SHEARMAN & STERLING LLP

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Trans-Pacific Partnership Agreement Includes New Investor-State Dispute Settlement Protections

If you wish to receive more information on the topics covered in this publication, you may reach out to your regular Shearman & Sterling contact person or any of the following:

Emmanuel Gaillard
Head of Practice
Paris
+33.1.53.89.70.00
egaillard@shearman.com

Yas Banifatemi
Paris
+33.1.53.89.70.00
ybanifatemi@shearman.com

Mark S. McNeill
London
+44.20.7655.5758
mark.mcneill@shearman.com

Christopher M. Ryan
Washington, D.C.
+1.202.508.8098
cryan@shearman.com

Jeremy K. Sharpe
London
+44.20.7655.5989
jeremy.sharpe@shearman.com

Henry Weisburg
New York
+1.212.848.4193
hweisburg@shearman.com

Alexander Bevan
Abu Dhabi
+971.2.410.8121
abevan@shearman.com

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On October 5, 2015, 12 nations comprising 40% of global economic activity announced the conclusion of negotiations on the Trans-Pacific Partnership. The deal promises to provide comprehensive standards for trade and investment across the Asia-Pacific region and offers a mechanism for Investor-State Dispute Settlement through binding arbitration.

A Major New Free Trade Area

The Trans-Pacific Partnership (TPP) is a free trade agreement that expands an earlier Economic Partnership Agreement among Brunei, Chile, New Zealand and Singapore that entered into force in 2006. Its expansion has been the subject of ongoing negotiations, and the October 5 agreement was signed by 12 States responsible for an estimated 40% of the global economy: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

The final text of the agreement has not yet been made public, but initial reports and a summary released by the Office of the United States Trade Representative suggest that the countries have reached a comprehensive agreement that will create major opportunities for clients with activities in the trade area. The agreement includes:

- The removal or reduction of tariffs and non-tariff barriers, including on financial services, telecommunications, the Internet and the digital economy, intellectual property, textiles and apparel, as well as agricultural products;
- Provisions related to State-Owned Enterprises and government procurement; and
- Anti-corruption measures and provisions related to public-interest regulation as well as promotion of labor rights and protection for the environment.

The TPP also includes mechanisms for resolving disputes that arise within the trade area, including between investors and States.

The TPP will create major opportunities for clients with activities in the trade area.

Investor-State Dispute Settlement

The Investor-State Dispute Settlement (ISDS) provisions of the TPP have become a subject of controversy in Washington and other world capitals, with some fearing that including ISDS could derail the agreement. While the world still awaits the final text of the agreement—which is being finalized and translated, and must be ratified before it comes into force—early reports confirm that 12 members of the TPP reached consensus on provisions that allow investors to raise and resolve alleged violations of the TPP through binding arbitration, including for violations of the investment and financial services chapters.

We expect that the ISDS provisions of the TPP will include many protections commonly found in investment agreements (a draft of the TPP leaked in January closely mirrored the 2012 U.S. Model Bilateral Investment Treaty), including the "most-favored-nation" and "national treatment" protections against discrimination; the customary international law minimum standard of treatment, which includes fair and equitable treatment and full protection and security; the prohibition of expropriation that is not for public purpose, without due process, or without compensation; restrictions on performance requirements mandating local content or technology localization; the free transfer of funds related to investments; and the freedom to appoint senior management positions regardless of nationality.

Anticipating Innovations in ISDS

We also expect that the ISDS provisions will continue to build on reforms found in recent U.S. international investment agreements and will include several innovations, including:

- Transparency requirements favoring open proceedings and disclosure of filings and arbitral awards, together with provisions allowing interested non-parties to the dispute, such as industry and civil society, to make *amicus curiae* submissions to a tribunal;
- Provisions allowing the non-disputing TPP States to make submissions to a tribunal, and to agree to binding interpretations of the agreement;
- Expedited review of frivolous claims and a mechanism for awarding costs, as well as rules to prevent parallel proceedings pursuing the same claim;
- Recognition of the rights of States to regulate in the public interest, including with respect to health, safety and environmental protection; exceptions to preserve discretion for financial regulations to promote stability, including through non-discriminatory measures implementing monetary policy; and a carve-out that excludes tobacco companies from bringing certain claims related to public health regulations; and
- New ethics guidelines for arbitrators.

"The TPP promises to provide both investors and States with new and efficient dispute-settlement procedures that play to Shearman & Sterling's strengths handling must-win arbitrations for our clients."
-Jeremy Sharpe, Partner, Shearman & Sterling

Implementing the TTP

The TPP agreement must still be ratified by all 12 countries before it comes into force. In many States, this will involve complex domestic political battles. While U.S. President Obama has already been granted "fast-track" negotiating authority from Congress, the legislature still gets an up or down vote. The TPP is expected to be a focal point in both

the upcoming Canadian and US election campaigns. Participation in the TPP has been the subject of controversy in Japan and the subject of protests in New Zealand. In short, we expect acrimonious debate on many provisions of the agreement in TPP States.

We will continue to monitor developments as the full text of the TPP provisions becomes available and as States begin to ratify the agreement. It is clear, though, that should the agreement come into force, ISDS will be a prominent feature of these debates and add a new set of protections for TPP members to the existing system of investment protections available to investors and States.

ISDS and Shearman & Sterling's Strengths

Shearman & Sterling is a global leader in international investment arbitration. Our International Arbitration Group has represented parties in such disputes for more than 30 years. We were among the very first law firms to have been involved in this developing field of law and have been at the heart of some of the most significant and groundbreaking cases in investment arbitration. The Group is led by Emmanuel Gaillard, widely recognized as a leading authority in the field.

We represent investors and States in arbitrations arising under bilateral and multilateral investment treaties. Partners of our firm also regularly serve as arbitrators in investment treaty disputes and as legal experts in relation to complex issues of international investment law.

Our track record includes representing the investors in the largest investment treaty dispute ever brought to arbitration, the case brought by the majority shareholders of the former Yukos Oil Company against the Russian Federation under the Energy Charter Treaty in relation to the expropriation of their investment in the company, in which our clients secured a USD 50 billion award, the largest arbitral award ever rendered in the history of international arbitration.

Jeremy Sharpe, Partner at Shearman & Sterling and former Chief of Investment Arbitration in the Office of the Legal Adviser at the U.S. Department of State, said of the announcement that States had reached agreement on the TPP, "The TPP promises to provide both investors and States with new and efficient dispute-settlement procedures that play to Shearman & Sterling's strengths handling must-win arbitrations for our clients."

9 APPOLD STREET | LONDON EC2A 2AP | UNITED KINGDOM