

## **Trading Views: Real Debates on Key Issues in TPP – Investment**

During the forum, there was confusion surrounding a question asked by Representative DeFazio regarding the remedies available to an investor that wins an ISDS dispute. To resolve this confusion, the panelists were asked to submit written responses to the following question:

- What remedies are available to an investor that wins a dispute?

### **Panelist Responses:**

*MATT PORTERFIELD*<sup>1</sup> –

#### ***Summary***

An investment tribunal may award monetary compensation or restitution of property (but not injunctive relief) to an investor who brings a successful investor-state dispute settlement (ISDS) claim under a United States investment treaty. Monetary awards rendered in ISDS proceedings are enforceable in federal court. A federal court may not declare a federal law to be invalid on the grounds that it is inconsistent with the investment chapter of a U.S. free trade agreement (FTA), but the federal government may challenge state and local law on such grounds. In contrast, under current practice U.S. bilateral investment treaties (BITs) are implemented as “self-executing” treaties that can be used to challenge both federal and state law in the federal courts.

#### ***The Available Remedies for Investors under U.S. Investment Treaties***

A tribunal in an ISDS proceeding brought under a United States investment treaty may award an investor, “separately or in combination,” monetary relief and restitution of property.<sup>2</sup> Although other forms of “non-pecuniary relief” are in theory available in ISDS proceedings,<sup>3</sup> United States investment treaties do not authorize a tribunal to award injunctive relief, such as an order for a government to cease enforcing a law against an investor.<sup>4</sup>

A government may, however, choose to repeal a law in order to avoid the significant financial liability that can result from an ISDS proceeding. Germany, for example, agreed to modify environmental standards for a coal-fired power plant in response to an ISDS claim brought by a Swedish Energy company.<sup>5</sup>

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<sup>1</sup> This document reflects the views of the author and not those of Georgetown University.

<sup>2</sup> See, e.g., 2012 Model U.S. Bilateral Investment Treaty, Article 34, available at <http://www.state.gov/documents/organization/188371.pdf>.

<sup>3</sup> See generally Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325 (2004).

<sup>4</sup> A tribunal may, however, order “an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction.” 2012 Model BIT, Article 28(8).

<sup>5</sup> *Vattenfall v. Federal Republic of Germany, Award*, ICSID Case No. ARB/09/6 (March 11, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/ita0890.pdf>.

## *The Enforcement of Investment Treaties in U.S. Courts*

The monetary awards rendered in ISDS proceedings are enforceable in federal court in the United States.<sup>6</sup> Under the implementing legislation for U.S. free trade agreements such as NAFTA, federal law may not be challenged in federal court on the grounds that it is inconsistent with a provision of the FTA's investment chapter, but the federal government may sue to preempt *state or local law* based on a conflict with an investor rights provision.<sup>7</sup> In contrast, current practice is to make the substantive investor rights provisions in U.S. BITs (such as the one currently being negotiated with China) “self-executing”— meaning that they can be directly enforced in federal courts against either state law or prior federal legislation.<sup>8</sup>

*TED POSNER* –

The remedies available to an investor that wins a dispute are set forth in Article 9.28.1 of the TPP text as published by USTR. According to that article, a tribunal may award a successful investor “only” (a) “monetary damages and any applicable interest” and (b) “restitution of property”. However, if a tribunal awards restitution, the respondent State at its option “may pay monetary damages and any applicable interest in lieu of restitution.” Article 9.28.1 makes clear that these are the “only” remedies a tribunal may award. Since injunctive relief is not among the “only” remedies a tribunal may award it is, by definition, excluded. At a tribunal’s discretion, costs and attorney’s fees also may be awarded. (Art. 9.28.3) A tribunal may not award punitive damages. (Art. 9.28.6)

*THEA LEE*<sup>9</sup> –

Typically in an investment case, the proceedings are made in different parts, so once an investor wins the case on the merits, the parties then argue the amount of damages due. If the dispute goes all the way through the process to the end, the investor’s award will be \$X, a monetary award. The arbitral panel is not empowered to overturn laws (as the Supreme Court is), but that doesn’t mean that there is no pressure on the government to do so.

Many cases are settled by negotiation of the parties—meaning the investor and the defendant country—either before a decision on the merits is announced, or after (in order to avoid a large loss in the damages phase). It is this settlement process which often leads countries to revise or repeal the measures at issue.

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<sup>6</sup> See 9 U.S.C. § 1 et seq. (The Federal Arbitration Act); 22 U.S.C. § 1650a (enforcement of ICSID awards).

<sup>7</sup> See 19 U.S.C. § 3312(A)(1) (“No provision of [NAFTA], nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect”); 19 U.S.C. § 3312(B)(2) (“No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with [NAFTA], *except in an action brought by the United States for the purpose of declaring such law or application invalid.*”) (emphasis added).

<sup>8</sup> See Resolution of Advice and Consent for the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, 157 Cong. Rec. S5339 (Sept. 6, 1011), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2011-09-06/pdf/CREC-2011-09-06-pt1-PgS5339.pdf>.

<sup>9</sup> The author would like to note the assistance received from her colleague at the AFL-CIO, Celeste Drake, in preparing her response.

For example, in the *Ethyl v. Canada* case, Ethyl sought \$250 million in damages. After Canada lost a jurisdictional decision, it settled with Ethyl corporation, providing a payment of \$13 million, reversing its ban on internal trade in the toxic MMT (which was the heart of the claim), and issuing a statement that MMT is safe (though interestingly most countries either ban it or simply don't use it in their gasoline<sup>10</sup>).

In 2003, Dutch insurer Eureko (now Achmea), sued Poland because Poland was backing off its decision to fully privatize its publicly owned health and life insurance company. Poland had partially privatized, but it wasn't working out as planned and so decided to stop. Once Poland lost the ISDS case on the merits, it settled for \$1.6 billion and committed to further reducing its stake in the publicly owned insurer, in order to avoid a potential damage award of \$12 billion (which is what Eureko was seeking).<sup>11</sup>

In a final example, Mexico lost a number of cases challenging its tax on beverages sweetened with high fructose corn syrup (Mexico argued that it wanted makers of sweet food and drinks to use sugar for health reasons; U.S. conglomerates such as ADM and Cargill argued that it was a protectionist measure designed to harm producers of HFCS). In any case, Mexico was assessed fines of \$58 million to Corn Products International, \$34 million to ADM and Tate & Lyle, and \$77 million to Cargill. After the U.S. also challenged the tax and won at the WTO, Mexico finally agreed to repeal it. Mexico was not "forced" to repeal it, but the U.S. and its corn processors certainly put on the financial pressure.

Canada is now in a similar position: Canada recently lost more than \$13 million to Mobil Oil and Murphy Oil in a case involving a challenge to a provincial requirement that the oil companies support local economic development through expenditures on provincial research, development and training programs (the program, which pre-dated NAFTA, was determined to be an illegal performance requirement). The provincial requirement remains in place and Mobil is suing again for additional damages suffered since the date of the initial decision on the merits.<sup>12</sup> It is not clear how long countries can go on having to pay the equivalent of a ransom just to keep their laws in place. It seems likely that we will see more cases like this one and more repeals of laws that are challenged.

In effect, ISDS turns the idea of the "polluter pays" principle on its head—requiring society to pay off the polluter in order to make it stop polluting (or to stop building on sensitive land, or to stop demanding privatization of a public enterprise, or to stop demanding patent rights on medicines that do not qualify for patents – or whatever the legal issue in question is).

So, the question is not whether ISDS tribunals can, in and of themselves, repeal or overturn laws (they can't), but whether they can create sufficient leverage, pressure, and financial pain to force countries to do so in response to challenge. Clearly, it is not "of their own accord" as the

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<sup>10</sup> See <http://www.theicct.org/blogs/staff/update-mmt>.

<sup>11</sup> See <http://us.practicallaw.com/4-501-0431?q=&qp=&qo=&qe=>.

<sup>12</sup> See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/20141016MobilCanadaNoticeofIntent.pdf/>.

government in question would not have backed off the policy challenged in the absence of a challenge.

Michael Smart has also argued that countries could lose and simply choose not to pay. This is not really a practical solution. Once a country has lost a case and refuses to pay, the winning investor can seek to have the award enforced in any country that is a party to the New York Convention (148 countries in all, including the U.S., Myanmar, and the Holy See) and in which the country has assets (there are other relevant international instruments, but the New York Convention is the most widely applicable). Argentina has lost a number of cases to vulture funds that bought Argentine debt for pennies on the dollar and then refused to accept debt work-out deals. Argentina refused to pay a number of such cases, but is paying the price in terms of being an international pariah and not receiving the foreign investment it otherwise would. Using the New York Convention, Argentina's creditors have seized more than \$23 million in Argentine government assets held in an overseas bank, and have attempted to seize an Argentine naval vessel, a booth at a book fair, and even the Argentinian Air Force One.<sup>13</sup>

Finally, there is the question of arbitral overreach—it is very important to note that in 2011, under the U.S.-Ecuador BIT, an arbitral panel took it upon itself to order the Government of Ecuador “to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case.” (The Ecuadoran courts had found Chevron liable in a multi-billion dollar tort alleging negligent clean-up of oil fields that caused massive health and environmental impacts—Chevron alleged bias in Ecuador's courts and malfeasance by the judge and the lawyer for the indigenous plaintiffs).<sup>14</sup>

This order by an ISDS panel was not a monetary judgment, but an order to act. Such an order is an equitable order (order someone to do or not to do something), not a legal order (order someone to pay a judgment), and it is not at all clear that an ad hoc tribunal has the equitable power to order a sovereign country to do (or to refrain from doing) something. While the panel in Chevron may have thought Chevron urgently needed its help in order to avoid paying an unjust award, there now remains an open question of how long it will be before another overreaching ISDS panel orders some country to refrain from enforcing its law due to potential damage to an investor requiring “urgent” action.<sup>15</sup>

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<sup>13</sup> See <http://www.forbes.com/sites/afontevvecchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/>; <http://www.wsj.com/articles/judge-orders-sanctions-against-argentina-in-victory-for-creditors-1439420949>.

<sup>14</sup> The order can be found here:

<http://www.chevron.com/documents/pdf/ecuador/TribunalInterimMeasuresOrder.pdf>.

<sup>15</sup> See also <http://blogs.reuters.com/alison-frankel/2012/01/30/ecuadoreans-call-for-u-s-help-in-chevron-arbitration/>.