



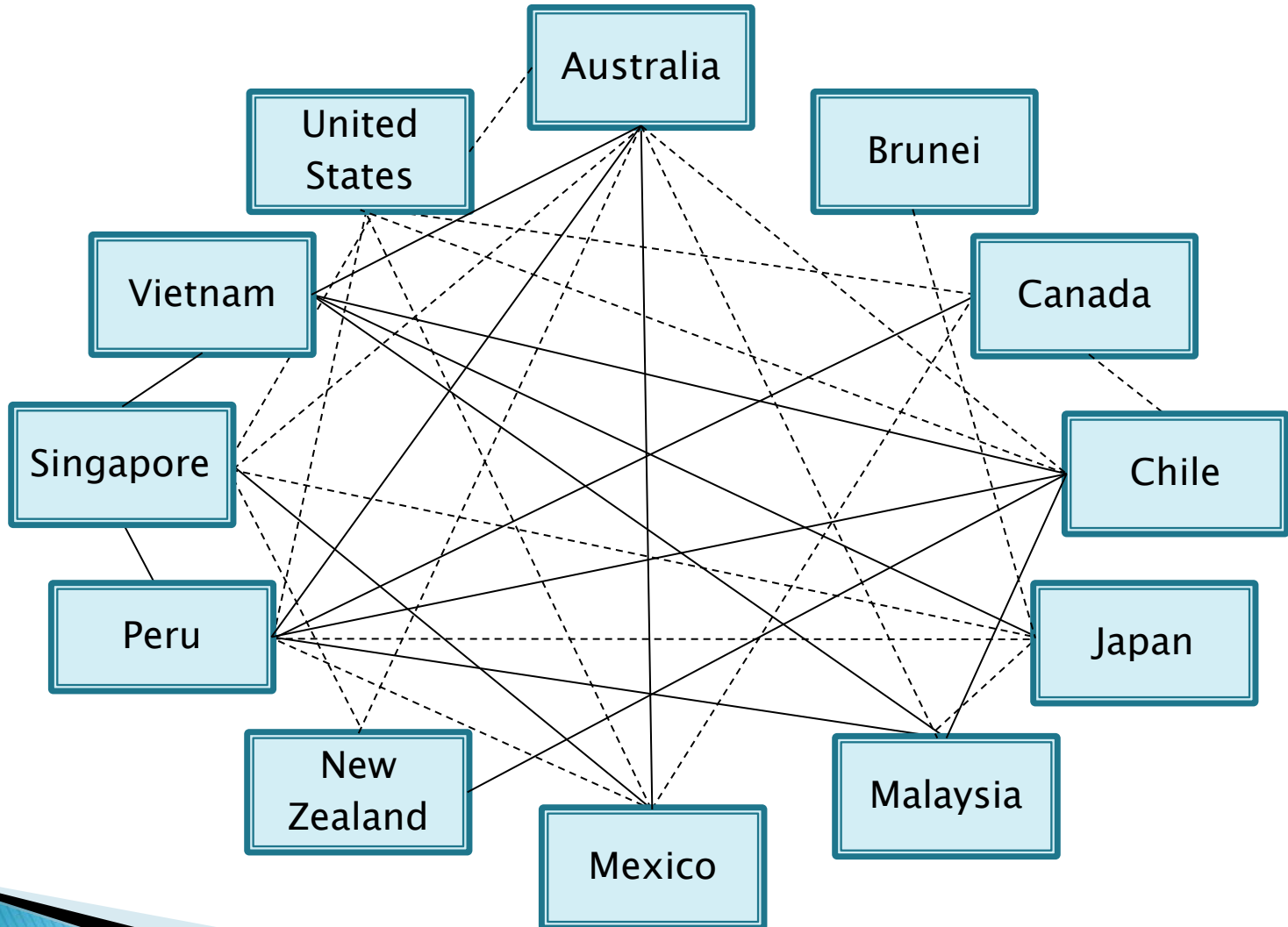
# **Capital Flow Management Measures and Trade and Investment Treaties**

*Existing Trans-Pacific Partnership Country  
Agreements and Options for Reform*

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# 32 Existing Agreements Between TPP Countries

(solid line = BIT, dashed line = FTA)



# Spectrum of Approaches to Capital Flow Management Measures (CFMs)





**1. Capital account liberalization is encouraged, but the agreement defers to national laws.**

## **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





## 2. CFMs are prohibited, but there is no investor-state dispute settlement.

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

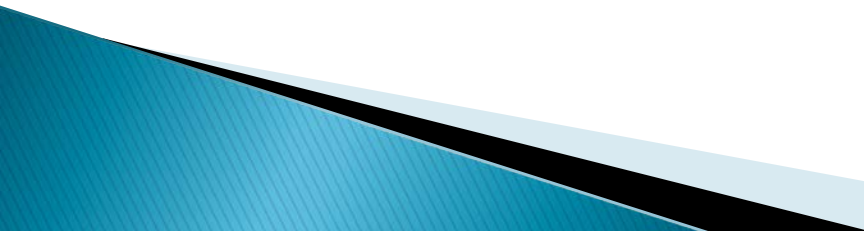
\*also include a safeguard






### **3. CFMs are prohibited, but there is a safeguard for times of crisis.**

#### **Agreements between TPP countries: 18**

- ▶ Fairly standard in agreements among TPP countries except the United States.
  - ▶ No safeguards in U.S. FTAs and BITs since the 1994 NAFTA.
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**4. CFMs are prohibited, but there are special dispute procedures related to certain types of CFMs. Foreign investors have to wait a bit longer before filing claims and have some limits on compensation.**

**Agreements between TPP countries: 3**  
(U.S. FTAs with Singapore, Chile, Peru)



**5. CFMs are prohibited, with no exceptions for crises. Extremely broad coverage, including derivatives and other portfolio investments.**

**Agreements between TPP countries: 0**

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





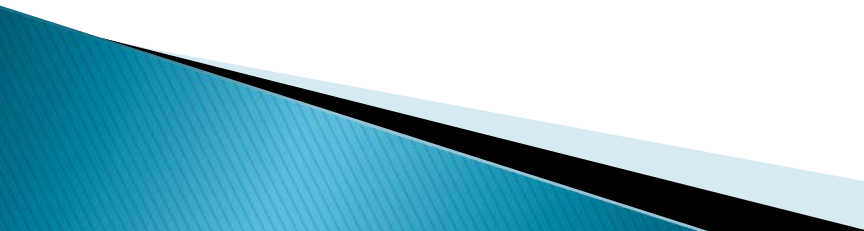
# What about the prudential measures exception?

- ▶ **US Model BIT Article 20**
- ▶ Governments “shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons.”



# Limits of the Prudential Exception

Self-cancelling 2<sup>nd</sup> sentence:

- ▶ Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.
- 



# Narrow definition of “prudential”

- ▶ The term “prudential reasons” includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions

(footnote 18, US Model BIT)





# What about the taxation exemption?

- ▶ Expropriation provisions still apply to all taxation measures. Even indirect expropriation is only allowed if it is carried out in a nondiscriminatory manner and with adequate compensation.
- ▶ Foreign investors could still file a claim for compensation by arguing that a tax-based CFM was discriminatory – especially if the tax is on the basis of residency.

# 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 regulations on capital inflows
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 --



# Reform options:

1. Exclude short-term financial instruments from covered investments.
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/1hfl9L6>