

TPP IMPACT: MINING

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Legal Briefings - By **Jay Leary, Partner and Stéphane Brabant**

As a sector heavily reliant on regional and international trade, the mining sector is anticipated to be substantially impacted by the Trans-Pacific Partnership (**TPP**). The new trade dynamics between the participating states and the elimination of the majority of regional barriers to trade, such as tariffs and export controls, presents new opportunities for mining companies with operations or interests in the region. It might also complicate existing preferential bilateral trade arrangements. However, it is the harmonisation of regulation on a number of issues of direct relevance to the mining sector that is of primary interest.

OPPORTUNITIES FOR THE MINING SECTOR

STATE-OWNED ENTERPRISES

The TPP contains a chapter which seeks to regulate the conduct of large state-owned enterprises (**SOEs**) that are principally engaged in commercial activities to ensure they compete fairly.

TPP parties will be prohibited from providing financial support to their SOEs that would give them an unfair advantage over their competitors. SOEs will also be required to make commercial purchases and sales on the basis of commercial considerations (subject to exceptions for public sector services), ensuring that foreign investors are not unfairly discriminated against.

As a sector which is necessarily reliant on close interactions with governments across the region, and which frequently involves long-term partnerships with SOEs, this chapter has the potential to introduce important new dynamics into these relationships.

INVESTMENT PROTECTION

The new investment protection regime created by the TPP provides different paths for investors in the region to plan their investments and provides additional investor confidence in less familiar markets, by requiring non-discriminatory investment policies, basic rule of law protections and the basic investment protections found in other investment-related agreements, such as the free transfer of funds and prohibitions on expropriation (subject to certain exceptions).

Importantly, investors will be able to enforce these obligations through the investor-state dispute settlement (ISDS) chapter of the TPP, which contains similar protections to those found in many bilateral investment treaties, and allows investors to pursue neutral, international arbitration if there is a dispute over the violation of one of the commitments under the investment protection regime. Other measures to facilitate investment have also been introduced, such as commitments from TPP parties not to introduce new foreign investment screening measures and for existing monetary thresholds to be increased in certain circumstances.

LABOUR AND ENVIRONMENTAL STANDARDS

The chapters seeking to harmonise regulation on labour and environmental standards will be of substantial relevance to those involved in the complex operations of the mining sector.

These chapters focus on the need to address environmental challenges such as pollution, deforestation and ozone layer depletion, as well as containing enforceable, harmonised labour standards to facilitate the regional movement of workers.

Commitments by TPP parties to encourage corporate social responsibility and other voluntary measures to protect the environment (such as public-private partnerships) may present new opportunities for companies who are already leaders in this space to foster greater government relations.

GOVERNMENT PROCUREMENT

The chapter addressing government procurement regimes provides greater opportunities for access to (and transparency around) lucrative government contracts across the region, both for the purchase of resources and for the services associated with the extraction and processing of minerals.

This is achieved through commitments from TPP parties on national-treatment, which requires a TPP party to extend to bidders on certain government procurement contracts the same treatment as it extends to its own firms, and on most-favoured-nation treatment, which requires a TPP party to provide a foreign investor from a TPP party at least as good treatment as it extends to other TPP parties' foreign investors.

Provision of complete and timely procurement information and notifications of procurement opportunities will aim to ensure transparency. Unsuccessful applicants will be able to request an explanation for the decision and have recourse to an impartial domestic dispute regime for any grievances and compensation for any wrongs.

Chapters relating to cross-border service provision and visa regulations are likely to have an impact on the prospects for technical cooperation across the region, as companies will be better able to transfer executives and senior managers for extended periods of time and obtain visas for contractors working on a temporary basis. This greater flexibility of movement will also facilitate better project oversight and risk management in the sector.

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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