

Trade Policy

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Investment in Trade Agreements

CPTPP Investment Articles

- Article 9.4: National Treatment
- 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
- 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

CPTPP Investment Articles

- Article 9.5: Most-Favoured-Nation Treatment
- 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
- 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

CPTPP Investment Articles

- **Article 9.6: Minimum Standard of Treatment**¹⁵
- 1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.
- 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:
 - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

CPTPP Investment Articles

- **Article 9.9: Transfers**²⁰
- 1. Each Party shall permit all transfers relating to a covered investment to be
- made freely and without delay into and out of its territory. Such transfers include:
 - (a) contributions to capital;
 - (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees and other fees;
 - (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
 - (d) payments made under a contract, including a loan agreement;
 - (e) payments made pursuant to Article 9.7 (Treatment in Case of Armed Conflict or Civil Strife) and Article 9.8 (Expropriation and Compensation); and
 - (f) payments arising out of a dispute.

Novartis in India

A key focus and tension of trade policy is the balancing of needs of emerging markets and the restrictions of developed markets. We see this specifically with regards to standards and in this case, intellectual property. How do we balance those competing concerns?

...the Intellectual Property Appellate Board (India) also declined Novartis' appeal, conceding that there was novelty in the process but the pricing of the drug made it unaffordable to Indian patients.....Novartis has to determine its innovation strategy in India and in the broader emerging markets based on the court ruling

Novartis global consolidation was reflected in its consolidation in India, bringing together the activities of all the three firms in order to focus on pharmaceuticals. In 2006, Novartis announced plans to invest about \$3 billion in a research and development facility...it also signed an MOU with the Indian government for expanding medical related IT

With reciprocal arrangements with the United Kingdom and other countries, the Indian patent law made filing international patents much simpler....This encouraged several multinational pharmaceutical companies such as GlaxoSmithKline, Johnson & Johnson, and Bayer to enter India in many important therapeutic areas.

...product patents were abolished and process were admissible. The law resulted in a spate of exits by many foreign multinational pharmaceutical firms from India...The country's weak intellectual property rights (IPR) provided many of these firms with legitimate means to copy and manufacture generic versions of the original drugs

In 1994, when India became a member of the World Trade Organization (WTO), it signed an agreement on trade related aspects of IPR (TRIPS). Under this agreement, India had to honour product patents after a grace period of 10 years (i.e. effective 2005). In order to comply with TRIPS, India enacted the Patent Reform Act in 2005.

...any new pharmaceutical patent had to adequately demonstrate increased efficacy apart from being non-obvious, novel, and capable of having an industrial application....governments and policy makers continued to wrestle with the issue of how to balance the goal of encouraging innovation on one hand while providing affordable access to life saving drugs.

What is the *specific* challenge for business people
and policy makers?

...realizing the price of such an essential drug was prohibitive for many patients, Novartis established the first global direct to patient access program....it provided Glivec at no cost to those patients deemed eligible by satisfying some criteria based on medical and socio-economic guidelines.

How do you craft business or public policy around responding to political pressures while balancing the need to make your country an attractive business environment?

After losing its drug patent appeal due to failing to demonstrate improved efficacy and cost Novartis appealed to the Indian Supreme Court. “The company wanted the Supreme Court to declare Section 3(d) was not consistent with India’s TRIPS...Novartis also decided to withdraw its proposal for a \$3 billion investment to create an R&D centre in India.”

Novartis challenge in India was symptomatic of similar issues in many developing markets. How could countries maintain the affordability of on patent drugs in developing economies while increasing the incentives to innovate?

Investment in Trade Agreements

What are Specific Investment Policies?

- Tax holidays, treaties to avoid double taxation, exemptions on import duties
- Content requirements for inputs
- Employment restrictions
- Export requirements
- Foreign equity or joint venture limits
- Landowning restrictions
- Transfers or liquidation requirements

Some WTO members have argued there is a need to negotiate multilateral rules for investment policies, such as the right of establishment and national treatment for foreign investors....in many sectors, the preferred mode of supplying a market maybe through foreign direct investment (FDI), no exports.

Restrictions on inward FDI may be motivated in part by the existence of high trade barriers, as this provides an incentive for tariff wall-hopping FDI

Multilateral investment agreements may help countries that seek to attract FDI by acting as a signaling device or instrument through which the perceived credibility of a set of policies intended to foster the FDI can be enhanced

Negotiating a WTO agreement on investment policies may prove useful in arriving at a grand bargain that extends to issues of a particular interest to developing countries