



The Trans-Pacific Partnership Provides New Protections for United States Companies Investing Abroad

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In the search for trade and investment opportunities abroad, the Trans-Pacific Partnership, or TPP, represents a significant development in American commerce.¹ It has been championed by the United States trade representative as “the most significant trade negotiations in a generation,” and one “that promises significant economic benefits for American businesses, workers, farmers, ranchers, and service providers.”² By erasing punishing import taxes and other non-tax barriers, the TPP has given “Made in America” manufactured agricultural, automotive, and information-and-communication products favorable and unprecedented access in TPP member countries, which collectively account for more than one-third of the global GDP.³ For example, the chemicals industry, which accounted for \$3.2 billion of Virginia’s total merchandise exports in 2014,⁴ stands to benefit tremendously from expanded free market access in the TPP member countries.

These economic benefits of the TPP have been hotly debated and widely covered in the media. However, less attention has been paid to the investor-state dispute resolution provisions in Chapter 9 of the TPP, which provide substantive legal protections for protected investors and guarantee a neutral dispute resolution forum for Americans investing in Australia, Canada, Japan, Malaysia, Mexico, Peru, Vietnam, Chile, Brunei, Singapore, or New Zealand.

What Is a BIT, and Why Should Investors Care?

Bilateral and multilateral investment treaties like Chapter 9 of the TPP, collectively referred to as BITs, guarantee the investors of one signatory state certain rights and protections for investments made in the territory of another signatory state. Importantly, they also generally guarantee qualified investors the right to bring an arbitration against a signatory state for violations of the treaty that negatively impact their protected investments.

Traditionally, BITs were signed between developing and developed nations as a way to encourage foreign investment by ensuring investors from developed nations a minimum standard of treatment and a promise of a neutral dispute resolution forum should things go awry. Now, with the astronomical growth of foreign direct investment, BITs are routinely

concluded between developing nations and included in multilateral treaties, such as NAFTA, CAFTA, and now, the TPP.

Among the signatories to the TPP, the United States has existing investment treaties with only Mexico and Canada.⁵ Thus, this single agreement provides new, substantive legal protections for American investors in several of the world's largest economies.

Each treaty is unique in the precise nature of protections it contains and the remedies available, and the TPP is no exception. A close read of the text shows that the drafters explicitly tried to avoid certain lines of cases in public international law and to steer future tribunals towards others. Thus, a prudent investor should consult with counsel regarding the best way to structure an investment to maximize investment treaty protections. Ultimately, while more state-friendly than other BITs, the TPP still provides several important protections to qualified investors.

What Investments Are Covered by the TPP?

Like most BITs, the TPP is engineered to provide protections for a wide array of investors and investments but contains some interesting caveats of which investors should be aware. A qualified investor can be either an individual citizen or a legal entity of a signatory that attempts to, is in the process of making, or has made an investment in another signatory's territory.⁶ However, the treaty explicitly permits a signatory state to deny treaty benefits in circumstances where the investor is a shell company owned or controlled by an investor who is a national of a non-TPP signatory or of the state denying the benefits.⁷

Similarly, a qualified investment can take many forms but must possess the "characteristics of an investment," such as "the commitment of capital," "the expectation of gain or profit," or "the assumption of risk."⁸ This explicit description of the "characteristics of an investment" displays the intention of the TPP member states to force arbitral tribunals to apply a set of heightened criteria for defining a protected investment, colloquially known as the Salini test.⁹ That said, the TPP's definition of investment nonetheless follows the broad pattern of other BITs and includes, among other things, shares, debt instruments, contracts, intellectual property rights, and physical property and its related property rights.¹⁰ The TPP will also retroactively protect qualified

investments in existence at the date of its entry into force.¹¹

What Substantive Protections Does the TPP Provide?

The TPP establishes certain fundamental obligations on the part of TPP member states that can give comfort to potential investors that neither they nor their investments will be discriminated against. These obligations extend to regional governments and any person or enterprise that exercises delegated governmental authority.¹² The discussion below is by no means an exhaustive list of the obligations of TPP member states vis-à-vis investors, but rather a brief overview of those duties that are fundamental to the operation of an investment in a foreign country.

TPP protections include obligations of National Treatment and Most-Favored Nation treatment, which means that a TPP member state must provide protected foreign investors treatment equal to or better than what it provides in similar circumstances to its own investors and investors of any other country.¹³ Notably, the TPP explicitly disallows the application of "most favored nation" status to "international dispute resolution mechanisms and procedures."¹⁴

Signatories to the TPP also promise to provide a minimum standard of treatment to covered investments that is not measured by local or national considerations, but by "customary international law principles."¹⁵ In the TPP, the minimum standard includes guarantees of "fair and equitable treatment" (FET), including in adjudicatory proceedings, and "full protection and security," meaning the level of police protection required under customary international law.¹⁶ However, this section of the TPP is also carefully worded in an attempt to limit the impact of international arbitral decisions that have interpreted both of these provisions in other treaties much more broadly. For example, the TPP provision regarding FET is explicit that a state action that is "inconsistent with an investor's expectations" by itself does not constitute a breach of the provision, even if that action negatively impacts the investment.¹⁷ This is in direct contrast to a string of earlier decisions that found violations of the FET standard where the state's actions frustrated an investor's "legitimate expectations."¹⁸

Finally, signatories to the TPP promise not to expropriate or nationalize covered investments, whether directly or indirectly.¹⁹ However, this obligation is subject to explicit exceptions in which expropriation or nationalization is justified. For instance, it is a recognized principle that a state may nationalize an investment for a public purpose if the action is non-discriminatory, in accordance with due process, and fair compensation is provided.²⁰ The TPP codifies this principle, but also creates specific exceptions for certain intellectual property licenses and government subsidies and grants, and makes clear that regulations regarding public health, safety and the environment should rarely be considered expropriatory.²¹

How Are Disputes Resolved Under the TPP?

For covered investors whose treaty protections have been violated, the TPP provides recourse to a neutral arbitral forum. The TPP permits an investor to bring a claim under the ICSID Rules, the ICSID Additional Facility Rules, the UNCITRAL Rules, or any other set of arbitral rules to which the parties agree.²² However, linked to the TPP's grant of access to international arbitral tribunals are a number of features of which investors should be aware.

First, an investor must decide early on to resolve the dispute in national courts or through international arbitration. This is because: the TPP contains a relatively brief

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statute of limitations of 3.5 years;²³ and the TPP contains a fork in the road provision that requires an investor who wishes to arbitrate the dispute to submit a written waiver of its rights to initiate or continue parallel proceedings in any other court or tribunal.²⁴

Second, an investor should be aware of some of the unique procedural elements of an arbitration under the TPP. For example, the TPP specifically allows an arbitral tribunal to accept submissions from TPP member states that are not parties to the dispute, as well as amicus curiae submissions.²⁵ Unlike

other BITs, the TPP also provides an expedited procedure for claims that are “manifestly without legal merit” that is similar to a motion to dismiss in US civil court proceedings.²⁶ Finally, the TPP permits an investor or a state to request consolidation of similar claims into one proceeding.²⁷

Most importantly, an investor should know that, unlike other arbitration options under international agreements, which may permit confidential proceedings, transparency is the general rule under the TPP. Arbitral submissions, hearing transcripts, and tribunal orders, awards, and decisions are generally to be made available to the public by the disputing state.²⁸ Hearings are also conducted in public.²⁹ The TPP does permit the parties to have certain information protected by the tribunal, but this is the exception rather than the rule.³⁰

In sum, it is clear that the TPP affords US investors tremendous opportunities for trade and commerce within the newly created free trade area, including investor protections and arbitral dispute-resolution rights. In a single document the TPP has managed to achieve, for American investors, the benefits of eleven separate bilateral investment treaties. However, investors and their counsel should be aware of the special features attached to these protections, and adjust their investment strategies accordingly, in order to maximize available benefits.

The views set forth here are the personal views of the authors and do not necessarily reflect those of any law firm with which they are associated.

Endnotes:

- 1 The TPP was signed on February 4, 2016 in New Zealand. See *Rebecca Howard, Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS, Feb. 4, 2016, <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S>. However, it is not yet in force. It will become binding either: (a) 60 days after all TPP states complete their respective domestic treaty ratification processes; or (b) if two years pass, 60 days after at least six TPP states, representing 85% of the total GDP of the original signatories, have completed their domestic ratification processes. See *TPP Full Text (“TPP”) art. 30.5*, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

- 2 See Office of the U.S. Trade Representative, USTR FACT SHEET: ECONOMIC BENEFITS OF TRANS-PACIFIC PARTNERSHIP (2013), <http://goo.gl/iWR8J0> (“USTR Fact Sheet”). See also *The Trans-Pacific Partnership, Leveling the Playing Field for American Workers & American Businesses*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp>; WHITE HOUSE OFFICE OF THE PRESS SECRETARY, FACT SHEET: HOW THE TRANS-PACIFIC PARTNERSHIP (TPP) BOOSTS MADE IN AMERICA EXPORTS, SUPPORTS HIGHER-PAYING AMERICAN JOBS, AND PROTECTS AMERICAN WORKERS (2015), <https://goo.gl/EoXcXA>.
- 3 USTR FACT SHEET.
- 4 DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, VIRGINIA: EXPANDING EXPORTS AND SUPPORTING JOBS THROUGH TRADE AGREEMENTS 1 (2015), <http://goo.gl/QVGyAX>.
- 5 The US also has existing free trade agreements with Chile, Peru, and Vietnam, which provide similar, but not identical, protections to those contained in the BITs. Additionally, the US/Australia Free Trade Agreement includes substantive protections for investors, but does not provide for dispute resolution beyond the national court system.
- 6 See TPP art. 9.1 (definition of investor).
- 7 See *id.* art. 9.15(1).
- 8 *Id.* art. 9.1 (definition of investment).
- 9 See *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 52-57 (July 16, 2001).
- 10 See TPP art. 9.1 (definition of investment).
- 11 See *id.* art. 9.1 (definition of covered investment).
- 12 See *id.* art. 9.2(2).
- 13 See *id.* arts. 9.4, 9.5.
- 14 *Id.* art. 9.5(3). The exclusion of international dispute-resolution mechanisms and procedures from the MFN obligation is most certainly a response to cases like *Maffezini v. Spain*, where the tribunal interpreted an MFN clause as encompassing such procedural rights. See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 64 (Jan. 25, 2000). As a practical matter, Article 9.5(3) can likely be read as limiting the TPP’s MFN clause to substantive protections.
- 15 TPP art. 9.6.
- 16 See *id.*
- 17 *Id.* art. 9.6(4).
- 18 See, e.g., *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 291 (June 21, 2011) (finding that Argentina’s decision to change the parity levels of the U.S. Dollar and Argentine Peso and to freeze tariffs frustrated the investors’ legitimate expectations based on the totality of the circumstances).
- 19 See TPP art. 9.8; *id.* annex 9-B.
- 20 See *id.* art. 9.8.
- 21 See *id.* art. 9.8(5)-(6); *id.* annex 9-B, art. 3(b).
- 22 See *id.* art. 9.19(4).
- 23 See *id.* art. 9.21(1). The TPP also mandates a six-month “cooling off” period between when the claimant first notifies the State of the dispute and actually submits the claim to arbitration. See *id.* art. 9.19(1).
- 24 See *id.* art. 9.21(2)(b). There is an exception for parallel disputes of an injunctive nature that is intended to preserve the parties’ rights during the pendency of the arbitration. See *id.* art. 9.21(3).
- 25 See *id.* arts. 9.23(2)-(3).
- 26 *Id.* arts. 9.23(4)-(5).
- 27 See *id.* art. 9.28.
- 28 See *id.* art. 9.24(1).
- 29 *Id.* art. 9.24(2).
- 30 The TPP’s definition of “protected information” includes confidential business information, information privileged under domestic law, and classified government information. *Id.* art. 9.1. The tribunal is required to “make appropriate arrangements” to prevent disclosure of protected information, which can include closing portions of the otherwise public hearing. *Id.* art. 9.24(2). A State also cannot be required to disclose protected information or information that falls under Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information). See *id.* art. 9.24(3).



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