

*Memento Mori: Membership Issues Surrounding Entry into, Modification of, and
Withdrawal from the TPP*

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‘The Jetavana Temple bells ring the passing of all things.
Twinned sala trees, white in full flower, declare the great man’s certain fall’.
The Tale of the Heike¹

I. Introduction

On February 4, 2016, twelve Asia-Pacific nations signed the Trans-Pacific Partnership (TPP) Agreement as original signatories, the aim of which is ‘to address future trade and investment challenges and opportunities, and contribute to advancing their respective priorities over time’ (Preamble of the TPP).²

In 2008, the United States announced its intention to ‘join’ the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP),³ which had been created by the Pacific Four (P4) countries—consisting of Australia, Brunei, New Zealand and Singapore—and was known to have achieved a significantly high level of trade liberalization since 2006. The US intended to accede to the TPSEP that is ‘open to accession on terms to be agreed among the Parties, by any APEC Economy or other State’ under Article 20.6(1) thereof. Later, however, the US decided to hold negotiations to launch a new trade agreement, separate from the TPSEP.⁴

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¹ Royall Tyler (trs; original author unknown in 13-14th Century Japan), *The Tale of the Heike* (Viking 2012) 1

² Website of the Ministry of Foreign Affairs and Trade of New Zealand, ‘Depository of the TPP Agreement’, <<https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tp-p/text-of-the-trans-pacific-partnership>> accessed 9 April 2016

³ USTR, *2009 Trade Policy Agenda and 2008 Annual Report* (2009) 127. <<https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report>> accessed 9 April 2016

⁴ In the end, all of the TPSEP member states signed the TPP as original signatories in February 2016. However, it does not affect effectiveness of the TPP among them.

Needless to say, creating new obligations does not in itself make the TPP qualitatively different from other free trade agreements (FTAs). The TPP is just another FTA, a set of special rules under the global rules established by the World Trade Organization (WTO). However, the TPP established a number of special rules and standards that were equipped with exceptionally effective enforcement mechanisms; thus, it is not surprising that the creation of this ‘mega-FTA’ in the Asia-Pacific region has attracted enormous interest from various industries and civil society.

So far, there are voluminous academic publications on the TPP Agreement, most of which focus on substantive rights and obligations that extend to agricultural tariff elimination, services liberalization, labour and environmental rights and state-owned enterprises. Others focus on enforcement mechanisms including cooperation, transparency, state-to-state dispute settlement procedures, and investor-to-state dispute settlement (ISDS) mechanisms. Conversely, only limited attention is paid to institutional issues, with the exception of requirements for entry into force of the TPP and possibility of new members’ accession, which attracted a certain amount of attention.

However, it is inevitable that membership issues will arise throughout the TPP’s lifecycle. First, the original signatories to the TPP resolved to expand their partnership ‘by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration and create the foundation of a Free Trade Area of the Asia Pacific’, as is stated in the last line of the preamble to the TPP. Apparently, the TPP is designed to change over time. Like all other FTAs, the TPP is supposed to develop and morph into a more developed and broader framework and, in the end, cease to be effective.⁵

In addition, the TPP is a system that needs more than one member to function effectively. Without a stable and reliable membership, its effectiveness will deteriorate. Metaphorically, during the TPP’s infancy (i.e., its entry into force), it must establish its identity by ensuring sufficient membership. It would encounter an identity crisis if not all of the original signatories ratified the treaty at the same time. Later on, as an adult, it must adjust to subsequent changes in circumstances through an amendment process. Delays in the entry into force of amendments due

⁵ In contrast with other membership issues typically included in regional FTAs, there are no specific provisions in the TPP to address termination of the entire agreement. However, the TPP will cease to function if all but one Parties withdraw, and will be terminated, de facto, if all Parties withdraw.

to delays of ratification by the member states would hamper its functioning, as if facing a midlife crisis. In the end, during old age, it has to prepare for either a lingering death by slow loss of individual members through withdrawal, or a swift death through voluntary termination. Providing a broader perspective on membership issues is the primary objective of this chapter in order to cast light on these systemic issues.

The following sections look at a series of topics involving membership that would affect proper decision-making and enforcement of the TPP. More specifically, in Section II, we analyse the requirements for an original signatory to be a Party to the TPP after it has taken effect for other original signatories ('late ratification' issue). We also touch on a systemic concern regarding internal consistency with the accession clause. In Section III, we evaluate the requirements for an amendment to take effect once it has been agreed by the Commission, i.e., the TPP's highest decision-making body ('second ratification' issue). In Section IV, we investigate if withdrawal is a real option, in relation to the threat of ISDS arbitration afterward ('litigation risk of withdrawal' issue). Section V summarizes our findings.

II. Entry into Force of the TPP

1. General requirements for critical mass

Ratification of a treaty consists of two actions: internal decision-making and international notification of intent to accede to the treaty.⁶ With regard to the requirements for the entry into force of the TPP, written notification of the completion of internal legal procedures—or ratification—by all twelve original signatories within two years of the date of signature (i.e., 4 February 2016) is designed to be a primary method to effectuate the agreement, in accordance with paragraph 1 of Article 30.5 (Entry into Force). In this case, the TPP will enter into force for all original signatories 60 days after the date of the last ratification.

Alternatively, the TPP can take effect if six or more original signatories ratify the agreement within two years of the date of signature, if they also account for 85% or more of the combined gross domestic product (GDP) of the twelve original signatories, at the earliest two years and sixty days after 4 February 2016.

In any case, the TPP will not take effect until 5 April 2018, if any original

⁶ GG Fitzmaurice, 'Do Treaties Need Ratification?' (1934) 15 *British Year Book of International Law* 113.

signatory, regardless of the size of its GDP, fails to ratify it, in accordance with Article 30.5(2). Thus, an original signatory can enjoy a breathing space of up to two years and sixty days if it elects not to ratify the TPP. If the same requirement is satisfied after 4 February 2018, the TPP will take effect 60 days after the last ratification, in accordance with Article 30.5(3).

Here, footnote 1 to Article 30.5 specifies that '[f]or the purposes of this Article, gross domestic products shall be based on data of the International Monetary Fund using current prices (U.S. dollars)'. According to the IMF World Economic Outlook Database, as of October 2015, using current prices in US dollars (shown in Table 1), the total GDP is accounted for as follows:⁷ 60.25% by the United States, 17.79% by Japan, 6.65% by Canada, 5.41% by Australia, 4.56% by Mexico, 1.17% by Malaysia, 1.09% by Singapore, 1.00% by Chile, 0.73% by Peru, 0.67% by New Zealand, 0.62% by Vietnam and 0.07% by Brunei.

Table 1: GDP data of the TPP original signatories

Country	Total GDP (Billion US Dollars)	GDP ratio among original signatories (%)	Per capita GDP (US Dollars)
United States	16,663.15	60.25	52,607.92
Japan	4,919.59	17.79	38,633.16
Canada	1,838.96	6.65	52,392.73
Australia	1,497.22	5.41	64,271.09
Mexico	1,261.86	4.56	10,657.85
Malaysia	323.34	1.17	10,796.94
Singapore	302.25	1.09	55,979.76
Chile	276.66	1.00	15,691.13
Peru	201.88	0.73	6,523.65
New Zealand	184.76	0.67	41,280.08
Vietnam	170.57	0.62	1,901.70
Brunei Darussalam	18.09	0.07	44,540.15
Total	27,658.32	100.00	

⁷ IMF website <<https://www.imf.org/external/pubs/ft/weo/2015/02/weodata/index.aspx>> accessed 9 April 2016

In other words, the TPP cannot function without ratification by both the US and Japan, while Canada, Australia and Mexico, collectively, can halt the TPP. Even a group of seven signatories with smaller GDPs, namely Malaysia, Singapore, Chile, Peru, New Zealand, Vietnam and Brunei, can block the entry into force of the TPP, even though their combined GDP accounts for only 5.34%, because it prevents the quorum (six countries minimum) stipulated in Articles 30.5(2) and 30.5(3). There are also several more combinations of signatories that can prevent the TPP from taking effect. As such, the fate of the TPP is far from determined.

This conundrum is not specific to the TPP, but applies to all treaties that set requirements for a quorum or critical mass for their entry into force. For example, the FTA between the Association of Southeast Asian Nations (ASEAN), called the Australia and the New Zealand (AANZFTA), requires ratification by Australia, New Zealand and at least four member states of the ASEAN.⁸ However, specific to the TPP is a quasi-veto power that we will discuss in the next subsection.

2. Additional burdens on late ratifiers

As shown in the previous subsection, the TPP can take effect without unanimous ratification, through ratification by six or more original signatories, or ‘early participants’, who collectively represent 85% or more of the total GDP of the twelve original signatories.⁹ If the TPP were to take effect in this way, how does it affect the rights and privileges of the other original signatories, or ‘late ratifiers’, that ratify the TPP afterward?

Original signatories that refrain from ratifying the TPP remain outside the scope of the TPP that entered into force only for early participants. The issue here is the rationale for imposing additional burdens on the late ratifiers when they eventually ratify the TPP to become Parties to it.

With regard to belated ratification, Article 30.5(4) states that, upon ratification by a late ratifier, the Commission shall determine within 30 days of the date of the notification by that original signatory whether the TPP shall enter into

⁸ Article 7 of Chapter 18 of the AANZFTA; see also, Article 19 of the Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asunción establishing MERCOSUR) <<http://www.sice.oas.org/Trade/MRCSR/MRCSRTOC.ASP>> accessed 9 April 2016; see also Article 41 of the Treaty of the Southern African Development Community (SADC) <<http://www.sadc.int/documents-publications/sadc-treaty/>> accessed 9 April 2016.

⁹ See Article 30.5(2) and 30.5(3) of the TPP.

force with respect to the notifying original signatory. Then, Article 30.5(5) states that the TPP shall enter into force for that late ratifier 30 days after the date on which the Commission makes an affirmative determination. In other words, for a late ratifier to be a Party to the TPP, it must obtain the Commission's affirmative determination within 30 days after the notification. In accordance with Article 27.1 (Establishment of the Trans-Pacific Partnership Commission), the Commission is comprised of 'government representatives of each Party at the level of Ministers or senior officials'. Moreover, according to Article 1.3 (General Definitions), 'Party means any State or separate customs territory for which this Agreement is in force'. Thus, under Articles 30.5(4) and 30.5(5), the Commission consists only of the representatives of early participants, excluding the late ratifiers.

Then, with regard to the decision-making process within the TPP, the paragraph 1 of Article 27.3 (Decision-Making) sets forth that the Commission, as well as all subsidiary bodies, shall take all decisions by consensus, except as otherwise decided by the Parties.¹⁰ Similar to the WTO Agreement, the idea of 'consensus' in this context is satisfied if no Party present at any meeting when a decision is taken objects to the proposed decision, in accordance with Article 27.3(1). Put differently, it is at the early participants' discretion whether to allow late ratifiers to join the TPP, a decision that must be taken by consensus except in cases where all the existing Parties agree otherwise.

Assuming that the Commission takes its decision by consensus, any early participant (e.g., an existing Party), can block an 'affirmative' determination to be otherwise taken by the Commission. Thus, each early participant has veto power for other original signatories to join the TPP just because they failed to ratify in time to qualify as early participants themselves.

You may wonder why early participants would want to refuse entrance to late ratifiers, once all the twelve countries signed the agreement in February 2016. Consider that there is a risk that a Party could use this opportunity as leverage for bilateral renegotiations or side payments for the purpose of economic or political benefits, inside or outside the framework of the TPP through separate channels, which would endanger the fragile balance that the original signatories reached in October 2015.¹¹

¹⁰ Note that footnote 2 of Article 27.3 clarifies that 'any such decision on alternative decision-making by the Parties shall itself be taken by consensus'.

¹¹ See, e.g., Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, *The Process for Withdrawing from the European Union*, Cm9216 (February 2016), p. 14 [paras.

Did the negotiators intend to give veto power to those original signatories who ratified the agreement earlier than other signatories did? Alternatively, did the negotiators intentionally draft these provisions to create incentives to ratify earlier rather than later, or to create disincentives to late ratification?

In contrast, the AANZFTA, which one-half of the TPP original signatories joined,¹² allows late ratifiers to join without any additional requirements (i.e., a late ratifier can join the AANZFTA 60 days after its ratification).¹³ It is hardly conceivable that drafters of the TPP overlooked the difference. Thus, to evaluate the legislative intent for the TPP, we need to examine the history of the drafting of Article 30, which is not disclosed yet. Absent specific rationales, it would be less convincing to treat late ratifiers in a manner unfavourable as compared to early participants.

III. Modification of the TPP Agreement

1. Risk of delay before amendments take effect by requiring unanimous ratification

According to paragraph 1(c) of Article 27.2 (Functions of the Commission) of the TPP, the Commission shall ‘consider any proposal to amend or modify this Agreement’. In addition, Article 30.2 (Amendments) briefly describes the procedural requirements to amend the TPP: an amendment agreed in writing ‘shall enter into force 60 days after the date on which all Parties have notified the Depositary in writing of the approval of the amendment in accordance with their respective applicable legal procedures, or on such other date as the Parties may agree’.

Thus, once an agreement to amend the TPP is reached among the Parties that consists of the Commission, Article 30.2 of the TPP still requires unanimous ratification of each amendment (‘second ratification’), in order to make the amendment effective.

Notably, the unanimous ratification requirement in Article 30.2 is different from the critical mass requirement for the initial entry into force of the

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<<https://www.gov.uk/government/publications/the-process-for-withdrawing-from-the-european-union>> accessed 26 April 2016.

¹² Australia, Brunei, Malaysia, New Zealand, Singapore and Vietnam.

¹³ Article 7(3), Chapter 18 of the AANZFTA.

TPP under Article 30.5.¹⁴ True, this Article 30.2 is similar to the corresponding provisions in the TPSEP,¹⁵ the bilateral US-Chile FTA,¹⁶ trilateral North American Free Trade Agreement (NAFTA) that are concluded among the TPP original signatories;¹⁷ however, other bilateral FTAs such as Singapore-Australia FTA do not require internal approval at all.¹⁸ What is the rationale for this stricter and different requirement of the unanimous ratification?

Not surprisingly, the WTO Agreement that has more than 160 member states, including all the twelve original signatories of the TPP, employs a flexible approach. Except for several sensitive provisions, amendments to the provisions of the WTO Agreement ‘of a nature that would alter the rights and obligations of the Members’ shall take effect if it is ratified by two-thirds or more of the WTO member states but only for those states, leaving the rest of the member states unaffected.¹⁹ For example, assume that two-thirds of the Parties, say, Group A, have ratified the amendment in question while the rest of the Parties, Group B, do not. In this case, even when the amendment takes effect, the amended text applies only to those Parties that have ratified it. Rights and obligations under the original text remain intact between a Group A Party and a Group B Party, and among Group B Parties.²⁰

Although the European Union (EU) that consists of twenty-eight member states requires, in principle, unanimous ratification for an amendment to take effect,²¹ there are certain flexibilities: if two years have passed, four fifth of the member states have already ratified the amendment in question, and if there are special difficulties on the part of late ratifiers, the issue can be referred to the EU Council.²² , in addition, smaller regional integration frameworks, such as the Southern African Development Community (SADC) that consists of fifteen member states, can adopt an amendment to its constitutional treaty by qualified

¹⁴ See II.1 above.

¹⁵ Article 20.7(2) of the TPSEP.

¹⁶ Article 24.2(2) of the Free Trade Agreement between the United States and Chile.

¹⁷ Article 2202(2) of the NAFTA.

¹⁸ Article 7 of Chapter 17 of the Singapore-Australia FTA

<<http://dfat.gov.au/trade/agreements/safta/singapore-australia-fta.aspx#documents>>
accessed 9 April 2016.

¹⁹ See paragraph 3 of Article X of the Marrakesh Agreement Establishing the World Trade Organization.

²⁰ For the sake of comparison, amendments to the Charter of the United Nations (UN) applies to all members if they have been ratified by two-thirds of the members, including the five permanent members of the Security Council. See Article 108 of the UN Charter.

²¹ Article 48(4) of the Treaty on European Union, OJ C 326, 26.10.2012.

²² *ibid* Article 48(5).

majority²³. All subsequent agreements to amend the SADC Treaty entered into force on the day of its adoption by a decision of three quarters of all the Members of the Summit.²⁴

Is the membership of the TPP limited enough to make unanimous voting a feasible approach? This requirement might be reasonable for an FTA with a small membership, such as the quadruple TPSEP;²⁵ however, it might be too burdensome for an FTA with six to twelve member states. Furthermore, there are other problems that may generate by the unanimous ratification requirement that we discuss in the next subsection.

2. Other systemic risks

First, it is true that allowing an amendment to take effect without unanimous ratification by the Parties will create duplicate treaty relationships among the Parties, with different rights and obligations between some Parties that have already ratified the amendment and others that have not.²⁶ It may increase complexity and make treaty interpretation more cumbersome. However, here, many provisions of the TPP are not universally applicable to all member states. In other words, the TPP is already complex, using intertwined bilateral annexes as well as side letters, setting aside the less sophisticated structure of the main text. Thus, avoiding duplicate treaty relationships to ensure integrity of the treaty regime cannot be a sufficient reason to require unanimity. It may jeopardize the FTA's responsiveness to necessary adjustments and subsequent changes in circumstances in an expeditious manner. Therefore, absent sufficient evidence of the legislative intent to cling to unanimity requirement, a systemic concern remains regarding the risks of giving existing Parties a second chance to block the process of amending the text by agreement, as is contained in the current Article 30.2.

Second, the unanimous ratification requirement may still create duplicate

²³ Article 36(1) of the SADC Treaty.

²⁴ Article 32 of the Agreement Amending the Treaty of the Southern African Development Community (2001); Article 7 of the Agreement Amending the Treaty of the Southern African Development Community [amending Article 22] (2007); Article 8 of the Agreement Amending the Treaty of the Southern African Development Community (2008); Article 3 of the Agreement Amending the Treaty of the Southern African Development Community [amending Articles 10A] of the Treaty (2009); Article 4 of the Agreement Amending the Treaty of the Southern African Development Community [amending Articles 10 and 14] (2009).

²⁵ Again, note some of the bilateral FTAs concluded by the TPP original signatories do not require second ratification. See n

²⁶ It is another question how an amendment to the text applies to acceding parties to the TPP later in time. In cases of accession, Parties usually specify relevant conditions in the accession protocol.

treaty relationships in terms of late ratifiers, even when all existing Parties ratify an amendment. Assume that the TPP entered into force with six Parties that account for 85% or more of the entire GDP of the twelve original signatories, and that the Parties unanimously agreed and ratified an amendment before the other six original signatories joined the TPP. It is not clear how this would affect the rights and obligations of the latter group of signatories when they intend to ratify the TPP.

As is shown in the previous section (II.2), late ratifiers are not formally considered ‘Parties’ (Article 1.3) that can agree and ratify amendments to the TPP. Thus, those original six Parties can overwrite the original TPP text by amending it as they wish to, depriving late ratifiers of opportunities to ratify the original TPP text that was agreed in October 2015. As in the situation shown above, the current Article 30.2 may incentivize each Party to the TPP to refrain from, or at least delay, approving entrance of late ratifiers so that it can use this as leverage.

The same concern applies to the accession process,²⁷ where paragraphs 3 and 4 of Article 30.4 (Accession) require the Commission to decide by consensus whether or not to approve accession. The Commission shall specify a deadline for ratification by an acceding country, in accordance with Article 30.4(5).²⁸ Furthermore, in accordance with Article 30.4(6), a country can become a Party to the TPP either (a) sixty days after the country deposits an instrument of accession, or (b) on the date on which all existing Parties have ratified the accession protocol, whichever is later. Thus, ratifications by all existing Parties are required to effectuate the accession. Even after the Commission’s affirmative decision of collective approval on a proposed accession and after ratifications by all other Parties, any existing Party can block the acceding country from being a Party to the TPP, just by failing to ratify the accession protocol. Obviously, this appears redundant.²⁹

²⁷ Needless to say, accession of a Party and the second ratification of an amendment are completely different in context; however, under the TPP, unanimous ratification is required for both situations. In this sense, they share the same problem in terms of the scope *in personam* of the treaty rights and obligations.

²⁸ It is not clear in the text if the Commission has the power to set a specific time limit on the part of existing Parties for their ratification of the agreed amendment, but this uncertainty about the power of the Commission can be avoided by setting a time limit on the existing Parties to decide whether or not to approve it as part of the substantive text of the proposed amendment.

S Yee, ‘The Time Limit for the Ratification of Proposed Amendments to the Constitutions of International Organizations’ (2000) 4 Max Planck Yearbook of United Nations Law 203.

²⁹ This also prevents the effectuation of the treaty rights and obligations vis-a-vis the acceding country and other Parties that have ratified the accession protocol. In contrast, Article 23.1(2) of

IV. Withdrawal of a Party from the TPP Agreement

1. Do the ISDS provisions deprive Parties of their right to withdraw?

For decades, withdrawal from trade agreements has been rare,³⁰ though it is still an option and can be used as leverage or to facilitate brinkmanship in negotiations.³¹ With regard to withdrawal from the entire TPP Agreement, Article 30.6 (Withdrawal) sets out that '[a]ny Party may withdraw from this Agreement by providing written notice of withdrawal to the Depositary' and it 'shall take effect six months after that, unless the Parties agree on a different period'. The text is essentially identical to the corresponding Article 20.8 of the TPSEP, along with many other FTAs previously concluded by original signatories of the TPP,³² except for some of the Japanese FTAs.³³ In principle, the date count starts from the day after the notification. For example, if a Party notified its intention to withdraw from the TPP on 1 April it will take effect on 2 October.³⁴

Dr. Mahathir Mohamad, the former Malaysian Prime Minister, argued that withdrawal from the TPP 'is not going to be easy and the cost would practically bankrupt us'.³⁵ He continued that a 'decision to withdraw [TPP] will

the bilateral US-Australia FTA allows accession to take effect between the acceding country and either of the two original member states that ratified the accession protocol.

³⁰ Several countries withdrew from the General Agreement on Tariffs and Trade (GATT) within a few years after its provisional application. See HW Cho, 'Legal Eligibility of Taiwan's Accession to GATT/WTO' (2000) 3 Maryland Series in Contemporary Asian Studies 4.

³¹ MS Jank and MQM Jales, 'On Product-, Box-, and Blame-Shifting: Negotiating Frameworks for Agriculture in the WTO Doha Round' in William Alexander Kerr and James D Gaisford (eds) *Trade Negotiations in Agriculture: A Future Common Agenda for Brazil and Canada?* (University of Calgary Press 2006) 74 (fn 2). See also discussions regarding the so-called 'Brexit' problem.

³² See e.g., Article 2205 of the NAFTA; Article 20-07(1) of Mexico-Chile FTA; Article 23.5(3) of Chile-Australia FTA; and Article 23.4(2) of the US-Australia FTA.

³³ In contrast, FTAs concluded by Japan tend to require a period of one year before the withdrawal takes place. Those arrangements are supposed to serve to improve predictability for transition. Recent examples are Article 17.5 of Mongolia-Japan FTA; Article 147 of Japan-India FTA; Article 224 of Peru-Japan FTA; Article 154 of Switzerland-Japan FTA; Article 129 of Vietnam-Japan FTA; and Article 173 of Thai-Japan FTA. See T Kobayashi, 'Running Many FTAs is Like Balancing between Many Bicycles: A Multidimensional Comparison of Institutional Provisions in Japan's FTAs' in Shotaro Hamamoto, Hironobu Sakai and Akiho Shibata (eds) *L'être Situé, Effectiveness and Purposes of International Law: Essays in Honour of Professor Ryuichi Ida* (Brill, 2015) 141. A similar provision appears in Article 57(1) of the Convention Establishing the European Free Trade Association (EFTA).

³⁴ There are inconsistent practices in date counting; for example, the AANZFTA sets forth that it enters into force '60 days after [...] the notification' of the ratification. In the case of entry of Thailand, Laos and Cambodia, the parties included the date of the notification of ratification while counting the waiting period. See A de Jonge, 'Australia' in Wenhua Shan (ed), *The Legal Protection of Foreign Investment: A Comparative Study* (Hart Publishing, 2012) 140.

³⁵ Mahathir Mohamad, 'TPPA' (Dr. Mahathir Mohamad: Blogging to Unblock, 31 December 2015) <<http://chedet.cc/?p=1949>> accessed 9 April 2016.

obviously result in loss of profit and future profits by companies investing in Malaysia or trading with Malaysia’ and that ‘[t]he withdrawal will involve numerous companies and the purported loss will run into hundreds of billions. The [ISDS arbitral] court will not be ours where we can count on sympathy and concern for what will happen to our economy and finances. There is also no way we can pressure or bribe the courts. We will just have to pay the billions’.³⁶

In response to the ‘litigation risk of withdrawal’ argument, Malaysia’s Ministry of International Trade and Industry (MITI) stated that the nation has an option to withdraw from the TPP without fear of being taken to ISDS arbitration. Reportedly, it said that since ‘withdrawal under the TPP is allowed, withdrawal as such is an exercise of our rights and not a breach of the agreement’.³⁷ It also stated, ‘[i]f Malaysia signs [the TPP], but then decided to withdraw, the protection under the Investment Chapter would be inapplicable to foreign investors’ and therefore ‘the mere act of withdrawal will not result in Malaysia being sued by a foreign company’.³⁸ Similar comments were reported on other occasions.³⁹

The first issue is whether a government’s withdrawal from the TPP in itself constitutes a breach of substantive obligations under Chapter 9 of the TPP. Here, paragraph 1(a) of Article 9.19 (Submission of a Claim to Arbitration) of the TPP sets forth that a foreign investor can file a claim for ISDS arbitration ‘[i]f an investment dispute has not been resolved within six months of the receipt by the respondent of a written request for consultations pursuant to Article 9.18.2 (Consultation and Negotiation)’.⁴⁰ There are FTAs concluded by TPP original signatories almost identical to this provision.⁴¹

Then, the claimant must show the breach of obligations, loss/damage and causation in order to file an arbitration claim. The breach evidence may be (i) a

³⁶ *Ibid.*

³⁷ Bernama, ‘MITI: Withdrawal from TPP will not bankrupt Malaysia’ *New Strait Times* (Singapore, 4 January 2016) <<http://www.nst.com.my/news/2016/01/120466/miti-withdrawal-tpp-will-not-bankrupt-malaysia>> accessed 9 April 2016).

³⁸ *Ibid.*

³⁹ Bernama, ‘M’sia can still exit TPPA if found to have more disadvantages than benefits’ *New Strait Times* (Singapore, 28 March 2016) <<http://www.nst.com.my/news/2016/03/135606/msia-can-still-exit-tppa-if-found-have-more-disadvantages-benefits>> accessed 9 April 2016.

⁴⁰ As another procedural requirement, ‘[a]t least 90 days before submitting any claim to arbitration under this Section, the claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration (notice of intent)’ in accordance with Article 9.19(3).

⁴¹ See, e.g., Articles 1120 of the NAFTA; Article 96(4) of Japan-India FTA; Article 94(3) of Switzerland-Japan FTA; Article 11.16(3) of the US-Korea FTA (KORUS).

breach of any of the substantive obligations set forth under Section A of Chapter 9, (ii) a breach of the terms of investment authorization made by the respondent government, or (iii) a breach of provisions under the investment agreement if the disputed matter and damages directly relate to that agreement.

As is argued by the Malaysian MITI, withdrawal from the TPP itself would not constitute a breach of substantive obligations listed in Section A of Chapter 9. Even if a Party has a legitimate right to withdraw from the agreement, however, it may still constitute a breach of obligations under investment authorization or an individual investment agreement. For this purpose, in order to avoid legal uncertainty that may be caused by future withdrawal, foreign investors can request that the receiving country include explicit provisions in every investment agreement concerning loss or damage in case the receiving country withdraws from the TPP within a certain period of time. This would help to stabilize the investment interests while restricting the policy space on the part of the receiving state.⁴²

2. Procedural leeway to withdraw from the TPP

Next, let us set aside the issue of whether ‘loss and damage’ incurred as a result of the withdrawal for those protected under Article 9.19. Instead, this subsection focuses on the two relevant provisions that deal with procedural requirements for filing a claim for ISDS arbitration. First, with regard to the consent requirements for ISDS arbitration, Articles 9.20 and 9.21 of the TPP are almost identical to those in the KORUS FTA⁴³ and are similar to corresponding provisions in many other existing FTAs.

Specifically, Article 9.20 (Consent of Each Party to Arbitration) of the TPP reads as follows:

1. Each Party *consents to the submission of a claim to arbitration* under this Section in accordance with this Agreement.
2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be *deemed to satisfy the requirements of:*
 - (a) *Chapter II of the ICSID Convention* (Jurisdiction of the

⁴² Australia, Canada, Mexico and New Zealand are not exempted from claims by foreign investors under certain conditions set out in Annex 9-H of the TPP, in accordance with footnote 31 to Article 9.19(1)(a)(i)(B).

⁴³ See Article 11.17 and 11.18 of the KORUS FTA.

Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [(b) and (c) omitted].⁴⁴

Article 9.21 identifies conditions such as the statute of limitations.

Here, Chapter II of the International Centre for Settlement of Investment Disputes (ICSID) Convention consists of Articles 25 through 27, of which Article 25(1) sets forth that ICSID has jurisdiction over legal disputes when a receiving state and foreign investor consent in writing that, following this consent, no party may withdraw unilaterally.⁴⁵ Put differently, the ICSID Convention requires the mutual consent of both disputing parties in order to admit jurisdiction of the ICSID to the ISDS proceedings. In Article 9.20(2)(a) of the TPP, the Parties to the TPP pledge to give general consent to the ICSID of the submission of claims against themselves. If a foreign investor submits a complaint against a TPP member country, the respondent country is seen to have given written consent to the jurisdiction of the ICSID.

When Article 25(1) of the ICSID Convention is read in combination with Article 9.20 of the TPP, a TPP member country cannot unilaterally escape from the ISDS proceedings once a foreign investor has submitted a hostile complaint to the ICSID in accordance with Article 9.19(5). Thus, a claimant investor is eligible to submit a complaint to arbitration if an investment dispute has not been resolved within six months of receipt by the respondent of a written request for consultations, and once it commences, the respondent Party cannot cancel the arbitration process by issuing a notification of withdrawal from the entire TPP.

Notably, however, withdrawal from the TPP becomes, in principle, effective six months after the notification, as is set out in Article 30.6; therefore, a withdrawal notification to the TPP Depository before a foreign investor submits a request for consultation would take effect before the consultation period lapses, depriving the foreign investor the right to file a claim to the ISDS arbitration.⁴⁶ For example, the date that a Party to the TPP notifies its intention to withdraw from the TPP is considered Day 0. Starting from the next day, the withdrawal takes effect six months later. Assuming that a foreign investor filed a request for

⁴⁴ Paragraphs 1 and 2 of Article 9.20 (emphases added).

⁴⁵ World Bank website < <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx> > accessed 9 April 2016

⁴⁶ Whether a claimant may argue for earlier submission of complaint by reason of futility or other equitable reliefs will be the subject of separate research.

consultation and the request was received on the same day,⁴⁷ it has to wait six months for the expiration of the consultation phase.⁴⁸ When the foreign investor, then, tries to file a claim to arbitration, the respondent state has already withdrawn from the TPP.

Finally, as a matter of substance, foreign investors might request a consultation with regard to loss and damage incurred solely as a result of the withdrawal of the receiving Party from the TPP, if there are specific provisions in investment agreements or decrees that entitle them to do so, as is shown in the previous subsection. However, as a matter of procedure, no foreign investor can submit a complaint for loss or damage arising out of a Party's withdrawal from the TPP Agreement if the withdrawal precedes the request for consultation. Even if a foreign investor has a right to pre-emptively request a consultation based on the threat of injury or potential loss that would be caused directly by a future withdrawal, and has exercised that right, the responding Party can still withdraw from the TPP to avoid the arbitration procedure and any resulting compensation awards, if it notifies its intention to withdraw on the same day as it received the request for consultation.⁴⁹

The same applies to the NAFTA Agreement's Chapter 11, which has almost identical provisions as the TPP.⁵⁰ In contrast, this does not happen in several other FTAs; for example, Article 101 of Japan-India FTA set forth the following:

In respect of investments made prior to the date of termination of this Agreement, the provisions of this Chapter, as well as provisions of this Agreement which are directly related to this Chapter, shall *continue to be effective for a period of ten years*

⁴⁷ A claimant must deliver a written request for consultation in order to commence the consultation phase, in accordance with Article 9.18(2). In addition, it can file a claim to arbitration if the dispute has not been resolved within six months of receipt by the respondent of a written request for consultation, as set forth in Article 9.19(1). Thus, the date of the receipt by the respondent matters more than the date the request was sent.

⁴⁸ Even if the consultation period within six months included Day 0, the respondent Party can easily delay the receiving date by notifying their intention to withdraw to the Depository after business hours. For the purpose of the notification of withdrawal, merely providing written notice of withdrawal to the Depository is required. Thus, notification through any diplomatic channel will suffice, regardless of business hours. On the other hand, close of business can be an excuse to reject the receipt of the request for consultation filed by a foreign investor. By doing so, the responding Party can 'buy' one additional day.

⁴⁹ Needless to say, it would be rather rare for a country to calculate that the total economic loss from ISDS arbitration would exceed the aggregate benefits to remain in the TPP.

⁵⁰ Articles 1120 and 2205 of the NAFTA; again, this would not become a real concern if each of the NAFTA member states considered the membership as compelling.

from the date of termination of this Agreement.⁵¹

Thus, a host state's obligations are not affected by withdrawal. Second, for FTAs that require one year of advance notice for a withdrawal to take effect set aside their substantive right to raise this issue,⁵² as foreign investors have six months to prepare for requesting a consultation. Third, under the US-Australia FTA and US-Singapore FTA, even when a member state notifies its intention to withdraw from the agreement, the other party can ask for a delay of the proposed withdrawal with regard to specific provisions.⁵³ Though it does not mean that the expiring dates are always extended, it helps to open the channels of negotiation to address potential adverse impacts of withdrawal.

Finally, the simple provision with regard to withdrawal turns out to be another source of systemic concern within the TPP provisions regarding membership. This could have easily been avoided if the drafters set a longer period for withdrawals to take effect. Whether or not it is intentionally drafted in this way deserves intensive investigation.

V. Conclusion

Our findings in the previous sections can be summarized as follows. First, with regard to the 'late ratification' issue, imposing an additional burden on a late ratifier regarding membership of the TPP may create incentives for early ratification; however, it may also incentivize rent-seeking in early participants by way of renegotiations or side payments, which will endanger the thin balance that original signatories reached in October 2015. Second, with regard to the 'second ratification' issue, the rationale that requires ratification by all member states for an amendment to take effect is not clear. The current requirement may prevent the TPP's expedited adjustment to subsequent changes in circumstances. Finally, with regard to the 'litigation risk of withdrawal' issue, a member state is free from risk of ISDS arbitration if the notification of the withdrawal from the TPP precedes the request for consultation by a foreign investor.

Of course, discussion of these subjects here are not exhaustive. Many other aspects of membership-related issues deserve further discourse. For example,

⁵¹ Article 10.20 of Mongolia-Japan FTA has an identical provision (emphasis added).

⁵² See recent Japanese FTAs and the EFTA shown in n 33 above.

⁵³ Article 23.4(3) of the US-Australia FTA; Article 2.9(3) of the US-Singapore FTA.

can an original signatory cancel its intention to be a member of the TPP—for some specified reason—by withdrawing its notice of ratification before the TPP takes effect for that country? If the answer is ‘yes’, will the answer change if the initial notification of ratification satisfied the critical mass requirements (i.e., six or more countries that collectively account for 85% of the total GDP) so that the date of the TPP’s entry into force has already been set, creating legitimate expectations? In addition, what will be the fate of side letters attached to the TPP Agreement after a country withdraws from the TPP? For example, the Japanese government classifies some side letters as international agreements by themselves (separate from the TPP Agreement) that have binding force and would require legislative approval in accordance with the Constitution of Japan,⁵⁴ while classifying others as non-binding.⁵⁵ Setting aside the rationales of such classification,⁵⁶ does the former category of side letters survive after Japan’s withdrawal from the TPP, or after the termination of the entire TPP by all Parties?

Finally, we hope to have established that membership issues are important in a variety of contexts to ensure the effective functioning of the TPP throughout its lifecycle, and illustrate how these issues deserve continued scrutiny.

⁵⁴ See e.g., the letters exchanged between Ambassador Michael B.G. Froman of the USTR and Mr. Shuichi Takatori, State Minister of the Cabinet Office of Japan, on 4 February 2016, which state that ‘[t]his understanding is without prejudice to the outcome of the processes initiated by Japan and the United States’ but still ‘this understanding, shall constitute an agreement between our two Governments, which shall enter into force on the date of your letter in reply’.

⁵⁵ See e.g., the letters exchanged between Ambassador Froman and Mr. Takatori on 4 February 2016, which include statements such as ‘Japan and the United States confirm that each government will maintain at least the current level of consistency with Article 3 (Procedural Fairness) of Annex 26-A (Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices)’. See also, letters exchanged between the Honourable Chrystia Freeland, Minister of International Trade, Canada, and Mr. Takatori on 4 February 2016, which include statements such as ‘[a]t the time of signature of this letter, the Government of Japan recognizes that the indications listed in Part A of the Annex to this letter (hereinafter referred to as “the Annex”) are protected geographical indications in Canada’.

⁵⁶ Another longstanding issue of debate is the blurring distinction between formal treaties and executive agreements. See J Yoo, ‘Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining’ (2011) 97 Cornell L. Rev. 1.