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TRANS-PACIFIC PARTNERSHIP

This BNA Insights article by Marney Cheek and Nikhil Gore of Covington & Burling discusses the Investment Chapter of the Trans-Pacific Partnership and its protections for U.S. investors in the Asia-Pacific region. The authors explain how the chapter aligns with other U.S. agreements and the 2012 U.S. model bilateral investment treaty, and how the chapter's protections may be enforced through investor-state arbitration.

BNA Insights

Trans-Pacific Partnership Investment Chapter: Maintaining Important Protections for U.S. Investors Overseas



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The final text of the Trans-Pacific Partnership, released Nov. 5, 2015, is not expected to enter into force until at least the last quarter of 2016, with the timeline dependent on the pace of ratification by member states. In the U.S., this means first securing Congressional approval, which pursuant to the recently en-

acted Trade Promotion Authority (TPA) cannot take place until at least 90 legislative days after the TPP is signed by the president.

The final text of the TPP's Investment Chapter remains broadly consistent with other U.S. investment agreements and includes some important new language that is consistent with the model bilateral investment

treaty (the U.S. Model BIT) issued by the U.S. State Department in 2012 after widespread consultation among stakeholders. The Investment Chapter contains meaningful protections (with some notable exceptions) for U.S. investors in the Asia-Pacific region, and establishes a workable and transparent investor-state arbitration system for the enforcement of such protections.

Core Investment Protections. The TPP preserves core protections against nationality-based discrimination against investors (Articles 9.4 and 9.5), uncompensated expropriations (or takings) of investments (Article 9.7), and treatment of investments and investors that runs afoul of the obligation to provide fair and equitable treatment and full protection and security (Article 9.6). Consistent with the U.S. Model BIT, the fair and equitable treatment obligation “prescribes the customary international law minimum standard of treatment of aliens.” This standard protects against, among other things, arbitrary or discriminatory governmental actions, and governmental actions that are inconsistent with due process. In general, the provisions articulating these protections align with existing U.S. agreements and do not introduce new norms.

In TPP’s Exceptions Chapter, the self-judging “essential security” provision found in the U.S. Model BIT also is included in the TPP. Under this provision, “[n]othing in [the] agreement shall be construed to . . . preclude a Party from applying measures that *it considers* necessary for the fulfilment of its obligations with respect to . . . the protection of its own essential security interests” (Article 29.2, emphasis added).

The TPP also includes explicit language confirming that the Investment Chapter does not interfere with a Party’s ability to adopt measures otherwise consistent with the Chapter that “it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives” (Art. 9.16).

Investor-State Arbitration Procedures. The TPP permits investors to arbitrate disputes with member states for breaches of the core protections summarized above, and it contains extensive procedural provisions related to such investor-state arbitral proceedings. In general, these provisions track existing best practices, but in some respects they are novel.

Notably, and atypically, the TPP requires investment tribunals to share their decisions with litigating parties (if requested to do so) before they are finalized, allowing the parties an opportunity to comment on draft arbitration awards (Art. 9.22(10)). This requirement is surprising in a non-state-to-state dispute context, and may add up to three-and-a-half months of delay to an already lengthy arbitral process.

The TPP also introduces several other procedural provisions not typically found in older (or “first generation”) BITs, including provisions: requiring public access to hearings and documents; permitting amicus submissions; establishing a procedure for expedited dismissal of frivolous claims; and permitting TPP members to issue binding joint interpretations of the Investment Chapter.

These provisions appear consistent with existing or evolving practices in other fora. For example, the 2014 UNCITRAL Transparency Rules favor public access to arbitral proceedings, and state parties to treaties such as the North American Free Trade Agreement have is-

sued joint interpretations of those treaties (although the validity of such interpretations has been contested and the deference afforded to such interpretations has not been uniform).

Broad Coverage of Investments. The TPP includes a broad definition of “investment” that covers a non-exhaustive list of tangible and intangible assets. Consistent with other recent U.S. investment treaties, it affirms that core investment protections apply to intellectual property rights.

As with prior U.S. agreements, the expropriation provisions do “not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the [WTO Trade-Related Aspects of Intellectual Property Rights] TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement” (Article 9.7(5)).

In addition, the TPP includes a new provision related to forced licensing of intellectual property rights. This provision, which forms part of a wider prohibition on specified “performance requirements,” would generally prohibit parties from requiring investors, in connection with the making or management of an investment, to adopt royalty rates or license durations that would directly interfere with existing license contracts (Article 9.9(1)(i)). Performance requirements are conditions on the establishment or operation of an investment, such as a condition that an investment use a minimum percentage of domestic goods, export a minimum percentage of its production, or transfer a particular technology to domestic partners.

There are several exceptions to the prohibition on forced licensing and on the other prohibitions on performance requirements, including with respect to pre-existing non-conforming measures that are carved out in annexes to the TPP and measures necessary to achieve legitimate regulatory objectives in areas ranging from competition law to environmental protection.

The TPP does provide a complete carve out for a limited category of claims, noting that any TPP party may “elect to deny the benefits of [the Investment Chapter] with respect to claims challenging a tobacco control measure” (Article 29.5).

The TPP also has specific rules for claims relating to measures covered by the TPP’s financial services chapter, Chapter 11. As a result, only certain categories of financial services investment claims are subject to investor-state arbitration, with discrimination claims notably being excluded (Article 11.2(2)). In addition, prudential measures and certain other financial regulations are entirely excepted from investor challenge (Article 11.11), and even an assertion that such regulation is implicated by an investment claim triggers extensive additional process (Article 11.22).

Conclusion. Overall, the Investment Chapter that emerged from the TPP incorporates many important features of the U.S. Model BIT.

The agreement underscores that BIT provisions can exist side-by-side with legitimate regulation and provides for public transparency. The agreement also ensures a predictable and transparent framework for resolving investment disputes across a range of trading partners not covered by existing investment

agreements—from Vietnam to Japan—thereby providing an important avenue for neutral resolution of investment-related disputes that fall under the ambit of the treaty.

The final TPP text is available at [https://ustr.gov/trade-](https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-)

partnership/tpp-full-text.

Text of the Trade Promotion Authority law is at <https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>.

The final text of the TPP's Investment Chapter is at <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.