

TPP11: MODIFIED APPROACH TO INVESTMENT AGREEMENTS, INVESTMENT AUTHORISATIONS AND CLAIMS REGARDING FINANCIAL SERVICES

INTRODUCTION

After a year of uncertainty following the withdrawal of the United States, the remaining eleven nations of the Trans-Pacific Partnership (TPP) have reached an agreement that will allow the ambitious trade bloc to proceed. The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11)* was concluded in Tokyo on 23 January 2018 and text of the agreement was released on 21 February 2018. The TPP11 is to be signed in Santiago, Chile on 8 March 2018. In this update, we consider how the TPP11 differs from the previously agreed text of the TPP in the area of investment protection.

The TPP11 countries – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam – have taken a pragmatic approach to reaching agreement, using a relatively short-form agreement that incorporates by reference the terms of the TPP that were agreed in Auckland on 4 February 2016 (before the Trump-led US withdrawal). However, as foreshadowed during the negotiations between the eleven Governments, the text of the original TPP has not been adopted in full: the TPP11 countries have agreed to suspend certain items of the TPP, including specific provisions of the Investment Chapter (Chapter 9) that concern "*investment agreements*" (contracts between central Government authorities and investors) and "*investment authorisations*" (foreign investment approvals) and the scope of claims that financial services businesses may submit to investor-State arbitration under the Financial Services Chapter (Chapter 11).

INVESTMENT AGREEMENTS

It was reported that, in the TPP negotiations, the US was the party that advocated for specific coverage for investment agreements. The suspension of coverage for investment agreements in the TPP11 may therefore be linked to the US withdrawal.

Investment agreements are common in sectors such as natural resources and infrastructure and so the suspension of coverage for investment agreements under the TPP11 may impact investors who are active in these areas. But it should be understood that the suspension of specific coverage for "*investment agreements*" does not mean that all contracts between foreign investors and

Key issues

- The Trans-Pacific Partnership (TPP) has been salvaged by the eleven nations that remained after the Trump-led US withdrawal last year.
- The new agreement (TPP11) will provide covered businesses with most of the benefits they would have enjoyed under the TPP. However, some provisions of the original TPP have been suspended in the TPP11.
- The suspended provisions include parts of the Investment Chapter that concern "*investment agreements*" and "*investment authorisations*" and the scope of claims that may be referred by investors to international arbitration under the Financial Services Chapter.
- As a result of these suspensions, investors from TPP11 States who enter into agreements with TPP11 Governments will not be able to use the TPP11 to bring pure breach of contract claims against their host Government.
- But investor-State contracts and certain licences will still enjoy protection from unlawful expropriation, unfair treatment, discrimination and other measures that violate the Investment Chapter of the TPP11.
- While the suspensions do narrow the scope of financial services-related claims that may be submitted to international arbitration, claims regarding expropriation and free transfer of capital may still be referred to arbitration by financial services businesses under the TPP11.

host States will be excluded from protection under the TPP11. Such contracts may still enjoy protection because the broad definition of "*investment*" in Article 9.1 of the TPP will still be part of the TPP11.

In investor-State dispute settlement proceedings under treaties such as the TPP, the definition of "*investment*" is critical as it determines the subject-matter scope of the arbitration claim that may be instituted by the investor under the applicable treaty (i.e. foreign investors can only bring claims in relation to "*investments*" as defined in the treaty under which their claim is brought).

The definition of "*investment*" adopted by the TPP11 is typically broad and includes "*turnkey, construction, management, production, concession, revenue-sharing and other similar contracts*". The link between this broad definition and the investor-State arbitration right is contained in Article 9.19 of the TPP, which gives investors the right to refer "*investment disputes*" to investor-State arbitration (the TPP11 has not suspended this key provision).

Therefore, an investor who has an agreement with its TPP11 host State (or one of its central authorities) may still refer a dispute relating to that agreement to investor-State arbitration under the TPP11 on the basis that it is an "*investment dispute*", provided that the dispute arises out of a violation of one or more of the substantive standards or protections accorded to investors under Section A of the Investment Chapter of the TPP (Minimum Standard of Treatment, expropriation, etc).

For example, if an investor from one TPP11 State enters into a concession agreement with the Government of another TPP11 State for the construction and operation of a toll road, and the host TPP11 State unlawfully terminates that concession agreement, the investor may refer its dispute with that host Government over the termination to investor-State arbitration under Article 9.19 of the TPP. The potential bases for this claim include that the investor's contractual rights have been unlawfully expropriated (in violation of Article 9.8 of the TPP) or that its concession agreement has been subjected to unfair or inequitable treatment (in violation of the Minimum Standard of Treatment due under Article 9.6 of the TPP). However, the effect of the TPP11 suspensions is that the investor will not be able to bring an investor-State arbitration claim on the basis that the host Government breached a term of the concession agreement (although the investor could still pursue the host Government in another forum).

The practical effect of these suspensions is that foreign investors cannot bring pure breach of contract claims against States under the TPP11. Investors who are entering into investment-related agreements with TPP11 States would therefore be well advised to include international arbitration clauses in their contracts with TPP11 Governments if they want the ability to bring breach of contract claims in an international forum. In this regard, it is important to note that the main forms of investor-State arbitration provided for under the TPP Investment Chapter – being arbitration at ICSID or arbitration under the UNCITRAL Rules – can be contractually agreed just as they can be made available through a treaty.

INVESTMENT AUTHORISATIONS

Regarding "*investment authorisations*", while the specific coverage in the TPP11 has been suspended, the definition of "*investment*" in the TPP (which has not been suspended) expressly covers "*licences, authorisations, permits and similar rights conferred pursuant to the [host] Party's law*".

So, in certain circumstances, an investor who has been issued a business licence by the Government of a TPP11 State may still be able to refer a dispute relating to the treatment of that licence to investor-State arbitration under the treaty. For example, if the licence were revoked or indefinitely suspended, this may constitute unlawful expropriation in violation of Article 9.8 or treatment in violation of Article 9.6 (Minimum Standard of Treatment), Article 9.4 (National Treatment) or Article 9.5 (Most Favoured Nation Treatment).

However, whether the investor can bring such a claim will depend on whether the licence qualifies as an "*investment*" (such that the dispute in respect of the licence is an "*investment dispute*" capable of referral to arbitration under the TPP11). This question is subject to a case-by-case analysis, guided by the considerations set out in footnote 4 of the Investment Chapter of the TPP, which provides that "[w]hether a particular type of licence, authorisation, permit or similar instrument (including a concession to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the Party's law. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law [...]".

As government measures against licences are a common cause of investor-State disputes, the admissibility of licence-related disputes to investor-State arbitration under the TPP11 is likely to be tested in future cases under the treaty. As with any licence relating to a foreign investment, investors in TPP11 States will need to ensure that they take advice from qualified counsel on the validity of their licences and the legal force of the rights they grant, under the law of their TPP11 host State.

SCOPE OF CLAIMS REGARDING FINANCIAL SERVICES

When the text of the original TPP was released, one of the features that attracted significant interest was that the TPP was going to make the investor-State arbitration process in its Investment Chapter available for certain disputes under its Financial Services Chapter.

However, under the TPP11, the scope of financial services-related disputes that may be submitted to investor-State arbitration has been narrowed. This narrowing has been achieved through the suspension of the cross-reference to TPP Article 9.6 (Minimum Standard of Treatment) in the provision of the TPP Financial Services Chapter (Article 11.2(2)(b)) that sets out the types of financial services claims that may be submitted to investor-State arbitration under the Investment Chapter.

Significantly, the investor-State arbitration mechanism in the Investment Chapter will still be available to financial services businesses where they have claims concerning the adoption of measures by their TPP11 host State that violate the TPP Investment Chapter provisions on expropriation and free transfer of capital.

It is also important to note that, while financial services businesses will not be able to refer claims regarding the Minimum Standard of Treatment to investor-State arbitration under the Investment Chapter, the TPP11 does not suspend the application of the Minimum Standard of Treatment to financial services. Financial services business will therefore still be entitled to the benefit of the Minimum Standard of Treatment (including fair and equitable treatment and full protection and security) – they just will not be able to enforce their

entitlement to that standard of treatment through the TPP's investor-State arbitration procedure.

CONTACTS

Dr Sam Luttrell
Partner

T +61 8 9262 5564
E sam.luttrell
@cliffordchance.com

Ben Luscombe
Partner

T +61 8 9262 5511
E ben.luscombe
@cliffordchance.com

Audley Sheppard QC
Partner

T +44 207006 8723
E audley.sheppard
@cliffordchance.com

Nish Shetty
Partner

T +65 6410 2285
E nish.shetty
@cliffordchance.com

Jessica Gladstone
Partner

T +44 207006 5953
E jessica.gladstone
@cliffordchance.com

Chris Bates
Partner

T +44 207006 1041
E chris.bates
@cliffordchance.com

Janet Whittaker
Partner

T + 44 207006 2821
E janet.whittaker
@cliffordchance.com

Dr Romesh Weeramantry
Foreign Legal Consultant

T +852 2825 8938
E romesh.weeramantry
@cliffordchance.com

Peter Harris
Senior Associate

T +61 8 9262 5581
E peter.harris
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, Level 7, 190 St Georges Terrace, Perth, WA 6000, Australia

© Clifford Chance 2017

Liability limited by a scheme approved under professional standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.