



Investor-state dispute settlement in the newly signed Trans-Pacific Partnership

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The Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) have both been the subject of negotiations in Fall 2015. In a significant development, on October 5, 2015, negotiators for the United States and the 11 other parties finally signed TPP.

Both agreements have been touted to “promote jobs and growth” through trade liberalization in their respective regions: TPP across the Asia Pacific region and TTIP between the United States and Europe. In addition, if ratified by the state parties, the agreements will replace the various dispute resolution mechanisms provided for in existing investment treaties among the parties. In fact, the inclusion or otherwise of investor-state dispute resolution provisions has contributed significantly to the controversy surrounding both agreements.

As a consequence, the execution of TPP represents a major development that investors throughout the Asia-Pacific region must consider going forward. However, TPP is yet to be ratified by the state parties, a challenging and likely long-term project.

Background

The TPP negotiations, which began in 2008, involved 12 state parties, including the US, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Six of these states – Canada, Mexico, Australia, Chile, Peru and Singapore – have existing free-trade agreements with the US. Proponents have pushed the expansion of the US network of trade agreements to include the world’s third-largest economy, Japan, and high-income New Zealand.

Indeed, the 12 state parties involved comprise close to 40 percent of global GDP and roughly one-third of world trade. Not surprisingly, this emerging trade alliance is being described by some media outlets as an emerging “geopolitical counterweight to a rising China.”

Investor-state dispute settlement

TPP will include dispute resolution provisions that are intended to allow the parties to expeditiously address disputes through investor-state dispute settlement (ISDS). Under such provisions, instead of bringing claims before domestic courts, disputes between investors from one of the state parties and another state party would go before an international panel of arbitrators. ISDS is not a new mechanism and its use is on the rise globally. The world’s leading ISDS institution, the International Centre of Settlement of Investment Disputes (ICSID), is a member of the World Bank Group.

The United Nations Conference on Trade and Development (UNCTAD) found that 27 international investment agreements (IIA) were concluded (14 BITs and 13 “other IIAs”) in 2014 alone – approximately one every other week. Of those 27 agreements involved, ten involved at least one state located in the Asia Pacific region and six contain an ISDS provision.

Despite the growing international acceptance of ISDS, there has been significant opposition to the TPP on the basis of its dispute resolution provisions. This has also been true of the TTIP.

TPP text released to the public

On November 5, 2015, the full text of the TPP was published. The text will continue to undergo legal review and will be translated into French and Spanish language versions prior to its entry into force. The TPP’s provisions on investment provide a detailed procedure for the resolution of disputes through neutral and transparent investment arbitration. Several significant provisions, many of which are rather innovative, merit special attention:

- Parties must undergo consultations and negotiations for at least six months before submitting a claim to arbitration.
- Parties must give written notice to the respondent at least 90 days before submitting any claim to arbitration.
- All proceedings are public – including pleadings, transcripts and other documents – and will be made available on the US State Department website.
- Amicus curiae and non-disputing party submissions are authorized.
- There is a process for summary review of frivolous claims.
- A fork in the road provision prohibits claimants from initiating parallel proceedings.
- The state parties will develop a code of ethics applicable to arbitrators.

Unsurprisingly, the TPP also provides the basic investment protections found in other investment-related agreements, including fair and equitable treatment, full protection and security, national treatment, most-favored-nation treatment, and “minimum standard of treatment” for investments in accordance with customary international law principles.

Criticisms and controversy

Most commonly, some US opponents to the inclusion of ISDS provisions fear the loss of control of the trusted American court system, reliance instead being placed on international tribunals.

Other criticisms asserted by US opponents of ISDS include the risks of favorable treatment for large corporations; foreign companies challenging American laws; unfair payouts ultimately funded by taxpayers; the loss of jobs in America; exacerbating income inequality, and ultimately, undermining U.S. sovereignty. Some point to supposed shortcomings of the North American Free Trade Agreement and others to the authority of the US Constitution.

Conclusion

The announcement of TPP’s execution was a significant step forward following nearly a decade of negotiations. It also demonstrates that far-reaching trade agreements are achievable, perhaps signaling some hope for TTIP, which recently seemed mired in similar challenges.

However, TPP must still be ratified by the state parties to the agreement, each of which will proceed based on their own national laws for treaty ratification. This process will likely take years and is subject to political changes in each of the state parties. For example, TPP’s prospects in Canada are thought to have diminished following the victory of the Liberal Party in Canada’s October 2015 national election.

Even so, the agreement’s impact on the availability and makeup of ISDS in the Asia-Pacific region is unmistakable and parties interested in investing in the region must pay careful attention as the treaty’s terms are published in the coming months.

Find out more about the ramifications of these agreements for arbitration by contacting the authors.

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