

Trans-Pacific Partnership Agreement (TPP): Final text released

The final text of the Trans-Pacific Partnership Agreement (TPP) was released on Thursday 5 November 2015. In 30 chapters, the TPP covers a wide range of subjects, from traditional trade liberalisation through to services, investment, environmental protection and labour standards. The TPP still needs to complete the ratification stage before it enters into force, and it will take some time for the parties and their communities to digest the whole agreement. However, based on a preliminary review, the TPP appears to be a very sophisticated and ambitious instrument. In this note, we supplement our initial thoughts on the TPP set out in our [Briefing in October](#), which we made in advance of the TPP text release.

The TPP is very much a "21st century" free trade agreement. In its recurring references to (and special rules for) IP exports and technology transfers, the TPP reveals a vision in which trade this century will be as much about ideas and services as it is about goods. From a trade-in-goods perspective, these objectives are supported by the special rules that pertain to the promotion of cross-border supply chains – for example, rules that should make it safer and cheaper for consumer electronics businesses to establish manufacturing bases (and engage contract manufacturers) in lower-cost locations. The TPP's trade-in-services rules will further aid the development of regional supply chains and electronic commerce.

Financial services businesses have also received special attention in the treaty. One of the main liberalising measures is the elimination of rules that require service providers to establish operations in a country before they can supply services within its borders. That means, essentially, that it will be cheaper and more efficient for financial services businesses to access TPP markets.

All substantive chapters contain carefully negotiated carve-outs and non-precluded measures clauses to ensure that TPP States' abilities to regulate in key areas (such environment, public health, safety, security, employment and innovation) are not unjustifiably limited by the treaty. The TPP's diverse carve-outs, when coupled with the positive rights and duties imposed in corresponding fields, operate to ensure that the interests of 12 countries and 800 million people within the TPP area are balanced with the objectives of rules-based trade and investment liberalisation. The task will now be for TPP members to convince their citizens that the right balance has been struck.

This balance is especially clear in the Investment Chapter 9. While this contains "teeth" in the form of rights to bring arbitration claims against a State in breach of the TPP's Investment Chapter, some of the investment protections granted under the TPP are tilted somewhat in favour of the host State. Nonetheless, the TPP generally contains the standards that

are needed to give foreign investors comfort around sovereign risk. Some of the core features and key innovations of the investment chapter are set out below.

- Covered investments are defined widely but need to have the "characteristics of an investment", which follows the approach adopted in *Salini v Morocco*¹ and may lead to protracted jurisdictional arguments.
- The Investment Chapter covers not simply investments but investment agreements relating to natural resources that a national authority controls, supply services for consumption by the general public and infrastructure projects between investors of another party to the TTP and central government authorities.
- The usual protections are offered, such as national treatment (NT), most favoured nation treatment (MFN), fair and equitable treatment (FET), full protection and security (FPS) and the prohibition against direct or indirect expropriation.
- However, some protections contain restrictive language. For example, such language may permit States to defend claimed breaches of the NT, MFN or expropriation provisions on the ground that "legitimate public welfare objectives" were involved. And in what appears to be a novel provision – departing from investment arbitration case law – the mere fact a State conducted itself in a way that was inconsistent with an investor's expectations may not constitute a breach of the FET or FPS provisions. Compulsory licences granted in relation to intellectual property rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are also carved out from the expropriation provisions.
- In investment claims challenging measures relating to regulation or supervision of financial institutions, markets or instruments, the TPP enables a State to make a defence on the ground that the measures were to protect investors, depositors or policy holders or to ensure the integrity and stability of the financial system.
- A detailed provision prohibits the imposition of performance requirements on foreign investors.
- A "denial of benefits clause" prevents shell companies to invoke rights under the investment chapter, a factor that will affect how investments are structured to take advantage of the TPP.
- A general provision enables States to ensure investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives.
- In following recent trends towards transparency, the pleadings and hearings in an arbitration will be (much like court procedure) open to the public. This should go some way to addressing concerns regarding ISDS "secret tribunals" that have been expressed by some sections of the community.
- Another unique provision is the right of the disputing parties to comment on draft decisions and awards of arbitral tribunals prior to them being rendered.
- Finally, the TPP establishes a Commission constituted by representatives of TTP's States, which may interpret provisions of the TPP. The Commission's decision will be binding on investment arbitration tribunals determining investor claims under the TPP.

Despite much comment that the Investment Chapter will represent a significant departure from prior investment treaties, the Chapter has many similarities to the model bilateral investment treaty adopted by the United States. This highlights the novelty of the ISDS provisions in the European Commission's draft TTIP.

In terms of its membership, the TPP group is diverse, including countries at varying stages of economic development (from most developed countries like Japan through the developing countries like Vietnam) with quite different political and legal traditions. Indonesia, the Philippines and South Korea have made it known that they may consider joining. The most notable TPP absentees are China and Russia. However, the TPP's accession rules seem reasonably open – especially for APEC countries. As Russia and China are APEC members, there is scope for them to join the pact. But the accession of

¹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* (ICSID Case No. ARB/00/4).

these (and other) countries will present certain challenges, ranging from implementation difficulties through to more sub-textual issues such as diplomatic and security relationships and trade sanctions.

The ratification of the TPP and the accession of States that did not sign the treaty on 4 October are matters now that need to be closely watched for all interested in cross border trade, services and investment in the Pacific Rim.

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102827-4-593-v0.5

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102827-4-593-v0.5

UK-0010-BD-CCOM