# **outcomes: investment**

# **BENEFITS OF FOREIGN INVESTMENT TO AUSTRALIA**

As a large country with a relatively small population, Australia relies on foreign investment to supplement domestic capital.

Foreign investment has helped Australia become the world’s 13th largest economy, with 25 years of uninterrupted growth. Foreign investment has enabled Australians to enjoy higher rates of economic growth, employment and standards of living than could have been achieved with domestic capital alone. In 2015, around 42 per cent of the total stock of foreign investment in Australia (valued at approximately $1.26 trillion) was from TPP countries.

Foreign investment helps Australia reach its economic potential by financing new industries and enhancing existing industries, boosting infrastructure, productivity and employment opportunities in the process.

Foreign investment also creates jobs – more than one in five businesses in Australia with 200 or more employees have greater than 50 per cent foreign ownership. Foreign investment stimulates economic activity – research has found that a 10 per cent increase in foreign investment in Australia could lead to a more than one per cent increase in GDP by 2020. Creating new businesses with connections in different markets, foreign investment opens up additional export opportunities, helping to boosting our overall export performance.

The Trans-Pacific Partnership (TPP) will promote further foreign investment in Australia by liberalising the screening threshold at which private foreign investments in non-sensitive sectors are considered by the Foreign Investment Review Board, increasing the threshold from $252 million to $1,094 million for all TPP countries. Under the TPP, Australia retains the ability to screen investments in sensitive sectors to ensure they are not contrary to the national interest. Proposed investments by foreign governments will continue to be examined and lower screening thresholds of $15 million and $55 million will apply to investment in agricultural land and agribusiness respectively.

# **BENEFITS for AUSTRALIAn investors**

Australian investment in TPP countries more than doubled in the last decade to reach $914 billion in 2015, a rise of 7 per cent over the previous year. Australian investment in TPP countries is 44 per cent of all outward Australian investment.

The TPP will promote further growth and diversification of Australian outward investment by opening up lucrative and growing market sectors such as mining and resources, telecommunications and financial services. Australian investors will also benefit from preferential investment screening thresholds in the TPP.

The TPP Investment Chapter contains a suite of rules that will provide additional protection to Australian investors operating in TPP countries. These protections include a minimum standard of treatment, the right to compensation for certain types of expropriation and protection against discrimination (see below). The Investor-State Dispute Settlement (ISDS) mechanism will provide Australian investors with the ability to enforce these protections in many of Australia’s key capital export markets, as well as many of the rapidly growing economies in the Asia‑Pacific region.

**Table 1: Total investment in Australia from TPP countries and total Australian investment in TPP countries in 2015**

|  |  |  |
| --- | --- | --- |
|  | Total investment in Australia from TPP countries ($m) | Total Australian investment in TPP countries ($m)  |
| Brunei Darussalam | 79 | 32 |
| Canada | 38,753 | 42,661 |
| Chile | NP\* | 2,943 |
| Japan | 199,596 | 93,164 |
| Malaysia | 20,455 | 8,573 |
| Mexico | NP | 4,912 |
| New Zealand | 39,668 | 98,693 |
| Peru | 163  | 465 |
| Singapore | 98,579 | 67,056 |
| United States | 860,313 | 594,425 |
| Vietnam | 468 | 1,457 |

NP = not published

# **TPP INVESTMENT CHAPTER**

Investment rules are included in trade agreements like the TPP because of the importance governments attach to guaranteeing the high standards of governance that are pivotal to attracting and sustaining foreign investment.

Investments include shares and stocks, enterprises and tangible and intangible property.

TPP investment rules:

* protect against discriminatory treatment;
* require payment of compensation in certain circumstances where an investment is expropriated;
* require that investment-related capital transfers can occur freely and without delay; and
* guarantee that investors and their investments will be accorded a minimum standard of treatment in accordance with the applicable customary international law standard, which includes an obligation to provide due process in court proceedings.

The TPP Investment Chapter contains an ISDS mechanism which provides investors with access to an independent arbitral tribunal to resolve disputes for breaches of these investment rules or the similar investment-related rules in the Financial Services Chapter.

An ISDS claim concerning the TPP may only be brought in relation to commitments in the Investment Chapter and a limited number of commitments in the Financial Services Chapter. The mechanism also enables an investor to initiate arbitration proceedings in relation to disputes over investment agreements and authorisations in certain limited circumstances.

The ISDS mechanism contains explicit safeguards protecting the Australian Government’s right to regulate in the public interest.

# What ISDS safeguards have been included?

The TPP Investment Chapter contains a set of high‑quality, modern rules governing the treatment of investors and their investments, balanced with robust safeguards to preserve the right of the Government to continue regulating in the public interest. As a result:

* there is explicit recognition that TPP Parties have an inherent right to regulate to protect public welfare, including in the areas of health and the environment;
* Australia’s tobacco control measures cannot be challenged;
* certain ISDS claims in specific policy areas in Australia cannot be challenged, including:
	+ social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities
	+ measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage
	+ Australia’s foreign investment policy, including decisions of the Foreign Investment Review Board.
* non-discriminatory regulatory actions to safeguard public welfare objectives, such as public health, safety or the environment, do not constitute indirect expropriation, except in rare circumstances;
* the fact that a subsidy or grant has not been issued or renewed, or has been reduced, does not breach the minimum standard of treatment obligation, even if it results in loss or damage to the investment.  This includes subsidies issued under Australia’s Pharmaceutical Benefits Scheme;
* government action which may be inconsistent with an investor’s expectations does not constitute a breach of the minimum standard of treatment obligation, even if it results in loss or damage to the investment.

The ISDS mechanism in the TPP also includes procedural safeguards to enhance the arbitration process. These include:

* a requirement that hearings will be open to the public, and that documents filed in the arbitration, as well as the tribunal’s decision, will be made public;
* a right for any TPP Party that is not involved in an ISDS case to make oral and written submissions;
* the ability to permit submissions from interested individuals, including from civil society and non‑governmental organisations;
* a requirement that the burden of proof rests with the claimant to establish its claim against a government, which also directs tribunals to decide cases in accordance with established interpretations of investment commitments;
* rules preventing a claimant pursuing a claim in parallel proceedings, such as before an Australian court;
* expedited review of claims that are baseless, or manifestly without legal merit;
* the ability of TPP Parties to issue interpretations of the Agreement, which must be followed by ISDS tribunals;
* mechanisms to disincentivise unmeritorious claims, such as through the award of costs against a claimant and the ability for a respondent government to recoup costs;
* interim review and award challenges;
* time limits on bringing a claim;
* a requirement for arbitrators to comply with rules on independence and impartiality, including on conflicts of interests.

For more information on ISDS, refer to [ISDS FAQ](http://dfat.gov.au/trade/topics/Pages/isds.aspx).