Membership to the TPP is also open to other Asia-Pacific countries, with both Korea and Indonesia expressing a strong interest in becoming

expropriation has become a defining characteristic of the right to regulate.¹⁹ In this respect, investors should be aware that the TPP language provides certain limitations on the scope of an investments protection and was designed to preserve the freedom of TPP Member States to regulate in areas of public welfare, environment, and health.²⁰ This language was also incorporated into Annex 9-B 3(b) of the investment chapter as an additional source of Article 9.8 interpretation that regulates expropriation and compensation. This annex states that:

“Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, *except in rare circumstances.*”²¹ (emphasis added)

From a quick reading of this provision, it seems that State’s sovereign right to adopt regulatory action to protect legitimate public welfare objectives should not be considered an indirect expropriation. However, the language “except in rare circumstances” opens the door to interpretation. Critics have focused on the words “rare circumstances” because the Investment

signatories.”).

¹⁹ CHRISTIAN TIETJE, FREYA RAETENS & ECORYS, MINISTER FOR FOREIGN TRADE & DEV. COOPERATION, THE IMPACT OF INVESTOR-STATE-DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP 49 (2014), <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf>.

²⁰ Pendás & Mathison, *supra* note 17, at 158–159. (“Since 2004, IIA provisions have addressed the fear of States to provide them with the ability to regulate health, welfare and environment issues, and at the same time, the fear no to be impeded or punish with less investment.”).

²¹ Trans-Pacific Partnership, *supra* note 13, annex 9-B n.37 (“For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.”).

Chapter of the TPP does not clarify the meaning of this standard.²² In this regard, and because of a lack of guidance, a future international arbitral tribunal could interpret a regulation to be an indirect expropriation even when such the measure, in another context, could be adopted and applied to protect legitimate public welfare objectives.

It has been theorized that the language used in Annex 9-B, rather than be a safeguard, can act as a loophole to allow foreign corporations to challenge new State regulations, if such regulation diminished the value of the investor's operations.²³ Therefore, while the United State Trade Representative (USTR) touts this provision to be a safeguard, the ISDS tribunal has the power to decide which environmental or other public interest policies fall into the "rare circumstances" loophole.²⁴

Even when there is no elaboration on when "rare circumstances" arise to render an otherwise non-compensable expropriation compensable, the absence of a regulatory expropriation in the applicable treaty does not foreclose States defending a taking as non-compensable,²⁵ or the investor from defending a taking as compensable.²⁶ In other words, if a treaty does

²² Tsai-yu Lin, *Preventing Tobacco Companies' Interference with Tobacco Control Through Investor-State Dispute Settlement under the TPP*, 8 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 565, 576 (2013).

²³ ILANA SOLOMON & BEN BEACHY, *SIERRA CLUB, A DIRTY DEAL: HOW THE TRANS-PACIFIC PARTNERSHIP THREATENS OUR CLIMATE* 7 (2015), https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org/creative-archive/files/pdfs/1197%20Dirty%20Deals%20Report%20Web_03_low.pdf ("Some argue that the TPP's inclusion of this expansion foreign investor right could allow a foreign corporation, like BHP Billiton, for example, to challenge a new environmental regulation, such as additional permit requirement, as a TPP-prohibited "indirect expropriation" if it diminished the value of its fracking operations.").

²⁴ LAURENCE TRIBE ET AL., *supra* note 8, at 2.

²⁵ Jean Ho, *Investment Protection Under Succession Treaties* 32 *ICSID Rev. Foreign Investment L.J.* 59, 74 (2017).

²⁶ *Les Laboratoires Servier, S.A.S. v. Republic of Poland*, Case No. II SA.Wa 838/13, Award (Redacted), ¶¶ 582-584 (Feb. 14, 2012). ("Thus, the burden then falls onto the Claimants to show that Poland's regulatory actions were inconsistent with a legitimate exercise of Poland's police powers. If the

not establish in which rare circumstances a State's action can be compensable, the parties shall follow the general principle in international adjudication that "whoever asserts must prove". In order to do so, the party that asserts the claim must obtain and present the necessary evidence in order to prove its assertion.²⁷ The parties might also take into consideration that any interpretation they reach should be according to the object and purpose of the treaty.²⁸

Independently of what side one may fall on, State or investor, by incorporating such language in the TPP, Member States have negotiated for this mandatory rule in order to protect their regulatory actions. There is a well-known phrase that "every rule has an exception," and this language "rare circumstances" might be one of them. It will be up to arbitral tribunals and the ability of a party's counsel to demonstrate that a specific State's regulatory action falls under such exception. In this respect, parties will play a crucial role in overcoming and giving meaning to this high standard of burden of proof.

B. REGARDING THE PROVISION "OTHERWISE CONSISTENT WITH THIS CHAPTER"

Article 9.16 "Investment and Environmental, Health and other Regulatory Objectives" is included in the Investment Chapter of the TPP. This article states:

"Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing *any measure otherwise consistent with this Chapter* that it

Claimants produce sufficient evidence for such a showing, the burden shifts to Poland to rebut it.").

²⁷ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 215 (Sept. 1, 2009). ("[T]he Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that "who asserts must prove", and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.")

²⁸ See *Investment*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-3> (last visited Sept. 26, 2016).

considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.” (Emphasis added)²⁹

The language “otherwise consistent with this chapter” is essentially a window dressing. In essence, the provision states that a party can regulate however it chooses, as long as it does not violate other obligations stated in the investment chapter. While the language of the TPP might “underscore” countries’ rights to regulate in the public interest, the treaty does not actually protect that right.³⁰ Instead, this article will likely provide only a slight interpretive gloss in favor of protecting public interest measures,³¹ indicating to investors that such regulations are still able to be changed. For example, if good faith measures are taken in the public interest, they can still be successfully challenged under the agreement as violating the TPP’s investor protections and thus negate any protections otherwise purported to be given under that article.³²

Similarly, TPP Member States have the freedom to adopt measures appropriate to ensure that investment activity in their territories are undertaken in a manner sensitive to their environment, health or other regulatory objectives, provided that such measures are not otherwise inconsistent with the investment

²⁹ Trans-Pacific Partnership, *supra* note 13, art. 9.16, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.

³⁰ See Lise Johnson & Lisa Sachs, *The TPP’s Investment Chapter: Entrenching, Rather than Reforming, a Flawed System*, COLUMBIA CTR. ON SUSTAINABLE INV. 2 (Nov. 2015), <http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf>. (“That article [9.16] provides no such real protection. Rather, it simply notes that the government can regulate in the public interest as long as, when doing so, the government complies with the Investment Chapter’s requirement regarding treatment of foreign investors and investments.”).

³¹ *Trading Views: Real Debates on Key Issues in TPP, Hearing on Trans Pacific Partnership Before the Subcomm. On Trade*, 114th Cong. (Dec. 2, 2015) (Statements of Ways and Means Democrats).

³² Johnson & Sachs, *supra* note 30, at 2.

chapter.³³ In other words, Member States have the freedom to adopt regulations assuming that these measures do not otherwise constitute a breach of obligations set forth in the investment chapter. It is important to note here that TPP Member States have clearly used language favoring States' regulatory powers. In this respect, Article 9.16 expressly states that Member States have not only legitimacy to *adopt* regulatory actions recognized in article 9.8, but also to *maintain* or *enforce* such measures to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.³⁴

Nevertheless, a state that is going to exercise such regulatory power should not act arbitrarily or in violation of other obligations stated in the investment chapter, as is required by the language "*otherwise consistent with this chapter.*" Therefore, in the context of the TPP and ISDS, State regulation should protect legitimate objectives in order to guarantee investor rights. Based on fairness, it cannot be justified to grant rights to one party (a State) and not another (an investor).

This provision of Article 9.16 ("otherwise consistent with this chapter") can help lawyers to improve their arguments during arbitration proceedings. In this regard, parties in a dispute must demonstrate that either the State respected its obligations when exercising its legitimate regulatory power, or that such regulatory power did not comport with the treaty's explicit obligations.

³³ The briefing also states that The TPPA's Chapter 9 (the Investment Chapter): (i) guarantees important protections to investments made by those nationals or companies; and (ii) contains investor-State dispute settlement (ISDS) provisions that entitle investors to submit disputes with TPP State Member to binding international arbitration. Much is the same as in other free trade and investment-protection agreements, but there are important differences requiring careful attention. See *Investment Protection and Investor-State Dispute Settlement under the Trans-Pacific Partnership Agreement* FRESHFIELDS BRUCKHAUS DERINGER (Nov. 17, 2015), http://knowledge.freshfields.com/en/Global/r/1325/investment_protection_and_investor-state_dispute.

³⁴ Trans-Pacific Partnership, *supra* note 13, art. 9.16, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.

C. THE TPP DOES NOT INCLUDE ENVIRONMENT AND HEALTH ISSUES AS CARVE OUTS.

Article 29.5 “Tobacco Control Measures” states that:

“A Party may elect to *deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure*³⁵ of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election....” (Emphasis added)³⁶

This article of the TPP embodies the carve-out clause of Tobacco Control Measures.³⁷ While the treaty has established filter mechanisms to avoid international claims³⁸ in other areas of public

³⁵*Id.*, art. 29.5 n.12, <https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf> (“A tobacco control measure means a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure.”).

³⁶*Id.* art. 29.5, <https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf>.

³⁷*Id.* It seems that this carve-out was formulated in response to the investment claim that a multinational Tobacco company brought against Australia to challenge the Tobacco Plain Packaging Bill (2011). *See also* Taejoon Ahn, THE UTILITY OF CARVE-OUT CLAUSES IN ADDRESSING REGULATORY CONCERNS IN INVESTMENT TREATY ARBITRATION 12 ASIAN INT’L ARB. J. 65, 72, 76 (2016) (“[T]o avoid regulatory concerns in certain regulatory areas, states need to carve out certain areas involving their vital regulatory concerns from the scope of international obligations in advance in the exercise of their sovereign choice. This is because just as the consent to international investment disciplines depends on a sovereign choice of each state, so the scope of the consent, namely the choice of certain areas included in the agreement and the exclusion of other areas from the agreement, is up to the sovereign state The carve-out clause is expected to be adopted by the new version of investment treaties as an effective instrument for alleviating regulatory concerns in terms of legal certainty, predictability and political acceptability.”).

³⁸ Johnson & Sachs, *supra* note 30, at 3.

interest such as taxation measures³⁹ and financial services regulations, this does not mean that such regulations are not subject to conditions, such as the “exceptional circumstances” measure, included in Article 29.3 of the treaty.⁴⁰

The fact that there are no filter mechanisms, as explained above, relating to environmental protection or public health issues in the TPP, has been criticized.⁴¹ Authors have questioned why this clause is so narrow, applying only to tobacco measures, when governments deal with a much wider array of health and environmental issues which would merit exclusion from arbitration proceedings just as often.⁴²

Other authors have used this carve-out clause to demonstrate that TPP Member States intentionally protected their regulatory power when public welfare objectives are at issue.⁴³ The will of TPP Member States is clear when public welfare objectives are

³⁹ Trans-Pacific Partnership, *supra* note 13, art. 29.4.9, <https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf> (“Nothing in this Agreement shall prevent Singapore from adopting taxation measures no more trade restrictive than necessary to address Singapore’s public policy objectives arising out of its specific constraints of space.”).

⁴⁰ Mélida Hodgson, *The Trans-Pacific Partnership Investment Chapter Set a New Worldwide Standard* COLUMBIA FDI PERSPECTIVES 1 (Nov. 9 2015), <https://academiccommons.columbia.edu/doi/10.7916/D86Q25WM/download> (“Then there is a provision in the General Exceptions chapter allowing temporary financial safeguards in ‘exceptional circumstances.’ Clearly, the shadow of the Argentina investment jurisprudence looms large—various Asian-Pacific countries themselves had to deal with a scarring financial crisis around the same time.”); *see also* Nahila Cortes, *Indirect Expropriation under the TPP: A New Frontier for the Right of States to Regulate?*, KLUWER ARBITRATION BLOG (Dec. 20 2015), <http://arbitrationblog.kluwerarbitration.com/2015/12/20/indirect-expropriation-under-the-tpp-a-new-frontier-for-the-right-of-states-to-regulate/> (“Article 29.3 recognizes that the State may adopt or maintain restrictive temporary financial safeguards in exceptional circumstances if they are consistent with the TPP.”).

⁴¹ Johnson & Sachs, *supra* note 30, at 3.

⁴² Nathalie Bernasconi-Osterwalder, *How the Investment Chapter of the Trans-Pacific Partnership Falls Short*, INT’L INST. FOR SUSTAINABLE DEV. BLOG (Nov. 6, 2015), <https://www.iisd.org/blog/how-investment-chapter-trans-pacific-partnership-falls-short>.

⁴³ GITANJALI BAJAJ ET AL., *supra* note 2, at 4.

involved, such as the regulation of tobacco packaging, which is that States should have more leeway and protections to regulate.⁴⁴

The fact that tobacco control measures are continually used as examples of States' regulatory power to protect public health, and excluded from international claims, can be used as an analogy in future environmental cases. States could establish that environmental measures similar to tobacco control measures are adopted to protect their citizens' health, and should be excluded from international claims and considered as part of a State sovereign power to regulate. In general, both the tobacco and environmental State regulatory powers protect public welfare objectives. The question of why environmental, health, and other measures were not also incorporated as carve-outs in the TPP may not be solved in the near future. Without a doubt, the incorporation of tobacco control measures is a positive step in the development of the international investment regime. Continued discussion of these environmental and health issues will help to set new standards to be included as carve-outs in future BITs and other Free Trade Agreements.

CONCLUSION

One cannot deny the tremendous work that TPP's Member States have put in to incorporate standards that were the subject of criticism over the past few years, in particular the express incorporation of the State power to regulate based on legitimate public welfare objectives. The fact that this provision is included in the TPP progresses the development of the international investment arbitration regime and opens the doors for future discussions in the field. This article presents analysis of TPP treaty language and highlights the positive aspects of it, with the aim of encouraging the audience to consider the positive impacts of this language for future BITs and Free Trade Agreements.

⁴⁴ Luis Miguel Velarde Saffer & Amir Ardelan Farhadi, *ISDS in the TPP: Is the Recent Uproar in the US Merited?—Part II*, Kluwer Arb. Blog (Nov. 7 2016), <http://arbitrationblog.kluwerarbitration.com/2016/11/07/isds-in-the-tpp-is-the-recent-uproar-in-the-us-merited-part-ii/>.