

THE TPP AND INVESTMENT PROTECTION

04 December 2015 | South East Asia, The Americas

Legal Briefings - By **Laurence Shore, Partner, Christian Leathley, Partner and Donald Robertson, Partner**

The investment-related dispute resolution procedures provided in the investment chapter of the TPP have proved to be one of the most contentious elements of the agreement.

IN BRIEF

- The Trans-Pacific Partnership ("**TPP**") allows investors to resolve disputes with TPP participants through consultation/negotiation, or failing that, through international arbitration
- As an evolution of the United States Model Bilateral Investment Treaty, the rights under the TPP are carefully drafted, with particular sensitivity towards protecting states' right to regulate in the public interest and to take temporary safeguard measures in exceptional circumstances
- There are provisions to enable greater public participation in the arbitral process, for example, there is a presumption that certain documents (such as memorials, hearing transcripts and the tribunal's award) will be made public, and the TPP expressly permits the submission of amicus curiae briefs
- This commentary is based on provisions in chapters 9 (investment), 28 (dispute settlement) and 29 (exceptions and general provisions) of the TPP.

STANDARDS OF PROTECTION

The major suite of rights protected under the TPP

- National treatment: TPP participants agree to give foreign investors (i.e. investors from other TPP countries) no less favorable treatment than that given to their own domestic investors, in like circumstances. In determining "like circumstances", a tribunal may consider whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public objectives
- Most-Favoured-Nation ("**MFN**") treatment: TPP participants agree to grant the same trade advantages to foreign and domestic investors, in like circumstances (assessed against legitimate public objectives, in the same way as discussed above). However, the TPP makes clear that the MFN clause does not include international dispute resolution procedures or mechanisms, meaning that claimants will not be able to rely on the MFN clause to broaden their access to dispute resolution mechanisms available under other bilateral or multilateral free trade agreements
- Minimum Standard of Treatment: TPP participants agree to give protected investments fair and equitable treatment and full protection and security, in accordance with customary international law. The TPP expressly provides that the mere fact that a TPP participant takes, or fails to take, an action that is inconsistent with an investor's expectations does not necessarily breach the minimum standard of treatment obligation. Further, TPP participants' discretion to grant or modify subsidies is expressly protected
- Expropriation: TPP participants agree not to expropriate directly or indirectly the investments of foreign investors without due process of law and adequate compensation. The TPP gives a detailed definition of what is "direct" and "indirect" expropriation. What constitutes indirect expropriation depends on all of the circumstances of the alleged expropriation, including the economic impact of the government action; the extent to which the government action interferes with distinct, reasonable, investor-backed expectations; and the character of the government action. It is made clear that non-discriminatory regulatory actions designed to advance public welfare objectives do not constitute indirect expropriations
- Denial of benefits: A TPP participant may deny the benefits of the TPP's investment chapter to an investor's enterprise, if that enterprise (i) is owned or controlled by a person from a non-TPP country or from the TPP country alleged to be denying the benefits; and (ii) does not have substantial business activities in the territory of any other TPP participant (i.e. a TPP country other than the TPP country alleged to be denying the benefits)

The TPP protects and pursues certain public interest objectives

- TPP participants preserve the right to make regulations they consider appropriate to ensure that investment activity in their territories are undertaken in a way that is sensitive to environmental, health or other regulatory objectives
- TPP participants preserve the right to take temporary safeguard measures in exceptional circumstances (such as a financial crisis). However, these measures must be temporary and must be phased out progressively over an 18-month period (unless exceptional circumstances apply)
- TPP participants also preserve the right to deny an investor protected rights with respect to claims challenging a tobacco control measure
- TPP participants also preserve the right to establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions
- TPP participants agree to encourage enterprises within their territories to adopt voluntarily internal policies that reflect international standards for Corporate Social Responsibility.

PROCEDURAL MATTERS

Dispute resolution procedure

- Parties to a dispute (i.e. a claimant investor and a respondent TPP participant) should seek to resolve an investment dispute through consultation/negotiation in the first instance, and can use a non-binding third-party procedure (such as mediation or conciliation) for this purpose
- If the parties cannot resolve their dispute within six months of the consultation/negotiation period, the claimant may submit the claim to arbitration
- Individual TPP participants have set out in the annexes any limitations on their consent to arbitration
- The respondent may make a counterclaim arising out of the same factual and legal basis for the claim.

- International arbitration may be administered by/under: (i) the International Centre for Settlement of Investment Disputes ("**ICSID**"); (ii) the ICSID Additional Facility Rules; (iii) the United Nations Commission on International Trade Law Arbitration Rules; or (iv) any other arbitral institution or arbitration rules the parties agree on
- Investors can arbitrate investment agreements (i.e. a written agreement that is concluded and takes effect after the TPP has entered into force between the central government of a TPP participant and a covered investment or an investor of another TPP participant) under the TPP, unless the investment agreement provides for investor-state arbitration. However, if the investment agreement does not provide for investor-state arbitration (e.g. it provides for dispute resolution in national courts), then the investor can choose arbitration under the TPP
- No claim may be brought after three and a half years have elapsed from the date the claimant first knew, or should have known, about the respondent's breach of a protected right
- The claimant may seek interim injunctive relief from a court or from an arbitral tribunal. The arbitral tribunal has a corresponding power to order interim relief
- Unless the parties otherwise agree, the tribunal shall comprise three arbitrators
- While the investment chapter does not establish an appellate mechanism for reviewing awards, it does provide that if such a mechanism is developed in the future, the TPP participants will consider whether awards rendered under the TPP will be subject to this mechanism
- The TPP provides for the consolidation of related disputes
- The claimant may only recover damages that it can prove it sustained in its attempt to make the investment, provided that it also proves that the respondent's breach of a protected right was the proximate cause of those damages. The tribunal may not award punitive damages
- There is a special procedure for taxation disputes whereby a claimant must first refer the issue of whether that taxation is an expropriation to the designated authorities of the TPP country of the investor and the respondent party. If the designated authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within six months of the referral, the investor may submit its claim to arbitration

Other notable aspects of the arbitral procedure

- TPP participants have agreed to develop a code of conduct for arbitrators
- The tribunal may accept amicus curiae submissions to assist the tribunal in evaluating the submissions and arguments of the disputing parties. Submissions may be made by persons or entities that have a significant interest in the dispute
- The TPP promotes transparency in the arbitral process, for example, certain documents (such as the memorials, hearing transcripts, and decisions of the tribunal) will be made public. The tribunal will also conduct the hearings in public. However, the respondent does not have to disclose information which it determines would be contrary to its security interests or would impede law enforcement, be contrary to the public interest or prejudice the legitimate commercial interests of particular enterprises. There is also a procedure for seeking permission from the tribunal to make redactions so as not to reveal protected information
- Each TPP participant shall provide for the enforcement of an award in its territory. A disputing party may seek to enforce the award under the ICSID Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") or the Inter-American Convention on International Commercial Arbitration ("**Panama Convention**"), as applicable
- Additionally, in the event the respondent does not abide by, or comply with, a final award, a panel shall be established from whom the investor can seek a declaration that the respondent's failure to comply with the award is inconsistent with its obligations under the TPP. This panel may accordingly recommend that the respondent abide by or, comply with, the award

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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