

# TRANS-PACIFIC PARTNERSHIP AGREEMENT

## CHAPTER SUMMARY: INVESTMENT

Investment rules are included in trade agreements such as the TPP because of the importance governments attach to guaranteeing the high standards of governance that are pivotal to attracting and sustaining foreign investment. By supporting a more predictable investment environment, investment rules play an important role in facilitating inbound foreign investment.

The TPP Investment Chapter balances the interests of governments and investors, by promoting foreign investment, while recognising the inherent right of governments to regulate in the public interest. The Chapter guarantees a set of basic protections to investors from TPP countries, while providing a range of robust and effective safeguards to protect a state's right to implement public policy regulation.

The Chapter will deliver important and meaningful benefits to Australia. It will facilitate foreign investment into Australia, and provide important protections to Australian businesses investing abroad.

### Inbound foreign investment

Foreign investment is fundamental to productivity and growth because it provides access to capital, technology and know-how and facilitates access to world markets. As a large country with a relatively small population, Australia relies on foreign investment to supplement domestic capital.

Foreign investment has helped Australia become the world's 12th largest economy, with 24 years of uninterrupted growth. In 2014, around 40 per cent of the total stock of foreign investment in Australia – valued at approximately \$1.1 trillion – was from TPP countries.

## MORE INFORMATION ON THE CHAPTER

### Protections to Australian investors

The Investment Chapter will benefit Australian businesses looking to invest overseas. By providing an important set of basic protections, Australian businesses will have greater legal certainty, providing them with more attractive opportunities to expand into new markets. These include several of Australia's largest capital export markets, as well as many of the fastest growing economies in the Asia-Pacific region.

### Protections for Foreign Investors in TPP Parties

The Investment Chapter contains a set of basic protections for investments made by investors from a TPP Party. Investments include shares and stocks, enterprises and tangible and intangible property.

The key protections require that:

- Investors and their investments are not subject to discrimination.



- An investment is only expropriated for a public purpose and on the prompt payment of market value compensation.
- Foreign investors and their investments are afforded a Minimum Standard of Treatment.
- Foreign transfers related to an investment can be made freely and without delay.

The Investment Chapter also establishes a mechanism for resolving disputes between investors and TPP Parties known as Investor-State Dispute Settlement, or ISDS.

### Non-discrimination

The Chapter obliges TPP Parties to provide non-discriminatory treatment to investors of other TPP Parties and their investments. This comprises two obligations.

First, the Chapter prohibits treating foreign investors from other TPP Parties or their investments less favourably than domestic investors in 'like circumstances'. This is known as the **national treatment** obligation.

Second, the Chapter prohibits treating foreign investors from other TPP Parties less favourably than investors from any other country in 'like circumstances'. This is known as the **most-favoured nation'** obligation.

### Expropriation

The Chapter contains an obligation requiring that an investment is only expropriated for a public purpose, in a non-discriminatory manner, observing due process and on the payment of prompt, freely transferrable market value compensation. This reflects the standard that Australia is obliged to follow as a matter of international law.

The obligation encompasses both direct and indirect expropriation. Direct expropriation means the expropriation of assets through the direct transfer of title of an investment. Indirect expropriation means the expropriation of an investment through an action or series of actions that have an effect equivalent to direct expropriation without formal transfer of title.

The Chapter contains a range of safeguards, which clearly define and circumscribe the scope of the expropriation obligation. These safeguards are discussed below.

### Minimum Standard of Treatment

The Chapter contains an obligation requiring TPP Parties to accord foreign investors a Minimum Standard of Treatment. This comprises an obligation to: (i) treat investors fairly, such as by affording due process in court proceedings; and (ii) provide protection to investments, such as by providing police protection to physical assets.

This reflects the standard that Australia is already required to provide to investors as a matter of general international law, although the Chapter contains a set of safeguards that ensure the obligation remains consistent with established interpretations of the international law standard. These safeguards are discussed below.

## Transfers

The Chapter requires that a TPP Party allow all transfers related to foreign investment (such as profits, interest and payments) into and out of the country freely and without delay. However, a TPP Party is entitled to limit transfers in several ways. Transfers can be limited or delayed:

- Through the good faith applications of laws in areas such as bankruptcy and trading of securities, and in accordance with judicial orders.
- During a balance of payments crisis or in cases of serious macroeconomic difficulty, in order to safeguard the domestic economy.

## Other protections

The Chapter contains a range of other important protections. These include:

- A prohibition on imposing any performance requirements in connection with the establishment, acquisition or operation of an investment. Examples include requiring that an investor only buy domestic goods, use a particular technology or adopt a given royalty amount under a licence contract.
- A prohibition on obliging foreign investors to appoint people of a particular nationality to senior management positions in a company
- A prohibition on discriminating against foreign investors when compensating for losses in cases of armed conflict or civil strife.
- Protection for an agreement with a national government (for Australia, the Commonwealth Government) concerning natural resources, public utilities and infrastructure.
- Protection for an alleged breach of an authorisation granted by a TPP Party to an investor from a TPP Party to invest in that TPP Party; however, this will have limited application to Australia due to carve-outs that exclude decisions made by Australia's Foreign Investment Review Board.

## Investor-State Dispute Settlement (ISDS)

The ISDS mechanism enables an investor from a TPP Party to initiate arbitration proceedings in relation to disputes over:

- The protections in the Investment Chapter, which are discussed in the section above.
- The investment-related protections in the Financial Services Chapter.

The TPP's ISDS mechanism will provide Australian investors with the ability to enforce these protections in many of Australia's key capital export markets, as well as many of the rapidly growing economies in the Asia-Pacific region.

An investor's claim will only succeed where it can demonstrate both: that a breach has occurred; and that the breach has led to loss or damage. It is not enough for an investor to merely be unhappy with a government decision, law or regulation. Importantly, an ISDS tribunal cannot order a government to change or amend its laws.

Where an investor from a TPP Party initiates a proceeding, the matter will be heard by three arbitrators; one chosen by the investor, another by the respondent TPP Party and the third by both parties to the dispute (the investor and the TPP Party). Disputes will be heard in a neutral venue outside the relevant TPP Party, independently of the domestic courts of the respondent TPP Party.

## Safeguards

The TPP Investment Chapter is high-quality and modern. It includes a robust set of substantive safeguards.

### Public policy regulation

The TPP contains a suite of mechanisms that, together, explicitly safeguard a State's ability to engage in legitimate public policy regulation. These include:

- An explicit recognition that States have the inherent right to regulate and to safeguard public welfare, including in the areas of health and the environment.
- Several mechanisms which explicitly provide that measures pursuing legitimate public policy objectives do not constitute a breach of the TPP, which are detailed below.

### National Treatment and Most-Favoured Nation

The TPP national treatment and most-favoured nation obligations only arise in respect of investors or investments that are in 'like circumstances'. The TPP makes clear that investors are not in 'like circumstances' where they are treated differently because of a legitimate public policy objective, such as those relating to health or the environment. In this situation, no discrimination will arise under the TPP.

### Expropriation

The Chapter provides extensive guidance on what constitutes expropriation. It makes clear that:

- Non-discriminatory regulatory actions designed and applied to safeguard public welfare do not constitute indirect expropriation, except in rare circumstances.
- The fact that an action or series of actions has an adverse impact on the economic value of an investment does not, standing alone, constitute indirect expropriation.
- A TPP Party's decision not to issue, renew, or maintain a subsidy or grant or to modify or reduce a subsidy or grant generally does not constitute an expropriation.
- An expropriation cannot occur unless it interferes with a property right in an investment.

### Minimum Standard of Treatment

The Chapter circumscribes the scope of the Minimum Standard of Treatment obligation, by confirming that:

- The Minimum Standard of Treatment obligation in the TPP does not go beyond the general international law standard, and does not create any additional substantive rights beyond that required under the general international law.

- A breach of another provision of the TPP or of another international agreement does not establish that there has been a breach of the Minimum Standard of Treatment obligation.
- The mere that fact action is taken that is inconsistent with an investor's expectations does not constitute a breach of the Minimum Standard of Treatment, even if there is loss or damage to their investment as a result of that action.
- The mere fact that a subsidy or grant has not been issued, maintained or renewed does not constitute a breach of the Minimum Standard of Treatment, even if there is loss or damage to an investment as a result of that subsidy or grant. This applies to pharmaceutical subsidies issued under Australia's Pharmaceutical Benefits Scheme.

The TPP also contains a procedural safeguard requiring a tribunal to decide cases in accordance with established interpretations of the Minimum Standard of Treatment obligation. This is discussed below.

### **Exclusions**

The Exceptions and General Provisions chapter of the TPP allows TPP Parties to deny access to ISDS for any claims in relation to that TPP Party's tobacco control measures. As a result, Australia's tobacco control measures will not be able to be challenged under the TPP ISDS mechanism.

The Investment Chapter also contains schedules, in which each country has listed country-specific measures, including laws, policies and institutional arrangements that are exempt from particular provisions of the Investment Chapter. For example, Australia has listed the following measures:

- Foreign investment policy, including decisions made pursuant to recommendations of the Foreign Investment Review Board
- Social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities. For health, this includes the subsidies programs delivered under the Pharmaceutical Benefits Scheme and the Medicare Benefits Scheme.
- Measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage.

As a result, Australian government measures that fall within these carve-outs cannot be subject to certain claims under the TPP's ISDS mechanism.

### **Procedural safeguards**

The TPP Investment Chapter also contains a set of procedural safeguards, which together work to establish a robust, transparent and procedurally rigorous arbitral process. Specifically, the Chapter contains:

- A requirement that prior to initiating proceedings, an investor from a TPP Party must first endeavour to resolve its dispute with the relevant TPP Party through consultations and negotiations, for at least six months.
- A stipulation that the ISDS mechanism only applies prospectively.

- A strict time limit of three years and six months for an investor to initiate proceedings.
- A mechanism to prevent forum shopping, by requiring the investor from a TPP Party bringing a claim to waive its rights to bring the claim under any other international or domestic dispute resolution procedure, including in a domestic court.
- A mechanism to strike out frivolous or baseless claims, on an expedited basis, as a preliminary matter.
- Several mechanisms to discourage frivolous and unmeritorious claims, through the ability to award costs against the investor, as well as the ability for a TPP Party to recoup costs should this occur.
- A robust transparency regime, pursuant to which:
  - (i) hearings will be conducted in public; and
  - (ii) documents filed in the arbitration and the decision will be made public;
 subject to provisions for the appropriate protection of confidential information.
- A right for any TPP Party that is not a party to the proceedings to make written and oral submissions on the interpretation of the Agreement.
- An explicit right for the tribunal to accept written submissions from interested parties, such as civil society and Non-Governmental Organisations, or NGOs.
- A regime to safeguard the independence and ensure impartiality of arbitrators.
- A right for parties to the arbitration (the investor and the TPP Party) to comment on an arbitral decision before it is finalized.
- A mechanism for a TPP Party to bring a counterclaim against the investor.
- Mechanisms to ensure that the TPP Parties maintain control over interpretation of the TPP, consisting of:
  - The ability for the TPP Parties to jointly issue interpretations of the TPP, which are binding on and must be observed by ISDS tribunals.
  - The right for any TPP Party that is party to an arbitration to have the question of whether a measure falls within one of its exceptions to the TPP (discussed above) determined jointly by the TPP Parties rather than the tribunal.
- The ability to deny the protections in the Investment Chapter to an investment that is not owned by an investor of a TPP Party, or to an investor that has no substantial activities in its TPP-country of residence.

- An ability for the tribunal to order provisional measures to safeguard the integrity of the arbitral process, such as by ordering the preservation of evidence relevant to the proceedings.
- An explicit requirement that an investor bears the burden of establishing its claim, as well as a direction to tribunals to decide cases in accordance with established interpretations of investment obligations.

### **Future appeal mechanism**

The Chapter also requires that if a future treaty is agreed that provides for appellate review of ISDS decisions, the TPP Parties will consider the application of that treaty to ISDS decisions under the TPP.