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Investment

The Trans-Pacific Partnership (TPP) levels the playing field for American workers and American businesses, leading to more Made-in-America exports and more higher-paying American jobs here at home. By cutting over 18,000 taxes different countries put on Made-in-America products, TPP makes sure our farmers, ranchers, manufacturers, service suppliers, and small businesses can compete—and win—in some of the fastest growing markets in the world. With more than 95 percent of the world’s consumers living outside our borders, TPP will significantly expand the export of Made-in-America goods and services and support American jobs.

EXECUTIVE SUMMARY

TPP’s chapter on Investment strengthens the rule of law in the Asia-Pacific region, deters foreign governments from imposing discriminatory or abusive requirements on American investors, and protects the right to regulate in the public interest. To this end, it ensures that American investors have

effective remedies in the event of a breach of their rights, while reforming the investor-state dispute settlement (ISDS) system by providing for tools to dismiss frivolous claims and instituting a range of other procedural and substantive safeguards.

CHAPTER OVERVIEW

Core Obligations

TPP's Investment chapter includes a set of core obligations that provide basic protections in TPP markets for U.S. and other investors or investments—the same types of protections we already provide to foreign investors under U.S. law, including:

- Providing for national treatment (i.e., treatment no less favorable than a TPP country provides, in like circumstances, to its own investors or investments); and most-favored-nation treatment (i.e., treatment no less favorable than a TPP country provides, in like circumstances, to another country's foreign investors or investments).
- Providing a "minimum standard of treatment" for investments, defined narrowly based on customary international law, including protections against denial of justice and failure to provide police protection.
- Ensuring that if a TPP government expropriates an investment, it does so for a public purpose, in accordance with due process of law, and subject to prompt, adequate and fully realizable and transferable compensation.
- Allowing for transfer of funds related to an investment covered under the agreement—such as contributions to capital, transfers of profits and dividends, payments of interest or royalties, and payments under a contract—to be made freely and without delay, subject to exceptions. These exceptions ensure that governments retain the flexibility to manage volatile capital flows, including permitting countries to impose non-discriminating temporary safeguard measures (i.e., capital controls) restricting investment-related transfers in the context of a balance of payments crisis, and certain other economic crises, or in the context of prudential measures to protect the integrity and stability of the financial system.
- Barring specified "performance requirements," including local content

requirements, export requirements, and technology transfer or technology localization requirements.

- Ensuring investors have the ability to appoint senior managers without regard to nationality, and ensuring that any nationality-based restrictions on the appointment of board members do not impair an investor's control over its investment.

Non-conforming measures

TPP countries have agreed to accept these core obligations on a “negative-list basis,” meaning that all obligations apply to all sectors and activities, apart from limitations negotiated and explicitly set out in a list of specific reservations describing the nature of any “non-conforming measures” that would be permissible even after the agreement enters into effect. These are recorded in two annexes:

- Annex I contains a list of current measures that would otherwise violate one or more of the core obligations of the chapter, but which the country has determined that it needs to maintain. In listing a measure in Annex I, the country commits to a “standstill,” which ensures that the measure will not become more restrictive in the future, as well as a “ratchet,” which means that if the measure is amended in the future to become less restrictive, the new, more favorable treatment will set the benchmark for the standstill requirement.
- Annex II contains a list of reservations that enable a country to have full discretion to maintain existing non-conforming measures or adopt new restrictions without any limitation under the agreement.

Denial of Benefits

The Investment chapter allows a TPP Party to deny benefits to “shell companies” owned by persons of that Party or a non-Party that establishes in another TPP country in order to take advantage of treaty rights but that lack substantial business activities in that country. It also allows the denial of benefits to companies that invest in a TPP country, but are owned by persons of non-Parties with whom a TPP Party prohibits certain transactions, such as under sanctions regimes.

Investor-State Disputes

TPP investors will have the right to pursue neutral, international arbitration in the event of a dispute between an investor of a TPP Party and another TPP Party over a violation of one of the commitments of the Investment chapter. The chapter specifies these proceedings will be conducted in a transparent manner, with opportunities for public participation and safeguards to prevent abuse and help deter frivolous or otherwise non-meritorious claims. The safeguards include:

- **Transparency of arbitral proceedings**

Ensuring that arbitration hearings and documents are open and available to the public. For investor-State cases against the United States under TPP, all submissions, hearing transcripts, and other key documents will be available on the U.S. State Department website.

- **Amicus curiae submissions**

Ensuring that interested stakeholders, including labor unions, civil society organizations and other interested stakeholders, can submit amicus curiae or “friend of the court” briefs.

- **Non-disputing party submissions**

Ensuring that an investor’s home government and other TPP Parties are able to make submissions to panels on the interpretation of the Agreement.

- **Expedited review of frivolous claims and possible award of attorneys’ fees**

Ensuring, as under the U.S. Federal Rules of Civil Procedure, that panels are able, on an expedited basis, to review and dismiss frivolous claims and award costs and attorneys’ fees to the respondent government.

- **Interim review and award challenges**

Ensuring that disputing parties will be able to review and comment on proposed arbitral awards prior to their issuance, and to allow both disputing parties the option to challenge a tribunal award.

- **Binding joint interpretations**

Ensuring that TPP Parties, at any time, can agree on interpretations of the agreement that are binding on tribunals.

- **Time limits**

The time period during which an investor can bring an investor-State claim is limited to three and a half years from the date of actual or constructive knowledge of an alleged breach.

- **Claimant waiver**

To prevent “forum shopping,” a claimant pursuing a claim in investor-State arbitration must waive the right to initiate parallel proceedings in other fora challenging the same measures.

NEW FEATURES

TPP’s Investment chapter includes innovations going beyond previous U.S. Free Trade Agreements (FTAs) to address new and emerging investment issues. These include obligations to address the growing problem of discriminatory measures that provide advantages to foreign SOEs, national champions, and others by forcing U.S. investors to favor another country’s domestic technology. They also include clarifications that TPP investment disciplines apply to SOEs and other persons exercising delegated government authority—whether delegated formally or informally—so that SOEs, acting on behalf of governments, cannot take actions that discriminate against foreign investors and then evade challenge by asserting that they are not covered by the disciplines of the agreement.

At the same time, the chapter includes stronger safeguards to close loopholes and to raise the standards of investor-State dispute settlement above virtually all of the other 3,200 plus investment-related agreements in effect around the world. These include underscoring that countries can regulate in the public interest, including on health, safety, financial stability, and environmental protection; expanding the rules discouraging and dismissing frivolous suits; clarifying that the claimant bears the burden to prove all elements of its claims; allowing governments to issue binding interpretations of the agreement; making proceedings fully open and transparent; and providing for the participation of civil society organizations and others parties not a direct party to the dispute. In addition, the chapter will for the first time clarify key concepts in the non-discrimination and minimum standard of

treatment obligations, for example, clarifying the significance of legitimate public welfare objectives in the non-discrimination analysis and addressing the concern that frustrating investor expectations in and of itself could result in a minimum standard of treatment claim. The chapter will also require the Parties to provide detailed guidance on arbitrator ethics and issues of arbitrator independence and impartiality.

- **Explicit language underscoring right to regulate in the public interest.** TPP includes new language underscoring that countries retain the right to regulate in the public interest, including to protect public health, safety, financial stability, and the environment. TPP will also include a separate, explicit recognition of health authorities' right to adopt tobacco control measures in order to protect public health.
- **Burden on claimant.** A new provision in TPP clarifies that the claimant—the investor bringing the case against the government—bears the burden to prove all elements of its claims, including claims of breach of the minimum standard of treatment (MST) obligation, an obligation which guarantees investors due process and certain other protections in accordance with customary international law.
- **Dismissal of frivolous claims.** TPP expands existing rules discouraging frivolous suits by permitting governments to seek expedited review and dismissal of claims that are “manifestly without legal merit.”
- **Investor “expectations” aren’t enough.** TPP explicitly clarifies that an investor cannot win a claim for breach of the MST obligation merely by showing that a government measure frustrated its expectations (for example, its expectations of earning certain profits).
- **Arbitrator ethics/code of conduct.** TPP countries will establish a code of conduct for ISDS arbitrators that will provide additional guidance on issues of arbitrator independence and impartiality.

IMPACT

International investment is a key driver of U.S. economic growth, benefiting the entire U.S. economy by boosting exports of goods and services and supporting high-paying jobs in the United States. Today, the U.S. is the world’s largest destination for foreign direct investment (FDI), with an inward FDI stock of \$5.4 trillion in 2014 (on a market value basis). We have been the largest recipient of FDI flows in 8 of the last 10 years. The foreign-based

companies making these investments employed 5.8 million Americans in 2012, including 2.2 million in the manufacturing sector. With more than 95 percent of the world's consumers and key natural resources outside the United States, investment abroad is often an important factor in supporting production at home in order to serve foreign customers and other purposes. U.S. companies with operations abroad employ 23 million Americans – roughly one private-sector worker in every five. These companies pay their workers 28 percent more on average than other private-sector jobs, and they account for nearly half of U.S. goods exports and 76 percent of U.S. research and development.

While valuable to U.S. workers and businesses, U.S. investments in other countries can encounter severe challenges. For example, since the 2000s, many countries—including in the Asia-Pacific—have begun experimenting with “forced localization” policies designed to force the transfer of technology, or deter investors from importing products from the United States by requiring purchase of local goods and services. In other cases, foreign governments have resorted to the full-scale expropriations of investment.

Investment protections have been a principal vehicle to guard against such policies in the Asia-Pacific and elsewhere. Over the last 50 years, 180 countries have negotiated over 3,200 agreements with investor protections. These provide assurance of basic rule of law protections and recourse to neutral, international arbitration in the event of an investment dispute.

