



Investment Protection and Investor-State Dispute Settlement under the Trans-Pacific Partnership Agreement

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The Trans-Pacific Partnership Agreement (*TPPA*) creates a free trade area accounting for nearly 40 per cent of global GDP and a third of global trade (see our [10 November 2015 client briefing](#)). The agreement was announced by Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam on 5 October 2015.

Once it enters into force, the TPPA will offer protections to investments by nationals or companies from one TPP Member State in the territory of another TPP Member State. 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 Member States 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.

The inclusion of ISDS in the Investment Chapter has implications for nationals or companies making investments in a TPP Member State.

First, it will significantly expand the ability of investors in several capital exporting states to take advantage of ISDS. For instance, US investors for the first time will be able to submit disputes with Australia, Brunei Darussalam, Japan, Malaysia, New Zealand and Vietnam to binding international arbitration. Similarly, Japanese investors for the first time will be able to submit disputes with Australia, Canada, New Zealand and the United States to binding international arbitration.

Second, nationals or companies from non-TPP Member States with existing or planned investments in a TPP Member State may wish to seek advice on how to structure their investment to benefit from the TPPA's ISDS provisions.

The TPPA will enter into force on the earlier of: (i) 60 days from the date on which all TPP Member States have confirmed that their domestic procedures are complete; or (ii) 60 days after the expiry of the two-year period from the date of signature if at least six TPP Member States, which together account for 85 per cent of the combined GDP of all the TPP Member States in 2013, have notified the completion of their domestic procedures (or 60 days after the date on which such number is reached after the two-year period has passed).

Threshold requirements for investment protection

In order to benefit from the Investment Chapter's investment protections, nationals and companies must satisfy the threshold definitions of "investor" of a TPP Member State and "covered investment".

"Investor" of a TPP Member State means a TPP Member State, or a national or enterprise of a TPP Member State that attempts to make, is making, or has made an investment in the territory of another TPP Member State. In order to qualify as an "enterprise of [a TPP Member State]", a company must be able to demonstrate that it carries out "business activities" in that TPP Member State.

"Covered investment" is defined as an investment by an "investor" of one TPP Member State in the territory of another TPP Member State that is in existence as of the date of entry into force of the TPPA, or established, acquired, or expanded after that date.

Substantive protections

If you are an "investor" with a "covered investment", your investment is entitled to the following protections under the Investment Chapter, subject to the exceptions flagged in the next section.

- **Minimum standard of treatment.** Each TPP Member State guarantees covered investments a minimum standard of treatment in accordance with customary international law. This includes: (i) fair and equitable treatment, including the obligation not to deny justice in legal proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (ii) full protection and security, which requires each TPP Member State to provide the level of police protection required under customary international law.
 - The text expressly provides that the mere fact that government action may be inconsistent with an investor's "expectations" does not breach this standard.
 - The text also expressly provides that the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a TPP Member State, does not breach this standard.
- **National and Most-Favoured-Nation (MFN) treatment.** TPP Member States guarantee investors of another TPP Member State and covered investments treatment no less favourable than treatment they accord, in like circumstances, to their own investors and their investments in their territories or to investors of any other state (*i.e.*, TPP Member State or non-TPP Member State) and their investments. This protection covers the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. The text expressly provides that MFN treatment does not encompass ISDS procedures, including those in the Investment Chapter.
- **Free transfer of funds relating to a covered investment.** Each TPP Member State must permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Transfers relating to a covered investment shall be permitted to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
- **Prohibition on expropriation without compensation.** The TPP Member States agree not to expropriate or nationalise covered investments directly through formal transfer of title or outright seizure of a covered investment, or indirectly through measures that have an *effect* equivalent to expropriation or

nationalization, except: (i) for a public purpose; (ii) in a non-discriminatory manner; (iii) on payment of prompt, adequate and effective compensation; and (iv) in accordance with due process of law. An important qualification to this guarantee is that non-discriminatory regulatory actions by a TPP Member State 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. The Investment Chapter does not clarify what qualifies as a “rare” circumstance.

Exceptions to investment protection under the TPPA

There are several exceptions to the investment protections in the Investment Chapter.

First, the national treatment and MFN treatment standards do not apply to non-conforming measures maintained by a TPP Member State. Each TPP Member State is required to provide a list of such measures as a Schedule to Annex I of the TPPA. TPP Member States may amend the non-conforming measures listed in their respective Schedules, provided the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with the national treatment or MFN treatment standards, or Articles 9.9 (Performance Requirements) or 9.10 (Senior Management and Board of Directors).

Second, TPP Member States have the freedom to adopt measures appropriate to ensure that investment activity in their territories is undertaken in a manner sensitive to their environmental, health or other regulatory objectives, provided that such measures are not otherwise inconsistent with the Investment Chapter, meaning that they do not otherwise constitute a breach of their obligations under the Investment Chapter.

Third, the TPPA includes a denial of benefits clause. It provides that a TPP Member State may deny the benefits of the Investment Chapter to an investor that is an enterprise of another TPP Member State and to any investments made by that investor, if the enterprise (i) is owned or controlled either by a person of a non-TPP Member State or of the denying TPP Member State, and (ii) has no substantial business activities in the territory of any TPP Member State other than the denying TPP Member State. The TPP Member State may also deny such benefits if extending investment protections to that investment or investor would circumvent or violate measures prohibiting transactions with that investor, *e.g.*, as a result of economic sanctions. In addition, a TPP Member State may deny the benefits of the section on ISDS with respect to claims challenging its tobacco control measures.

The TPPA’s ISDS provisions

Investors are able to enforce the Investment Chapter’s protection against a TPP Member State by submitting a dispute to binding international arbitration if it cannot be resolved within six months by consultation and negotiation with the TPP Member State.

The Investment Chapter’s ISDS provisions extend beyond alleged breaches of the obligations in the Investment Chapter itself to include disputes regarding alleged breaches of any: (i) investment authorisation (*i.e.*, an authorisation that a TPP Member State’s foreign investment authority grants to an investor of another TPP Member State or a covered investment); or (ii) investment agreement (*i.e.*, a written agreement between a central government authority of a TPP Member State and an

investor of another TPP Member State or covered investment which the investor or covered investment relies upon to establish or acquire a covered investment).

The Investment Chapter offers investors the option of both institutional and *ad hoc* arbitration. For instance, an investor may submit a dispute to ICSID arbitration if both the Respondent State and the investor's home State are parties to the ICSID Convention (*i.e.*, all TPP Member States, except Vietnam and Mexico). Alternatively, an investor may submit a dispute to arbitration under the ICSID Additional Facility Rules if either the Respondent State or the investor's home State is a party to the ICSID Convention; the UNCITRAL Arbitration Rules; or any other arbitration institution or rules agreed by the disputing parties.

TPP Member States expressly address a number of aspects of how ISDS will apply in proceedings initiated under the Investment Chapter.

First, the ISDS provisions expressly provide that the governing law of any arbitration shall be the TPPA and applicable rules of international law. If a claim arises out of alleged breaches of an investment authorisation or an investment agreement, a TPPA tribunal must apply the rules of law specified in the relevant agreement or such other rules as the parties agree.

Second, the Investment Chapter addresses the risk of multiple proceedings under the TPPA and other treaties concluded between one or more of the TPP Member States, *e.g.*, the North American Free Trade Agreement or **NAFTA** entered into between Canada, Mexico and the United States. The notice of arbitration in a TPPA dispute must be accompanied by a written waiver of any right to *initiate or continue* proceedings before any court or administrative tribunal of a TPP Member State, *or any other dispute settlement procedures*, any proceeding, with respect to any measure alleged to constitute a breach of an obligation under the Investment Chapter, an investment authorisation or an investment agreement. In other words, if an investor wishes to take advantage of the ISDS provisions in the Investment Chapter, it must first discontinue any existing dispute settlement proceedings and undertake not to initiate any other dispute settlement proceedings relating to the same measure(s). In addition, Chile, Peru and Vietnam each expressly precludes an investor who has commenced proceedings before a court or administrative tribunal in its territory from submitting a dispute to ISDS under the Investment Chapter.

Third, an investor's ability to bring a claim under the Investment Chapter is subject to a limitation period. An investor cannot bring a claim if *more than three years and six months* have elapsed from the date on which the claimant first acquired or should have acquired both knowledge of the alleged breach *and* knowledge that the investor had incurred loss or damage. This provision is similar to the three-year limitation period that applies to claims under the NAFTA.

Fourth, the TPPA establishes a TPP Commission with the power to issue binding interpretations of the TPPA's provisions similar to the role of the Free Trade Commission established under Article 2001 of the NAFTA. The TPP Commission will meet at the level of Ministers or senior officials of TPP Member States, as mutually determined, and each TPP Member State will be responsible for the composition of its delegation to the TPP Commission. A TPPA tribunal's award must be consistent with the TPP Commission's decisions.

Fifth, the TPPA includes a Code of Conduct for arbitrators. Prior to the entry into force of the TPPA, the TPP Member States will provide guidance on the application of the

Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (Dispute Settlement) of the TPPA to arbitrators selected to serve on TPPA tribunals. Arbitrators must comply with such guidance in addition to the applicable arbitral rules regarding independence and impartiality.

Sixth, the Investment Chapter expressly provides that the investor has the burden of proving all elements of a claim submitted under the Investment Chapter, “consistent with general principles of international law applicable to international arbitration”.

Seventh, the TPPA’s ISDS provisions contain a number of innovations, several of which are modelled on the 2012 US Model Bilateral Investment Treaty.

- **Expedited procedure for jurisdictional objections.** If, within 45 days of the constitution of a tribunal under the TPPA, the Respondent State requests that the tribunal decide a jurisdictional objection on an expedited basis, the tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s) no later than 150 days after the date of such a request.
- **Transparency.** All hearings are to be open to the public and documents that have been submitted to a TPPA tribunal (including pleadings, memorials, written submissions and briefs) shall be made available to the public. A TPPA tribunal’s orders, awards and decisions shall also be made available to the public.
- **Written comments.** A TPPA tribunal must transmit its proposed decision or award to the disputing parties before issuing a decision or award on liability. The disputing parties have 60 days to submit written comments to the tribunal concerning any aspect of the proposed decision or award. A TPPA tribunal must consider any such comments and issue its decision or award no later than 45 days after the expiration of the 60-day period.
- ***Amicus curiae* submissions.** After consultation with the disputing parties, a TPPA tribunal may accept and consider written *amicus curiae* submissions from any person or entity that has a significant interest in the proceedings.

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