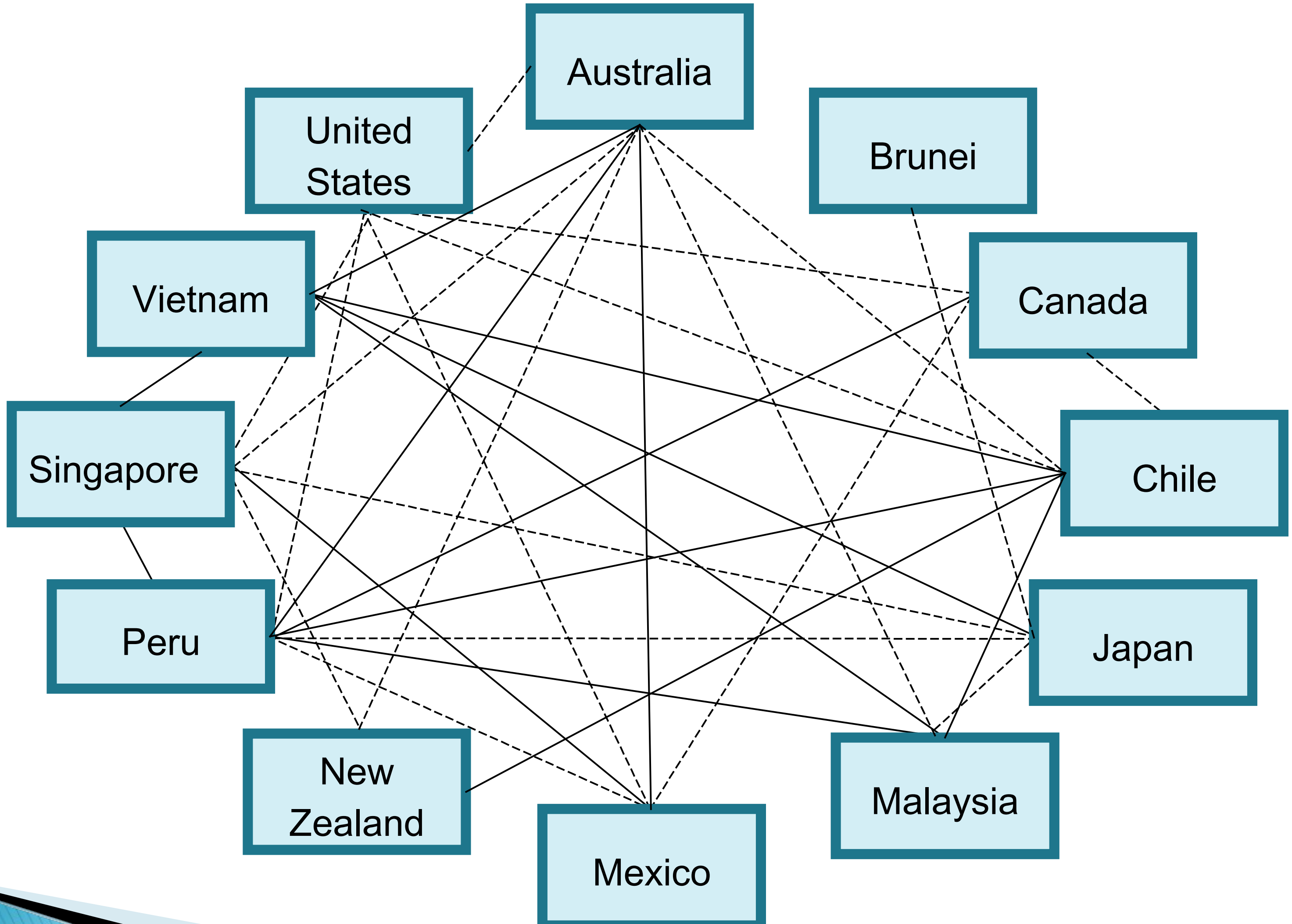
Capital Account Regulations and Trade and Investment Treaties

Existing Trans-Pacific Partnership Country Agreements and Options for Reform

Sarah Anderson, Institute for Policy Studies
Washington, DC
sarah@ips-dc.org

32 Existing Agreements Between TPP Countries

(solid line = BIT, dashed line = FTA)



Spectrum of Approaches to Capital Account Regulations

1. Capital controls are prohibited, with <u>no exceptions for crises</u>. Extremely <u>broad coverage</u>, including derivatives and other portfolio investments.

Agreements between TPP countries: 0

Other: 2012 U.S. Model BIT, CAFTA-DR

2. Capital controls are prohibited, but there are <u>special dispute procedures</u> related to certain types of controls. These include an extended "cooling off period" and some limits on compensation.

Agreements between TPP countries: 3

(U.S. FTAs with Singapore, Chile, Peru)

3. Capital controls are prohibited, but there is a <u>safeguard</u> for times of crisis.

Agreements between TPP countries: 18

- Standard in agreements among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam.
- No safeguards in U.S. FTAs and BITs since the 1994 NAFTA.

4. Capital controls are prohibited, but there is <u>no investor-state</u> dispute settlement.

- **Agreements between TPP countries: 3** (Australia FTAs with New Zealand,* Malaysia,* and the United States.

*also include a safeguard

5. Capital account liberalization is encouraged, but the agreement defers to national laws and regulations.

Agreements between TPP countries: 12

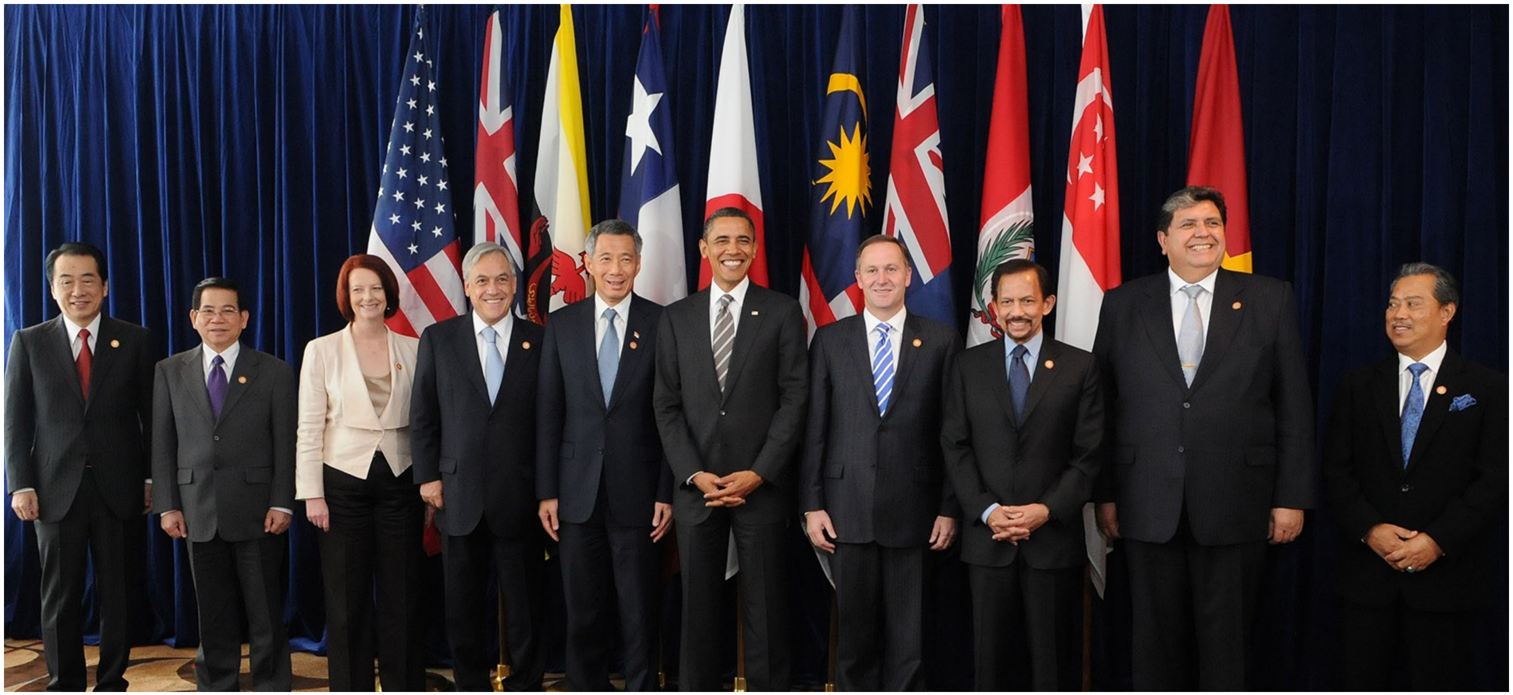
(Malaysia BITs with Chile, Peru, and Vietnam; Singapore BITs with Peru and Vietnam; Chile BITs with New Zealand, Peru, and Vietnam; Australia-Chile FTA; Australia-Vietnam BIT; Canada-Chile and Japan-Chile BITs.)

Other: Brunei-China BIT

6. No rules on capital controls.

- **Agreements between TPP countries: 0**
- Other: China-Germany BIT, US-Israel FTA

Hot Money a Hot Issue in TPP



Leaked Investment Chapter Draft Shows Resistance to U.S. Model

Relevant Provisions in the Draft:

1. A balance of payments safeguard
2. An exemption for Chile's capital account regulations
3. Allows governments to require domestic review before claims go to international tribunals
4. An exemption for Australia from investor-state dispute settlement

-- ALL ARE IN BRACKETS, MEANING NO CONSENSUS --

Former U.S. Treasury Secretary Geithner:

Geithner argument #1: U.S. model offers "adequate flexibility" through prudential measures exception.

- Like GATS, this exception includes language many legal experts say is "self-canceling."
- Beyond GATS, this defines "prudential" as pertaining to the safety of <u>individual</u> financial institutions (and allows investor-state claims).
- Geithner also said "<u>non-discriminatory</u> tax measures affecting capital <u>inflows</u>" are permitted. But many such controls are on basis of residency.

Geithner argument #2: Governments have sufficient alternative tools

1. Fiscal policy measures
2. Monetary policy measures
3. Exchange rate adjustment
4. Non-discriminatory prudential measures, such as bank reserve or capital requirements
5. Limitations on exposure to exchange rate risk

The IMF and others have concluded that in some circumstances these remedies alone are ineffective and capital controls are a necessary option.

Reform options:

1. Exclude capital controls, given ongoing international debate.
2. Remove investor-state dispute settlement.
3. Expand prudential measures exception to cover "macroprudential" measures and remove "self-canceling" language.
4. Strong balance of payments safeguard (no "necessity test" and allow for the need for longer-term measures that may have discriminatory impacts).

For a detailed paper based on this presentation, see: http://bit.ly/1hfI9L6