

Client Alert

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US Withdraws from the TPP. What's Next For American Investors Abroad?

On January 23, 2017, President Donald J. Trump signed an executive order directing the US Trade Representative to withdraw the United States as a signatory to the Trans-Pacific Partnership Agreement (TPP). The United States formally withdrew from the TPP one week later, when the Office of the Trade Representative sent a withdrawal letter to the other TPP signatories. Because Congress had not yet voted on whether to ratify the TPP, the agreement was not in force at the time of the announced withdrawal. Nevertheless, for the near future, American investors who had hoped to benefit from the TPP's protections will not be able to do so.

Among the TPP's important, but often overlooked, benefits is its provisions protecting investors of one TPP member that make an investment in the territory of another TPP member. Under the TPP, member nations may not unlawfully expropriate property belonging to an investor of another TPP nation, treat investors from other TPP nations contrary to customary international legal principles or treat them less favorably than domestic investors. The investor-state dispute settlement (ISDS) provisions of the TPP provide an option for international arbitration of such treaty violations, thus allowing foreign investors to bypass foreign courts and have their claims against sovereigns heard by a neutral international tribunal. In light of the US withdrawal from the TPP, American investors will not be able to take advantage of these ISDS and investment protection provisions.

All is not lost, however, for American investors who would benefit from such protections. Currently, the United States has international free trade agreements in place with six of the eleven original signatories to the TPP: Canada, Chile, Mexico, Peru, Vietnam and Singapore. These agreements, like the TPP, protect US investors from unlawful expropriation, unfair treatment and discriminatory treatment, and contain ISDS provisions. In short, US nationals with investments in these six nations already have broad treaty protections for their investments.

If US investors are concerned about investment protection and access to ISDS in one of the remaining five countries — Australia, Brunei, Japan, Malaysia and New Zealand — there may be options for them to consider. Corporate investors may restructure their investment through foreign subsidiaries to take advantage of the protections and ISDS procedures in bilateral or multilateral treaties and trade agreements that other countries have with these five countries. Restructuring of this nature is often used to ensure that investments are adequately protected under international law.

The US withdrawal from the TPP is a marked change from decades of US trade policy. More changes may be coming. In this unpredictable environment, it is important for foreign investors to regularly assess whether their investments in foreign jurisdictions are adequately protected. Hunton & Williams LLP frequently advises clients on the proper structuring of investments to maintain international investment protections and is experienced in investor-state dispute resolution.

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