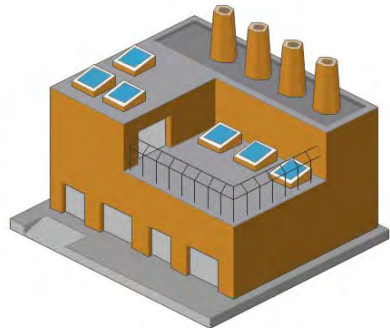




TPP Chapter 9 – Investment and Investor-State Dispute Resolution
TPP Chapter 17 – State-Owned Enterprises and Monopolies
TPP Chapter 30 – Provisions on Accession

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Caveats

- Impact assessment is largely hypothetical – TPP is not yet in force
- Lawyer's bias – identifying risk factors from the existing legal text doesn't necessarily mean the risks will always materialize
- Decision on accession is Thailand's to make – UNCTAD officially neither supports nor opposes, but we want to make sure country equipped to make informed policy choice

Chapter 9 – Investment Obligations and Investor-State Dispute Settlement (ISDS)

- Definition of investment includes intellectual property rights
- TPP parties required to refrain from *performance requirements* to transfer particular technology, production process or other proprietary knowledge to a person in the country (ex. Indonesia's Decree 1010)
- Covers both *direct and indirect expropriation* – prohibited unless for public purpose and done in a non-discriminatory manner against compensation
- *ISDS* allows foreign investors to pursue remedies in a private arbitral proceeding directly against a TPP party in relation to breaches of TPP's investment provisions

Safe Harbors (1)

- Non-discriminatory regulatory actions for public health purposes don't constitute indirect expropriation, except in rare circumstances – this includes regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products
- Nothing in this Chapter shall be construed to prevent a Party from taking measures otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives

Safe Harbors (2)

- The general prohibition on expropriation and the obligation of compensation does not apply to the issuance of compulsory licenses or the revocation/limitation of IPRs **to the extent that this is otherwise consistent with Chapter 18 of the TPP and the TRIPS Agreement**
 - Chapter 18 reaffirms Doha Declaration on TRIPS and Public Health; so while not absolute, right to issue CLs and government use licenses on medicines for legitimate public health purposes appears largely unaffected by TPP provisions on expropriation
- Decisions to authorize specific investment proposals by Australia, Canada, Mexico and New Zealand have been specifically excepted from ISDS under an Annex
- Parties may elect to deny the benefits of ISDS to claims challenging tobacco control measures of the Party under Article 29.5 (exceptions)

ISDS and Plain Packaging of Tobacco (1)

- In 2010, Philip Morris launched an ISDS challenge at ICSID under the Swiss-Uruguay FTA after Uruguay enacted plain packaging legislation
- Claims extent of plain packaging required amounts to indirect expropriation of their trademarks under the FTA, violation of fair and equitable treatment
- In 2013, ICSID panel declares it has jurisdiction over the case
- In December 2015, ICSID panel declares Uruguay justified in enacting plain packaging as a health measure

ISDS and Plain Packaging of Tobacco (2)

- In 2011, Philip Morris used its subsidiary in Hong Kong to launch an ISDS challenge under an FTA after Australia enacted plain packaging legislation
- Claims extent of plain packaging required amounts to indirect expropriation of their trademarks under the FTA, violation of fair and equitable treatment
- In 2012, Australia's domestic court rules plain packaging legitimate exercise of power in interests of public health, not expropriation
- In December 2015, ISDS Arbitral panel throws out case saying it lacked jurisdiction; no decisions on substantive issues
- Plain packaging still under litigation at WTO

Chapter 17 – State-Owned Enterprises (SOEs)

- Does not prohibit SOEs or designated monopolies *per se*
- Companies principally engaged in commercial activities that are more than 50 percent owned or controlled by the government (SOEs)
- Entities designated as the sole provider or purchaser of a good or service in a market (designated monopoly)
- Threshold for application – SDR 200 million, adjusted every 3 years (higher for first 5 yrs for some countries)
- Procurement is covered under a separate chapter of the TPP

Obligations on Commercial Considerations

- Non-discriminatory treatment vis-à-vis enterprises from other TPP parties in purchases and sales of goods/services by SOE (no preferences for local suppliers)
- Obligation to act in accordance with commercial considerations (price, quality and availability)
- Applies to **commercial activities** of an SOE, which is defined as:

activities which an enterprise undertakes with an orientation toward profit-making and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise

Non-Commercial Assistance to SOEs

- Prevents a TPP party from causing adverse effects to the interests of another TPP party through non-commercial assistance that it provides to an SOE (footnote implies that adverse effects can be to a non-party as well)
- Non-commercial assistance defined as direct transfers of funds or potential direct transfers of funds and liabilities, provisions of goods or services other than general infrastructure on terms more favorable than those commercially available

Various Procedural Aspects

- TPP parties to form a Committee on SOEs and Designated Monopolies to review and consider the operation and implementation of Chapter 17
- Commitment by TPP parties to make publicly available on an official website list of all SOEs and designated monopolies
- Obligation to provide information at the request of other parties on SOEs and designated monopolies
- Disputes subject to interpretation and settlement under Chapter 28

Will Chapter 17 Apply to GPO? (1)

- It is clearly an SOE (but what about its joint venture GPO-Mérieux?)
- Threshold revenue pretty close as of 2011 Annual Report
- Is it principally engaged in a commercial activity? Can it be fall under the exception for public service mandates?
 - GPO Charter emphasizes its public health mandate
 - R&D, manufacture, import and sale of medicines for Thailand's public health system
 - However, it has an International Business Division and exports its products to other developing countries
 - Reports profits in its annual report
 - Public service mandate only excepts SOE from obligation to act in accordance with commercial considerations; all other obligations including non-discriminatory treatment and prohibition of non-commercial assistance that causes adverse effects to another TPP party, apply

Will Chapter 17 Apply to GPO? (2)

- Safe harbor for SOEs providing goods or services to domestic market, but only if SOE is providing such goods or services **exclusively**
- Potential application of exceptions that apply across the TPP – includes measures necessary to protect human, animal or plant life or health

Chapter 30 – Accessions (Article 30.4)

- Governing Commission to establish a working group to consider requests for accession to TPP
- Working group to reach agreement with accession candidate on proposed terms and conditions for accession
- Working group may require adherence to TRIPS-plus standards, as has happened in the case of Ukraine and Viet Nam
- No guarantee flexibilities, such as delays in implementation, allowed for Viet Nam and other developing countries will be granted to Thailand as a late-comer signing an existing text

Thank You

