

Client Alert

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Trans-Pacific Partnership Offers Investors New Protections and Dispute Resolution Options

The Trans-Pacific Partnership (“TPP”) is a free-trade agreement among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States (the “TPP Members”). While, as reported, an agreement on the TPP was reached on October 5, 2015, each of the TPP Members must still enact the TPP. On November 5, 2015, the full text of the TPP trade agreement was released to the public for the first time.

Investor Protection

An important component of the TPP for investors is the chapter on investments in TPP Member countries. Consistent with many other bilateral and multilateral investment agreements, the TPP’s investment chapter offers protections for investors from TPP Members who invest in other TPP Members. These protections include: (1) according treatment no less favorable than that accorded to a TPP Member’s own investors; (2) according treatment no less favorable than that which a TPP Member accords to other foreign investors; (3) granting a minimum standard of treatment in accordance with customary international legal principles; and (4) prohibitions against expropriation, except in limited circumstances, in which case investors must be compensated. The provisions apply to both existing and future investments.

Dispute Resolution Mechanism

In what has become an issue of considerable controversy, the TPP includes dispute resolution provisions that call for international arbitration. Accordingly, if a TPP Member breaches any of the protections provided in the TPP—for example by expropriating an investment—the investor may submit a claim to arbitration. In presenting the arbitration, the investor can avail itself of several alternative forums and rules, depending on its nationality. For example, if the investor is a national of a country that is a party to the Washington Convention, which may govern the settlement of international investment disputes, and the expropriating TPP Member is also a party to the Washington Convention, the claim may be brought before the International Centre for the Settlement of Investment Disputes (“ICSID”) under the ICSID Rules of Procedure. If either the investor’s country or the TPP Member is a party to the Washington Convention, the claim can be brought under the ICSID Additional Facility Rules. Alternatively, the investor may bring an ad hoc arbitration pursuant to the arbitration rules of the United Nations Commission on International Trade Law (“UNCITRAL”). The investor and the TPP Member can mutually agree to any other arbitral institution arbitration rules.

The TPP’s dispute resolution clause has several other notable features. First, the TPP expressly allows TPP Members permission to bring counterclaims against investors. This is significant, as it is unclear whether, in the absence of such a provision, a state may bring a counterclaim. Second, the TPP has a broad transparency clause, under which all pleadings, awards and decisions of a tribunal must be publicly disclosed, as well as minutes and transcripts of hearings, except for the portions designated confidential. Third, unlike most other investment treaties, the TPP calls for the creation of a code of conduct for arbitrators. This provision addresses a serious concern and topic of debate within the arbitration

community, thereby dealing with criticism of arbitrators' not being subject to a binding international code of conduct.

Considerations

As disputes with TPP Members unfold, choosing the appropriate arbitration forum and rules are key strategic considerations for investors, as each has its own advantages. For example, the ICSID Convention calls for member states to recognize and enforce an award as if it were a final judgment of a member state's own courts. Awards rendered pursuant to the UNCITRAL Rules and the Additional Facility Rules may be recognized and enforced under the New York Convention, which creates additional steps in the recognition and enforcement process.

The TPP is part of a broader landscape of multilateral and bilateral trade agreements that protect international investors by providing for international arbitration before a neutral arbitral tribunal. Hunton & Williams LLP's international arbitration practice is prepared to assist those who must navigate that landscape. Should you need any advice concerning the protections that will soon be available to international investors under the TPP, and that are currently available under other trade agreements, please contact a member of the Hunton & Williams international arbitration team.

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