

The Trans-Pacific Partnership and What It Means for Pre-Existing Treaties

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On November 5, 2015, after seven years of high-stakes negotiations, the Office of the United States Trade Representative released the draft Trans-Pacific Partnership (TPP), a proposed free trade agreement among the United States and 11 other countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam) that would cover approximately 40 percent of the global gross domestic product. The TPP's 30 chapters address a range of subject areas, from the protection of intellectual property rights to labor rights and environmental protections.

The agreement provides certain legal rights and guarantees to foreign investors from one TPP country who are making, or are looking to make, an investment in another TPP country. If the agreement is ratified and enters into force, U.S. companies' investments in any other TPP country will be legally protected by the agreement. This is meant to protect and therefore foster investor activity, but how these protections affect actual activity remains to be seen.



Legal Protections for Investments in the TPP

A fundamental right against expropriation without compensation is found in the agreement. While the TPP does not prevent a country from expropriating a foreign investment, it requires (similar to other investment treaties) any expropriation to be nondiscriminatory, conducted with due process, performed for a public purpose and, most importantly, accompanied by fair market value compensation paid without delay. This may, in fact, be seen as an international version of the Takings Clause in the Fifth Amendment of the U.S. Constitution.

The TPP explains that an expropriation is not only found when a government formally seizes title to a foreign investment, but also when a government commits acts that indirectly expropriate an investment. This is intended to protect investors from government acts that deprive an investor of its rights in an investment, even if that is not expressly stated to be the government's

goal. Determining whether such an indirect expropriation has occurred is a fact-intensive exercise, and, according to the TPP, "[n]on-discriminatory regulatory actions" undertaken for "legitimate public welfare objectives" are rarely considered indirect expropriations.

Other protections include a guarantee of "minimum standard of treatment" for investors under "customary international law" (defined by the TPP as the "general and consistent practice of States that they follow from a sense of legal obligation") as well as guarantees that an investor and its investment will be afforded the same treatment given to the nationals of a TPP country and nationals of third states (so-called "national treatment" and "most-favored nation treatment"). In most treaties, the most-favored nation treatment standard allows an investor to claim not only the legal protections of that particular

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treaty but also the best possible legal protections given to any other investor in any other treaty signed, or that will one day be signed, by a host country. However, all the TPP countries appear to have expressed in some form that the most-favored nation treatment protection in the TPP will not extend to legal protections provided in treaties that are currently in force; they will extend only to protections in those treaties a host country signs in the future.

TPP parties can exempt themselves from certain protections by listing existing nonconforming measures or sectors in which they reserve the right to take such measures. Notably, however, those exemptions are not intended to apply to the expropriation protections in the agreement.

Finally, the agreement grants foreign investors the right to bring claims against a TPP party for a breach of legal rights, as well as certain other claims, to an arbitral tribunal. This investor-state arbitration provision is intended to give the TPP's investment protections a neutral international forum for the resolution of any disputes.

Pre-Existing Treaties Remain in Effect

Foreign investors should not look solely to the TPP to provide international legal protection for their investments. Pre-existing treaties between TPP countries continue in force — and there is no inconsistency when a prior treaty provides “more favorable treatment of . . . investments or persons” than provided by the agreement. In this respect, investors also should be aware that the United States already has entered into free trade agreements

containing investment protection chapters with every other TPP country except Brunei, Japan, Malaysia, New Zealand and Vietnam. Although the investment chapters of many of these agreements contain provisions that are similar to those in the agreement, these treaties also may be interpreted (in certain circumstances) to provide additional protection and/or may not contain carve-outs from investment protection that are found in the TPP. As a result, these treaties also should be considered when assessing the legal protection of a foreign investment in a TPP country.

Ratification of the TPP

In the United States, the ratification process is governed by the Trade Promotion Authority (TPA), which requires the president to notify Congress of his intent to sign the TPP at least 90 calendar days prior to signing it (and further requires the TPP's text be made publicly available at least 60 calendar days before signature). President Barack Obama notified Congress of that intention on November 5, 2015, the same day the agreement was released to the public. Current reports suggest that the TPP will be signed in February 2016. Following signature, Congress will have an additional 90 legislative days to review the agreement before voting on ratification. Taking into account the congressional spring and summer recesses, some have speculated that a vote on the TPP will not take place until after the November 2016 elections. If adopted, the TPP may become an important element of the protection of foreign investment among its various signatories.